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WHEREFORE, we *AFFIRM* with *MODIFICATION* the Decision dated 22 August 2002 and Resolution dated 30 January 2003 of the Commission on Audit. The personnel of the DBP Service Corporation need not refund the amelioration allowances they received pursuant to Board Resolution No. 1313, Series of 1997.

SO ORDERED.

Davide, Jr., C.J., Puno, Panganiban, Quisumbing, Ynares-Santiago, Sandoval-Gutierrez, Austria-Martinez, Corona, Carpio Morales, Callejo, Sr., Tinga, Chico-Nazario, and *Garcia, JJ., concur.*

Azcuna, J., on leave.

SECOND DIVISION

[G.R. No. 159288. October 19, 2004]

JOHNSON LEE, *petitioner, vs.* **PEOPLE OF THE PHILIPPINES and NEUGENE MARKETING, INC.,** *respondents.*

SYNOPSIS

After dissolution of the Neugene Marketing, Inc., the trustees of the corporation filed an estafa case against the petitioner, then President, and Sonny Moreno, General Manager of the Corporation alleging that they refused to turn over to the corporation the money they received as payment of Victorias Milling Company, a customer of Neugene Marketing, Inc. During the trial, the RTC admitted in evidence photocopies of the charge invoices and checks because the prosecution was not in custody of the original copies thereof. Petitioner, however, objected to the admission thereof on the following

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grounds: the best evidence rule was violated; and the prosecution failed to prove the authenticity and due execution of the offered documents. The RTC denied petitioner's motion for reconsideration, ruling that the prosecution had adduced preponderant evidence that the original copies of the said charges and checks were lost, destroyed or non-available. Petitioner filed a petition for *certiorari* under Rule 65 with the CA, but the latter dismissed the petition for lack of merit. Hence, this petition for review on *certiorari* under Rule 45.

The Supreme Court affirmed the CA decision and thereby denied the petition. The Supreme Court held that the prosecution mustered the requisite quantum of evidence to prove the predicates to the admission of the photocopies of the charge invoices and checks. The Supreme Court also held that a petition for *certiorari* under Rule 65 is limited to resolving only errors or jurisdiction. *Certiorari* will issue only to correct errors of jurisdiction. It is not a remedy to correct errors of judgment. In this case, the RTC had jurisdiction over the estafa case. The Order admitting in evidence the photocopies of the charge invoices and checks was issued by the RTC in the exercise of its jurisdiction. Even if erroneous, the same is a mere error of judgment. Additionally, the admission of the secondary evidence in lieu of the original copies predicated on proof of the offeror of the conditions *sine qua non* to the admission of said evidence is a factual issue addressed to the sound discretion of the trial court which must be sustained unless shown that the trial court committed grave abuse of discretion amounting to excess or lack of jurisdiction. Petitioner's remedy after the admission of the photocopies of the charge invoices and checks was to adduce his evidence, and if after trial, he is convicted, to appeal the decision to the appropriate appellate court. Moreover, under Rule 45 of the Rules of Court as amended, only questions of law may be properly raised.

SYLLABUS

1. REMEDIAL LAW; SPECIAL CIVIL ACTIONS; PETITION FOR *CERTIORARI* UNDER RULE 65; RESOLVES ONLY ERRORS OF JURISDICTION, NOT ERRORS OF JUDGMENT.— In a petition for *certiorari*, the jurisdiction of the court is narrow in scope. It is limited to resolving only

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errors of jurisdiction. It is not to stray at will and resolve questions or issues beyond its competence such as errors of judgment. Errors of judgment of the trial court are to be resolved by the appellate court in the appeal by and of error or *via* a petition for review on *certiorari* under Rule 45 of the Rules of Court, as amended. *Certiorari* will issue only to correct errors of jurisdiction. It is not a remedy to correct errors of judgment. An error of judgment is one in which the court may commit in the exercise of its jurisdiction, and which error is reversible only by an appeal. Error of jurisdiction is one where the act complained of was issued by the court without or in excess of jurisdiction and which error is correctible only by the extraordinary writ of *certiorari*. *Certiorari* will not be issued to cure errors made by the trial court in its appreciation of the evidence of the parties, its conclusions anchored on the said findings and its conclusions of law thereon. As long as the court acts within its jurisdiction, any alleged errors committed in the exercise of its discretion will amount to nothing more than mere errors of judgment, correctible by an appeal if the aggrieved party raised factual and legal issues; or a petition for review under Rule 45 of the Rules of Court if only questions of law are involved.

2. ID.; ID.; ID.; ID.; ADMISSION OF SECONDARY EVIDENCE IN LIEU OF ORIGINAL COPIES IS A FACTUAL ISSUE ADDRESSED TO SOUND DISCRETION OF TRIAL COURT; *CERTIORARI* NOT A PROPER REMEDY IN CASE AT BAR. – In this case, there is no dispute that the RTC had jurisdiction over the cases filed by the public respondent against the petitioner for estafa. The Order admitting in evidence the photocopies of the charge invoices and checks was issued by the RTC in the exercise of its jurisdiction. Even if erroneous, the same is a mere error of judgment and not of jurisdiction. Additionally, the admission of secondary evidence in lieu of the original copies predicated on proof of the offeror of the conditions *sine qua non* to the admission of the said evidence is a factual issue addressed to the sound discretion of the trial court. Unless grave abuse of discretion amounting to excess or lack of jurisdiction is shown to have been committed by the trial court, the resolution of the trial court admitting secondary evidence must be sustained. The remedy of the petitioner, after the admission of the photocopies of the charge invoices and the checks, was to adduce his evidence, and if

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after trial, he is convicted, to appeal the decision to the appropriate appellate court. Moreover, under Rule 45 of the Rules of Court, as amended, only questions of law may be properly raised.

3. ID.; EVIDENCE; BEST EVIDENCE RULE; PURPOSE AND MODERN JUSTIFICATION.— Before the onset of liberal rules of discovery, and modern technique of electronic copying, the best evidence rule was designed to guard against incomplete or fraudulent proof and the introduction of altered copies and the withholding of the originals. But the modern justification for the rule has expanded from the prevention of fraud to a recognition that writings occupy a central position in the law. The importance of the precise terms of writings in the world of legal relations, the fallibility of the human memory as reliable evidence of the terms, and the hazards of inaccurate or incomplete duplicate are the concerns addressed by the best evidence rule.

4. ID.; ID.; SECONDARY EVIDENCE; OFFEROR THEREOF BURDENED TO PROVE PREDICATES; WHERE MISSING DOCUMENT IS THE FOUNDATION OF THE ACTION, MORE STRICTNESS IN PROOF IS REQUIRED THAN WHERE DOCUMENT IS ONLY COLLATERALLY INVOLVED.— The offeror of secondary evidence is burdened to prove the predicates thereof: (a) the loss or destruction of the original without bad faith on the part of the proponent/ offeror which can be shown by circumstantial evidence of routine practices of destruction of documents; (b) the proponent must prove by a fair preponderance of evidence as to raise a reasonable inference of the loss or destruction of the original copy; and (c) it must be shown that a diligent and *bona fide* but unsuccessful search has been made for the document in the proper place or places. It has been held that where the missing document is the foundation of the action, more strictness in proof is required than where the document is only collaterally involved.

5. ID.; ID.; ID.; CERTIFICATE OF CUSTODY OF DOCUMENT IS INCOMPETENT TO PROVE LOSS OR DESTRUCTION THEREOF.— If the document is one in which other persons are also interested, and which has been placed in the hands of a custodian for safekeeping, the custodian must be required

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to make a search and the fruitlessness of such search must be shown, before secondary evidence can be admitted.[43] The certificate of the custody of the document is incompetent to prove the loss or destruction thereof. Such fact must be proved by some person who has knowledge of such loss.

6. ID.; ID.; PROOF OF PRIVATE DOCUMENT; TESTIMONY OF AN EYEWITNESS AS TO EXECUTION OF A PRIVATE DOCUMENT MUST BE POSITIVE.— The testimony of an eyewitness as to the execution of a private document must be positive. He must state that the document was actually executed by the person whose name is subscribed thereto.[45] The admission of that party against whom the document is offered, of the authenticity and due execution thereof, is admissible in evidence to prove the existence, authenticity and due execution of such document.

APPEARANCES OF COUNSEL

Joselito T. Bayatan for petitioner.
The Solicitor General for respondent.

D E C I S I O N

CALLEJO, SR., *J.*:

NEUGENE Marketing, Inc. (NMI) was incorporated on January 27, 1978 with funds provided by the Uy Family. It had an authorized capital stock of ₱3 million divided into 30,000 shares with a par value of ₱100 per share. The original incorporators, with their corresponding number of shares and the amounts thereof, are as follows:

Johnson Lee	600	₱ 60,000.00
Lok Chun Suen	1,200	120,000.00
Charles O. Sy	1,800	180,000.00
Eugenio Flores, Jr.	2,100	210,000.00
Arsenio Yang, Jr.	300	30,000.00
TOTAL	6,000	₱600,000.00

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There were two stock dividend declarations, one on June 7, 1980 in the amount of ₱60,000.00 and another on May 2, 1981 for ₱40,000.00. On May 15, 1986 Eugenio Flores, Jr. assigned/ divested himself of his shares in favor of Sonny Moreno, 1,050 shares; Arsenio Yang, Jr., 700 shares and Charles O. Sy, 700 shares.[1]

On June 11, 1987, the NMI sold and delivered to the Victorias Milling Company, Inc. (VMCI), in Victorias, Negros Occidental, 77,500 pieces of empty white bags for the price of ₱565,750.00. NMI issued Charge Invoice No. 0809[2] dated June 11, 1987 to VMCI covering said sale. On June 18, 1987, VMCI purchased 100,000 pieces of empty white bags from NMI for ₱730,000.00 for which NMI issued Charge Invoice No. 0810.[3] On June 25, 1987, VMCI again purchased 28,000 pieces of empty white bags from NMI for the price of ₱204,400.00 and the latter issued Charge Invoice No. 0811[4] dated June 25, 1987. In payment of said purchases from NMI, VMCI drew and issued two Bank of the Philippine Islands (BPI) Checks: Check No. 068706 dated August 3, 1987 in the amount of ₱565,750.00[5] and Check No. 068993 dated August 19, 1987 in the amount of ₱934,400.00.[6] Both checks were payable to the order of NMI.

On October 13, 1987, stockholders owning two-thirds (2/3) of the subscribed capital stock of NMI voted to call a stockholders' meeting. One of the items in the agenda was the dissolution of the corporation.

Pursuant thereto, a special stockholders' meeting was held on October 24, 1987 in Bacolod City. The following stockholders, who were also directors, were present and voted to dissolve the corporation:

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[1] Annex "B", CA Decision, p. 2.

[2] Exhibit "G".

[3] Exhibit "H".

[4] Exhibit "I".

[5] Exhibit "K".

[6] Exhibit "L".

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Name of Stockholders	Number of Shares
Arsenio Yang, Jr.	1,050
Charles Sy	2,800
Lok Chun Suen	1,400
Total	5,250

Accordingly, notices were again sent to all stockholders of record, all of whom properly acknowledged the said notices, that a meeting was to be held on November 30, 1987 to consider the dissolution of the corporation. Again the stockholders who attended the October 24, 1987 meeting were present. Upon motion duly seconded, the dissolution was approved. Per Resolution of the Board of Directors, the law firm of Reyes, Treyes & Fudolin Law Office was appointed as trustee to collect all the receivables of the corporation.

At the time of the approval of the dissolution of the corporation on November 30, 1987, the shares of each stockholder were as follows:

Name of Stockholders	Total as of Nov. 30.
Johnson Lee, 600 (subscription); 60 (June 7, 1980 stock dividend); 40 (May 2, 1981 stock dividend) ---------	700 shares
Lok Chun Suen, 1,200 (subscription); 120 (June 7, 1980 stock dividend); 80 (May 2, 1981 stock dividend) ---------	1,400 shares
Charles O. Sy, 1800 (subscription); 180 (June 7, 1980 stock dividend); 120 (May 2, 1981 stock dividend); 700 (acquisition from Eugenio Flores ----	2,800 shares
Arsenio Yang, Jr., 300 (subscription); 30 (June 7, 1980 stock dividend); 20 (May 2, 1981 stock dividend); 700 (acquisition from Eugenio Flores) --------	1,050 shares
Sonny Moreno, 1,050 (acquisition From Eugenio Flores) ----------	1,050 shares
Total ----------	7,000 shares

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Pursuant to Section 11 of the Corporation Code, the Securities and Exchange Commission approved the dissolution of the corporation on March 1, 1988 subject to compliance of the requirements, such as the sending of notices to stockholders and publication thereof in a newspaper of general circulation, among others.

On March 22, 1988, Johnson Lee, Sonny Moreno, Leoncio Tan and Nicanor Martin filed a petition with the Securities and Investigation Clearing Department (SICD) of the Commission praying, among other things, for the annulment or nullification of the Certification of Filing of Resolution of Voluntary Dissolution of NMI for being contrary to law and its by-laws.

In the meantime, the trustee wrote the petitioner, Johnson Lee, on March 8, 1988 requesting him to turn over to it the ₱1,500,150.00 he received in payment of the empty bags sold by NMI to VCMI. However, he failed to do so.[7]

A verified complaint for three (3) counts of *estafa* was filed against the petitioner and Sonny Moreno with the City Prosecutor's Office. Appended to the complaint were photocopies of Charge Invoice Nos. 0809, 0810, and 0811, issued by NMI to VMCI.

During the requisite preliminary investigation, the petitioner and Moreno submitted their counter-affidavits. The counter-affidavit of the petitioner consisted of five pages.[8] After the investigation, two (2) Amended Informations were filed against the petitioner and Moreno, with the Regional Trial Court (RTC) of Negros Occidental. Except as to the particulars of the checks, the accusatory portions of the two Informations are identical, thus:

That sometime in the month of August 1987, in the City of Bacolod, Philippines, and within the jurisdiction of this Honorable Court, the herein accused, Johnson Lee, being then the President and Sonny Moreno, the General Manager of Neugene Marketing, Inc., with the

[7] Exhibit "J".

[8] CA *Rollo*, pp. 145-149.

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duty and responsibility to collect, turn over and deliver their collections to the herein offended party, Neugene Marketing, Inc., a corporation organized and existing by and under the laws of the Philippines, represented herein by its Trustees, Roger Reyes, Ernesto Treyes, and Eutiquio Fudolin, the said accused conspiring, confederating, and acting in concert far from complying with the aforementioned obligation having collected the amount of ₱565,750.00 covered by BPI Check No. 068766 (*sic*) dated August 3, 1987 as payment of Victorias Milling Company, a customer of the herein offended party, with intent of gain, and with unfaithfulness or abuse of confidence failed and refused to deliver the aforementioned amount to the herein offended party, up to the present, in spite of proper demands, but instead, did, then and there willfully, unlawfully and feloniously convert[ed] and/or misappropriated the same to their personal use and benefit to the damage and prejudice of the herein offended party in the aforementioned amount of FIVE HUNDRED SIXTY-FIVE THOUSAND SEVEN HUNDRED FIFTY (₱565,750.00) PESOS, Philippine Currency.

Act contrary to law.[9]

The cases were docketed as Criminal Cases Nos. 10010 and 10011.

During the trial, the original copies of Charge Invoice Nos. 0809, 0810 and 0811, and of BPI Check Nos. 068766 and 068993 were not in the custody of the prosecution.

To prove the loss, destruction or non-availability of the original copies of the charge invoices and checks, as well as the authenticity and due execution thereof, the prosecution presented Ban Hua Flores, who testified that she saw the two checks in the office of the petitioner at the Singson Building, Plaza Moraga, Sta. Cruz, Manila. Sometime in 1987, she went to the office of the VMCI and inquired if it still had copies of the two checks and the clerk thereat informed her that it would be difficult to locate the checks as they were stored in the *bodega*, where many other checks were kept.[10] Flores also testified that the signatures at the dorsal portion of the checks were those of the petitioner,

[9] *Id*. at 252.

[10] TSN, 27 July 2001, pp. 36-66.

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the President of NMI, with whom she had been working, and that he indorsed and deposited the same on September 4, 1987 with the Solidbank, instead of the BPI Plaza Cervantes branch in Manila, the official depository bank of NMI. According to Flores, she was able to secure microfilm copies of the checks from Solidbank, and was sure that the copies of the checks and invoices were faithful reproductions of the original copies thereof.[11]

Testifying for the prosecution in obedience to a *subpoena* issued by the court, Merlita Bayaban, Manager for Corporate Affairs of VMCI, declared that the records section of VMCI, which had custody of all checks and other corporate records, was near her office. She testified that the checks, including their other records, were lost during the flood in 1985.[12] She also testified on the Certification[13] issued by Carolina Diaz, the Comptroller of VMCI, confirming the loss of the two checks. She, however, admitted that she did not see the original copies of the checks[14] and that she was not a signatory thereto.[15]

Thereafter, the prosecution formally offered in evidence the counter-affidavit of the petitioner during the preliminary investigation, as well as the charge invoices and checks, *viz*.

"G"	NMI Charge Invoice No. 0809 dated June	To prove that Victorias Milling Co., Inc. 11, 1987(VMC) ordered 77,500 pieces of empty bags from NMI on June 11, 1987 and that these bags were delivered to VMC.
"H"	NMI Charge Invoice No. 0810 dated June 18, 1987	To prove t hat VMC ordered 100,000 pieces of empty bags from NMI on June 18, 1987 and that these bags were delivered to VMC.

[11] *Id*. at 64-67.

[12] *Id*. at 25-27.

[13] Exhibit "Z".

[14] TSN, 7 February 2002, p. 53.

[15] *Id*. at 63-64.

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"I"	NMI Charge Invoice No. 0811 dated June 25, 1987	To prove that VMC ordered 28,000 pieces of empty bags from NMI on June 25, 1987 and that these bags were delivered to VMC.
"J"	Demand letter dated March 8, 1988 signed by Atty. Roger Z. Reyes	To prove that in 1988, NMI made a demand upon the accused for the delivery of the amount of ₱1,500,150.00 representing VMC's payment for the delivery of the empty bags mentioned in Exhibits "G", "H" and "I".
"J-1"	Signature appearing above the typewritten name "Roger Z. Reyes"duly identified by the prosecution witness, Mrs. Ban Hua Flores as the signature of Atty. Roger Z. Reyes	To prove the genuineness, authenticity and due execution of Exhibit "J".
"K"	Bank of the Philippine Islands (BPI) Legaspi Village Extension Check No.068706 dated August 3, 1987 in the amount of ₱565,750.00	To prove that VMC made a check to NMI, in the amount of ₱565,750, as payment to NMI for the delivery of the empty bags mentioned in Exhibits "G", "H", and "I".
"K-1"	Signature found on the dorsal side of Exhibit "K"which Mrs. Flores identified as the signature of accused Johnson Lee.	To prove that the accused Lee received and was in possession of Exhibit "K" and that he indorsed and deposited the same.
"K-2"	Rubberstamp showing the name of "Solidbank" appearing on the dorsal side of Exhibit "K"	To prove that Exhibit "K" was deposited by accused Lee in the Solidbank which is not the official depository bank of NMI, the official NMI depository bank being the BPI Plaza Cervantes Branch.

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"L"	BPI Legaspi Village Extension Check No. 068993 dated Aug. 19, 1987 in the amount of ₱934,400.00	To prove that VMC made a check payable to NMI in the amount of ₱934,400, as payment to NMI for the delivery of the empty bags mentioned in Exhibits "G", "H" and "I".
"L-1"	Signature found on the dorsal side of Exhibit "L" which Mrs. Flores identified as the signature of accused Lee	To prove that the accused Lee received and was in possession of Exhibit L"and that he indorsed and deposited the same.
"L-2"	Rubberstamp showing the name of "Solidbank" appearing on dorsal side of Exh. "L"	To prove that Exhibit "L" was deposited by accused Lee in the Solidbank which is not the official depository bank of NMI, the official NMI depository bank being the BPI Plaza Cervantes Branch.[16]

The prosecution also offered in evidence the counter-affidavit of the petitioner during the preliminary investigation, as follows:

"O"	Counter-Affidavit dated September 9, 1988 signed and submitted by Johnson Lee in B.C.-I.S. No 88-347, consisting of 5 pages	To prove that the proceeds of Exhibit "K" and "L" in the total amount of ₱1,500,150 are in the possession and control of the accused and that both refused to deliver the same to NMI despite demand
"O-1"	Signature found on page 5 of Exhibit "O" above the typewritten name "Johnson Lee"	To prove the g enuineness, due execution and authenticity Exhibit "O", which both of the accused also admitted.
"O-2"	Paragraph 6 of Exhibit "O" found on page 2 thereof.[17]	Same purpose as in Exhibit "O".

[16] CA *Rollo*, pp. 255-257.

[17] Folder of Exhibits, pp. 4-5.

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The accused objected to the admission of the photocopies of the checks and charge invoices on the ground that the best evidence were the original copies thereof. On April 12, 2002, the trial court issued an Order admitting the counter-affidavit of the petitioner, as well as the photocopies of the checks and charge invoices, on the ground that the prosecution had adduced preponderant evidence that the original copies of the said charges and checks were lost, destroyed or non-available.[18] The accused filed a motion for reconsideration of the order, claiming that the prosecution failed to prove the authenticity and due execution of the offered documents, a prerequisite to the admission thereof as secondary evidence. They also filed a Motion for Leave to File a Demurrer to Evidence. The trial court denied both motions.

In a petition for *certiorari* under Rule 65 of the Rules of Court filed with the Court of Appeals, the petitioner alleged that —

> Respondent judge committed grave abuse of discretion equivalent to lack or excess of jurisdiction, in admitting in evidence the People's documentary evidence, consisting of mere unauthenticated photocopies, in flagrant violation of the Best Evidence Rule (Sec. 3, 4, 5 and 6, Rule 130), despite the repeated vehement objections of the petitioner, thereby wantonly refusing to exclude such clearly inadmissible evidence, which actuation as embodied in his two (2) assailed Orders, is capricious, whimsical and patently erroneous, as to amount to an evasion of positive duty or to a virtual refusal to perform the duty enjoined or to act at all in contemplation of law, and the remedy of ordinary appeal would not afford petitioner adequate and expeditious relief, for while available eventually, such remedy is cumbersome for it requires petitioner to undergo a useless and time-consuming trial, and thus becomes an oppressive exercise of judicial authority; hence, the imperative necessity for the issuance of a temporary restraining order or preliminary injunction requiring respondent judge to refrain from further proceeding with Crim. Cases Nos. 10010 and 10011 until the Petition shall have been disposed of, otherwise, failure of justice is sure to ensue.[19]

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[18] *Id*. at 37-38.

[19] CA *Rollo*, pp. 9-10.

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On March 14, 2003, the Court of Appeals rendered judgment dismissing the petition for lack of merit.[20]

The Court of Appeals ruled that the charge invoices and the checks were not the best evidence to prove receipt by the accused of the amounts allegedly misappropriated; hence, the best evidence rule does not apply. It also held that even if the contents of the checks were the subject of inquiry, based on the proofs adduced by the prosecution, such checks are admissible in evidence. The Court of Appeals declared that, in any event, the prosecution proved the loss or destruction or non-availability of the checks and charge invoices. The petitioner's motion for reconsideration of the decision suffered the same fate.

The petitioner then sought relief from this Court, in a petition for review on *certiorari*, and raises the following issues:

1. CAN (*sic*) PRIVATE DOCUMENT OFFERED AS AUTHENTIC BE RECEIVED IN EVIDENCE WITHOUT PROOF OF ITS DUE EXECUTION AND AUTHENTICITY?

2. CAN SECONDARY EVIDENCE BE ADMITTED WITHOUT PROOF OF ITS LOSS OR UNAVAILABILITY AND EXECUTION OF THE ORIGINAL?

3. DID THE COURT OF APPEALS ERR WHEN IT RULED THAT THE FAILURE TO PRODUCE THE ORIGINAL OF A DOCUMENTARY EVIDENCE, CONSISTING OF PRIVATE INSTRUMENTS DOES NOT VIOLATE THE BEST EVIDENCE RULE, INASMUCH AS RECEIPT BY THE PETITIONER OF THE AMOUNT ALLEGEDLY MISAPPROPRIATED MAY BE PROVED BY EVIDENCE OTHER THAN THE ORIGINAL OF THE SAID PRIVATE DOCUMENTS?

4. IS THE FINDING OF THE COURT OF APPEALS THAT THE FACT OF LOSS OR DESTRUCTION OF THE CHECKS AND THE CHARGE INVOICES HAS BEEN ESTABLISHED BY OTHER EVIDENCE, DEVOID OF SUPPORT BY THE EVIDENCE ON RECORD AND IS, THEREFORE, A BARE CONCLUSION OR A FINDING BASED ON SURMISE AND CONJECTURES?

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[20] Penned by Associate Justice Jose Sabio, Jr. with Associate Justices Portia Aliño Hormachuelos and Amelita G. Tolentino, concurring.

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5. IS ANOTHER FINDING, IN THE FORM OF ASSUMPTION, OF THE COURT OF APPEALS THAT SINCE THE WITNESSES FOR THE PROSECUTION ARE OFFICERS WITH AUTHORITY TO KEEP THE QUESTIONED DOCUMENTS, THEY NECESSARILY TOOK AND CONDUCTED A THOROUGH SEARCH FOR THE MISSING DOCUMENTS, A MERE CONJECTURE OR SURMISE OR A FINDING GROUNDED ENTIRELY ON SPECULATION?

6. DID THE COURT OF APPEALS VIOLATE THE *DICTUM* OF THE COLD NEUTRALITY OF AN IMPARTIAL JUDGE WHEN IT DENIED PETITIONER'S MOTION FOR INHIBITION GROUNDED ON ITS DISPLAY OF UNDUE INTERESTS AND WHEN A MEMBER THEREOF HAS SEEN IT FIT AND APPROPRIATE TO RECUSE HERSELF?[21]

The petitioner avers that the prosecution failed to prove the loss, destruction or non-availability of the original copies of the checks and charge invoices; that diligent efforts were undertaken to locate the original copies of the checks and invoices; and that said efforts were futile. He asserts that the witness competent to prove the loss or destruction of the original of the checks would be the records custodian of VMCI. Bayaban was not a competent witness thereon, considering that she merely testified that the clerk of the VMCI failed to locate the original copies of the checks because the latter was lazy to search for the same. The petitioner posits that the prosecution failed to prove the due execution and authenticity of the charge invoices and the two checks through the testimonies of Flores and Bayaban. He contends that Bayaban even admitted that she was not privy to and had no knowledge of the execution of the said checks and of the signatories of the checks. The petitioner further avers that, although the appellate court held that the photocopies of the checks were admissible in evidence based on other proofs adduced by the prosecution, it failed to specify the other proofs adverted to by it.

In its Comment on the petition, the Office of the Solicitor General asserts that through the testimony of Bayaban, the due execution and authenticity of the checks were proved by the

[21] *Rollo*, pp. 25-26.

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prosecution as well as the admissions of the petitioner in his counter-affidavit during the preliminary investigation. It further averred that through the testimonies of Bayaban and Flores, it proved, with reasonable certainty, the loss or destruction of the original copies of the checks and the charge invoices.

The issues for resolution are as follows: (a) whether or not the petition at bar is the proper remedy of the petitioner; and (b) whether or not the trial court committed a grave abuse of its discretion amounting to excess or lack of jurisdiction in admitting in evidence the photocopies of the checks and charge invoices in lieu of the original copies thereof.

The Ruling of the Court

In *People v. Court of Appeals*,[22] we held that for a petition for *certiorari* or prohibition to be granted, it must set out and demonstrate, plainly and distinctly, all the facts essential to establish a right to a writ.[23] The petitioner must allege in his petition and establish facts to show that any other existing remedy is not speedy or adequate[24] and that (a) the writ is directed against a tribunal, board or officer exercising judicial or quasi-judicial functions; (b) such tribunal, board or officer has acted without or in excess of jurisdiction, or with grave abuse of discretion amounting to excess or lack of jurisdiction; and, (c) there is no appeal or any plain, speedy and adequate remedy in the ordinary course of law.[25]

The trial court acts without jurisdiction if it does not have the legal power to determine the case; there is excess of jurisdiction where the respondent, being clothed with the power to determine the case, oversteps its authority as determined by law. There is grave abuse of discretion where the public respondent acts in a capricious, whimsical, arbitrary or despotic manner in the exercise of its judgment as to be said to be equivalent to lack of

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[22] G.R. No. 144332, June 10, 2004.

[23] *Heung v. Frista*, 559 So.2d 434.

[24] *Alabama Power Co. v. City of Fort Wayne*, 187 S.W.2d 632 (1939).

[25] *Sanchez v. Court of Appeals*, 279 SCRA 647 (1997).

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jurisdiction.[26] Mere abuse of discretion is not enough. A remedy is plain, speedy and adequate if it will promptly relieve the petitioner from the injurious effects of that judgment and the acts of the tribunal or inferior court.[27] A petition for *certiorari* cannot co-exist with an appeal or any other adequate remedy. The existence and the availability of the right to appeal are antithetical to the availment of the special civil action for *certiorari*. These two remedies are mutually exclusive.[28]

In a petition for *certiorari*, the jurisdiction of the court is narrow in scope. It is limited to resolving only errors of jurisdiction. It is not to stray at will and resolve questions or issues beyond its competence such as errors of judgment. Errors of judgment of the trial court are to be resolved by the appellate court in the appeal by and of error or *via* a petition for review on *certiorari* under Rule 45 of the Rules of Court, as amended. *Certiorari* will issue only to correct errors of jurisdiction. It is not a remedy to correct errors of judgment. [29] An error of judgment is one in which the court may commit in the exercise of its jurisdiction, and which error is reversible only by an appeal. Error of jurisdiction is one where the act complained of was issued by the court without or in excess of jurisdiction and which error is correctible only by the extraordinary writ of *certiorari*.[30] *Certiorari* will not be issued to cure errors made by the trial court in its appreciation of the evidence of the parties, its conclusions anchored on the said findings and its conclusions of law thereon.[31] As long as the court acts within its jurisdiction, any alleged errors committed in the exercise of its discretion will amount to

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[26] *Condo Suite Club Travel, Inc. v. NLRC*, 323 SCRA 679 (2000).

[27] *Pioneer Insurance & Surety Corp. v. Hontanosas*, 78 SCRA 447 (1977).

[28] *Ley Construction & Development Corporation v. Hyatt Industrial Manufacturing Corporation*, 339 SCRA 223 (2000).

[29] *People v. Court of Appeals*, 308 SCRA 687 (1999).

[30] *Toh v. Court of Appeals*, 344 SCRA 831 (2000).

[31] *Tensorex Industrial Corporation v. Court of Appeals*, 316 SCRA 471 (1999).

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nothing more than mere errors of judgment, correctible by an appeal if the aggrieved party raised factual and legal issues; or a petition for review under Rule 45 of the Rules of Court if only questions of law are involved.[32]

In this case, there is no dispute that the RTC had jurisdiction over the cases filed by the public respondent against the petitioner for estafa. The Order admitting in evidence the photocopies of the charge invoices and checks was issued by the RTC in the exercise of its jurisdiction. Even if erroneous, the same is a mere error of judgment and not of jurisdiction. Additionally, the admission of secondary evidence in lieu of the original copies predicated on proof of the offeror of the conditions *sine qua* non to the admission of the said evidence is a factual issue addressed to the sound discretion of the trial court.[33] Unless grave abuse of discretion amounting to excess or lack of jurisdiction is shown to have been committed by the trial court, the resolution of the trial court admitting secondary evidence must be sustained. The remedy of the petitioner, after the admission of the photocopies of the charge invoices and the checks, was to adduce his evidence, and if after trial, he is convicted, to appeal the decision to the appropriate appellate court. Moreover, under Rule 45 of the Rules of Court, as amended, only questions of law may be properly raised.

In the final analysis, the threshold issue in this case is whether or not the prosecution adduced evidence, testimonial and documentary, to prove the predication to the admission of the photocopies of the charge invoices[34] and of the checks.[35] The petitioner posits that the prosecution failed to discharge its burden, in contrast to the claim of the prosecution that it succeeded in doing so. In resolving the petition at bar, the court will have to delve into and calibrate the testimonial and documentary evidence adduced by the parties in the trial court, which the court is

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[32] *People v. Court of Appeals, supra*.

[33] *United States v. Shoels*, 685 F. 2d. 379 (1982).

[34] Exhibits "G", "H" and "I".

[35] Exhibits "K" and "L".

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proscribed to do under Rule 45 of the Rules of Court. This was the ruling of the Court in *Johnson Lee v. People*:[36]

In other words, *certiorari* will issue only to correct errors of jurisdiction and not to correct errors of procedure or mistakes in the court's findings and conclusions. An interlocutory order may be assailed by *certiorari* or prohibition only when it is shown that the court acted without or in excess of jurisdiction or with grave abuse of discretion. However, this Court generally frowns upon this remedial measure as regards interlocutory orders. To tolerate the practice of allowing interlocutory orders to be the subject of review by *certiorari* will not only delay the administration of justice but will also unduly burden the courts.

We find that the allegations of the petitioners are not sufficient grounds to qualify as abuse of discretion warranting the issuance of a writ of *certiorari*. The petitioners present factual contentions to absolve them from the criminal charge of estafa. The criminal cases concern corporate funds petitioners allegedly received as payment for plastic bought by Victorias Milling Corporation from NMI. They refused to turn over the money to the trustee after NMI's dissolution on the ground that they were keeping the money for the protection of the corporation itself. Thus, the elements of misappropriation and damage are absent. They argue that there is no proof that, as officers of the corporation, they converted the said amount for their own personal benefit. They likewise claim that they already turned the money over to the majority stockholder of the defunct corporation.

Clearly, the said allegations are defenses that must be presented as evidence in the hearing of the criminal cases. They are inappropriate for consideration in a petition for *certiorari* before the appellate court inasmuch as they do not affect the jurisdiction of the trial court hearing the said criminal cases but instead are defenses that might absolve them from criminal liability. A petition for *certiorari* must be based on jurisdictional grounds because, as long as the respondent court acted with jurisdiction, any error committed by it in the exercise thereof will amount to nothing more than an error of judgment which can be reviewed or corrected on appeal.

Moreover, the petition for *certiorari* before the Court of Appeals was premature for the reason that there were other plain and adequate remedies at law available to the petitioners. Under Section 3(a) of

[36] 393 SCRA 397 (2002).

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Rule 117 of the Revised Rules of Criminal Procedure, the accused can move to quash the information on the ground that the facts do not constitute an offense. There is no showing that the petitioners, as the accused in the criminal cases, ever filed motions to quash the subject informations or that the same were denied. It cannot then be said that the lower court acted without or in excess of jurisdiction or with grave abuse of discretion to justify recourse to the extraordinary remedy of *certiorari* or prohibition.

But it must be stressed that, even if petitioners did file motions to quash, the denial thereof would not have automatically given rise to a cause of action under Rule 65 of the Rules of Court. The general rule is that, where a motion to quash is denied, the remedy is not *certiorari* but to go to trial without prejudice to reiterating the special defenses involved in said motion, and if, after trial on the merits an adverse decision is rendered, to appeal therefrom in the manner authorized by law. And, even in the exceptional case where such denial may be the subject of a special civil action for *certiorari*, a motion for reconsideration must first be filed to give the trial court an opportunity to correct its error. Finally, even if a motion for reconsideration was filed and denied, the remedy under Rule 65 would still be unavailable absent any showing of the grounds provided for in Section 1 thereof. The petition before the Court of Appeals, subject of this appeal, did not allege any of such grounds.

Furthermore, a petition for review under Rule 45 of the 1997 Revised Rules of Civil Procedure before this Court only allows questions of law. Inasmuch as petitioners' defenses alleging circumstances that negate misappropriation definitely require appreciation of facts, *i.e.*, testimonial and documentary evidence, this Court cannot assess the merit of the said claims.[37]

Moreover, the factual findings of the Court of Appeals are conclusive on the Court unless the petitioner is able to establish that the findings of facts of the appellate court are not supported by or are contrary to the evidence; or if the appellate court ignored, misconstrued or misinterpreted vital facts and circumstances, which, if considered, could change or even reverse the outcome of the case. In this, the petitioner failed.

Rule 130, Section 3 of the Revised Rules of Court reads:

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[37] *Id.* at 402-404.

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Original document must be produced; exceptions. — When the subject of inquiry is the contents of a document, no evidence shall be admissible other than the original document itself, except in the following cases:

(a) When the original has been lost or destroyed, or cannot be produced in court without bad faith on the part of the offeror;

(b) When the original is in the custody or under the control of the party against whom the evidence is offered, and the latter fails to produce it after reasonable notice;

(c) When the original consists of numerous accounts or other documents which cannot be examined in court without great loss of time and the fact sought to be established from them is only the general result of the whole;

(d) When the original is a public record in the custody of a public officer or is recorded in a public office.

Before the onset of liberal rules of discovery, and modern technique of electronic copying, the best evidence rule was designed to guard against incomplete or fraudulent proof and the introduction of altered copies and the withholding of the originals. But the modern justification for the rule has expanded from the prevention of fraud to a recognition that writings occupy a central position in the law. The importance of the precise terms of writings in the world of legal relations, the fallibility of the human memory as reliable evidence of the terms, and the hazards of inaccurate or incomplete duplicate are the concerns addressed by the best evidence rule.[38]

The rule does not apply to proof of facts collateral to the issues such as the nature, appearance or condition of physical objects or to evidence relating to a matter which does not come from the foundation of the cause of action or defense; or when a party uses a document to prove the existence of an independent fact, as to which the writing is merely collated or incidental.[39]

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[38] *Seiler v. Lucas Films Ltd*., 808 F. 2d 1316 (1989).

[39] *United States v. Gonzales-Benitez*, 537 F. 1051.

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The offeror of secondary evidence is burdened to prove the predicates thereof: (a) the loss or destruction of the original without bad faith on the part of the proponent/offeror which can be shown by circumstantial evidence of routine practices of destruction of documents;[40] (b) the proponent must prove by a fair preponderance of evidence as to raise a reasonable inference of the loss or destruction of the original copy; and (c) it must be shown that a diligent and *bona fide* but unsuccessful search has been made for the document in the proper place or places.[41] It has been held that where the missing document is the foundation of the action, more strictness in proof is required than where the document is only collaterally involved.[42]

If the document is one in which other persons are also interested, and which has been placed in the hands of a custodian for safekeeping, the custodian must be required to make a search and the fruitlessness of such search must be shown, before secondary evidence can be admitted.[43] The certificate of the custody of the document is incompetent to prove the loss or destruction thereof. Such fact must be proved by some person who has knowledge of such loss.[44]

The proponent is also burdened to prove the due execution or existence of the original as provided in Rule 130, Section 5 of the Revised Rules of Court:

When the original document is unavailable. — When the original document has been lost or destroyed, or cannot be produced in court, the offeror, upon proof of its execution or existence and the cause of its unavailability without bad faith on his part, may prove its contents by a copy, or by a recital of its contents in some authentic document, or by the testimony of witnesses in the order stated.

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[40] *United States v. Balzano*, 687 Fed. 6; *Wright v. Farmers Co-op*, 681 F. 2d. 549.

[41] 32 *Corpus Juris Secundum*, *Id*. at 773.

[42] *Serirner v. American Car and Foundry Co*., 50 SW 1001.

[43] 32 Corpus *Juris Secundum*, Evidence, p. 776.

[44] *Ibid*.

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Rule 132, Section 20 of the Revised Rules of Court provides the procedure on how the authenticity and due execution of a private document which is offered as authentic may be proved:

> *Proof of private document*. — Before any private document offered as authentic is received in evidence, its due execution and authenticity must be proved either:
>
> (a) By anyone who saw the document executed or written; or
>
> (b) By evidence of the genuineness of the signature or handwriting of the maker.
>
> Any other private document need only be identified as that which it is claimed to be.

The testimony of an eyewitness as to the execution of a private document must be positive. He must state that the document was actually executed by the person whose name is subscribed thereto.[45] The admission of that party against whom the document is offered, of the authenticity and due execution thereof, is admissible in evidence to prove the existence, authenticity and due execution of such document.

In this case, there is no dispute that the original copies of the checks were returned to VMCI after the same were negotiated and honored by the drawee bank. The originals of the charge invoices were kept by VMCI. There is also no dispute that the prosecution offered the photocopies of the invoices in evidence to prove the contents thereof, namely that: (a) VMCI purchased 203,500 empty bags from NMI for the total price of ₱1,500,150.00; (b) VMCI received the said goods in good order and condition; and (c) NMI charged VMCI for the purchase price of said goods. The prosecution offered the checks to prove the contents thereof as well as the following: (a) VMCI drew and delivered the checks to the NMI; (b) the said checks were endorsed by the petitioner; and (c) the said checks were deposited by the petitioner with the Solidbank which was not the official depository of NMI. Thus, the prosecution was burdened to prove the loss, destruction or its inability to produce in court without bad faith on its part

[45] *Nolan v. Salas*, 7 Phil. 1 (1906).

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of the original copies of the said invoices and checks without bad faith on its part.

We agree with the petitioner that the Certification signed by Carolina Diaz was inadmissible in evidence against him because of the failure of the prosecution to present her as witness and to testify on said certification.

However, the records show that, in obedience to the *subpoena duces tecum* and *ad testificandum* issued by the trial court directing the VMCI to produce the originals of the checks and the charge invoices, Bayaban, the Manager for Corporate Affairs of VMCI, testified that all its records, including the charge invoices and checks, were destroyed seven years ago in a flash flood which occurred on November 28, 1995, and that such loss/ destruction was known to all the employees of VMCI, including herself:

FISCAL ESQUILLA:

Q Please inform this Honorable Court how were you able to appear this afternoon in connection with this case?

. . . . . .

A The Legal Department, through the instruction of our Chief Operating Officer, inquired from our Accounting through our comptroller, Carolina S. Diaz to produce the original copies of the two (2) checks which was mentioned in the subpoena issued by Prosecutor Esquilla. And then, through my direct Boss, the Chief Accountant, Mrs. Melanie Roa, instructed me to look into the two (2) checks. And since the record is under my Department, I immediately asked my subordinate to look for it. And, in fact, she was also under my supervision when we looked for the document. And I have already knowledge during the November 28, 1995 due to flash flood, we lost our records. And in fact, we have declaration to the Bureau of Internal Revenue (BIR). And we also exhausted some means to look for the documents, but we really cannot produce the original copies of the checks, even the Xerox, no more copies of the checks as requested.

. . . . . .

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Q Madam Witness, when you said that you instructed your subordinate to look for the record, specifically, the records being asked in the subpoena, the original copies of the checks, these two (2) checks, will you please inform this Honorable Court where these records in 1995 including these checks, of course, have been kept by your office?

A It is kept at the Records Section Office just near my table. It is just over there. It is just over there. The distance is very near. We have the vault power cards and all old records were kept are downstairs and the new ones are kept upstairs. So, we don't anticipate the flood and because that was the first time that we were hit by that flash flood.

. . . . . .

Q So, you want to impress this Honorable Court that those records which were kept downstairs your office were carried or destroyed by this flash flood which occurred in 1995 is that correct or is that what you mean?

A Yes, Your Honor.

. . . . . .

Q And can you say that if these two (2) checks, subject of this case now, were there downstairs and was destroyed by the 1995 flash flood, can you say that before this Honorable Court?

A Yes, Your Honor.

. . . . . .

Q Aside from these checks downstairs which were destroyed by this flash flood, what were the other records that were kept there that were lost also?

A All our Bank Vouchers, some of our General Ledgers. Actually, I cannot memorize it, but in our declaration to the Bureau of Internal Revenue (BIR) we have listings of those documents which were damaged by flash flood.

. . . . . .

Q Alright, Madam Witness. So, when this *subpoena/subpoena* (*sic*) *duces tecum* was received by Victorias Milling Company, addressed to the Chief Operating Officer, do I get from you that this was referred to the Legal Affairs of VICMICO?

A Yes, Your Honor.

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COURT:

Slowly, the stenographer may not be able to catch up with you.

FISCAL ESQUILLA:

I see. Sorry, Your Honor. And from the Legal Affairs, where did it proceed, this subpoena or this was referred to by the Legal Affairs to whom?

WITNESS:

A To Mrs. Carolina Diaz, the Comptroller.

FISCAL ESQUILLA:

Q You mentioned that she is your immediate Boss?
A I have also, next to her, Mrs. Melanie Roa, and I am next to her.

Q And you are holding office there at VICMICO together with the Comptroller, Carolina Diaz?
A We are in the same building.

Q And does she has a cubicle of her own?
A Yes, Your Honor.

Q And your table up to her cubicle, how far is your table from her cubicle?
A They are very near. I can see from my place her office and I can see anytime she went in and out of the room. Maybe from here up to that next room.

COURT:

About 25 to 30 meters, more or less.

FISCAL ESQUILLA:

Q And, Madam Witness, may I know from you that who requested you to testify because this Certification bears the signature of Mrs. Diaz?

. . . . . .

A Ah, Mrs. Diaz, in fact, ah — there is a Memo from the Legal Affairs that we will submit the Certification to the Honorable Court and the Memo was addressed to Mrs. Diaz. And there was a note from Mrs. Diaz to my direct Boss, the Chief

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Accountant, and then I was tasked by my immediate Boss to attend to this.

Q How were you able to secure a Certification?
A A Certification was issued also upon our recommendation to the Chief Accountant that we cannot produce anymore the original copies of the said document.

Q Who gave you that Certification so that you can bring that today in Court?
A Marie Melanie G. Roa.

Q Do you have with you now the Certification?
A Yes, Your Honor.

Q And you are showing the original copy of the Certification?
A Yes, Your Honor.

Q I show to you the Certification dated December 6, 2001 issued by Carolina Diaz, Comptroller. Do you know whose signature is this?
A That is the signature of Mrs. Carolina S. Diaz.

Q How do you know that this is her signature?
A I'm very much familiar with her signature because in our day to day undertakings in the office, I can see this in the checks she signed, and in the Office Memorandum. And, in fact, I also prepare some of the communications for her signature.

Q For the record, Madam Witness, will you please read the first paragraph of that Certification issued by Carolina Diaz?
A "Victorias Milling Co., Inc. Certification. This is to certify that Victorias Milling Co., Inc. no longer have the original copies of the BPI, Legaspi Village, Extension Office, Legaspi St., Makati, Metro Manila, Check No. 068766 dated August 3, 1987 and Check No. 068993 dated August 19, 1987 as the same were destroyed by flash flood that hit the province of Negros Occidental particularly the City of Victorias on November 28, 1995."

FISCAL ESQUILLA:

Your Honor, may I request that this Certification be marked as our Exhibit "X" temporarily.

COURT:

Mark it.

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FISCAL ESQUILLA:

> And then the signature as identified by this witness, of her immediate Boss, be encircled and marked as Exhibit "X-1".

COURT:

> Mark it.

COURT INTERPRETER:

> Your last Exhibit is Exhibit "Y".

FISCAL ESQUILLA:

> I will change my Exhibit from Exhibit "X" and "X-1" to "Z" and "Z-1". No further, Your Honor.

COURT:

> Do you want to cross?

ATTY. MAGDAMIT:

> Yes, Your Honor.

COURT:

> Alright, cross for the accused Moreno. We will give the Manila lawyer the first shot.

CROSS-EXAMINATION OF THE WITNESS MERLITA T. BAYABAN CONDUCTED BY ATTY. SIMEON M. MAGDAMIT.

. . . . . .

ATTY. MAGDAMIT

Q Madam Witness, when you received the subpoena, it contained a photocopy of the checks that were being requested, is that correct?

(At this juncture, there is no answer from the witness)

ATTY. MAGDAMIT: (Follow-up question)

Q Did it already contain a copy of the photocopy?
A Ah. Attached to the subpoena.

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Q Have you seen this photocopy when you received the subpoena? You did not see?
A Ah, actually, the subpoena was directed to the Legal.

Q You did not see. You did not see the photocopy? May I know the point of *Compañero*, Your Honor.

WITNESS: (Answers before Atty. Magdamit)
A I remember it was presented to me by Mrs. Diaz.

ATTY. MAGDAMIT

Q Mrs. Diaz. So, let me just clear this up. The subpoena did not immediately go to the Legal, it was presented to you by Mrs. Diaz?

A No, it was presented by the Legal to our Comptroller. Then . . .

. . . . . .

COURT:

Q And then to?
A And then to me.

Q There is an initial, "MGR." Do you know who is that?
A That is Mrs. Melanie G. Roa, our Chief Accountant.

Q And from then, when it reached you, you were the ones who sorted through the files, were you the one?
A Ah, my subordinate.

Q Ah, you were not the one?
A No, Your Honor.

Q Now, but you were certain — I withdraw that question. When you received the subpoena with the attached document, were you already aware that the records, the original, were destroyed or you were not yet aware?
A Very much aware that the records were destroyed by the flash flood because it was not only in that case that we were tasked to look for the documents. There were also Examiners from the Bureau of Internal Revenue who asked for the documents prior to 1995 and that's our reason, we cannot produce the documents.

Q Now, wait. Were you the only one who was aware that this file was destroyed or was it a matter that was known in your company?

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A It was known to everybody.

Q It was known?
A Yeah.

Q So, can you conclude that just upon receiving the subpoena and looking at the photocopy of the checks, you would immediately know that this was among the files that was destroyed by the flood?
A Yes, because of the date, 1995.

Q So, despite that knowledge, it still went through the process and you still looked for it, is that correct?
A Yes, Your Honor.

Q So, despite of your knowledge that it was destroyed, you still looked for it?
A Yeah, we still looked for it because there might be some files to prove that it was really our check issuance. So even our files, even our Bank Recon, we cannot produce it.[46]

Contrary to the claim of the petitioner, the prosecution adduced preponderant evidence to prove the existence, the due execution and the authenticity of the said checks and charge invoices consisting of the admission of no less than the petitioner in his counter-affidavit. The petitioner admitted therein that he received the total amount of ₱1,500,150.00 from VMCI in full payment of the delivery and sale of the empty bags by NMI to VMCI and that the said amount was in the custody of the said corporation, thus:

6. That the collection by the Corporation of the amount of ₱1,500,150.00 is a valid act of the corporation; that it is the full and complete and just payment for the three deliveries of plastic materials by the Neugene Marketing, Inc. to Victorias Milling Company on June 11, 1987, June 18, 1987 and June 25, 1987 when I was and I am still the President and Mr. Sonny Moreno, General Manager of the Neugene Marketing, Inc. and that the said Victorias Milling Company paid in full and payments were made to the Corporation and it is only a legitimate act of the Neugene Marketing, Inc. in the regular course of business to receive payment for the obligations of its customers to the Corporation;

[46] TSN, 7 February 2002, pp. 21-42.

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7. That with respect to the demand letter addressed to me to turn over aforesaid ₱1,500,150.00, the said amount is money of the Neugene Marketing, Inc. and the corporation is the legitimate possessor thereof and that Reyes, Treyes, and Fudolin Law Firm has no right or authority to make the demand letter; and that it is the corporation that holds the money and that personally, neither I nor Sonny Moreno can just take the money to give to Reyes, Treyes and Fudolin Law Firm which cannot be trusted and which is an unauthorized entity to receive, hold and possess said funds or to file this case;

8. That the amount of ₱1,500,150.00 the corporate funds of the Neugene Marketing, Inc. unless authorized by the members of the Board of Directors, neither I nor Sonny Moreno can dispose of the said sum of money and it is the corporation that is holding the said amount and holding it to answer for corporation expenses on its business operations and to answer for obligations to its creditors including the claims of Sonny Moreno and myself for unpaid compensation, salaries, fringe benefits, allowances and shares in the profits of the Corporation; and that therefore, it is beyond our authority or power to refuse the turn over or to turn over the aforesaid amount; and that if there is evidence of the malicious and criminal intent to appropriate the same for personal benefit that is more applicable to Reyes, Treyes and Fudolin who apparently without any legal authority and illegally posing as a trustee when as a matter of fact, they have never been appointed or designated a[s] trustee by the Neugene Marketing, Inc.; and therefore, complainants should be the one held criminally responsible for the illegal "dissolution" of the Neugene Marketing, Inc., and for which they will be charged with the corresponding action for falsification and perjury for having been able to secure a Certification of Dissolution from the Securities and Exchange Commission by means of false pretenses and representations;[47]

It bears stressing that the counter-affidavit of the petitioner was adduced in evidence by the prosecution precisely to prove the existence, authenticity and due execution of the original of the said charge invoices and checks and the trial court admitted the same for the said purpose.

By his counter-affidavit, the petitioner, in effect, admitted the allegations of the affidavit-complaint of the trustee of NMI:

[47] Annex "4", CA *Rollo*, pp. 146-14

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a. Sometime on June 11, 1987, June 18, 1987 and June 25, 1987, respectively, NEUGENE MARKETING, INC. made three (3) deliveries of plastic materials to Victorias Milling Company, Victorias, Negros Occidental totalling ₱1,500,150.00 covered by Charge invoices . . .

b. Aforesaid charge invoices were subsequently paid by Victorias Milling Company in full and payments delivered to Johnson Lee and/or Sonny Moreno, as President and General Manager of Neugene Marketing, Inc.

c. As Trustee of Neugene Marketing, Inc., the Reyes, Treyes & Fudolin Law Firm sent a demand letter addressed to Johnson Lee to turn over aforesaid ₱1,500,150.00. . .

d. As of the date of this Affidavit-Complaint, Johnson Lee and/or Sonny Moreno have failed to deliver aforesaid sum to the herein trustee contrary to law.

4. Johnson Lee and/or Sonny Moreno have no authority whatsoever to withhold aforesaid sum of ₱1,500,150.00 and their refusal to turn over aforesaid amount is evidence of a malicious and criminal intent to appropriate the same for their own personal benefit.[48]

With the admissions of the petitioner in his counter-affidavit, the prosecution even no longer needed to adduce evidence *aliunde* to prove the existence, due execution and the authenticity of the charge invoices and the checks.

All told then, the prosecution mustered the requisite *quantum* of evidence to prove the predicates to the admission of the photocopies of the charge invoices and checks.

IN LIGHT OF ALL THE FOREGOING, the petition is *DENIED*. The assailed decision of the Court of Appeals is *AFFIRMED*. No costs.

SO ORDERED.

Puno (*Chairman*) *Austria-Martinez* and *Tinga, JJ.,* concur.

Chico-Nazario, J., on leave.

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[48] *Id.* at 131-132.