Republic of the Philippines
National Capital Judicial Region
REGIONAL TRIAL COURT
Branch 145
Makati City

PEOPLE OF THE PHILIPPINES,

- versus -

CRIM. CASE NOS. 95-841 and 842

VIC T. DEL FIERRO, JR.,
Accused.
x-----------------------x

DECISION

Private complainant PepsiCo, Inc. is a foreign corporation engaged in, among others, the manufacture, purchase, sale, bottling and distribution of softdrinks and non-alcoholic beverages all over the world, either by itself or through its various franchisees. The accused is the president of a consumer group then known as "*Coalition 349, Inc.*"

Sometime in June 1994, private complainant received a copy of accused's June 8, 1994 solicitation letter (the Letter) to Mr. *Rafael B. Buenaventura*, then *President and Chief Executive Officer of the Philippine Commercial International Bank.* Subsequently, sometime in October 1994, private complainant received a copy of a pamphlet entitled "Coalition 349 Question and Answer, A Primer on the World's Biggest Marketing Disaster" (the Pamphlet) bearing accused's signature as a consumer advocate and president of Coalition 349. The Letter and the Pamphlet were written in connection with private complainant's "Number Fever" promotion.

Believing that the Letter and the Pamphlet contained libelous statements against it, private complainant filed, through its then Marketing Services Manager Mr. Quintin Gomez, two separate complaint-affidavits for libel against the accused in November 1994. Following the conduct of preliminary investigations, the accused was charged in two informations for separate counts of libel allegedly committed as follows:

Criminal Case 95-841:

That on or about the 9th day of June 1994, in the Municipality (now City) of Makati, Metro Manila, Philippines and within the jurisdiction of this Honorable Court, the above-named accused, with manifest intent of impeaching the virtue and reputation of Pepsi Co. Inc. and with the malicious intent of injuring and exposing said corporation to public hatred, contempt and ridicule, did then and there willfully, unlawfully and feloniously and with malice aforethough[t] write and publish a three-page letter dated June 9, 1994 addressed to one Mr. Rafael B. Buenaventura, President and Chief Executive Officer of the Philippine Commercial International Bank (PCIB) and signed by the said accused, the pertinent portions of which read as follows, to wit.

"a. 'x x x We have newspaper clippings dated March and April to buttress this fraud in the Pepsi Number Fever Promotion x x x.'

b. 'x x x The truth has been revealed 800,000 caps with the number 349 cap was seeded at the very start of the promotion and half of that are 400,000 caps, marked One Million cash winner to dupe the people to intensify their purchase of the products x x x.'

c. 'Pepsico and its local franchisee, Pepsi Cola Philippines are both guilty of BREACH OF CONTRACT x x x FRAUD AND WITHHOLDING OF VITAL INFORMATION FROM THE CONSUMERS. BUT Pepsi's advertising budget clout has muted our own vigilant media. Our system of justice is being abused, thanks to their highly paid lawyer mercenaries. Law enforcement officers and other military elements are being bribed and induced to spy, frame up, intimidate leaders of 349 groups standing for our exploited poor. Our government officials are being 'influenced' to ignore this advocacy for consumer justice.'

d. 'Pepsi was behind the NBI's illegal arrest and detention of yours truly and my son, last May 12, 1994 in Cagayan de Oro. x x x My right was violated and the NBI agents were paid obvious(ly) by parties hurt by our movement for justice.'

e. ' x x x stop the EXPLOITATION OF POVERTY AND IGNORANCE OF CONSUMERS IN THIRD WORLD COUNTRIES THROUGH DECEPTIVE PROMOTIONS LIKE WHAT PEPSI DID IN THEIR INFAMOUS NUMBER FEVER.'

f. ' x x x In this era of social marketing, Pepsico instead of respecting and contri[b]uting to the social culture of the Filipino People has exploited the same for profits'." (Emphasis supplied; capitalization and underscoring in the original)

Criminal Case 95-842:

That on or about and sometime in the month of October 1994, in the Municipality (now City) of Makati, Metro Manila, Philippines and within the jurisdiction of this Honorable Court, the above-named accused, with the manifest intent of impeaching the virtue and reputation of Pepsi Co. Inc. and with the malicious intent of injuring and exposing said corporation to public hatred, contempt and ridicule, did then and there willfully, unlawfully and feloniously and with malice aforethought write, **publish and circulate nationwide or cause to be written, published and/or circulated nationwide pamphlet: "Coalition 349 Question and Answer, A Primer on the World's Biggest Marketing Disaster", the pertinent portions of which read as follows**, to wit:

"Introduction

'That was February 1992. x x x Soon, a convulsive epidemic developed over Pepsi's Number Fever, one of the worst large scale marketing scam in the annals of human history x x x The temptation from the deceitful serpent of Eden had come to life. x x x

In return, we seized the Pepsi challenge by the horn. We must make them realize that this time, even poor nations can muster courage and fortitude to stand up against the acts of fraud and deception executed by a multinational giant.'

H.G. Wells' immortal words prefaced our germinal thoughts in this primer, a real thought-provoking one, coming from a great social critic and literary figure. Humanity will self-destruct if contemporary barbarisms committed by global corporation will continue unabatedly with the condoning attitude of men and women in our midst.'

1. What is the main issue here?

'It is absolutely not true that it was purely a mistake, Pepsi started rejecting claimants of Pepsi Number Fever Promotion with caps bearing the announced three-digit numbers as early as March 1992, two weeks after the promo was launched.'

2. Is it true that it was a simple case of computer glitch?

Yes. It is a battle between lies and deception on their part and truth in our side. x x x"

29. Were there other similar consumer revolt against PepsiCo in other countries?

"None that we know of. x x x Chances are, our consumer uprising against Pepsi which has echoed around the world is a precedent and an example for other Third World countries to follow in their struggle against deception and fraud *in marketing as observed by some multinational giants.*

30. Is there any social relevance to your *crusade against PepsiCo?*

YES! x x x 3. Its curtain time for deceptive promotions and unethical marketing promotions exercises. 4. *The once timid and passive consumer* attitude can be properly harnessed to address their unified actions strategically against multinationals exploiting the poverty and ignorance of the people. x x x."

2. Launch Stage

x x x

Non-mentioned manifested Pepsi's deception and silence of security code."

On Stream Phase

x x x

Fraud in promotions manifested."

Extension Phase

x x x

Pepsi Cola Products Philippines guilty of negligence."

Summary Conclusion

The Pepsi Generated Number Fever promotions was inherently deceptive and hallmarked with fraud as claimants with 3 digit number[s] were

> being rejected as 'fake' long before May 25, 1992 when '349' was announced.
>
> The country franchisee Pepsi Cola Products Philippines is guilty of negligence is [sic] announcing '349' as winners.
>
> PepsiCo PCPI (sic) further confused the confused with crisis with mismanagement (sic) of the controversy."

Under Article 353 of the Revised Penal Code, libel is defined as "a public and malicious imputation of a crime, or of a vice or defect, real or imaginary, or any act, omission, condition, status, or circumstance tending to cause the dishonor, discredit, or contempt of a natural or juridical person, or to blacken the memory of one who is dead." Its elements are as follows: (a) an imputation of a discreditable act or condition to another; (b) publication of the imputation; (c) identity of the person defamed; and (d) the existence of malice. Thus, for an imputation to be libelous, it must be defamatory, malicious, published, and the victim is identifiable. (*Binay v. Secretary of Justice*, G.R. No. 170643, September 8, 2006)

The elements of identity and defamatory imputation are clearly present in both cases with PepsiCo, Inc. being expressly named and imputed to have committed fraud, bribery, coercion, illegal arrest, illegal detention, exploitation, consumer deception, and unethical practices in both the Letter and the Pamphlet. In fact, the accused no longer made an attempt to argue in his Memorandum that *these two elements are not present in these cases, limiting his discussion to the elements of publication and malice -- which shall now be discussed below.*

Publication

Publication means making the defamatory matter, after it is written, known to someone other than the person against whom it has been written. (*Novicio v. Aggabao*, G.R. No. 141332, December 11, 2003)

The prosecution presented the Letter as its Exhibit A for Criminal Case No. 95-841 – to prove, inter alia, that the accused, on or about June 9, 1994, wrote, signed and published the said Letter; and the Pamphlet as its Exhibit A for Criminal Case No. 95-842 – to prove, inter alia, that the accused, sometime in October 1994, wrote, published and circulated nationwide said Primer.

With regard to the Letter, the prosecution points out that the accused admitted in his comment on the prosecution's formal offer of evidence (Comment on Offer) that he wrote the Letter to ask sympathy, as well as support and *contribution from Mr. Buenaventura. The accused counters that the prosecution* has not shown that the Letter was read by Mr. Buenaventura or by any other third person (i.e. someone other than private complainant) as Mr. Buenaventura was not presented as a witness nor was any other person presented to testify as having read the Letter.

While it is true that the accused's admission that he wrote the Letter is not sufficient to establish publication thereof, accused's claim that no witness was presented to testify as to having read the Letter is not accurate because the prosecution's lone witness, Mr. Quintin Gomez, testified that he has seen the Letter at around the early part of June 1994 (TSN, March 17, 1999, p. 10). It may be argued that "to see" is not exactly the same as "to read", but any doubt as to whether Mr. Gomez actually read the Letter is eliminated when his testimony is related to the complaint-affidavit he executed in connection with the preliminary investigation of Criminal Case No. 95-841, the contents of which Mr Gomez affirmed at the witness stand upon the request of then defense counsel Atty. Camilo Sabio (TSN, June 7, 1999, p. 3). In paragraph 7 of this complaint-affidavit, Mr. Gomez narrated the contents of the Letter, thus showing that he has read the same. As the Letter was read by a person other than the person against whom it has been written, the element of publication is present.

With regard to the Pamphlet, the prosecution correctly points out that publication thereof was admitted by the accused in his Comment on Offer where the accused stated that the Pamphlet was "written and published ... to inform public consumers the truth behind the Pepsi 349 Promo Fever." (Comment on Offer, par. 2)

Thus, the element of publication is likewise present in both cases.

Malice

Article 354 of the Revised Penal Code states, as a general rule, that every defamatory imputation is presumed to be malicious, even if true, if no good intention and justifiable motive is shown.

As an exception to the rule, the presumption of malice is done away with when the defamatory imputation qualifies as privileged communication mentioned in the same Article 354 to be: (1) A private communication made by a person to another in the performance of any legal, moral, or social duty; and (2) A fair and true report, made in good faith, without any comments or remarks, of any judicial, legislative, or other official proceedings which are not of confidential nature, or of any statement, report, or speech delivered in said proceedings, or of any act performed by public officers in the exercise of their functions. In short, proof of actual malice is required in cases involving privileged communications.

The prosecution correctly points out that neither the Letter nor the Pamphlet fall within the exceptions provided by Article 354. They obviously do not fall under the second exception, and neither do they fall within the first exception since they were not addressed to an officer or a board, or superior, having some interest or duty in the matter, and who has the power to furnish the protection sought. In *Brillante v. Court of Appeals* (G.R. No. 118757 & 121571, October 19, 2004), the Supreme Court held that:

In order to prove that a statement falls within the purview of a qualifiedly privileged communication under Article 354, No. 1, the following requisites must concur: (1) the person who made the communication had a legal, moral, or social duty to make the communication, or at least, had an interest to protect, which interest may either be his own or of the one to whom it is made; **(2) the communication is addressed to an officer or a board, or superior, having some interest or duty in the matter, and who has the power to furnish the protection sought;** and (3) the statements in the communication are made in good faith and without malice. *(Emphasis supplied)*

However this does not necessarily mean that they are not privileged. To be sure, the enumeration under Article 354 is not an exclusive list of qualifiedly privileged communications. (see *Borjal v. Court of Appeals*, G.R. No. 126466, January 14, 1999).

In *Guingguing v. Court of Appeals* (G.R. No. 128959, September 30, 2005), the Supreme Court stated:

The international trend in diminishing the scope, if not the viability, of criminal libel prosecutions is clear. Most pertinently, it is also evident in our own acceptance in this jurisdiction of the principles applied by the U.S. Supreme Court in cases such as *New York Times* and *Garrison*.

Particularly, this Court has accepted the proposition that **the actual malice standard governs the prosecution of criminal libel cases concerning public figures.** In *Adiong v. COMELEC*, the Court cited *New York Times* in noting that "[w]e have adopted the principle that debate on public issues should be uninhibited, robust, and wide open and that it may well include vehement, caustic and sometimes unpleasantly sharp attacks on government and public officials." The Court was even more explicit in its affirmation of *New York Times* in *Vasquez v. Court of Appeals*. Speaking through Justice Mendoza

For that matter, even if the defamatory statement is false, no liability can attach if it relates to official conduct, unless the public official concerned proves that the statement was made with actual malice — that is, with knowledge that it was false or with reckless disregard of whether it was false or not. This is the gist of the ruling in the landmark case of New York Times v. Sullivan, which this Court has cited with approval in several of its own decisions. 69 This is the rule of "actual malice." In this case, the prosecution failed to prove not only that the charges made by petitioner were false but also that petitioner made them with knowledge of their falsity or with reckless disregard of whether they were false or not.

The Court has likewise extended the "actual malice" rule to apply not only to public officials, but also to public figures. In *Ayer Productions Pty. Ltd. v. Capulong*, the Court cited with approval the following definition of a public figure propounded by an American textbook on torts:

A public figure has been defined as a person who, by his accomplishments, fame, or mode of living, or by adopting a profession or calling which gives the public a legitimate interest in his doings, his affairs, and his character, has become a 'public personage.' He is, in other words, a *celebrity*. Obviously to be included in this category are those who have achieved some degree of reputation by appearing before the public, as in the case of an actor, a professional baseball player, a pugilist, or any other entertainer. The list is, however, broader than this. It includes public officers, famous inventors and explorers, war heroes and even ordinary soldiers, an infant prodigy, and no less a personage than the Grand Exalted Ruler of a lodge. It includes, in short, anyone who has arrived at a position where public attention is focused upon him as a person.

. . .

We considered the following proposition as settled in this jurisdiction: that **in order to justify a conviction for criminal libel against a public figure, it must be established beyond reasonable doubt that the libelous statements were made or published with *actual malice*, meaning knowledge that the statement was false or with reckless disregard as to whether or not it was true.** As applied to the present petition, there are two main determinants: whether complainant is a public figure, and assuming that he is, whether the publication of the subject advertisement was made with actual malice. Sadly, the RTC and the CA failed to duly consider both propositions. (Emphasis supplied; citations omitted)

Contrary to the prosecution's assertion, private complainant is undoubtedly a public figure. To be sure, its own witness, Mr. Gomez testified that private complainant is a "foreign corporation engaged in the manufacture, purchase, sale, bottling and distribution of softdrinks and non-alcoholic beverages all over the world" and "was ranked in Fortune International Magazine's July 26, 1993 issue as 1992's 51st *largest industrial corporation in the world*." (Records, p. 32) Persons lesser known than private complainant have been considered as public figures by the Supreme Court as in the case of Mr.

As regards the statements of the accused imputing bribery, coercion, illegal arrest, illegal detention, exploitation, consumer deception, and unethical practices to private complainant, the Court notes that the prosecution has not *presented any evidence to show that the accused knew the statements in the advertisement were false or nonetheless proceeded with reckless disregard as to* publish it whether or not it was true.

In any case, the Court is satisfied that the accused had some ground to believe his statements to be true at the time he made them.

With respect to the statements imputing bribery, coercion, illegal arrest, and illegal detention, the accused testified that he was arrested and detained for several hours by members of the National Bureau of Investigation (NBI) on the basis of information given by private complainant's counsel, a certain Atty. *Salcedo; and that while in custody, accused was asked about his plans of filing a case against private complainant in New York in connection with the latter's* "Number Fever" promotion. (see TSN, August 16, 2005, pp. 42 to 60)

With respect to the statements imputing fraud, exploitation, consumer deception, and unethical practices, the Court takes judicial notice of the July 12, 1993 Senate Committee Report No. 190 submitted by its Committee on Trade and Commerce (headed by then Senator Gloria Macapagal-Arroyo), and which contained the following findings:

> q.1) [Pepsi-Cola Products Phils., Inc. and PepsiCo, Inc.] PCPPI-PCI may be faulted for **gross negligence**, by its failure to exercise that degree of due diligence in assuring that its "Number Fever" promotions scheme which involved as it did hundreds of *thousands of consumers nationwide, is conducted scrupulously and devoid of mistakes as will not* ***delude and/or mislead the consuming public***, following as it did, barely a month on the heels of the PEPSI Chilean fiasco which also created a consumer furor nationwide caused by its franchisee's "mistake" in the announcement of the winning number.
>
> q.2) PCPPI-PCI may be faulted for **misleading and/or deceptive advertising** "by changing rules of the game" contrary to that made known to the consuming public in clear and unmista[ka]ble terms the importance and relevance of the security codes, to the winning process.
>
> q.3) PCPPI-PCI **violated the provisions of M.O. #33** (Series 1983), by its failure to submit to DTI-NCR for approval, its print, radio and TV ads, with the *required modifications*, for the protection of the consuming public.
>
> q.4) ...
>
> q.5) DTI failed in its mandate of protecting the interest of the consumers by its failure to pursue to a conclusion, the hearing

> in Adm. Case No. 92-31 against PCPPI-PCI for **violation of the Fair Trade Laws**, by allowing a compromise settlement without findings of culpability or non-culpability, despite findings of the DTI Task Force .. *(Emphasis supplied)*

The Court likewise takes judicial notice that in the Roberts v. Court of Appeals (G.R. No. 113930, March 5, 1996), the Supreme Court found that **several thousand holders of "349" Pepsi crowns** *in connection with "Number Fever"* promotion filed with the Office of the City Prosecutor of Quezon City complaints for: (a) estafa; (b) violation of R.A. No. 7394, otherwise known as the Consumer Act of the Philippines; (c) violation of E.O. No. 913; & and (d) violation of Act No. 2333, entitled "An Act Relative to Untrue, Deceptive and Misleading Advertisements," as amended by Act No. 3740.

Surely, if the Senate Committee on Trade and Commerce, and several thousand other persons believed that private complainant and/or its local franchisee are guilty of gross negligence, deluding or misleading the public, deceptive and/or misleading advertising, violating DTI M.O. #33 (Series of 1983), *violation of the Fair Trade Laws, Estafa, violation of the Consumer Act of the* Philippines, violation of E.O. No. 913, and violation of Act. No. 2333, entitled "An Act Relative to Untrue, Deceptive and Misleading Advertisements" -- then it is reasonable for the accused to believe the same to be true, or at the very least, this circumstance would create a reasonable doubt that the accused acted with actual malice when he imputed fraud, exploitation, consumer deception, and unethical practices to private complainant.

PREMISES CONSIDERED, *the accused is hereby* ACQUITTED of the charge of libel in Criminal Case Nos. 95-841 and 95-842.

SO ORDERED.

Makati City, August 30, 2007.

CESAR D. SANTAMARIA
Presiding Judge

/vms