



Republic of the Philippines
Sandiganbayan
Quezon City

SIXTH DIVISION

PEOPLE OF THE PHILIPPINES,
Plaintiff,

SB-15-CRM-0087

For: Violation of Section 3(e) of R.A. No. 3019,
as amended

SB-15-CRM-0088

For: Malversation of Public Funds

- versus -

Present

FERNANDEZ, SJ, J.


Chairperson

MIRANDA, J. and

VIVERO, J.

LORETO LEO S. OCAMPOS,
and FOAD AKHAVAN,
Accused.

Promulgated:

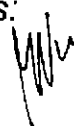
December 5, 2018 

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DECISION

VIVERO, J.:

On February 17, 2014, the Office of the Ombudsman formally charged **Loreto Leo S. Ocampos**, former Governor of Misamis Occidental, and **Foad Akhavan**, a private individual and an American, with *violation of Section 3 (e) of Republic Act No. 3019*, otherwise known as the "Anti-Graft and Corrupt Practices Act" and *malversation of public funds* under Article 217 of "The Revised Penal Code of the Philippines". The accusatory portions of the two (2) informations are quoted *ipssisimi verbis*:




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SB-15-CRM-0087

"The undersigned Prosecutor of the Office of the Ombudsman accuses **LORETO LEO S. OCAMPOS** and **FOAD AKHAVAN** of violating **Section 3 (e) of Republic Act No. 3019, otherwise known as the Anti-Graft and Corrupt Practices Act**, committed as follows:

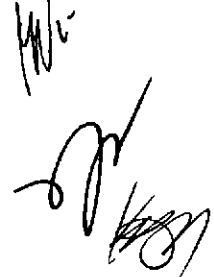
"In the period of 2004 to 2009, or sometime prior or subsequent thereto, in the Province of Misamis Occidental, Philippines and within the jurisdiction of this Honorable Court, the above-named accused **LORETO LEO S. OCAMPOS**, a public officer being then the Governor of the Province of Misamis Occidental, committing the offense in the discharge of his official functions, conspiring and confederating with **FOAD AKHAVAN**, with evident bad faith, manifest partiality, or at the very least, gross inexcusable negligence, did then and there willfully, unlawfully, and criminally give unwarranted benefits, preference, and advantage to Akhavan by entering into an investment contract that amounted to a **build-operate-transfer (BOT) agreement with the said Akhavan for the construction, operation and maintenance of the Misamis Occidental Aquamarine Park (MOAP) facilities**, without complying with the procedures under Republic Act No. 6957, as amended by Republic Act No. 7718 or the BOT Law, and with Akhavan not being qualified to conduct business in the Philippines; and thereafter **cause the payment by the Provincial Government of Misamis Occidental of Five Hundred Fifty-Nine Thousand Nine Hundred Twenty-Five Pesos (P559,925.00) for the salaries of the employees at the MOAP facilities, which salaries should have been shouldered by Akhavan as provided in the investment contract**; accused Ocampos likewise did **not require Akhavan to remit to the Provincial Government of Misamis Occidental its thirty percent (30%) share in the net income from the operation of the MOAP facilities**, in violation of the investment contract, thereby causing undue injury to the Provincial Government of Misamis Occidental.

"**CONTRARY TO LAW.**"¹ (Italics and Underscoring Ours.)

SB-15-CRM-0088

"The undersigned Prosecutor of the Office of the Ombudsman accuses **LORETO LEO S. OCAMPOS** and **FOAD AKHAVAN** of the crime of **MALVERSATION OF**

¹ Records, Vol. I, pages 1 - 2.



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PUBLIC FUNDS defined and penalized under Art. 217 of the Revised Penal Code, committed as follows:

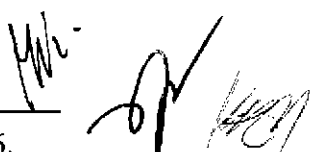
"In 2009, or sometime prior or subsequent thereto, in the Province of Misamis Occidental, Philippines, and within the jurisdiction of this Honorable Court, the above-named accused, **LORETO LEO S. OCAMPOS**, a public officer being then the Governor of the Province of Misamis Occidental, as such had control of and was accountable for public funds belonging to the Province, committing the offense in the discharge of his official functions, conspiring and confederating with private investor **FOAD AKHAVAN (Akhavan)**, did then and there willfully, unlawfully, and feloniously permit the taking by Akhavan of part of said public funds by causing the payment of such public funds amounting to Five Hundred Fifty-Nine Thousand Nine Hundred Twenty-Five Pesos (P559,925.00) for the salaries of the employees of the Misamis Occidental Aquamarine Park (MOAP) facilities constructed and exclusively operated by Akhavan, which salaries should have been shouldered by Akhavan as operating expense of the MOAP facilities, to the damage and prejudice of the Province of Misamis Occidental.

"CONTRARY TO LAW."² (Italics and Underscoring Ours.)

THE CASE

On March 17, 2011, one Oscar R. Visitacion, a concerned citizen, filed a verified complaint³ against Loreto Leo S. Ocampos, Governor of Misamis Occidental, for alleged irregularities arising from the contract between the Provincial Government of Misamis Occidental and Mr. Foad Akhavan, an American, relating to the construction, operation, and management of the facilities in the Misamis Occidental Aquamarine Park (MOAP) Satellite Marine Farm, or more popularly known as the Dolphin Island. On August 26, 2011, Mr. Visitacion filed a supplemental complaint.⁴

On December 29, 2011, Ocampos filed his counter-affidavit.⁵ He countered that:


² Records, Vol. IV, pp. 5 - 6.

³ **EXHIBIT "I"**: Verified Complaint dated March 15, 2011, of O. R. Visitacion to Ombudsman M. Gutierrez, pp. 1 - 3; Records, Vol. I, pp. 23 - 25.

⁴ **EXHIBIT "J"**: Notarized letter-complaint dated August 8, 2011, of O. R. Visitacion to Ombudsman C. Carpio-Morales, pp. 1 - 2.

⁵ Records, Vol. I, pp. 44 - 56.

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"3.1 x x x [A] reading of Resolution No. 067-04 of the Sangguniang Panlalawigan of the Province of Misamis Occidental . . . clearly shows that I, as then Governor of the Province, was duly authorized and empowered by the Province . . . to enter into a Memorandum of Agreement (MOA) in behalf of the Province, with the private investor, Mr. Foad Akhavan . . .

"3.2 Complainant Visitacion also baselessly alleged that Mr. Akhavan was without the necessary legal requirements to be a legitimate business investor in the country. Contrary to this baseless allegation, Mr. Akhavan is a bona fide holder of a Special Resident Retirees Visa ('SRRV') No. M-00861 which was issued to him pursuant to Executive Order No. 1037. x x x

"3.2.1 Furthermore, Mr. Akhavan has been authorized by the Department of Trade and Industry ('DTI') to engage in [the] business of Eco-Tourism in the Philippines in accordance with the provisions of the Foreign Investments Act of 1991 (R.A. No. 7042). x x x

"3.3 x x x Visitacion baselessly accused me of alleged 'flagrant violation of the constitutional mandate' in authorizing Mr. Akhavan to invest in (sic) because allegedly Mr. Akhavan is an 'individual person' and 'an American citizen' and not a corporation or association whose capital is owned by Filipinos by at least 60% with whom the state may enter into 'co-production, joint venture, or production sharing agreements'. Lest complainat Visitacion is confused, the activity undertaken by Mr. Akhavan at the MOAP is not for 'exploration,' 'development' nor of 'utilization of natural resources' but for the construction of the needed facilities at the MOAP such as hotel suite accommodation in MOAP mainland, as well as restaurant and recreational facilities in the Dolphin Island.

"x x x

"3.5 x x x

"3.5.1 . . . [T]he development, maintenance and operation of the MOAP itself is generally financed by the Province of Misamis Occidental itself and not by the private investor, Mr. Akhavan. What was granted by the Province under the MOA was for Mr. Akhavan to construct and finance selected facilities at the MOAP mainland, including needed facilities in the Dolphin Island, and a right to manage over the facilities financed by him for purposes of ensuring efficient recovery of investment plus reasonable profit.

"3.5.2 Unfortunately, as with any other capital-heavy business venture, the business venture of Mr. Akhavan at MOAP sustained losses . . . The financial



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reports of the business for the years 2007 – 2010 reveal successive annual operating loss from operation. x x x.

"3.5.3 x x x

"3.5.4 . . . [T]he Provincial Government of Misamis Occidental . . . has not collected the supposed 30% share of the Province due to the financial losses incurred by Mr. Akhavan.

"3.5.5 Due to the losses suffered by Mr. Akhavan, the Province spent P559,925.00 as payment for labor actually rendered to a 'tourism development and promotion program' of the Province. x x x

"x x x." ⁶

On February 17, 2014, the Office of the Ombudsman issued a Resolution, finding probable cause to indict Ocampos and Akhavan for violation of Section 3 (e) of Republic Act No. 3019, as amended, and Malversation of public funds under Article 217 of the Revised Penal Code.⁷

Accused Ocampos voluntarily surrendered and posted his cash bail bond. On March 27, 2015, the Court allowed his provisional liberty.⁸

On March 30, 2015, the Court issued a Hold Departure Order⁹ against both accused. On separate occasions, Akhavan filed Motions for Leave to Travel Abroad, but these were denied thrice.¹⁰

Meanwhile, having received word that the Office of the Ombudsman had indicted him sans any investigation, accused Akhavan filed a *Motion for Preliminary Investigation*¹¹ before this

⁶ Counter-affidavit dated December 22, 2011, of L. L. S. Ocampos, pp. 2 – 6 of 12 (Records, Vol. I, pp. 45 – 49).

⁷ *Oscar R. Visitacion v. Loreto Leo S. Ocampos and Foad Akhavan*, OMB-C-C-11-0339-F (Records, Vol. I, pp. 5 – 16).

⁸ Records, Vol. I, p. 81.

⁹ Hold Departure Order dated March 30, 2015, p. 1; Records, Vol. I, p. 85.

¹⁰ Resolution dated February 26, 2016, p. 1 (Records, Vol. I, p. 312); Resolution dated November 29, 2016, pp. 1 – 2 (Records, Vol. II, pp. 88 – 89); Resolution dated January 30, 2017, pp. 1 – 3 (Records, Vol. II, pp. 126 – 128).

¹¹ Motion for Preliminary Investigation dated March 30, 2015 (Records, Vol. I, pp. 88 – 93); Minute Resolution dated April 10, 2015, noting entry of appearance of Ocampos and Akhavan's counsel of record (Records, Vol. I, p. 106).

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Court, which was granted.¹² Accordingly, the cases were remanded to the Office of the Ombudsman.¹³

On April 8, 2015,¹⁴ this Court received the *Manifestation* of Ocampos, serving notice that he had filed with the Supreme Court a petition for *certiorari*¹⁵ with the end in view of nullifying the Ombudsman's indictment.¹⁶

On February 17, 2016, Foad Akhavan filed with the Office of the Ombudsman his counter-affidavit.¹⁷ His version of the factual milieu runs thus:

"2. . . . [N]o investor was willing to infuse capital in the MOAP for fear, among others, of the Kuratong Baleleng Group which has gained notoriety in the Province. Hence, the Misamis Occidental Provincial Government offered the Project to me. x x x After much prodding, . . . and after its undertaking tht it will be a joint venture between me and the Misamis Occidental Provincial Government, I acceded. I agreed, in principle, to put no less than Fifteen Million Pesos (Php 15,000,000.00) of my own money into the MOAP for the development of additional facilities.

"x x x

"3. The benefits of the Akhavan Facilities in the Dolphin Island were instantaneous. Just shortly after it started operations, it already put the province in the spotlight as a viable eco-tourism destination. x x x

"4. As with any other capital-intensive endeavor, however, the MOAP sustained losses in its infancy stage. The Akhavan Facilities, in particular, realized negative income. Hence, the Misamis Occidental Provincial Government was not able to get its supposed thirty percent (30%) net income share therein.

"5. x x x

"x x x



¹² Resolution dated November 5, 2015, of the Sandiganbayan (Third Division), pp. 1 – 8 (Records, Vol. I, pp. 188 – 195).

¹³ The Sandiganbayan gave the Prosecution up to April 23, 2016 to complete the preliminary investigation of the cases insofar as accused Foad Akhavan is concerned (Order dated March 28, 2016 [Records, Vol. I, p. 365]).

¹⁴ Minute Resolution dated April 10, 2015 (Records, Vol. I, p. 145).

¹⁵ G.R. No. 217153, Petition for *Certiorari*, pp. 1 – 33 (Records, Vol. I, pp. 11 – 143).

¹⁶ Manifestation dated March 31, 2015 (Records, Vol. I, pp. 108 – 109).

¹⁷ Counter-affidavit dated February 17, 2016, of Foad Akhavan, pp. 1 – 17 (Records, Vol. I, pp. 264 – 280).

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"8. . . . [N]o crime is chargeable against me as my participation in the Joint Venture was regular and above-board."¹⁸

The preliminary investigation yielded *prima facie* evidence showing that Governor Ocampos and Mr. Akhavan are probably guilty of the overt acts imputed against them.¹⁹ On April 20, 2016, the Office of the Ombudsman resolved that:

"WHEREFORE, after a thorough review of the above-entitled complaint *vis a vis* the counter-affidavit submitted by accused Foad Akhavan together with its supporting documents x x x, the undersigned Assistant Special Prosecutor found no cogent reason to disturb the Resolution of this Office, dated February 17, 2014, finding probable cause against both accused, Loreto Leo S. Ocampos and Foad Akhavan for Violation of Section 3 (e) of R.A. 3019 and for Malversation of Public Funds as charged.

"SO ORDERED."

During the arraignment, Ocampos pleaded "NOT GUILTY."²⁰ Likewise, Foad Akhavan entered a plea of "NOT GUILTY."²¹

On June 23, 2016, accused Ocampos and Akhavan filed an "Omnibus Motion (For 1) Judicial Determination of Probable Cause; and 2) Dismissal of Information for Lack of Probable Cause)."²² The Court denied their motion, stating unequivocally that "the Court finds probable cause in these cases".²³ Accused moved for a reconsideration of said ruling,²⁴ but the Court denied said motion for lack of merit.²⁵



¹⁸ Id., pp. 2 – 4 of 17 (Records, Vol. I, pp. 265 – 267).

¹⁹ Accused filed a **petition for certiorari** before the Supreme Court assailing the Resolution dated September 7, 2016 of the Sandiganbayan (Records, Vol. II, pp. 10 – 14), but the High Tribunal dismissed said petition, citing the time-honored **policy of non-interference observed by courts with respect to the exercise of discretion by the Ombudsman in determining whether a criminal case should be filed in court** (Resolution dated June 5, 2017, of the Supreme Court (First Division), pp. 1 – 2 [Records, Vol. II, pp. 194 – 195]; Entry of Judgement dated July 27, 2017, of the Supreme Court, p. 1 [Records, Vol. V, pp. 10 – 16]).

²⁰ Order dated December 7, 2016, p. 1 (Records, Vol. II, p. 94).

²¹ Certificate of Arraignment dated February 22, 2016, of Foad Akhavan (Records, Vol. I, p. 257); Order dated February 22, 2016, pp. 1 – 2 (Records, Vol. I, pp. 309 – 310).

²² Records, Vol. I, pp. 459 – 486.

²³ Resolution dated September 7, 2016, pp. 1 – 5 (Records, Vol. II, pp. 10 – 14).

²⁴ Motion for Reconsideration dated September 29, 2016, which was filed on October 3, 2016, pp. 1 – 5 (Records, Vol. II, pp. 21 – 25).

²⁵ Resolution dated December 1, 2016, pp. 1 – 4 (Records, Vol. II, pp. 82 – 86).

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The preliminary conference was held on February 21, 22, 2017 and March 23, 2017.²⁶ The parties were ordered to submit the judicial affidavits of their witnesses, as well as their joint stipulation of facts.²⁷ But the parties did not enter into any stipulation of facts or admissions.²⁸ The parties agreed on the following **ISSUES**:

1. Whether the accused are guilty beyond reasonable doubt of violation of Section 3 (e) of Republic Act No. 3019, otherwise known as the Anti-Graft and Corrupt Practices Act; and
2. Whether the accused are guilty beyond reasonable doubt of malversation under Article 217 of the Revised Penal Code.²⁹

Trial commenced on June 19, 2017,³⁰ and the prosecution completed the presentation of its witnesses on October 3, 2017.³¹

After the prosecution presented its last witness, Mr. Jesus G. Salvador, the Court ordered the prosecution to file its Formal Offer of Evidence.³² The prosecution filed the same on October 6, 2017;³³ however, the prosecution served upon the accused a copy thereof *via* personal service beyond the 5-day deadline. This prompted the accused to file a *Motion (to Consider the Prosecution to Have Waived the Filing of its Formal Offer of Evidence and/or to Expunge its Formal Offer of Evidence, if Any)*, claiming that the prosecution has exhibited its wanton and consistent disregard of the rules and this Court's Orders.³⁴ The prosecution explained that its misstep was attributable to time constraints.³⁵ The Court accepted the prosecution's explanation and resolved to deny the motion of the accused.³⁶

²⁶ Order dated March 9, 2017, p. 1 (Records, Vol. II, p. 276); Order dated March 23, 2017, p. 1 (Records, Vol. II, p. 379).

²⁷ Order dated March 23, 2017, p. 1 (Records, Vol. II, p. 379).

²⁸ Pre-trial Order dated March 23, 2017, p. 1 of 6 (Records, Vol. II, pp. 380-A – 380-F).

²⁹ *Ibid.*

³⁰ Order dated June 5, 2017 (Records, Vol. III, p. 81).

³¹ Minutes of Hearing dated October 3, 2017 (Records, Vol. III, p. 428).

³² Order dated October 3, 2017 (Records, Vol. III, p. 430).

³³ Formal Offer of Evidence dated October 6, 2017, pp. 1 - 22 (Records, Vol. III, pp. 434 - 455).

³⁴ Records, Vol. IV, pp. 229 – 233.

³⁵ Comment/ Opposition (To the Motion to Consider the Prosecution to Have Waived the Filing of its Formal Offer of Evidence and/or to Expunge its Formal Offer of Evidence, if Any, dated October 10, 2017), pp. 1 – 7 (Records, Vol. IV, pp. 238 – 244).

³⁶ Minute Resolution dated October 27, 2017, pp. 1 – 2 (Records, Vol. IV, pp. 262 – 263).

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On December 15, 2017, the Court resolved³⁷ to **admit** the following exhibits offered by the prosecution as its evidence, to wit:

- **EXHIBIT "A"**³⁸ ("1"): Resolution No. 067-04 dated February 20, 2004, of the *Sangguniang Panlalawigan* of Misamis Occidental, p. 1 of 1;³⁹
- **EXHIBIT "B"**⁴⁰ ("2"): Resolution No. 318-04 dated October 22, 2004, of the *Sangguniang Panlalawigan* of Misamis Occidental, p. 1 of 1;⁴¹
- **EXHIBIT "C"**⁴² ("3"): Contract dated November 19, 2004, entered into by and between the Provincial Government of Misamis Occidental, represented by Governor L. L. S. Ocampos and Foad Akhavan, pp. 1 – 4;⁴³
- **EXHIBIT "D"**⁴⁴ ("4"): Ordinance No. 13-04 entitled "An Ordinance Establishing the Misamis Occidental Aquamarine Park (MOAP) as an Economic Enterprise and Defining its Operations and Organization," enacted on December 10, 2004, pp. 1 – 6;⁴⁵
- **EXHIBIT "E"**⁴⁶ ("5"): Ordinance No. 07-05 entitled "An Ordinance Establishing the Misamis Occidental Aquamarine Park (MOAP), Misamis Occidental Enterprise Development and Research Center (MOEDRC), Misamis Occidental Drug Treatment and Rehabilitation Center (MODTRC) and Misamis Occidental Provincial Housing Project (MOPHP) as Economic Enterprises; and Creating the Economic Enterprise Management Board, the Economic Enterprises Executive Committees, and the Economic Enterprise Office and Defining their

³⁷ Resolution dated December 15, 2017, of the Sandiganbayan (Sixth Division), pp. 1 – 2 (Records, Vol. IV, pp. 361 – 362).

³⁸ Including Exhs. "A-1", "A-2", "A-3".

³⁹ Records, Vol. III, p. 161.

⁴⁰ Including Exhs. "B-1", "B-2", "B-3".

⁴¹ Records, Vol. III, p. 162.

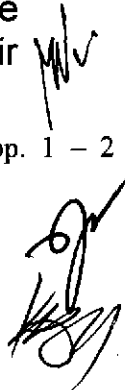
⁴² Including Exhs. "C-1", "C-2", "C-3". "C-3-a", "C-3-e".

⁴³ Records, Vol. III, pp. 163 – 166.

⁴⁴ Including the series marked.

⁴⁵ Records, Vol. III, pp. 167 – 172.

⁴⁶ Including the series marked.



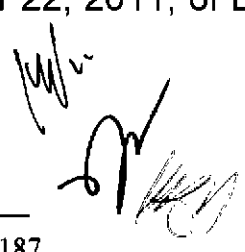
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Functions," enacted on September 23, 2005, pp. 1 - 15;⁴⁷

- **EXHIBIT "F"**⁴⁸ ("6"): Amended Investment Contract dated January 29, 2007, between the Provincial Government of Misamis Occidental, duly represented by Governor L. L. S. Ocampos, and Foad Akhavan, the private investor;⁴⁹
 - **EXHIBIT "G"** ("7"): Ordinance No. 05-04 entitled "An Ordinance Appropriating the Amount of One Million Pesos (Php1,000,000.00) from the Trust Fund of the Misamis Occidental Aquamarine Park (MOAP) for the Purchase of Important Medicines to be Used by All Hospitals Operated by the Provincial Government of Misamis Occidental," enacted on July 30, 2004, p. 1 of 1;⁵⁰
 - **EXHIBIT "H"**: Commission on Audit (COA) Annual Audit Report (AAR) on the Province of Misamis Occidental for the year ending on December 31, 2009.
 - **EXHIBIT "I"**⁵¹: Verified Complaint dated March 15, 2011, filed by the private complainant, Oscar R. Visitacion, pp. 1 - 3;⁵²
 - **EXHIBIT "J"**⁵³: Follow-up, verified complaint dated August 26, 2011, filed by the private complainant, Oscar R. Visitacion, pp. 1 - 2;⁵⁴
 - **EXHIBIT "K"**⁵⁵: Verified, counter-affidavit dated December 22, 2011, of Loreto Leo S. Ocampos, pp. 1 - 12;⁵⁶
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⁴⁷ Records, Vol. III, pp. 173 - 187.

⁴⁸ Including the series marked.

⁴⁹ Records, Vol. III, pp. 188 - 191.

⁵⁰ Records, Vol. III, p. 192.

⁵¹ Including the series marked.

⁵² Records, Vol. IV, pp. 54 - 56.

⁵³ Including the series marked.

⁵⁴ Records, Vol. IV, pp. 57 - 58.

⁵⁵ Including the series marked.

⁵⁶ Records, Vol. IV, pp. 59 - 70.

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- **EXHIBIT “L”⁵⁷:** Comment to Respondent’s Counter-Affidavit dated February 14, 2012, of Oscar R. Visitacion, pp. 1 – 7;⁵⁸
- **EXHIBIT “M”⁵⁹:** Audit Observation Memorandum (AOM) No. 09-002 dated December 29, 2002, issued by the Commission on Audit and addressed to Governor L. L. S. Ocampos of Misamis Occidental, pp. 1 – 2;⁶⁰ This was certified by COA Auditor Rebecca Chua-Ozaraga, a member of the audit team.
- **EXHIBIT “N”:** Department of Trade and Industry (DTI) Certificate of Authority No. 001 dated August 23, 2007, issued by Ruel B. Paclipan, Provincial Director of DTI Misamis Occidental, in favor of Foad Akhavan, p. 1;⁶¹
- **EXHIBIT “P”:** Certification dated December 20, 2011, issued by Foad Akhavan, Private Investor – Dolphin Island Resort, p. 1;⁶²
- **EXHIBIT “Q”:** Judicial affidavit dated June 20, 2017, of Rebecca Chua-Ozaraga, State Auditor IV of the Commission on Audit (COA), pp. 1 – 9;⁶³
- **EXHIBIT “R”:** Judicial affidavit dated July 12, 2017, of Othelia G. Arbon, State Auditor IV of the Commission on Audit (COA), pp. 1 – 14;⁶⁴
- **EXHIBIT “S”:** Judicial affidavit dated June 19, 2017, of Atty. Irene T. Zapatos, Secretary to the *Sangguniang Panlalawigan* of Misamis Occidental, pp. 1 – 7;⁶⁵
- **EXHIBIT “T”:** Judicial affidavit dated June 19, 2017, of Francisco T. Paylaga, former Vice-Governor

⁵⁷ Including the series marked.

⁵⁸ Records, Vol. IV, pp. 80 – 86.

⁵⁹ Including the series marked.

⁶⁰ Records, Vol. IV, pp. 87 – 88.

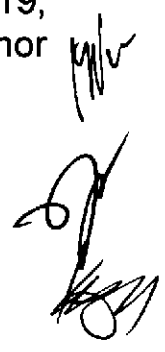
⁶¹ Records, Vol. I, p. 57.

⁶² Records, Vol. I, p. 79.

⁶³ Records, Vol. III, pp. 135 – 143.

⁶⁴ Records, Vol. IV, pp. 100 – 113.

⁶⁵ Records, Vol. III, pp. 103 – 109.



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of Misamis Occidental and then Presiding Officer of the *Sangguniang Panlalawigan* of Misamis Occidental, pp. 1 – 11;⁶⁶

- **EXHIBIT “V”:** Judicial affidavit dated August 30, 2017, of Celso L. Vocal, Regional Director of Region X, pp. 1 - 6;⁶⁷
- **EXHIBIT “W”:** Judicial affidavit dated September 4, 2017, of Jimmy R. Regalado, Vice-Mayor of the municipality of Aloran, Misamis Occidental, pp. 1 - 13;⁶⁸
- **EXHIBIT “X”:** Annual Audit Report of the Commission on Audit for the Province of Misamis Occidental for the year ended December 31, 2010;⁶⁹
- **EXHIBIT “Y”:** Journal Entry Voucher No. JEV-101-10-12-017838 dated December 30, 2010, p. 1;⁷⁰
- **EXHIBIT “Z”⁷¹:** Judicial affidavit dated September 27, 2017, of Jesus G. Salvador, Administrative Officer V of the Central Records Division of the Office of the Ombudsman, pp 1 - 7.⁷²

On January 8, 2018, accused filed jointly a *Motion for Leave to File Demurrer to Evidence*,⁷³ which was, however, denied by this Court in the Resolution dated January 22, 2018.

Atty. Helen E. Tenchavez, the sole witness for the defense, testified in open court on April 26, 2018,⁷⁴ after several postponements.⁷⁵

⁶⁶ Records, Vol. III, pp. 150 - 160.

⁶⁷ Records, Vol. IV, pp. 132 - 137.

⁶⁸ Records, Vol. IV, pp. 138 - 150.

⁶⁹ Records, Vol. IV, pp. 151 - 220.

⁷⁰ Records, Vol. IV, p. 221.

⁷¹ Including the series marked.

⁷² Records, Vol. III, pp. 370 - 376.

⁷³ Records, Vol. IV, pp. 368 - 371.

⁷⁴ Order dated April 26, 2018, p. 1 (Records, Vol. IV, p. 417).

⁷⁵ Order dated February 12, 2018, p. 1 (Records, Vol. IV, p. 397); Order dated February 26, 2018 (Records, Vol. IV, p. 405).

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On May 3, 2018, accused Ocampos and Akhavan filed their *Formal Offer of Evidence*.⁷⁶ After the Office of the Special Prosecutor filed its *Comment/ Opposition* thereto,⁷⁷ the Court resolved⁷⁸ to admit the following documentary evidence adduced by the accused, to wit:

- **EXHIBITS “1” to “7”** of the defense are the same as **EXHIBITS “A” to “G”** of the prosecution.⁷⁹
- **EXHIBIT “8”, “8-A” to “8-L”**: 12 photographs of Akhavan facilities;⁸⁰
- **EXHIBIT “11”**: Letter dated January 20, 2009, from President Gloria Macapagal Arroyo to Mr. Foad Akhavan expressing her gratitude for Mr. Akhavan’s “kind assistance” during her visit to Misamis Occidental last January 5-6, 2009, p. 1;⁸¹
- **EXHIBIT “12”**: Statement of Profit and Loss for the period January 1 to December 31, 2008;⁸²
- **EXHIBIT “12-A”**: Statement of Profit and Loss for the period January 1 to December 31, 2009, pp. 1 - 2;⁸³
- **EXHIBIT “12-B”**: Statement of Profit and Loss for the period January 1 to December 31, 2010, pp. 1 - 2;⁸⁴
- **EXHIBIT “13”, “13-A”**: Judicial affidavit dated May 19, 2017, of Atty. Helen E. Tenchavez, pp. 1 – 18.⁸⁵

The prosecution filed a *Manifestation and Motion to Cancel Hearing* informing the Court that it will no longer present any rebuttal evidence. Accordingly, the Court ordered the parties to file their respective memoranda within a non-extendible period of thirty (30)

⁷⁶ Formal Offer of Evidence dated May 2, 2018, pp. 1 – 12 (Records, Vol. IV, pp. 419 – 430).

⁷⁷ Comment/ Opposition (to Accused’s Formal Offer of Evidence) dated May 4, 2018 (Records, Vol. IV, pp. 546 – 549).

⁷⁸ Resolution dated May 30, 2018, pp. 1 – 2 (Records, Vol. V, pp. 5 – 6).

⁷⁹ TSN, February 21, 2017 (Preliminary Conference), pp. 35 - 36; TSN, February 22, 2017 (Preliminary Conference), pp. 5 – 14.

⁸⁰ Records, Vol. IV, pp. 463 – 475; See TSN, April 26, 2018, pp. 12 – 14.

⁸¹ Records, Vol. IV, p. 476; See TSN, April 26, 2018, p. 17 – 18.

⁸² Records, Vol. IV, p. 541; TSN, April 26, 2018, p. 16.

⁸³ Records, Vol. IV, p. 542 – 543; See TSN, April 26, 2018, p. 16.

⁸⁴ Records, Vol. IV, p. 544 – 545; See TSN, April 26, 2018, p. 16.

⁸⁵ Records, Vol. IV, pp. 477 – 494.

[Handwritten signatures and initials]

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days from June 21, 2018.⁸⁶ Conformably therewith, the prosecution and the accused filed seasonably their respective memoranda.⁸⁷

Hence, this case is deemed submitted for decision.

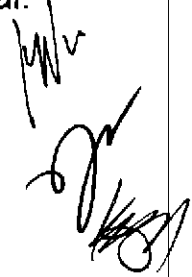
THE ANTECEDENT FACTS

The factual background, as culled from the record, are portrayed below, viz:

The Misamis Occidental Aquamarine Park (MOAP) is a 200-hectare animal conservation park⁸⁸ which the government of the aforementioned second (2nd) class province⁸⁹ began developing in 2003. The complex has a marine sanctuary, fishponds, a hatchery, a zoo and an island (i.e. Dolphin Island).

On February 20, 2004, the *Sangguniang Panlalawigan* of Misamis Occidental authorized the Provincial Governor, Loreto Leo S. Ocampos, to enter into a Memorandum of Agreement (MOA), with the municipal government of Sinacaban and with a private investor, accused Foad Akhavan, a citizen of the United States of America (USA), for the construction, operation and maintenance of the MOAP-Satellite Marine Farm.

On July 30, 2004, the *Sangguniang Panlalawigan* enacted **Ordinance No. 05-04**,⁹⁰ setting aside and appropriating the amount of one million pesos (P1,000,000.00) from the trust fund of the Misamis Occidental Aquamarine Park (MOAP) for the purchase of important medicines to be used by all hospitals operated by the Provincial Government of Misamis Occidental.



⁸⁶ Order dated June 21, 2018, p. 1 (Records, Vol. V, p. 23).

⁸⁷ Prosecution's Memorandum dated July 20, 2018, pp. 1 – 19 (Records, Vol. V, pp. 46 – 64); Joint Memorandum dated July 18, 2018, pp. 1 – 36 (Records, Vol. V, pp. 70 – 105).

⁸⁸ **EXHIBIT "13"**: Judicial Affidavit dated May 19, 2017, of Atty. Helen E. Tenchavez, p. 2.

⁸⁹ **EXHIBIT "X-8"**: Annual Audit Report on the Province of Misamis Occidental for the Year Ended December 31, 2010, p. 8.

⁹⁰ **EXHIBIT "G", "7"**.

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On October 22, 2004, the *Sangguniang Panlalawigan* enacted **Resolution No. 318-04**,⁹¹ adopting Mr. Foad Akhavan as a son of the province of Misamis Occidental.

On November 19, 2004, a **contract**⁹² was forged between the Provincial Government of Misamis Occidental ("*First Party*"), represented by Governor Ocampos, and Mr. Akhavan ("*Second Party*"). Among the terms and conditions of the bilateral contract are quoted below, *viz*:

"A. Role of the FIRST PARTY

"The First Party shall allow the Second Party to cause the **CONSTRUCTION OF NEEDED FACILITIES** at the **MOAP** and **MRRC**.

"For the duration of this Contract, the First Party shall grant the Second Party **ABSOLUTE MANAGEMENT OVER THE FACILITIES FULLY FINANCED BY THE LATTER** (hereinafter called the 'Facility') for the purpose of ensuring efficient recovery of investment plus reasonable profit thereon.

"X X X

"B. Role of the SECOND PARTY

"THE SECOND PARTY SHALL FINANCE THE CONSTRUCTION OF GUEST COTTAGES AND ALLIED STRUCTURES X X X

"Areas of investment and income include, but may not be limited to the following:

- i. Guest cottages on & off shore
- ii. Glass bottom boat (corral [sic] viewing)
- iii. Water sports facilities and equipment
- iv. Picnic huts
- v. Restaurants
- vi. Gift shop
- vii. Dive shop/ snorkeling shop
- viii. Entrance fee to the entertainment park at the MRRC

"C. Term & Amendment of the Contract

⁹¹ EXHIBIT "B", "2".

⁹² EXHIBIT "C", "3".



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"The First Party hereby grants the Second Party a **PERIOD OF FIFTY (50) YEARS TERM OF CONTRACT** wherein **THE**

"X X X

"AT THE INSTANCE OF EITHER PARTY AND AS THE NEED ARISES, THIS CONTRACT MAY BE AMENDED FROM TIME TO TIME.

"X X X

"F. Profit-Sharing Scheme

"The Second Party shall remit to the First Party thirty percent (30%) of the net income from operation of the Facility. The net income shall be computed as follows: Gross Receipts less Maintenance & Operating Expenses.

"That actual and reasonable maintenance and operating expenditures attributable to this **VENTURE** shall include, but may not be limited to the following:

- a. salaries/ wages of personnel
- b. electricity cost

"J. Transfer of the Facility

"Upon the expiration of the term of this Contract, the Second Party shall turn-over and **TRANSFER** the facility to the First Party. X X X.

"X X X." ⁹³ (Capitalization and Underscoring Ours.)

On December 10, 2004, the *Sangguniang Panlalawigan* passed **Ordinance No. 13-04,⁹⁴** (i.e. **"The Provincial Aquamarine Park Ordinance of 2004"**, "establishing the Misamis Occidental Aquamarine Park (MOAP) as an economic enterprise, thereby promoting a sustainable, self-liquidating and self-financing endeavor".⁹⁵ Among its significant provisions are as follows:

"TITLE IV "PROMOTION, PROTECTION AND MANAGEMENT OF PRIVATE INVESTMENT

"X X X

⁹³ EXHIBIT "C", "C-1", "C-2", "C-3".

⁹⁴ EXHIBIT "D", "D-1" to "D-5"; "4".

⁹⁵ Title II, Section 2 of Ordinance No. 13-04.

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"SECTION 3. Management of Private Investment. Management and operation of the INFRA FACILITY FULLY FINANCED THROUGH PRIVATE INVESTMENT SHALL BE JOINTLY MANAGED by the Provincial Government and private investor. The MOAP Board of Directors shall prescribe the process of JOINT MANAGEMENT.

"Contract Agreement. The right of the PRIVATE INVESTOR to FINANCE, CONSTRUCT AND OPERATE a specific facility at the MOAP shall be embodied in a Contract Agreement. X X X

"X X X

"Construction. The private investor shall undertake the CONSTRUCTION and repair of the infra facility, X X X.

"Transfer of Facility. After recovery of the private investment plus reasonable return thereon, as stipulated in the Contract Agreement, THE PRIVATE INVESTOR SHALL TRANSFER AND TURNOVER THE FACILITY TO THE PROVINCIAL GOVERNMENT. The latter shall then possess FULL LEGAL OWNERSHIP over the project, subject to any existing liens as may be agreed upon in the Contractd Agreement.

"Fixing of Rates. The private investor has the right to FIX THE RATES ON THE FACILITY FULLY FINANCED BY HIM, X X X.

"Revenue Generation Activity. Subject to prior consultation with the Board, the private investor MAY CREATE OTHER REVENUE-GENERATING ACTIVITIES X X X.

"Profit & Loss Sharing.

"The allowable maintenance and operating cost of the facility fully financed by the private investor shall be deducted from its gross revenue. The resulting NET INCOME . . . shall be shared . . . as follows:

- a) SEVENTY PERCENT (70%) for the PRIVATE INVESTOR
- b) THIRTY PERCENT (30%) for the PROVINCIAL GOVERNMENT

"IN CASE THE OPERATION RESULTS IN A LOSS, THE PRIVATE INVESTOR SHALL BEAR ALL THE LOSS.



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"Term of Contract. The operation of the private investment shall remain in effect until the cost of investment is fully recovered plus a reasonable return thereon, in accordance with the Contract Agreement.

"Report and Remittances. The private investor shall **SUBMIT MONTHLY FINANCIAL REPORT TO THE PROVINCIAL GOVERNMENT** through the MOAP Board of Directors. Profits shall be remitted to the Provincial Government on a quarterly basis.

"X X X." ⁹⁶

On September 23, 2005, the *Sangguniang Panlalawigan* enacted **Ordinance No. 07-05⁹⁷** (i.e. **"The Economic Enterprise Ordinance of 2005"**) "establishing the Misamis Occidental Aquamarine Park (MOAP), Misamis Occidental Enterprise Development and Research Center (MOEDRC), Misamis Occidental Drug Treatment and Rehabilitation Center (MODTRC) and Misamis Occidental Provincial Housing Project (MOPHP) as economic enterprises, and creating the Economic Enterprise Management Board, the Economic Enterprises Executive Committees, and the Economic Enterprise Office and defining their functions." ⁹⁸

On January 2007, the contract earlier executed on November 19, 2004 between the Provincial Government of Misamis Occidental and Mr. Foad Akhavan was **amended**.⁹⁹ Under the **"Amended Investment Contract,"** the Marine Rescue and Recreation Center (MRRC) had been renamed as **"Dolphin Island"**. Moreover, the third paragraph in Clause (C), which reads: *"At the instance of either party and as the need arises, this Contract may be amended from time to time,"* had been **deleted**. Further, the following provision had been added, to wit:

"B. Role of the Second Party

"X X X

"The Second Party shall be responsible for the ample sustenance, care, preservation and rehabilitation of all forms of marine mammals, including dolphins, committed to the Dolphin

⁹⁶ EXHIBIT "D-3" to "D-4".

⁹⁷ EXHIBIT "E", "E-1" to "E-14"; EXHIBIT "5".

⁹⁸ Ordinance No. 07-05 which was enacted on September 23, 2005, was approved by Governor Ocampos on October 20, 2005.

⁹⁹ EXHIBIT "F", "6": "Amended Investment Contract", pp. 1 - 4.



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Island for having been stranded and/or accidentally caught by fishermen. In addition, the Second Party, in coordination with the Bureau of Fisheries and Aquatic Resources (BFAR), may provide foreign experts and scientists to the Facility to conduct experimentation on breeding of marine mammals. The Second Party shall shoulder all the costs related to these undertaking. As a result, the Second Party shall be considered the beneficial owner of all marine mammals committed to the Dolphin Island.

"X x x." ¹⁰⁰

On December 29, 2009, a team from the Commission on Audit (COA) issued ***Audit Observation Memorandum (AOM) No. 09-002.***¹⁰¹ Notably, the team found that:

"While there was no share of income received, SALARIES/ WAGES¹⁰² OF PERSONNEL/ WORKERS AT DOLPHIN ISLAND AND OTHER FACILITIES AT MOAP WHICH ARE OPERATED AND ABSOLUTELY MANAGED BY THE PRIVATE INVESTOR, WERE PAID BY THE PROVINCIAL GOVERNMENT OF MISAMIS OCCIDENTAL, instead of by the investor contrary to the contract agreement.¹⁰³ (Capitalization Ours.)"

Correlatively, said constitutional Commission issued ***Annual Audit Report (AAR) on the Province of Misamis Occidental for the Year Ended December 31, 2009,***¹⁰⁴ which reiterated the COA audit team's findings,¹⁰⁵ as depicted in the AOM. In addition, the Report¹⁰⁶ cited the following shortfalls pertaining to the MOAP, *scilicet*:

- The Economic Enterprise Management Board (EEMB) had not fully functioned or performed its duties and functions as prescribed under Section 5 (b.1) and (b.4) of Ordinance No. 07-05 dated October 20, 2005, of the Province of Misamis Occidental x x x.¹⁰⁷
- . . . [T]he Provincial Government hired casual and/or job order employees assigned at Dolphin Island, a facility

¹⁰⁰ EXHIBIT "F-1": page 2 of the Amended Investment Contract.

¹⁰¹ EXHIBIT "M" and series.

¹⁰² See EXHIBITS "H-44", "H-44-A", "H-72", "H-72-A", "H-72-B".

¹⁰³ *Ibid.*; See EXHIBIT "H-8-A"; See also EXHIBITS "I-1", "J".

¹⁰⁴ EXHIBIT "H".

¹⁰⁵ EXHIBIT "H-31": page 20 of the Annual Audit Report (2009).

¹⁰⁶ EXHIBITS "H-5" to "H-9".

¹⁰⁷ EXHIBIT "H-32-A": page 21 of the Annual Audit Report (2009).

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exclusively owned and managed by the private investor. Likewise, some other employees like those hired for MOAP Maintenance, Hotel and Cottages and Dive Shop sections are working both with the facilities of the investor and with the Provincial Government. Salaries and wages of these employees amounting to ₱ 559,925.00 . . . were improperly paid by the Provincial Government and accounted as maintenance and other operating expense of the latter.¹⁰⁸

- . . . [C]onsidering the huge investment poured out by the private investor at MOAP with very minimal return of investment (ROI) . . . the Provincial Government, as a sort of subsidy, hired some casual and/or job order personnel to assist in the operation of the investor's business facilities. Also, as sort of tax holiday, the provincial share on the income from business operation of the private investor was not yet enforced.¹⁰⁹

EVIDENCE FOR THE PROSECUTION

A. TESTIMONIAL EVIDENCE:

The witnesses presented by the prosecution, including the substance of their testimonies are summarized below, viz:

Jesus G. Salvador, Administrative Officer V of the Central Records Division, Office of the Ombudsman,¹¹⁰ is the custodian of documents filed with said Office during the preliminary investigation. These include:

1. Verified complaint¹¹¹ dated March 15, 2011, of Oscar Visitacion which was filed with the Office of the Ombudsman on March 17, 2011;

¹⁰⁸ EXHIBIT "H-33-A": page 22 of the Annual Audit Report (2009).

¹⁰⁹ EXHIBIT "H-33-B": page 22 of the Annual Audit Report (2009).

¹¹⁰ TSN, October 3, 2017, pp. 5, 16.

¹¹¹ EXHIBIT "I".

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2. Verified follow-up letter¹¹² dated August 8, 2011, of Oscar Visitation which was filed with the Office of the Ombudsman on August 26, 2011;
3. Counter-affidavit¹¹³ dated December 22, 2011, of Loreto Leo S. Ocampos which was received by the Office of the Ombudsman on December 29, 2011; and
4. Comment to respondent's Counter-affidavit¹¹⁴ dated February 14, 2012, of Oscar Visitation which was received by the Office of the Ombudsman on March 8, 2012.

Francisco T. Paylaga, Jr., Vice-Governor of Misamis Occidental from July 1, 2001 to July 15, 2006,¹¹⁵ was the Presiding Officer of the *Sangguniang Panlalawigan*. He attested that the local legislature deliberated on all resolutions and ordinances akin to the Misamis Occidental Aquamarine Park (MOAP) prior to their passage.¹¹⁶ Accordingly, the contract between Governor Ocampos, on behalf of the Provincial Government of Misamis Occidental, and Foad Akhavan had the *imprimatur* of the members of the *Sangguniang Panlalawigan*.¹¹⁷ To be sure, Resolution No. 067-04 of said *Sanggunian* authorized Governor Ocampos to enter into said contract.¹¹⁸ Notably, however, he disavowed personal knowledge that said contract was grossly disadvantageous to the government.¹¹⁹

Jimmy R. Regalado, former member of the *Sangguniang Panlalawigan*,¹²⁰ affirmed that nobody had assailed the validity of the investment contract between Misamis Occidental and Foad Akhavan before any court of competent jurisdiction.¹²¹ Truth to tell, said contract was approved unanimously by members of the *Sangguniang Panlalawigan*.¹²² The investment contract expressly provided that

¹¹² EXHIBIT "J".

¹¹³ EXHIBIT "K".

¹¹⁴ EXHIBIT "L".

¹¹⁵ Now Mayor of the municipality of Panaon, Misamis Occidental.

¹¹⁶ TSN, August 22, 2017, pp. 12 – 13, 27, 31; Judicial Affidavit dated June 19, 2017, of F. T. Paylaga, Jr., pp. 1 – 11 (Records, Vol. III, pp. 150 – 160).

¹¹⁷ *Loc. cit.*, pp. 18, 23.

¹¹⁸ *Op. cit.*, pp. 24, 33 – 34.

¹¹⁹ TSN, August 22, 2017, p. 35.

¹²⁰ Now Vice-Mayor of the Municipality of Aloran, Misamis Occidental.

¹²¹ TSN, September 18, 2017, p. 13.

¹²² *Loc. cit.*, p. 16.

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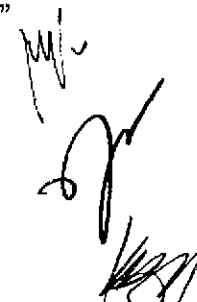
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Misamis Occidental shall continuously enjoy its 30% share of the net income of the facility.¹²³ Unfortunately, however, since the MOAP facilities sustained economic losses, the private investor never remitted the 30% share of the local government unit.¹²⁴ There is no gainsaying, however, that this remained consistent with the provision on "*Profit and Loss Sharing*" of the contract which explicitly states that "[i]n case the operation results in a loss, the private investor shall bear all the loss."¹²⁵

Irene T. Zapatos, Secretary of the *Sanggunian Panlalawigan* of Misamis Occidental,¹²⁶ was the custodian of two (2) Resolutions¹²⁷ and three (3) Ordinances¹²⁸ passed by said local legislative body and approved by accused Ocampos in connection with the MOAP.¹²⁹ The parties admitted the genuineness and due execution of following enactments¹³⁰ of the local legislature, to wit:

1. **Resolution No. 067-04**¹³¹ dated February 20, 2004, authorizing Governor Ocampos, "to enter into a Memorandum of Agreement (MOA), in behalf of the Provincial Government of Misamis Occidental, with the Local Government of Sinacaban and with the Private Investor, Mr. Foad Akhavan, for the construction, operation and maintainance of the MOAP-Satellite Marine Farm";
2. **Resolution No. 318-04**¹³² dated October 22, 2004, "adopting Mr. Foad Akhavan as a son of the Province of Misamis Occidental" for "investing in the construction of cottages at the Misamis Occidental Aquamarine Park (MOAP) and for [the] development of the Marine Rescue and Recreation Center thereat."



¹²³ *Op. cit.*, p. 19.

¹²⁴ TSN, September 18, 2017, p. 29 - 30.

¹²⁵ **EXHIBIT "D-4-A"**; TSN, September 18, 2017, p. 32.

¹²⁶ TSN, June 19, 2017, pp. 15 - 16.

¹²⁷ **EXHIBITS "A", "1"**: Resolution No. 067-04; **EXHIBITS "B", "2"**: Resolution No. 318-04.

¹²⁸ **EXHIBIT "D", "4"**: Ordinance No. 13-04; **EXHIBITS "E", "5"**: Ordinance No. 07-05; **EXHIBITS "G", "7"**: Ordinance No. 05-04.

¹²⁹ Records, Vol. III, pp. 104 - 107.

¹³⁰ TSN, June 19, 2017, pp. 17 - 18, p. 50.

¹³¹ **EXHIBIT "A", "1"**.

¹³² **EXHIBIT "B", "2"**.

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3. **Ordinance No. 13-04¹³³** (i.e. **"The Provincial Aquamarine Park Ordinance of 2004"**), dated December 10, 2004, "establishing the Misamis Occidental Aquamarine Park (MOAP) as an economic enterprise, thereby promoting a sustainable, self-liquidating and self-financing endeavor".¹³⁴
4. **Ordinance No. 07-05¹³⁵** (i.e. **"The Economic Enterprise Ordinance of 2005"**) dated September 23, 2005, "establishing the Misamis Occidental Aquamarine Park (MOAP), Misamis Occidental Enterprise Development and Research Center (MOEDRC), Misamis Occidental Drug Treatment and Rehabilitation Center (MODTRC) and Misamis Occidental Provincial Housing Project (MOPHP) as economic enterprises, and creating the Economic Enterprise Management Board, the Economic Enterprises Executive Committees, and the Economic Enterprise Office and defining their functions." ¹³⁶
5. **Ordinance No. 05-04¹³⁷** dated July 30, 2004, setting aside and appropriating the amount of one million pesos (P1,000,000.00) from the trust fund of the Misamis Occidental Aquamarine Park (MOAP) for the purchase of important medicines to be used by all hospitals operated by the Provincial Government of Misamis Occidental.

Rebecca Chua-Ozaraga, State Auditor III,¹³⁸ was a member of the audit team that drafted the Audit Observation Memorandum.¹³⁹

Among the significant facts elicited from Ozaraga's direct testimony are the following:

1. The salaries and wages of casual/ job order employees assigned at the facilities exclusively operated and managed by the private investor, Foad Akhavan, in the year 2009 were paid by the provincial government of

¹³³ **EXHIBIT "D", "4"**. Ordinance No. 13-04 which was enacted on December 10, 2004, was approved by Governor Ocampos on December 13, 2004.

¹³⁴ Title II, Section 2 of Ordinance No. 13-04.

¹³⁵ **EXHIBIT "E", "5"**.

¹³⁶ Ordinance No. 07-05 which was enacted on September 23, 2005, was approved by Governor Ocampos on October 20, 2005.

¹³⁷ **EXHIBIT "G", "7"**.

¹³⁸ Now State Auditor IV.

¹³⁹ TSN, August 7, 2017, pp. 33, 39.

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Misamis Occidental ; hence, this runs counter to the Contract dated November 19, 2004 (Exh. "C").¹⁴⁰

2. Akhavan is actually, directly and exclusively responsible for the management and operation of Dolphin Island Resort.¹⁴¹
3. Dolphin Island Resort, the facilities financed by Akhavan, is merely a part of the Misamis Occidental Aquamarine Park (MOAP).¹⁴²
4. Despite the issuance of the Audit Observation Memorandum on the MOAP, there was –
 - a. NO notice of disallowance;¹⁴³
 - b. NO audit decision;¹⁴⁴ and
 - c. NO notice of charge¹⁴⁵issued subsequently by COA.

Othella G. Arbon, team leader of the audit team that prepared the Annual Audit Report (2009) and the one who endorsed said Report to the Regional Director of the COA, declared under oath that:

1. Public funds were used to defray the wages of workers at Dolphin Island Resort.¹⁴⁶
2. The wages of workers at Dolphin Island had been booked as "*Accounts Receivable*." ¹⁴⁷

Atty. Celso L. Vocal, Supervising Auditor of the COA, Region X, testified that he had personal knowledge of Annual Audit Report for 2009 regarding the MOAP. He stressed that after the Audit Observation Memorandum (AOM) on the MOAP was issued, neither a Notice of Suspension (NS) nor a Notice of Disallowance (ND)

¹⁴⁰ Judicial Affidavit of R. Chua-Ozaraga dated June 20, 2017, pp. 3 - 4.

¹⁴¹ TSN, August 8, 2017, p. 73.

¹⁴² TSN, August 7, 2017, p. 43; TSN, August 8, 2017, pp. 15, 66, 70.

¹⁴³ TSN, August 8, 2017, pp. 21, 53, 81, 96.

¹⁴⁴ *Ibid.*

¹⁴⁵ TSN, August 8, 2017, pp. 26, 53 - 54, 81, 97.

¹⁴⁶ TSN, August 8, 2017, pp. 62 - 64.

¹⁴⁷ TSN, August 8, 2017, p. 95.

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followed because of the positive action taken by the Provincial Government. Seventy percent (70%) of the salaries/ wages (Php559,925.00) of workers assigned at Dolphin Island was booked as "Accounts Receivable". As per Annual Audit Report for 2010 about the MOAP, Php391,947.50 was booked as "Accounts Receivable from Foad Akhavan," as evidenced by Journal Entry Voucher No. 101-10-12-017838 dated December 30, 2010.¹⁴⁸

B. DOCUMENTARY EVIDENCE:

The formally offered documents of the prosecution which were admitted as evidence by this Court included Exhibits "A",¹⁴⁹ "B",¹⁵⁰ "C",¹⁵¹ "D",¹⁵² "E",¹⁵³ "F",¹⁵⁴ "G",¹⁵⁵ "H",¹⁵⁶ "I",¹⁵⁷ "J",¹⁵⁸ "K",¹⁵⁹ "L",¹⁶⁰ "M",¹⁶¹ "N",¹⁶² "P",¹⁶³ "Q",¹⁶⁴ "R",¹⁶⁵ "S",¹⁶⁶ "T",¹⁶⁷ "V",¹⁶⁸ "W",¹⁶⁹ "X",¹⁷⁰ "Y",¹⁷¹ and "Z".¹⁷¹



¹⁴⁸ TSN, September 4, 2017, pp. 11 - 12, 17; Judicial Affidavit dated August 30, 2017, of C. L. Vocal, p. 3 of 5 (Records, Vol. III, p. 283).

¹⁴⁹ Including Exhs. "A-1", "A-2", "A-3".

¹⁵⁰ Including Exhs. "B-1", "B-2", "B-3".

¹⁵¹ Including Exhs. "C-1", "C-2", "C-3". "C-3-a", "C-3-e"; Records, Vol. III, pp. 163 - 166.

¹⁵² Including the series marked; Records, Vol. III, pp. 167 - 172.

¹⁵³ Including the series marked; Records, Vol. III, pp. 173 - 187.

¹⁵⁴ Including the series marked; Records, Vol. III, pp. 188 - 191.

¹⁵⁵ Records, Vol. III, p. 192.

¹⁵⁶ Including the series marked; Records, Vol. IV, pp. 54 - 56.

¹⁵⁷ Including the series marked; Records, Vol. IV, pp. 57 - 58.

¹⁵⁸ Including the series marked; Records, Vol. IV, pp. 59 - 70.

¹⁵⁹ Including the series marked; Records, Vol. IV, pp. 80 - 86.

¹⁶⁰ Including the series marked; Records, Vol. IV, pp. 87 - 88; This was certified by COA Auditor Rebecca Chua-Ozaraga, a member of the audit team.

¹⁶¹ Records, Vol. I, p. 57.

¹⁶² Records, Vol. I, p. 79.

¹⁶³ Records, Vol. III, pp. 135 - 143.

¹⁶⁴ Records, Vol. IV, pp. 100 - 113.

¹⁶⁵ Records, Vol. III, pp. 103 - 109.

¹⁶⁶ Records, Vol. III, pp. 150 - 160.

¹⁶⁷ Records, Vol. IV, pp. 132 - 137.

¹⁶⁸ Records, Vol. IV, pp. 138 - 150.

¹⁶⁹ Records, Vol. IV, pp. 151 - 220.

¹⁷⁰ Records, Vol. IV, p. 221.

¹⁷¹ Including the series marked; Records, Vol. III, pp. 370 - 376.

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EVIDENCE FOR THE DEFENSE

A. TESTIMONIAL EVIDENCE:

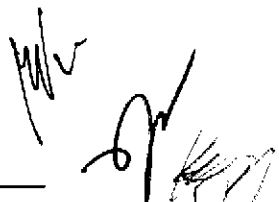
Only Atty Helen Tenchavez took the witness stand for the defense. The substance of her direct testimony is summarized below, viz:

Atty. Helen Tenchavez, Provincial Accountant of Misamis Occidental from 1995 to 2004,¹⁷² declared that the Provincial Government of Misamis Occidental entered into a **“joint venture agreement”** with Foad Akhavan,¹⁷³ a citizen of the United States of America (USA).¹⁷⁴ Under the agreement, 70% of the net earnings would go to Mr. Akhavan and 30% shall go to the Provincial Government, and the net earnings shall be computed as gross receipts less maintenance and operating expenses. To be sure, part of the maintenance and operating expenses are the salaries and wages of personnel.¹⁷⁵ In the Annual Audit Report for 2009, among the recommendations are:

“Require the investor to submit financial statement duly audited by an independent auditor as bases of (sic) computing the 30% share of income accruing to the Provincial Government of Misamis Occidental as stipulated in the Contract Agreement entered into by and between the Provincial Government of Misamis Occidental and Mr. Foad Akhavan and impose collection thereon.

“Require the Provincial Accountant to book as ‘accounts receivable’ the amount of P391,947.50 representing 70% of the cost of salaries and wages of casual and job order employees hired and paid by the Provincial Government for CY 2009 which should have been paid by the investor as operating expense of the business facility and require the later (sic) to pay or remit the said amount to the Provincial Government together with the 30% share of income as above-mentioned.

“X X X.”¹⁷⁶



¹⁷² Now, Deputy City Prosecutor of Oroquieta City.

¹⁷³ TSN, April 26, 2018, pp. 20, 23 – 24.

¹⁷⁴ *Loc. cit.*, p. 22.

¹⁷⁵ *Op. cit.*, p. 26.

¹⁷⁶ **EXHIBIT “H-34-A”**; Records, Vol. IV, p. 15.

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Anent the aforequoted recommendation of the COA team, Atty. Tenchavez acknowledged that she booked the 30%,¹⁷⁷ because "30% of the net income of the Akhavan facilities will be the share of the province."¹⁷⁸ However, she disavowed any knowledge concerning the steps, if any, undertaken by Governor Ocampos to collect said receivables.¹⁷⁹

Atty. Tenchavez declared that the parties faithfully executed their obligations.¹⁸⁰ Mr. Akhavan had submitted monthly financial reports. Regrettably, however, the Office of the Provincial Accountant had validated reports that:

"the facilities has not been generating revenues from 2008 up to 2010"¹⁸¹

The Misamis Occidental Aquamarine Park is a sprawling complex. To be sure, Dolphin Island is merely a sandbar, and it is a small part of the MOAP complex.¹⁸² The two big cottages therein are the only facilities managed by Mr. Akhavan.¹⁸³ The other cottages, the restaurant, the function hall, the min-zoo, the viewing deck and the water sports facilities are funded and managed by the provincial government.¹⁸⁴

The provincial government of Misamis Occidental had no capital investment in the Akhavan-operated facilities of the MOAP.¹⁸⁵ True, the COA had issued its Audit Observation Memorandum (AOM) and Annual Audit Report on the Province of Misamis Occidental for 2009 and 2010. Yet, neither a notice of suspension nor a notice of disallowance had been issued by the COA to said local government with respect to the MOAP.¹⁸⁶

¹⁷⁷ TSN, April 26, 2018, p. 30.

¹⁷⁸ *Op. cit.*, p. 52.

¹⁷⁹ *Loc. cit.*, pp. 31, 38.

¹⁸⁰ *Op. cit.*, p. 34.

¹⁸¹ TSN, April 26, 2018, p. 36.

¹⁸² TSN, April 26, 2018, pp. 40, 50 - 51.

¹⁸³ TSN, April 26, 2018, pp. 42 - 43, 46.

¹⁸⁴ *Loc. cit.*, pp. 46 - 47.

¹⁸⁵ *Op. cit.*, p. 51.

¹⁸⁶ TSN, April 26, 2018, pp. 51 - 52, 54.

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B. DOCUMENTARY EVIDENCE:

The following documents had been formally offered as evidence by accused Ocampos and Akhavan, and these were considered admissible by this Court:

- **EXHIBIT "1":**¹⁸⁷ Resolution No. 067-04 dated February 20, 2004, of the *Sangguniang Panlalawigan* of Misamis Occidental, p. 1 of 1;¹⁸⁸
- **EXHIBIT "2":**¹⁸⁹ Resolution No. 318-04 dated October 22, 2004, of the *Sangguniang Panlalawigan* of Misamis Occidental, p. 1 of 1;¹⁹⁰
- **EXHIBIT "3":**¹⁹¹ Contract dated November 19, 2004, entered into by and between the Provincial Government of Misamis Occidental, represented by Governor L. L. S. Ocampos and Foad Akhavan, pp. 1 – 4;¹⁹²
- **EXHIBIT "4":**¹⁹³ Ordinance No. 13-04 entitled "An Ordinance Establishing the Misamis Occidental Aquamarine Park (MOAP) as an Economic Enterprise and Defining its Operations and Organization," enacted on December 10, 2004, pp. 1 – 6;¹⁹⁴
- **EXHIBIT "5":**¹⁹⁵ Ordinance No. 07-05 entitled "An Ordinance Establishing the Misamis Occidental Aquamarine Park (MOAP), Misamis Occidental Enterprise Development and Research Center (MOEDRC), Misamis Occidental Drug Treatment and Rehabilitation Center (MODTRC) and Misamis Occidental Provincial Housing Project (MOPHP) as Economic Enterprises; and Creating the Economic Enterprise Management Board, the Economic Enterprises Executive Committees, and the

¹⁸⁷ Including Exhs. "A-1", "A-2", "A-3".

¹⁸⁸ Records, Vol. III, p. 161.

¹⁸⁹ Including Exhs. "B-1", "B-2", "B-3".

¹⁹⁰ Records, Vol. III, p. 162.

¹⁹¹ Including Exhs. "C-1", "C-2", "C-3". "C-3-a", "C-3-e".

¹⁹² Records, Vol. III, pp. 163 – 166.

¹⁹³ Including the series marked.

¹⁹⁴ Records, Vol. III, pp. 167 – 172.

¹⁹⁵ Including the series marked.



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Economic Enterprise Office and Defining their Functions," enacted on September 23, 2005, pp. 1 - 15;¹⁹⁶

- **EXHIBIT "6":**¹⁹⁷ Amended Investment Contract dated January 29, 2007, between the Provincial Government of Misamis Occidental, duly represented by Governor L. L. S. Ocampos, and Foad Akhavan, the private investor;¹⁹⁸
- **EXHIBIT "7":** Ordinance No. 05-04 entitled "An Ordinance Appropriating the Amount of One Million Pesos (Php1,000,000.00) from the Trust Fund of the Misamis Occidental Aquamarine Park (MOAP) for the Purchase of Important Medicines to be Used by All Hospitals Operated by the Provincial Government of Misamis Occidental," enacted on July 30, 2004, p. 1 of 1;¹⁹⁹
- **EXHIBIT "8", "8-A" to "8-L":** 12 photographs of Akhavan facilities;²⁰⁰
- **EXHIBIT "11":** Letter dated January 20, 2009, from President Gloria Macapagal Arroyo to Mr. Foad Akhavan expressing her gratitude for Mr. Akhavan's "kind assistance" during her visit to Misamis Occidental last January 5-6, 2009, p. 1;²⁰¹
- **EXHIBIT "12":** Statement of Profit and Loss for the period January 1 to December 31, 2008;²⁰²
- **EXHIBIT "12-A":** Statement of Profit and Loss for the period January 1 to December 31, 2009, pp. 1 - 2;²⁰³

¹⁹⁶ Records, Vol. III, pp. 173 - 187.

¹⁹⁷ Including the series marked.

¹⁹⁸ Records, Vol. III, pp. 188 - 191.

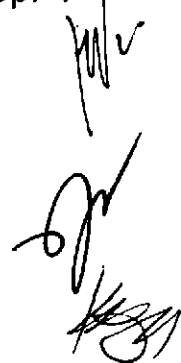
¹⁹⁹ Records, Vol. III, p. 192.

²⁰⁰ Records, Vol. IV, pp. 463 - 475; See TSN, April 26, 2018, pp. 12 - 14.

²⁰¹ Records, Vol. IV, p. 476; See TSN, April 26, 2018, p. 17 - 18.

²⁰² Records, Vol. IV, p. 541; TSN, April 26, 2018, p. 16.

²⁰³ Records, Vol. IV, p. 542 - 543; See TSN, April 26, 2018, p. 16.



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- **EXHIBIT “12-B”**: Statement of Profit and Loss for the period January 1 to December 31, 2010, pp. 1 - 2.²⁰⁴
- **EXHIBIT “13”, “13-A”**: Judicial affidavit dated May 19, 2017, of Atty. Helen E. Tenchavez, pp. 1 – 18.²⁰⁵

DISCUSSION

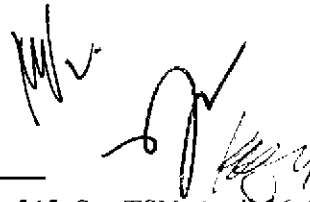
I. THE ENFORCEABLE CONTRACT BETWEEN THE PROVINCIAL GOVERNMENT OF MISAMIS OCCIDENTAL, REPRESENTED BY GOVERNOR LORETO LEO OCAMPOS, AND MR. FOAD AKHAVAN, A FOREIGN INVESTOR, COMES WITHIN THE PURVIEW OF A BUILD-OPERATE-TRANSFER (BOT) SCHEME.

The characterization of the subject contract (i.e. Amended Investment Contract) is crucial in the resolution of the central issues in this case.

Accused Ocampos and Akhavan insist that the contract between the Provincial Government of Misamis Occidental and Mr. Foad Akhavan is a **joint venture**.²⁰⁶

The Court is not swayed.

In *Aurbach, et. al. v. Sanitary Wares Manufacturing Corporation, et. al.*,²⁰⁷ which accused's counsel cited in their memorandum,²⁰⁸ the Supreme Court clarified the nature of a joint venture in this wise:



²⁰⁴ Records, Vol. IV, p. 544 – 545; See TSN, April 26, 2018, p. 16.

²⁰⁵ Records, Vol. IV, pp. 477 – 494.

²⁰⁶ Joint Memorandum dated July 18, 2018, of accused L. L. S. Ocampos and F. Akhavan, pp. 9 – 13 of 36 (Records, Vol. V, pp. 78 – 82).

²⁰⁷ G.R. Nos. 75875/ 75951/ 75975-76, December 15, 1989.

²⁰⁸ *Supra*, Note 168, p. 10 of 36.

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"The legal concept of a joint venture is of common law origin. It has no precise legal definition but it has been generally understood to mean an organization formed for some temporary purpose. It is in fact hardly distinguishable from the partnership, since their elements are similar: community of interest in the business, sharing of profits and losses, and a mutual right of control. The main distinction cited by most opinions in common law jurisdictions is that the partnership contemplates a general business with some degree of continuity, while the joint venture is formed for the execution of a single transaction, and is thus of a temporary nature. This observation is not entirely accurate in this jurisdiction, since under the Civil Code, a partnership may be particular or universal, and a particular partnership may have for its object a specific undertaking. (Art. 1783, Civil Code). It would seem therefore that under Philippine law, a joint venture is a form of partnership and should thus be governed by the law of partnerships. The Supreme Court has however recognized a distinction between these two business forms, and has held that although a corporation cannot enter into a partnership contract, it may however engage in a joint venture with others."²⁰⁹ (Citations omitted; Emphasis and Underscoring Ours.)

The execution of a joint venture agreement creates reciprocal obligations²¹⁰ that must be performed by the parties in order to fully consummate the contract and achieve the purpose for which it was entered into.²¹¹

After a judicious scrutiny of the provisions of the "Amended Investment Contract," this Court finds, and so holds, that said Contract is a **Build-Operate-Transfer (BOT) contract**.

A **BOT agreement** is not a mere financing arrangement. In *National Power Corporation v. Central Board of Assessment Appeals, et. al.*,²¹² the Supreme Court discussed the nature of BOT agreements in the following manner:

²⁰⁹ *Tuazon v. Bolanos*, 95 Phil. 906 [1954]) (Campos and Lopez-Campos CORPORATION CODE: COMMENTS, NOTES AND SELECTED CASES, [1981], p. 12.

²¹⁰ Reciprocal obligations are those which arise from the same cause, in which each party is a debtor and a creditor of the other, such that the obligation of one is dependent on the obligation of the other. *Cortes v. Court of Appeals*, 527 Phil. 153, 160 (2006)

²¹¹ *Fong v. Dueñas*, G.R. No. 185592, June 15, 2015; *Ampil v. Office of the Ombudsman, Espenesin, et. al.*, G.R. Nos. 192685, 199115, July 31, 2013.

²¹² G.R. No. 171470, January 30, 2009, 57 SCRA 418, 434-437.

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"The underlying concept behind a BOT agreement is defined and described in the BOT law²¹³ as follows:

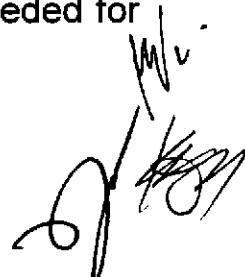
Build-operate-and-transfer – A contractual arrangement whereby the project proponent undertakes the construction, including financing, of a given infrastructure facility, and the operation and maintenance thereof. The project proponent operates the facility over a fixed term during which it is allowed to charge facility users appropriate tolls, fees, rentals, and charges not exceeding those proposed in its bid or as negotiated and incorporated in the contract to enable the project proponent to recover its investment, and operating and maintenance expenses in the project. The project proponent transfers the facility to the government agency or local government unit concerned at the end of the fixed term which shall not exceed fifty (50) years x x x.

"Under this concept, it is the project proponent who constructs the project at its own cost and subsequently operates and manages it. The proponent secures the return on its investments from those using the project's facilities through appropriate tolls, fees, rentals, and charges not exceeding those proposed in its bid or as negotiated. At the end of the fixed term agreed upon, the project proponent transfers the ownership of the facility to the government agency. Thus, the government is able to put up projects and provide immediate services without the burden of the heavy expenditures that a project start up requires."

A plain reading of the black-letter provisions of the parties' "Amended Investment Contract" shows that it fully conforms to this BOT concept. **By its express terms, Mr. Foad Akhavan has complete control – both operational and financial – of the project, including the facilities and equipment used, subject only to the transfer of these properties without cost to the Provincial Government of Misamis Occidental after the lapse of the period agreed upon.** Curiously, Ordinance No. 13-04 dated December 10, 2004, provides that the project should be **"jointly managed"**. Contrarily, however, the "Amended Investment Contract" dated January 2007, unequivocally recognizes the **"absolute management of Mr. Akhavan"**.

Mr. Akhavan infused capital for the construction of the facilities in Dolphin Island, including the structures and equipment needed for

²¹³ Republic Act No. 6957, as amended by Republic Act No. 7718.



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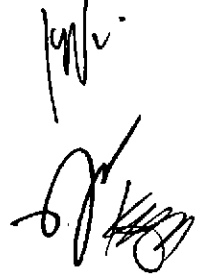
facilities in a satellite marine farm. Thereafter, it actually operated the facilities and received payment for the activities thereat. Conversely, Mr. Akhavan – as owner-user – bears the brunt of any risk, operational snag or economic reverses.

That some kind of "financing" arrangement is contemplated – in the sense that the proponent (i.e. private investor) shall initially shoulder the heavy cost of constructing the project's buildings and structures and of purchasing the needed machineries and equipment – is undeniable. The arrangement, however, goes beyond the simple provision of funds, since the proponent not only constructs and buys the necessary assets to put up the project, but operates and manages it as well during an agreed period that would allow it to recoup its basic costs and earn profits. In other words, the proponent goes into business for itself, assuming risks and incurring costs for its account. If it receives support from the government at all during the agreed period, these are pre-agreed items of assistance geared to ensure that the BOT agreement's objectives – both for the project proponent and for the government – are achieved. In this sense, a BOT arrangement is different from the usual financing arrangements where funds are advanced to a borrower who uses the funds to establish a project that it owns, subject only to a collateral security arrangement to guard against the non-payment of the loan. It is different, too, from an arrangement where a government agency borrows funds to finance a project from a private sector-lender who is thereafter commissioned to run the project for the government agency. In the latter case, the government agency is the owner of the project from the beginning, and the lender-operator is merely its agent in running the project.²¹⁴

Consistent with the BOT concept²¹⁵ and as implemented, **Mr. Foad Akhavan – the OWNER-MANAGER-OPERATOR of Dolphin Island – is the ACTUAL USER of its facilities, structures and equipment. Mr. Akhavan's ownership and use of the facilities, among others, are actual, direct, and immediate, while the Provincial Government's is contingent.** In fact, Dolphin Island, which has turned out to be a "*white elephant*," has been mothballed.

²¹⁴ *National Power Corporation v. Province of Quezon and Municipality of Pagbilao*, G.R. No. 171586, January 25, 2010.

²¹⁵ *Tatad v. Garcia*, 313 Phil. 296, 323, 326 (1995).



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II. THE ALLEGED VIOLATION OF SECTION 3(e) OF REPUBLIC ACT NO. 3019, AS AMENDED

Accused Loreto Leo S. Ocampos and Foad Akhavan were formally charged with violation of Section 3(e) of R.A. No. 3019, as amended. To be convicted under the said provision, the following elements must be established:

1. The accused must be a public officer discharging administrative, judicial or official functions;
2. The accused must have acted with manifest partiality, evident bad faith or gross inexcusable negligence; and
3. The action of the accused caused undue injury to any party, including the government, or gave any private party unwarranted benefits, advantage or preference in the discharge of the functions of the accused.²¹⁶

First element: Without need of an extended discussion, this Court believes that the presence of the first element is beyond question in this case, it is undisputed that then Governor Loreto Leo S. Ocampos is an elective civil servant discharging official and administrative functions.

Second element: The second element, for its part, describes the three ways by which violation of Section 3(e) of R.A. No. 3019 may be committed, that is, through manifest partiality, evident bad faith or gross inexcusable negligence. Case law²¹⁷ stressed the modes of committing the offense, viz:

²¹⁶ *People of the Philippines v. Priscila R. Justimbaste, et al.* SB-10-CRM-0040 to 0044, February 26, 2018; *Consigna v. People*, G.R. No. 175750-51, April 2, 2014; *Efren L. Alvarez v. People*, G.R. No. 192591, June 29, 2011; *Cabrera v. Sandiganbayan*, G.R. Nos. 162314 - 17, October 25, 2004, 441 SCRA 377, citing *Jacinto v Sandiganbayan*, G.R. No. 84571, October 2, 1989.

²¹⁷ *People v. Sandiganbayan (Fourth Division), et al.*, G.R. No. 160619, September 9, 2015 citing *Uriarte v. People*, G.R. No. 169251, December 20, 2006, 511 SCRA 471, 486; *Santos v.*

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"Section 3(e) of R.A. 3019 may be committed either by *dolo*, as when the accused acted with evident bad faith or manifest partiality, or by *culpa* as when the accused committed gross inexcusable negligence. There is **"manifest partiality"** when there is a clear, notorious or plain inclination or predilection to favor one side or person rather than another. **"Evident bad faith"** connotes not only bad judgment but also palpably and patently fraudulent and dishonest purpose to do moral obliquity or conscious wrongdoing for some perverse motive or ill will. It contemplates a state of mind affirmatively operating with furtive design or with some motive or self-interest or ill will or for ulterior purposes. **"Gross inexcusable negligence"** refers to negligence characterized by the want of even the slightest care, acting or omitting to act in a situation where there is a duty to act, not inadvertently but willfully and intentionally, with conscious indifference to consequences insofar as other persons may be affected.²¹⁸ R.A. No. 3019 may be committed through manifest partiality, evident bad faith or gross inexcusable negligence. **Proof of ANY of these three in connection with the prohibited acts mentioned in Sec. 3(e) is enough to convict.**" (Capitalization and Underscoring Ours.)

In construing these phrases, the High Court observed that bad faith or partiality, on the one hand, and negligence, on the other hand, *per se* are not enough for one to be held criminally liable under the law. It must also be shown by proof beyond reasonable doubt that the bad faith or partiality is evident or manifest, or, that the negligent act or omission is gross and inexcusable.²¹⁹

Section 465, Art. 1, Chapter 3 of Republic Act No. 7160 (i.e. The Local Government Code of 1991) empowers the provincial governor to "[r]epresent the province in all its business transactions and **sign in its behalf all bonds, contracts, and obligations, and such other documents upon authority of the Sangguniang Panlalawigan** or pursuant to law or ordinances." Sec. 468, Art. 3 of the same chapter also establishes the *Sanggunian's* power, as the province's legislative body, to authorize the provincial governor to

People, G.R. No. 161877, March 23, 2006, 485 SCRA 185, 194; *Cabrera v. Sandiganbayan*, G.R. Nos. 162314-17, October 25, 2004, 441 SCR 377, 386; and *Jacinto v. Sandiganbayan*, G.R. No. 84571, October 2, 1989, 178 SCRA 254, 259.

²¹⁸ *People v. Roberto P. Fuentes*, SB-Criminal Case No. 28342, September 30, 2008.

²¹⁹ *Jaca v. People, et al.*, G.R. No. 166967, January 28, 2013; *Umipig v. People*, G.R. No. 171359, July 18, 2012; *People v. Juanito A. Rubio, et al.* Criminal Case Nos. SB-16-CRM-0531 to 0536, March 14, 2018.

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negotiate and contract loans, lease public buildings held in a proprietary capacity to private parties, among other things.

The foregoing inexorably confirms the indispensability of the *Sanggunian's* authorization in the execution of contracts which bind the local government unit to new obligations. Accused Ocampos acted *ex auctoritate mihi commissa*.²²⁰ Be that as it may, **accused cannot shield himself from criminal liability simply because the *Sangguniang Panlalawigan* passed the necessary resolutions adopting the BOT project and conferring its stamp of approval on the Amended Investment Contract.**

As the local chief executive, accused Ocampos is not only expected to know the proper procedure in the bidding and award of contracts such as BOT projects, he is also duty bound to follow the same and his failure to discharge this duty constitutes **gross and inexcusable**²²¹ **negligence**.²²² Further, Ocampos' assent to total abnegation of control and management over the facilities in Dolphin Island is anathema to Ordinance No. 13-04²²³ dated December 10, 2004. While said ordinance explicitly states that the facilities shall be "***jointly managed***," the Amended Investment Contract vests "***absolute management***" in favor of Mr. Akhavan. Hence, breach of the ordinance is manifest. Apparently, accused Ocampos threw all caution to the wind and relied solely on the self-serving representation of Mr. Akhavan that he possesses the requisite qualifications and that he can make things happen.

Accused's contention that "*what was conferred upon Mr. Akhavan was merely the right to manage the Akhavan Facilities, not the entire Dolphin Island, let alone the entire MOAP*"²²⁴ does not matter. Spatial considerations do not alter, much less erase, the fact that the law was brazenly violated. The bottom line, so to speak, is that accused Ocampos should have done what the law requires him to do, that is, to make sure that the terms and conditions

²²⁰ "*by the authority entrusted to him.*"

²²¹ Gross negligence is *inexcusable* when it cannot in any way or manner be explained or justified (Aquino, HANDBOOK ON THE ANTI-GRAFT AND CORRUPT PRACTICES ACT, 2000 Edition, p. 51).

²²² *Ong v. People*, G.R. No. 176546, September 25, 2009, 601 SCRA 47, 56.

²²³ EXHIBIT "D".

²²⁴ Joint Memorandum dated July 18, 2018, of L. L. S. Ocampos and F. Akhavan, p. 15.

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contained in the contract are consistent with the law, more particularly the *Sanggunian* ordinances that gave him the authority to deal with Mr. Akhavan, to begin with.

The prosecution was able to successfully demonstrate that accused Ocampos acted with manifest partiality and gross inexcusable negligence in bypassing the procurement process altogether, and in awarding the BOT contract to an unlicensed and unqualified private contractor. R.A. No. 6957 as amended by R.A. No. 7718, requires that a BOT project be awarded to the bidder who has satisfied the minimum requirements, and met the technical, financial, organizational and legal standards provided in the BOT Law. Section 5 of the applicable law provides:

SEC. 5. Public Bidding of Projects. - x x x

In the case of a build-operate-and-transfer arrangement, the contract shall be awarded to the bidder who, having satisfied the minimum financial, technical, organizational and legal standards required by this Act, has submitted the lowest bid and most favorable terms for the project, based on the present value of its proposed tolls, fees, rentals and charges over a fixed term for the facility to be constructed, rehabilitated, operated and maintained according to the prescribed minimum design and performance standards, plans and specifications. x x x
(Emphasis supplied.)

Third element. Accused argue that they cannot be held liable under Section 3(e) of R.A. No. 3019 since the Provincial Government of Misamis Occidental did not suffer any undue injury as a consequence of the contract and the "Amended Investment Contract".²²⁵ Neither did those contracts confer any unwarranted benefit in favor of Mr. Akhavan.²²⁶

We disagree.

This Court has clarified that the use of the disjunctive word "**or**" connotes that either act of (a) "causing any undue injury to any party, including the Government"; and (b) "giving any private party any unwarranted benefits, advantage or preference," qualifies as a violation of Section 3(e) of R.A. No. 3019, as amended. The use of the disjunctive "**or**" connotes that the two modes need not be present

²²⁵ Joint Memorandum dated July 18, 2018, of L. L. S. Ocampos and F. Akhavan, pp. 21 – 25.

²²⁶ *Loc. cit.*, pp. 26 – 27.

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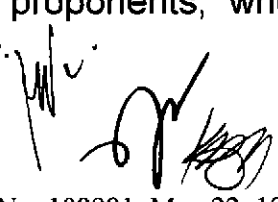
at the same time. In other words, the presence of one would suffice for conviction.²²⁷

As the Supreme Court explained in *Bautista v. Sandiganbayan*.²²⁸

"Indeed, Sec. 3, par. (e), RA 3019, as amended, provides as one of its elements that the public officer should have acted by causing any undue injury to any party, including the government, or by giving any private party unwarranted benefits, advantage or preference in the discharge of his functions. The use of the disjunctive term "or" connotes that either act qualifies as a violation of Sec. 3, par. (e), or as aptly held in *Santiago*,²²⁹ as two (2) different modes of committing the offense. This does not, however, indicate that each mode constitutes a distinct offense, but rather, that an accused may be charged under either mode or under both."²³⁰ (Underscoring supplied.)

The Supreme Court *en banc* likewise held in *Fonacier v. Sandiganbayan*²³¹ that proof of the extent or quantum of damage is not essential. It is sufficient that the injury suffered or benefits received can be perceived to be substantial enough and not merely negligible.²³² Under the second mode of the crime defined in Section 3(e) of R.A. No. 3019 therefore, damage is not required. In order to be found guilty under the second mode, it suffices that the accused has given unjustified favor or benefit to another, in the exercise of his official, administrative or judicial functions.²³³

It is apparent that the unwarranted benefit in this case lies in the very fact that Mr. Akhavan was allowed to present his proposal without compliance with the requirements provided under the relevant laws and rules. To begin with, the provincial government never conducted a public bidding prior to the execution of the contract. The project was immediately awarded to the Mr. Akhavan without delay and without any rival proponents, when it was not qualified to participate in the first place.



²²⁷ *Quibal v. Sandiganbayan (Second Division)*, G.R. No. 109991, May 22, 1995, 244 SCRA 224.

²²⁸ G.R. No. 136082, May 12, 2000, 332 SCRA 126, 135.

²²⁹ *Santiago v. Garchitorena*, G.R. No. 109266, December 2, 1993, 228 SCRA 214, 222-223.

²³⁰ As cited in *Cabrera v. Sandiganbayan*, G.R. No. 162314-17, October 25, 2004, 484 Phil. 350, 441 SCRA 377.

²³¹ G.R. Nos. 50691, 52263, 52766, 52821, 53350 & 53397, December 5, 1994, 238 SCRA 655.

²³² *Ibid.* at 688. See also *Soriques v. Sandiganbayan*, G.R. No. 153526, October 25, 2005, 474 SCRA 222, 230.

²³³ *Sison v. People*, G.R. Nos. 170339 & 170398-403, March 9, 2010, 614 SCRA 670, 681.

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Further, we cannot turn a blind eye to the glaring finding of COA's team that:

"While there was no share of income received, salaries/ wages of personnel/ workers at Dolphin Island and other Facilities at MOAP are operated and absolutely managed by the private contract."²³⁴ (Emphasis Ours.)

Mr. Foad Akhavan confirmed the audit team's finding thru a Certification dated December 20, 2011, which he issued. Pertinent portions thereof read:

"... Dolphin Island Resort ... has been sustaining losses since [the] start of the business, late in the year 2007 up to the present." x x x

"Thus, Dolphin Island Resort could not remit to the Provincial Government of Misamis Occidental the stipulated 30% share of the net income given that NO 'net income' was earned by the business since year 2007 – under the administration of former Governor Loreto Leo S. Ocampos, up to the close of year 2010 x x x." (Emphasis and Underscoring Ours.)

For his part, accused Ocampos expressly admitted the following in his Counter-Affidavit:²³⁵

"3.5.3 Knowing that the operation was not doing well and that it was financially unfeasible to enforce, ... the Provincial Government of Misamis Occidental, in the hope of encouraging more investment and to prevent the operation of the MOAP, particularly the Dolphin Island, from being halted as it is one of the attractions in the MOAP, and as a sort of subsidy, hired some job order workers to assist in the operation of the investor's facilities, in order to continue its operation ...

"3.5.4 x x x the Provincial Government of Misamis Occidental ... has not collected the supposed 30% share of the Province due to the financial losses incurred by Mr. Akhavan.

"3.5.5 Due to the losses suffered by Mr. Akhavan, the Province spent ₱559,925.00 as payment for labor actually

²³⁴ **EXHIBIT "H-8-A"**: Annual Audit Report on the Province of Misamis Occidental for the Year Ended December 31, 2009.

²³⁵ **EXHIBIT "K"**: Counter-affidavit dated December 22, 2011, of L. L. S. Ocampos, pp. 1 – 12 (Records, Vol. IV, pp. 59 – 70).

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rendered to 'a tourism development and promotion program' of the Province. x x x

"3.6.6 Thus, the cost of workers' wages temporarily assigned at the Dolphin Island in the year 2009 was actually booked up in the LGU books as Account Receivable from the private investor, as required in Audit Report. A copy of *Journal Entry Voucher (JEV) No. 101-10-12-017838* reflecting the required adjustment on the LGU books is attached and made an integral part hereof . . ." ²³⁶

State Auditor III Rebecca C. Ozaraga disclosed that the wages of casual employees working at the facilities of Foad Akhavan for 2009 were paid by the Provincial Government of Misamis Occidental instead of said private investor. Her positive testimony runs thus:

"7. Q. Now in the course of your audit, what did you find out, particularly with respect to the operation of the Misamis Occidental Aquamarine Park (MOAP), if any?

A. We have found out that the salaries and wages of casual/ job order employees assigned at the facilities exclusively operated and managed by private investor in the year 2009 were paid by the provincial government of Misamis Occidental, sir.

"8. Q. Whenever you said private investor, to whom you are (sic) referring to?

A. I am referring to Mr. Foad Akhavan, sir.

"9. Q. What was the participation of Mr. Foad Akhavan, the private investor in these cases, if any?

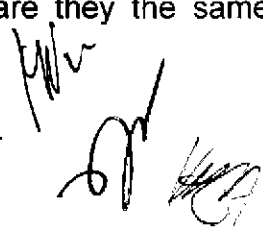
A. He was the one who entered into [a] contract with the provincial government of Misamis Occidental in connection with the MOAP, sir.

"10. Q. Who represented the provincial government of Misamis Occidental in those contracts entered into by the private investor?

A. Our then provincial governor, Mr. Loreto Leo S. Ocampos, sir.

"11. Q. You mentioned Mr. Foad Akhavan and Gov. Loreto Leo S. Ocampos, are they the same persons charged in these cases?

²³⁶ Records, Vol. IV, pp. 64 – 65.



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A. Yes, sir.

"12. Q. Madam Ozaraga, you mentioned earlier that the salaries and wages for the year 2009 of casual and job order employees working at the facilities exclusively operated and managed by the private investor were paid by the Provincial Government of Misamis Occidental, so what is wrong if the salaries and wages of the employees working at the facilities exclusively managed by Mr. Foad Akhavan were paid by the Provincial Government of Misamis Occidental, if any?

A. The salaries and wages of casual and job order employees working at the facilities of Mr. Akhavan should have been paid by Mr. Akhavan and not by the Provincial Government of Misamis Occidental, sir.

"13. Q. What was your basis . . . ?

A. Based on the Contract dated November 19, 2004, sir.

"14. Q. What is the audit team's findings, in so far as the MOAP operations, if any?

A. Based on our Audit Observation Memorandum (AOM) No. 09-002 dated December 29, 2009, we found out that while there was no share of income received by the Provincial Government, salaries/ wages of personnel/ workers at Dolphin Island and other facilities which are operated and absolutely managed by the private investor, are paid by the Provincial Government of Misamis Occidental, contrary to the contract agreement, sir." ²³⁷

"X X X

"27. Q. What particular provision in this Contract with respect to the payment of salaries and wages of employees working at the Facilities exclusively managed by Mr. Foad Akhavan, if any?

A. Under this Contract, particularly in paragraph F under sub-title **Profit-Sharing Scheme**, it was stated that:

'The Second Party shall remit to the First Party thirty percent (30%) of the net income from operation of the Facility. The net income shall be computed as follows: Gross Receipts less Maintenance & Operating Expenses.

²³⁷ Judicial Affidavit dated June 20, 2017 of R. Chua-Ozaraga, pp. 3-4 of 9 (Records, Vol. III, pp. 137 - 138).

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'The actual and reasonable maintenance and operating expenditures attributable to this venture shall include, but may not be limited to the following:

'a) salaries and wages of personnel

'b) x x x

'c) x x x

"27. Q. In relation to that provision in the Contract, what was the audit team's recommendation, if any?

A. **The audit team recommended that the payment made to those casual/ job order employees working exclusively at the facilities exclusively managed by the private investor should be booked as account receivable by the Provincial Government of Misamis Occidental,** considering that the salaries and wages of those personnel working exclusively at the facilities of the private investor should be considered as operating expenditures by [the] private investor and should have not been paid by the Provincial Government, sir.

"28. Q. After the audit of the accounts and operations of the Province of Misamis Occidental for the year ended December 31, 2009, what did the audit team do next, if any?

A. The succeeding Audit Team, headed by Team Leader Othella Arbon, prepared the Annual Audit Report (AAR) on the Province of Misamis Occidental for the year 2009, sir."²³⁸ (Emphasis and Underscoring Ours.)

In addition, the COA found that:

"... [T]he Provincial Government hired casual and/or job order employees assigned at Dolphin Island, a facility exclusively owned and managed by the private investor. Likewise, some other employees like those hired for MOAP Maintenance, Hotel and facilities of the investor and with the provincial government. Salaries and wages of these employees amounting to P559,925.00 . . . were improperly paid by the Provincial Government and accounted as maintenance and other operating expenses of the latter.

"x x x." ²³⁹ (Emphasis and Underscoring Ours.)

The Audit Observation Memorandum, as well as the Annual Audit Reports on the MOAP are significant pieces of evidence that

²³⁸ Judicial Affidavit dated June 20, 2017, of R. Chua-Ozaraga, pp. 6 – 7 of 9 (Records, Vol. III,

²³⁹ **EXHIBIT "H-33-A":** Annual Audit Report on the Province of Misamis Occidental for the Year Ended December 31, 2009.

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cannot be casually ignored.²⁴⁰ This stems from the jurisprudentially embedded truism that COA's findings are entitled to respect and finality.²⁴¹ Although neither a Notice of Suspension nor a Notice of Disallowance was issued, its absence, without more, does not *ipso facto* negate the probative value of the audit findings. COA findings are a veritable *indicium* of a breach of the law.

Furthermore, Atty. Helen Tenchavez, the defense's lone witness, corroborated, albeit ironically, the Commission's audit findings. Her direct testimony is quoted below, *viz*:

"ASSOC. JUSTICE MIRANDA

"Q You just said there were times that that happened, there were big . . . there were activities held at the Dolphin Island where facilities were run by Mr. Akhavan, tama, *di ba*?

"WITNESS

"A Yes, your Honors.

"Q But since there were so many people, there were employees coming who were LGU paid brought to the Island facilities run by Mr. Akhavan, tama?

"A Yes, your Honors.

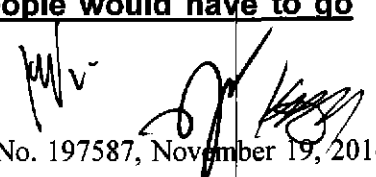
"Q To help out?

"A Yes, your Honors.

"Q So, what is your qualification?

"A The Dolphin Island, your Honors, part of the workers there are also LGU paid workers. Because the LGU is the one maintaining the marine sanctuary area.

"Q We made a distinction between Akhavan-run facilities and LGU-run facilities so we were talking about the restaurant, the viewing deck, the motorsports facilities, so my question again is the times that there were so many people in the restaurant, viewing deck, motorsports facilities in the Dolphin Island, that LGU-paid people would have to go there and help out, is that correct?



²⁴⁰ *Garcia, Jr. v. Office of the Ombudsman, et. al.*, G.R. No. 197587, November 19, 2014, 741 SCRA 172, 189 – 191.

²⁴¹ *Nava v. Palattao*, G.R. No. 160211, August 28, 2006, 499 SCRA 745; *Veloso v. Commission on Audit*, G.R. No. 193677, September 6, 2011, 656 SCRA 767, 776.

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"A Those that are already at Dolphin Island, your Honors.

"Q Why should they be in the Dolphin Island to help out?

"A Because they are LGU-paid workers at the Dolphin Island, those who maintain the sanctuary area, your Honors.

"ASSOC. JUSTICE MIRANDA

"Q No, no, let's make a distinction, because you were saying earlier in the facilities of Mr. Akhavan, so the restaurant, the viewing deck?

"WITNESS

"A Yes, your Honors.

"Q Then, *sabihin na lang natin*, part and in addition to that maintaining the sanctuary, is that what you are saying?

"A It's the LGU that maintains the sanctuary, your Honors.

"Q Yes, but when there is a need to augment the personnel in the restaurant, viewing deck and motorsports facilities in Dolphin Island run by Mr. Akhavan, then the LGU at times, let the people, if you are saying, the one helping out in maintaining the marine sanctuary, these LGU-paid people also help out in the restaurant, viewing deck and motorsports?

"A Not in the motorsports, your Honors because it needs expertise, your Honors.

"Q So in the restaurant and in the viewing deck?

"A In the restaurant yes, your Honors, just to carry goods, your Honors, it's not much work done.

"CHAIRPERSON

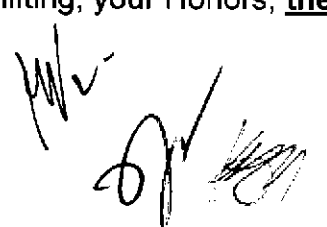
"Q And do they get overtime pay for that?

"WITNESS

"A When they work, your Honors, they get paid.

"Q When they work in the restaurants, do they get overtime pay, if it goes beyond the regular office hour?

"A They do shifting, your Honors, the workers at the MOAP do shifting.



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"Q They work until night?

"A There are those whose shift are in the night time, so there's actually no work beyond the eight hour period because there's a shift of workers.

"Q Did the Dolphin Island Resort turn in a profit as of 2010?

"A Not yet, your Honors.

"Q Until the time that you left the LGU, it has not earn (sic) a profit?

"A Actually, your Honors, when the then Governor Campos left the LGU, another Governor took over, the facility was closed so there was no more.

"ASSOC. JUSTICE MIRANDA

"Q Close in what year?

"A 2010 your Honors, at the assumption of the . .

"Q Up to now, it close?

"A Yes, your Honors." ²⁴² (Emphasis and Underscoring Ours.)

Concededly, the Amended Investment Contract had placed Mr. Akhavan at an arbitrary position where he can do as he pleases without being accountable to the Provincial Government in any way whatsoever. True enough, when Mr. Akhavan was in dire straits on account of "no net income," and closed down, the province found itself at extreme disadvantage without recourse to a performance security. As the cliché goes, Mr. Akhavan had his cake and ate it too, while the provincial government got the raw end of the deal. Suffice it to say that the undue injury to the pecuniary interests of the Provincial Government Misamis Occidental was the inevitable, logical and necessary consequence of accused Ocampos' gross and inexcusable negligence.

In the context of Section 3 (e) of R.A. No. 3019, **undue injury** has been equated with the civil law concept of "actual damage".²⁴³ **Undue** has been defined as "more than necessary, not proper, [or]

²⁴² TSN, April 26, 2018, pp. 58 - 62.

²⁴³ ARTICLE 2199, CIVIL CODE; Noel G. Villaroman, LAWS AND JURISPRUDENCE ON GRAFT AND CORRUPTION, 3rd Edition, 2010, citing *Santos v. People*, G.R. No. 161877, March 23, 2006; *Caugma v. People*, G.R. No. 167048, April 7, 2006.

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illegal;" and ***injury*** as "any wrong or damage done to another, either in his person, rights, reputation or property[; that is, the] invasion of any legally protected interest of another."²⁴⁴ It is sufficient that the injury suffered is perceived to be substantial enough and not merely negligible.²⁴⁵ Needless to say, undue injury must be specified, quantified and proved to the point of moral certainty during the trial.²⁴⁶

Prescinding from the foregoing, the Court agrees with the prosecution's position, which is quoted below, *viz*:

"42. The public funds spent by the Province for the salaries/ wages of the workers of accused Akhavan were never returned to the Province, despite its booking as account receivables. Thus, the damage and prejudice caused to the government amount to at P 559,925.00, corresponding to the total amount paid by the Province for the year 2009 to job order/ casual employees working exclusively at the facilities exclusively managed and operated by the private investor.

"43. x x x

"44. x x x [T]here is no doubt that the government suffered undue injury in this case as a consequence [of] the payment of workers' salaries at the Dolphin Island by the Province, causing undue injury to the government amounting to at least P 559,925.00."²⁴⁷ (Emphasis and Underscoring Ours.)

III. THE ALLEGED CONSPIRACY BETWEEN THE ACCUSED PUBLIC OFFICER AND THE ACCUSED PRIVATE PARTY:

With the allegation of conspiracy at its crux, each of the accused was charged as a principal. From an evidentiary perspective, to be held liable as a co-principal, there must be a showing of an overt act in furtherance of the conspiracy, either by actively participating in the actual commission of the crime, or by lending moral assistance to his co-conspirator by being present at the

²⁴⁴ *Pecho v. Sandiganbayan*, G.R. No. 111399, November 14, 1994, 238 SCRA 116, 133.

²⁴⁵ *Garcia and Brizuela v. Sandiganbayan*, G.R. No. 197204, March 26, 2014; *Reyes v. People*, G.R. Nos. 177105-06, August 4, 2010, 626 SCRA 782.

²⁴⁶ *Llorente, Jr. v. Sandiganbayan*, G.R. No. 122166, March 11, 1998, 287 SCRA 382; *People v. Sandiganbayan (Fourth Division)*, *Arciaga, et. al.*, G.R. NO. 160619, September 9, 2015.

²⁴⁷ Prosecution's Memorandum dated July 20, 2018, p. 16 of 19 (Records, Vol. V, p. 61).

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scene of the crime, or by exerting moral ascendancy over the rest of the conspirators to move them towards executing the conspiracy.²⁴⁸ Direct proof, however, is not imperative. In *Alvizo v. Sandiganbayan*,²⁴⁹ the Supreme Court laid down the guideline in the appreciation of evidence, to wit:

"... The existence of the assent of minds which is involved in a conspiracy may be and from the secrecy of the crime, usually must be, inferred by the court from proof of facts and circumstances which, taken together, apparently indicate that they are merely parts of some complete whole. If it is proved that two or more persons aimed by their acts towards the accomplishment of the same unlawful object, each doing a part so that their acts, though apparently independent, were in fact connected and cooperative, indicating a closeness of personal association and a concurrence of sentiments, then a conspiracy may be inferred though no actual meeting among them to concert means is proved. Thus, the proof of conspiracy, which is essentially hatched under cover and out of view of others than those directly concerned, is perhaps most frequently made by evidence of a chain of circumstances only." (Emphasis and Underscoring Ours.)

Prescinding from the foregoing, ***implied conspiracy*** may be established from the **mode, method and manner** by which the offense was perpetrated, or inferred from the acts of the accused before, during and after the commission of the crime indubitably pointing to a joint purpose and design, concerted action and community of interest.²⁵⁰ The totality of the facts and circumstances²⁵¹ proved the prosecution's allegation that "the collective act of both accused, in conspiracy with one another, resulted to the unlawful disbursement of public funds in favor of accused Akhavan."²⁵² To be sure, the chain of circumstances supported a finding of the presence of criminal conspiracy.²⁵³

The Amended Investment Contract is the linchpin in the prosecution's case. It is tailored-fit to vest unbridled control and discretion to an illegitimate businessman²⁵⁴ at the expense of the

²⁴⁸ *People v. Camaddo*, G.R. No. 97934, January 18, 1993, 217 SCRA 162, 167; *People v. Peralta*, 134 Phil. 703, 723 [1968].

²⁴⁹ 454 Phil. 34, 106 [2003].

²⁵⁰ *Salapuddin v. Court of Appeals*, 704 Phil. 577 [2013]; *People v. Del Castillo*, G.R. No. 169084, January 18, 2012, 663 SCRA 226, 246.

²⁵¹ *Napoles v. Sandiganbayan (Third Division)*, G.R. No. 224162, November 2, 2017.

²⁵² Prosecution's Memorandum dated July 20, 2018, p. 16 of 19 (Records, Vol. V, p. 61).

²⁵³ *People v. Furugganan*, 271 Phil. 496, 507 [1991].

²⁵⁴ Exhibit "N" (Certificate dated August 23, 2007, from the Department of Trade and Industry) showed that at the time the Amended Investment Contract was perfected, Foad Akhavan was

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local government unit that accused Ocampos has sworn to serve with utmost integrity. Alas, accused Ocampos is a whited sepulcher who has given primacy to his ties with accused Akhavan at the expense of public interest. Worse, neither checks nor balances have been incorporated in said Contract, thereby excluding any obligation on Akhavan's part to render periodic accounting to the provincial government. Their conscious design towards the furtherance of activities at the facilities operated by accused Akhavan while exploiting provincial employees and using public monies to pay for their wages is clearly manifest and egregious.²⁵⁵ Indeed, conspiracy is the product of intentionality on the part of cohorts.²⁵⁶

In fine, weighty and probative evidence pointed unquestionably to the active participation of accused Akhavan, the private party, in the irregularities perpetrated by accused Ocampos, a public officer. Hence, conspiracy is extant. Consequently, both accused shall be held criminally liable for violation of Section 3 (e) of Republic Act No. 3019.

III. THE ALLEGED MALVERSATION OF PUBLIC FUNDS:

Accused Ocampos and Akhavan are charged, in conspiracy with each other, with the felony of malversation of public funds, defined and penalized under Article 217²⁵⁷ of the Revised Penal Code, as amended.

not qualified to do business in the Philippines, much less enter into a Build-Operate-Transfer (BOT) contract in accordance with the applicable law.

²⁵⁵ *People v. Sandiganbayan (Second Division), Saludaga, et. al.*, G.R. No. 197953, August 5, 2015; *People v. Lizada*, G.R. Nos. 143468-71, January 24, 2003, 396 SCRA 62, 94-95.

²⁵⁶ *Magsuci v. Sandiganbayan*, G.R. No. 101545, January 3, 1995, 240 SCRA 13, 18; *People v. Fulgencio P. Pajanustan, Sr., et. al.*, SB Criminal Case No. 25879, May 9, 2012.

²⁵⁷ **Art. 217. Malversation of public funds or property; Presumption of malversation.** - Any public officer who, by reason of the duties of his office, is accountable for public funds or property, shall appropriate the same, or shall take or misappropriate or shall consent, or through abandonment or negligence, shall permit any other person to take such public funds or property, wholly or partially, or shall, otherwise, be guilty of the misappropriation or malversation of such funds or property, shall suffer:

1. The penalty of *prision correccional* in its medium and maximum periods, if the amount involved in the misappropriation or malversation does not exceed 200 pesos.
2. The penalty of *prision mayor* in its minimum and medium periods, if the amount involved is more than 200 pesos but does not exceed 6,000 pesos.
3. The penalty of *prision mayor* in its maximum period to *reclusion temporal* in its minimum period, if the amount involved is more than 6,000 pesos but is less than 12,000 pesos.

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The essential elements common to all acts of malversation under Article 217 of the Revised Penal Code, as amended, are:

- (a) That the offender be a public officer;
- (b) That he had the custody or control of funds or property by reason of the duties of his office;
- (c) That those funds or property were public funds or property for which he was accountable; and
- (d) That he appropriated, took, misappropriated or consented, or through abandonment or negligence, permitted another person to take them.²⁵⁸

First, it is undisputed that accused Ocampos is a public officer. A public officer is defined in the Revised Penal Code as "any person who, by direct provision of the law, popular election, or appointment by competent authority, shall take part in the performance of public functions in the Government of the Philippine Islands, or shall perform in said Government or in any of its branches public duties as an employee, agent, or subordinate official, of any rank or class." For his part, accused Akhavan, a private individual, may be liable for malversation if he conspires with an accountable public officer to commit said felony.

Second, the funds allegedly misappropriated are public in character, as they were funds belonging to the Province of Misamis Occidental.

4. The penalty of *reclusion temporal* in its medium and maximum periods, if the amount involved is more than 12,000 pesos but is less than 22,000 pesos. If the amount exceeds the latter, the penalty shall be *reclusion temporal* in its maximum period to *reclusion perpetua*.

In all cases, persons guilty of malversation shall also suffer the penalty of perpetual special disqualification and a fine equal to the amount of the funds malversed or equal to the total value of the property embezzled.

The failure of a public officer to have duly forthcoming any public funds or property with which he is chargeable, upon demand by any duly authorized officer, shall be *prima facie* evidence that he has put such missing funds or property to personal use.

²⁵⁸ *People v. Pajaro*, G.R. Nos. 167860-65, June 17, 2008, 554 SCRA 572, 584; *Zoleta v. Sandiganbayan (Fourth Division)*, et. al., G.R. No. 185224, July 29, 2015; *Barriga v. Sandiganbayan*, G.R. Nos. 161784-86, April 26, 2005, 496 Phil. 764, 774.

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Third, Governor Ocampos is an accountable public officer. Section 101(1) of the Government Auditing Code of the Philippines (P.D. No. 1445) defines accountable officer to be every officer of any government agency whose duties permit or require the possession or custody of government funds or property and who shall be accountable therefor and for the safekeeping thereof in conformity with law. In the determination of who is an accountable officer, it is the nature of the duties which he performs - the fact that, as part of his duties, he received public money for which he was bound to account, and not the nomenclature or the relative importance the position held - which is the controlling factor. The following provisions of said Code are also important:

"Section 102. Primary and secondary responsibility. -

(1) The head of any agency of the government is **immediately and primarily responsible for all government funds and property pertaining to his agency.**

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Sec. 105. Measure of liability of accountable officers. -

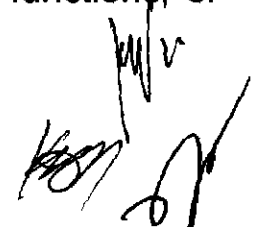
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(2) Every officer accountable for government funds shall be liable for all losses resulting from the unlawful deposit, use, or application thereof and for all losses attributable to negligence in the keeping of the funds. (Emphasis supplied.)

The Local Government Code expanded the foregoing with regard to local government officials. Section 340 of the Republic Act No. 7160 reads:

Section 340. Persons Accountable for Local Government Funds. - Any officer of the local government unit whose duty permits or requires the possession or custody of local government funds shall be accountable and responsible for the safekeeping thereof in conformity with the provisions of this title. Other local officials, though not accountable by the nature of their duties, may likewise be similarly held accountable and responsible for local government funds through their participation in the use or application thereof. (Emphasis ours.)

Parenthetically, local government officials become accountable public officers either (1) because of the nature of their functions; or



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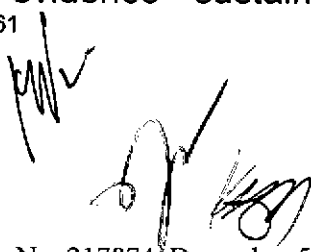
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(2) on account of their participation in the use or application of public funds.

A public officer may be held liable for malversation even if he does not use public property or funds under his custody for his personal benefit, but consents to the taking thereof by another person, or through abandonment or negligence, permitted such taking.²⁵⁹

A reading of the information filed readily reveals that intentional, and not merely culpable, malversation is imputed against the accused. The information is clear in its allegation that the accused "willfully, unlawfully, and feloniously permit the taking by Akhavan of part of said public funds by causing the payment of such public funds amounting to Five Hundred Fifty-Nine Thousand Nine Hundred Twenty-Five Pesos (P559,925.00) for the salaries of the employees of the Misamis Occidental Aquamarine Park (MOAP) facilities constructed and exclusively operated by Akhavan . . .". The *dolo* or the *culpa* present in the offense is only a modality in the perpetration of the felony. Even if the mode charged differs from the mode proved, the same offense of malversation is involved and, if the evidence warrants, conviction thereof is proper.²⁶⁰ A possible exception would be when the mode of commission alleged in the particulars of the indictment is so far removed from the ultimate categorization of the crime that it may be said due process was denied by deluding the accused into an erroneous comprehension of the charge against him. That said, even on the hypothesis that there is a divergence between the mode of commission as alleged in the prosecutorial indictment and as found in the judicial adjudication, there would nonetheless be no reversible flaw in the judgment. In other words, an accused charged with wilful malversation can be validly convicted of malversation through negligence where the evidence sustains the latter mode of perpetrating the offense.²⁶¹



²⁵⁹ *Hernan v. Sandiganbayan*, G.R. No. 217874, December 5, 2017.

²⁶⁰ *Major Joel G. Cantos v. People*, G.R. No. 184908, July 3, 2013, 700 SCRA 535, 545-546.

²⁶¹ *People v. Consigna, et al.*, 122 Phil. 293, 296 (1965); *People v. Ochoa*, 511 Phil. 682 (2005); *Tubola, Jr. v. Sandiganbayan*, G.R. No. 154042, April 11, 2011, 647 SCRA 446, 459 citing *Cabello v. Sandiganbayan*, G.R. No. 93885, May 14, 1991, 197 SCRA 94.

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More importantly, in malversation of public funds, the prosecution is burdened to prove beyond reasonable doubt, either by direct or circumstantial evidence, that the public officer appropriated, misappropriated or consented, or through abandonment or negligence, permitted another person to take public property or public funds under his custody. Absent such evidence, the public officer cannot be held criminally liable for malversation. Mere absence of funds is not sufficient proof of conversion; neither is the mere failure of the public officer to turn over the funds at any given time sufficient to make even the *prima facie* case. In fine, conversion must be proved.²⁶²

In the instant case, there lies no evidence which would give a *prima facie* indication that the funds disbursed for the project (i.e. Dolphin Island) were misappropriated for any personal use. COA's Memorandum and Report show that the province's funds were used for a public purpose, albeit without proper allotment issued therefor.

On this score, the Supreme Court's ruling in *Madarang v. Sandiganbayan*²⁶³ is instructive. Pertinent portions therefrom are quoted below, *viz*:

"Concededly, the first three elements are present in the case at bar. Lacking any evidence, however, of shortage, or taking, appropriation, or conversion by petitioner or loss of public funds, there is no malversation (*Narciso v. Sandiganbayan*, 229 SCRA 229 [1994]). True, the law creates a presumption that the mere failure of an accountable officer to produce public funds which have come into his hand on demand by an officer duly authorized to examine his accounts is *prima facie* evidence of conversion. The presumption is, of course, rebuttable. Accordingly, if petitioner is able to present adequate evidence that can nullify any likelihood that he had put the funds or property to personal use, then that presumption would be at an end and the *prima facie* case is effectively negated.

"X X X

when the absence of funds is not due to the personal use thereof by the accused, the presumption is completely destroyed; in fact, the presumption is deemed never to have existed at all

²⁶² *Legrama v. Sandiganbayan and People*, G.R. No. 178626, June 13, 2012; *Pondevida v. Sandiganbayan*, G.R. Nos. 160929-31, August 16, 2005, 467 SCRA 219, 242-243.

²⁶³ G.R. No. 112314, March 28, 2001, 355 SCRA 525.

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(*Diaz v. Sandiganbayan*, 302 SCRA 118 [1999]). The prosecution which has the responsibility of establishing by proof beyond reasonable doubt that petitioner had committed the offense charged, essentially relied on the aforesaid statutory presumption and failed to present any substantial piece of evidence which would indicate that petitioner had used the funds for personal gain. The fact is that there is no evidence that petitioner ever put the public funds in his custody to his personal use. x x x Mere absence of the funds is not sufficient proof of conversion. Neither is the mere failure of petitioner to turn over the funds at any given time sufficient to make even a *prima facie* case. Conversion must be affirmatively proved, either by direct evidence or by the production of facts from which conversion necessarily follows (*U.S. v. Catolico*, 18 Phil. 504 [1911]).'

"x x x." ²⁶⁴

Othella Arbon, a prosecution witnesses, declared unequivocally that there is no proof the actual disbursement of public funds to pay for the salaries of workers at Dolphin Island was approved and signed by accused Ocampos.²⁶⁵ Also, State Auditor III Rebecca C. Ozaraga gave negative testimony that accused Ocampos never approved the payroll for said workers.²⁶⁶ Hence, the Court is inclined to lend credence to the accused's contention that no adequate proof had been adduced to prove malversation.²⁶⁷

Technical malversation does not include, or is not necessarily included in the crime of malversation of public funds.²⁶⁸ That said, conviction for such felony is out of the question. Besides, consistent with the equipoise rule, where there is doubt on which side the evidence weighs, the doubt should be resolved in favor of the accused.²⁶⁹ The Court hastens to add, however, that this is only with respect to the charge of malversation in the instant case.

²⁶⁴ 355 SCRA 525, at 534 – 536.

²⁶⁵ TSN. August 8, 2017, p. 84.

²⁶⁶ TSN, September 8, 2017, p. 54.

²⁶⁷ Joint Memorandum dated July 18, 2018, of accused, p. 34 (Records, Vol. 5, page 103).

²⁶⁸ *Garcia, Jr. v. Sandiganbayan*, G.R. No. 197567, November 19, 2014, citing *Parungao v. Sandiganbayan*, 274 Phil. 451, 460 [1991].

²⁶⁹ *Amanguiton v. People*, G.R. No. 186080, August 14, 2009.

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All things considered, Rule 133, Section 2 of the Revised Rules on Evidence specifies the requisite quantum of evidence in criminal cases:

"Section 2. Proof beyond reasonable doubt. — In a criminal case, the accused is entitled to an acquittal, unless his guilt is shown beyond reasonable doubt. Proof beyond reasonable doubt does not mean such a degree of proof, excluding possibility of error, produces absolute certainty. Moral certainty only is required, or that degree of proof which produces conviction in an unprejudiced mind."

This rule places upon the prosecution the task of establishing the guilt of an accused, relying on the strength of its own evidence, and not banking on the weakness of the defense of an accused. Moreover, it is axiomatic that **all doubts must be resolved in favor of the accused. *In dubilis reus est absolvendus.*** Requiring proof beyond reasonable doubt finds basis not only in the due process clause²⁷⁰ of the Constitution, but similarly, in the right of an accused to be presumed innocent until the contrary is proved.²⁷¹

All things considered, accused Ocampos and Akhavan are **cleared** in so far as their indictment for malversation is concerned. To doubt is to sustain the presumption of innocence in this regard.

V. THE PENALTY:

The penalty for violation of Section 3 (e) of Republic Act No. 3019, as amended, is "imprisonment of not less than six (6) years

²⁷⁰ 1987 CONSTITUTION, ARTICLE III, Section 1: No person shall be deprived of life, liberty, or property without due process of law, nor shall any person be denied the equal protection of the laws.

²⁷¹ 1987 CONSTITUTION, ARTICLE III, Section 14 (2): In all criminal prosecutions, the accused shall be presumed innocent until the contrary is proved, and shall enjoy the right to be heard by himself and counsel, to be informed of the nature and cause of the accusation against him, to have a speedy, impartial, and public trial, to meet the witnesses face to face, and to have compulsory process to secure the attendance of witnesses and the production of evidence in his behalf. However, after arraignment, trial may proceed notwithstanding the absence of the accused provided that he has been duly notified and his failure to appear is unjustifiable.

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and one (1) month nor more than fifteen (15) years, and perpetual disqualification for public office.”²⁷²

Under Act No. 4103, as amended by Act No. 4225 (i.e. Indeterminate Sentence Law), if the offense is punished by a special law, as in the present case, an indeterminate penalty shall be imposed on the accused, the maximum term of which shall not exceed the maximum fixed by the law, and the minimum not less than the minimum prescribed therein.²⁷³

The record shows that both accused posted bail, thereby rendering moot the issuance of a warrant of arrest.²⁷⁴ This fact is analogous to voluntary surrender, a **mitigating** circumstance. No **aggravating** circumstance, however, may be properly appreciated. Hence, the apposite penalty for the crime perpetrated by accused Ocampos and his co-conspirator, accused Akhavan is imprisonment ranging from six (6) years, one (1) month to ten (10) years.²⁷⁵

WHEREFORE, premises considered, the Court finds and holds –

1. accused **Loreto Leo S. Ocampos** **GUILTY** of violation of Section 3 (e) of Republic Act No. 3019, as amended in Criminal Case No. SB-15-CRM-0087
2. accused **Foad Akhavan** **GUILTY** of violation of Section 3 (e) of Republic Act No. 3019, as amended in Criminal Case No. SB-15-CRM-0087
3. accused **Ocampos and Akhavan** **NOT GUILTY** of malversation under Article 217 of the Revised Penal Code in Criminal Case No. SB-15-CRM-0088.

²⁷² Section 9, R. A. No. 3019, as amended; *Ong v. People*, G.R. No. 106546, September 25, 2009, 651 SCRA 47, 56.

²⁷³ *Guadines v. Sandiganbayan*, G.R. No. 164891, June 6, 2011, 650 SCRA 422, 444; *Nacaytuna v. People*, G.R. No. 171144, November 24, 2006, 508 SCRA 128, 135.

²⁷⁴ *Valle v. Sandiganbayan*, 214 SCRA 532 [1992]; *People v. Tito S. Sarion*, SB-11-CRM-0256 – 0257, September 29, 2017.

²⁷⁵ *Umipig v. People*, G.R. No. 171359, July 18, 2012, 677 SCRA 53, 90.

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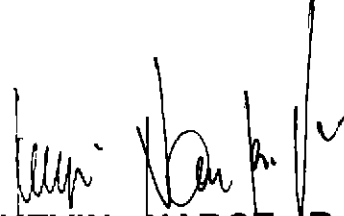
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Accordingly, accused **Loreto Leo S. Ocampos**, as well as accused **Foad Akhavan**, shall suffer the indeterminate penalty of six (6) years and one (1) month as *minimum* to ten (10) years as *maximum*. Additionally, accused **Ocampos** is hereby sentenced to suffer perpetual disqualification to hold public office.

SO ORDERED.


KEVIN NARCE B. VIVERO
Associate Justice

WE CONCUR:


SARAH JANE T. FERNANDEZ
Associate Justice
Chairperson


KARL B. MIRANDA
Associate Justice

ATTESTATION

I attest that the conclusions in the above Decision were reached in consultation before the case was assigned to the writer of the opinion of the Court's Division.


SARAH JANE T. FERNANDEZ
Chairperson, Sixth Division

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CERTIFICATION

Pursuant to Article VIII, Section 13 of the Constitution, and the Division Chairperson's Attestation, it is hereby certified that the conclusions in the above Decision were reached in consultation before the case was assigned to the writer of the opinion of the Court's Division.


AMPARO M. CABOTAJE-TANG
Presiding Justice

