

**JIBIN ARULA, PETITIONER, VS. BRIG. GEN. ROMEO C. ESPINO,
MEMBERS OF THE GENERAL COURT-MARTIAL, NAMELY, CANDIDO
B. GAVINO, PRESIDENT, CRISOGONO T. MAKILAN, RUBEN S.
MONTOKA, SIXT...**

G.R. No. L-28949. June 23, 1969

Ponente: CASTRO, J.

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CASTRO, J.:

I. Preliminary Statement

The present original petition for certiorari and/or prohibition with prayer for writ of preliminary injunction, seeks the annulment of Special Order 208[1] (issued on April 6, 1968 by the respondent Brigadier General Romeo C. Espino as commanding general of the Philippine Army), which special order convenes a general court-martial and appoints the members thereof, and to prohibit permanently the said court-martial, composed of the other respondents, from taking cognizance of and proceeding with the trial of the case before it with respect to the shooting and wounding of the petitioner Jibin Arula. The petition was filed with this Court on April 25, 1968,[2] and given due course the following day, April 26. We issued a temporary restraining order on the same day, April 26, "effective immediately and until further orders from this Court," and set the "hearing on the injunction and merits" for May 6.

On May 4 the respondents filed their answer (with opposition to the issuance of writ of preliminary injunction). On this day also, Capt. Alberto Soteco, MSgt. Benjamin Munaj, Reynaldo Munar and Eugenio Alcantara, thru counsel filed a motion to intervene; Attorneys Jesus G. Barrera, J. Antonio Araneta and Crispin Baizas of the Citizens' Legal Assistance Committee of the Philippine Bar Association moved for leave to appear as amici curiae.

At the hearing of the case on May 6, in Baguio City, Atty. Gregorio M. Familiar argued for the petitioner, Solicitor General Antonio Barredo argued for the respondents.[3] The petitioner was given 5 days to submit a memorandum of additional facts and additional arguments. The respondents were granted leave to submit an answer thereto, and allowed to present within 3 days the affidavit of Capt. Ruperto B. Amistoso. The motion to intervene was likewise granted, and the intervenors were given 5 days to file the necessary pleadings.

On May 7 this Court gave leave to Attys. Barrera, Araneta and Baizas to appear as amici curiae, granting them 10 days from notice within which to submit their memorandum. On the same day the Solicitor General submitted the affidavit of Capt. Amistoso, in compliance with this Court's May 6 resolution.

On May 11 the petitioner filed an amended petition; on May 22 the intervenors filed an answer with counter-petition for preliminary injunction; and on May 27 the respondents submitted their answer to the amended petition. On June 18 the amici curiae filed their memorandum, making common cause with the petitioner.

This case was reheard on August 26. The petitioner thereafter, on September 19, filed his memorandum of

authorities and exhibits. The intervenors filed their reply memorandum of authorities and exhibits on October 23. And on November 12 the Solicitor General filed the respondents' reply to the petitioner's memorandum of authorities and exhibits.

II. Facts

Shorn of trivia and minutiae, the uncontroverted facts converge in sharp focus.

The petitioner Arula was on December 17, 1967 recruited by one Capt. Teodoro R. Facelo of the Armed Forces of the Philippines at Simunul, Sulu, to undergo training. On the following January 3, he, together with other recruits, was taken to Corregidor island. On March 18 a shooting incident occurred at Corregidor, resulting in, among other things, the infliction of serious physical injuries upon the petitioner. Despite his wounds, he succeeded in fleeing Corregidor, and on March 23 he filed a criminal complaint with the city fiscal of Cavite City for frustrated murder against Capt. Alberto Soteco, Benjamin Munar alias Lt. Baqui, Reynaldo Munar alias Lt. Rey, Eugenio Alcantara alias Lt. Alcantara,[4] and nine others. Acting on the criminal complaint, the city fiscal on March 29 sent subpoenas to the persons above enumerated, advising them that the preliminary investigation was set for April 3 at 9:00 o'clock in the morning, and requiring them to appear at his office on the same date and time.

On April 2 the petitioner sent a letter to the commanding officer of the Philippine Army, informing the latter that he was "not filing any charges" with the military authorities against the army personnel responsible for his injuries, for the reason that he had "already filed the corresponding criminal complaint" with the city fiscal of Cavite City. On the following day, April 3, the date set for the preliminary investigation, army lawyers headed by Capt. Jose Magsanoc appeared on behalf of the respondents and requested for transfer of the preliminary investigation which, as a result of such request, was reset for April 16.

Meanwhile, the respondent General Espino directed Capt. Alfredo O. Pontejos of his command to conduct a pre-trial investigation of the Corregidor incident to pinpoint responsibility therefor. As early as March 22, however, all of the army personnel, except two, supposedly involved in the hapless incident had already been placed under technical arrest and restricted to camp limits. (These last two were subsequently, on April 16, placed under technical arrest)

On April 6 Capt. Pontejos, as pre-trial investigator, submitted his written report, which contained the substance of the declarations of Andrew Gruber, Colonel Wilfredo E. Encarnacion, Trainee Capt. Rosauro Novesteras, Lt. Tomas Rainilo of the Special Forces Training Unit (provisional), 2nd Class Trainee Wilfredo Pahayhay, Trainee Dugasan Ahid, and 2nd Lt. Antonio Santos. Appended thereto was an array of documents.

Recommended for trial by general court-martial are Major Eduardo Martelino, alias Major Abdul Latif Martelino, Capt. Cirilo Oropesa, Capt. Teodoro R. Facelo, Capt. Ruperto B. Amistoso, Capt. Alberto G. Soteco, 1st Lt. Eduardo B. Batalla, 2nd Lt. Rolando Abadilla, MSgt. Benjamin C. Munar, MSgt. Federico Ilang-ilang, MSgt. Cesar Calinawagan, TSgt. Timoteo C. Malubay, TSgt. Pedro Banigued, SSgt. Narciso T. Dabbay, Cpl. Rolando Buenaventura, Cpl. Felix Lauzon, Cpl. Evaristo Ruiz, Cpl. Orlando Decena, Cpl. Francisco Grinn, Cpl. Agustin Dagdag, Cpl. Alfredo F. Forfieda and Pfc. Wilfredo Latonero.

On April 14, Capt. Pontejos submitted a supplemental report, recommending trial by general court-martial of Capt. Solferino Titong alias Capt. Mike, trainee Reynaldo Munar alias Lt. Rey and trainee Eugenio Alcantara alias Lt. Alcantara.

On the same day (April 6) that Capt. Pontejos submitted his pre-trial investigation report, the respondent General Espino issued Special Order 208, appointing a general court-martial, composed of the other respondents, to try the case against the army personnel involved in the Corregidor incident, intervenors herein being among them.

Charges and specifications for violations of articles of war 94 [5] and 97 were filed with the general court-martial; additional charges and specifications were subsequently filed and renumbered.

At the hearing by the general court-martial on April 16, the petitioner Arula adduced testimony to prove specification 1, charge 1 (violation of the 94th article of war) which directly and squarely pertains to the shooting and wounding of the said petitioner.

On April 19 the Armed Forces lawyers moved to dismiss the complaint filed with the city fiscal of Cavite upon the ground that the civil courts had lost jurisdiction over the case because a court-martial had been convened.

It is here pertinent to note that on March 21 President Ferdinand Marcos (as Commander-in-Chief) ordered an investigation of the reported killings of commando trainees on Corregidor Island, and, on the following day, March 22, directed the creation of a court-martial to try whomsoever might be responsible for the reported killings. (See the March 22 and 23, 1968 issues of the Manila Times, Philippines Herald and Manila Daily Bulletin.) So that before the petitioner Arula filed his criminal complaint (on March 23) with the city fiscal of Cavite, the President had already ordered an investigation of the Corregidor incident and the convening of a court-martial relative thereto.

III. Issues

The petitioner poses as the dominant issue the jurisdiction of the general court-martial to take cognizance of charge 1, specification 1, for frustrated murder involving the petitioner's injuries. More specifically he avers that

1. the offense was committed outside a military reservation because Corregidor where the offense was committed had been declared by President Ramon Magsaysay as a "national shrine";
2. he, the petitioner, is a civilian, not subject to military law because he had never enlisted in the Army nor had he been formally inducted therein; and
3. the Court of First Instance of Cavite has already taken cognizance of the case, to the exclusion of the general court-martial.

On the other hand, the respondents maintain that the general court-martial has jurisdiction over the offense committed against the petitioner, to the exclusion of the Cavite CFI, because

1. the petitioner, like all the persons accused before the general court-martial, is subject to military law;
2. the offense (shooting and wounding of the petitioner) was committed inside a military reservation by persons subject to military law; and
3. the general court-martial acquired jurisdiction over the case ahead of any civil court with concurrent jurisdiction.

At the threshold, the respondents traverse the petitioner's legal personality to bring and maintain the present

action.[6]

On their part, the intervenors refuted point by point the arguments advanced by the petitioner in his amended petition. Upon the other hand, the amici curiae, as stated earlier, made common cause with the petitioner.

On the basis of the pleadings of all the parties, the following issues are joined: (1) Does the petitioner have legal personality to institute and maintain the present action for certiorari and prohibition to stop the general court-martial from proceeding with the hearing of the case insofar as it concerns the injuries inflicted upon him? (2) In the affirmative, does the general court-martial have jurisdiction over the case? This in turn depends on the resolution of the sub-issues of (a) whether the petitioner is a person subject to military law; (b) if he is not, whether Corregidor is a military reservation; and (c) whether the filing by the petitioner of a criminal complaint (involving the same offense) with the city fiscal of Cavite City forthwith invested the Court of First Instance of Cavite jurisdiction to try the case to the exclusion of the general court-martial.

IV. Discussion

Of basic and immediate involvement is article of war 94 of Commonwealth Act 408, as amended by Republic Act 242, which provides in full as follows:

"Various Crimes. — Any person subject to military law who commits any felony, crime, breach of law or violation of municipal ordinance which is recognized as an offense of a penal nature and is punishable under the penal laws of the Philippines or under municipal ordinances, (A) inside a reservation of the Armed Forces of the Philippines, or (B) outside any such reservation when the offended party (and each one of the offended parties if there be more than one) is a person subject to military law, shall be punished as a court-martial may direct, Provided, That, in time of peace officers and enlisted men of the Philippine Constabulary shall not be triable by courts-martial for any felony, crime, breach of law or violation of municipal ordinances committed under this article. In imposing the penalties for offenses falling within this article, the penalties for such offenses provided in the penal laws of the Philippines or such municipal ordinances shall be taken into consideration."

The parties are agreed on the purview and meaning of this article. It places persons subject to military law[7] under the jurisdiction of courts-martial, concurrent with the jurisdiction of the proper civil courts, when they commit any felony, crime, breach of law or violation of municipal ordinance which is recognized as an offense of a penal nature and is punishable under the penal laws of the Philippines or under municipal ordinances, (a) inside a reservation of the Armed Forces of the Philippines, or (b) outside any such reservation when the offended party (and each one of the offended parties if there be more than one) is a person subject to military law. Whenever persons subject to military law commit offenses punishable under article of war 94 outside a military reservation and the offended party (or any one of the offended parties if there be more than one) is not a person subject to military law, they fall under the exclusive jurisdiction of civil courts. This article of war removes officers and enlisted men of the Philippine Constabulary entirely from the jurisdiction of courts-martial when they commit offenses under this article in time of peace, notwithstanding that the said offenses are committed within military reservations, or outside such reservations and the offended party (and each one of the offended parties if there be more than one) is a person subject to military law.

Nor is it disputed that the crime of frustrated murder, the offense imputed to the military personnel accused before the general court-martial, is embraced within the purview of article of war 94. That the said accused are members of the Armed Forces of the Philippines and are not officers or enlisted men of the Philippine Constabulary, is likewise conceded.

The divergence of opinion is as to whether Corregidor was, on March 18, 1968 (the date when the offense was allegedly committed), a military reservation, and, if it was not, as to whether the petitioner was at that time a person subject to military law.

1. On May 31, 1948 President Elpidio Quirino issued Proclamation No. 69[8] (hereinafter referred to as P-69) declaring "Corregidor, including the adjacent islands and detached rocks surrounding the same," a military reservation and placing it under the direct supervision and control of the Armed Forces of the Philippines. The petitioner's insistence that Corregidor is no longer a military reservation is anchored on Executive Order No. 58[9] (hereinafter referred to as EO 58) issued on August 16, 1954 by President Ramon Magsaysay, which declared "all battlefield areas in Corregidor and Bataan province" as national shrines and, "except such portions as may be temporarily needed for the storage of ammunition or deemed absolutely essential for safeguarding the national security," opening them "to the public, accessible as tourist resorts and attractions, as scenes of popular pilgrimages and as recreational centers," from which the petitioner argues that Corregidor is no longer a military reservation because it has been converted into a national shrine and made accessible to the public.

For several cogent reasons, it is our view that this argument is devoid of merit.

In the first place, EO 58 does not expressly repeal P-69. From the terms contained without the four corners of the later presidential decree cannot be inferred or implied a repeal of the former presidential act. It cannot, therefore, be safely said that implied repeal of P-69 was intended. Well-entrenched is the rule that implied repeals are not favored (*Camacho vs. CIR*, 80 Phil. 848; *Visayan Electric Co. vs. David*, 94 Phil. 969; *North Camarines Lumber Co., Inc., vs. David*, 51 OG 1860; *Manila Electric Co. vs. City of Manila*, 98 Phil. 951; *Manila Letter Carriers Association vs. Auditor General*, 57 OG 9027).

In the second place, there is nothing in the language of EO 58 from which it can be reasonably inferred that the declaration of certain areas in Corregidor island as battlefield areas or as national shrines necessarily divests such areas—or the entire island of Corregidor itself—of their character as a military reservation and national defense zone. Even if an area were actually declared as a "national shrine" or "battlefield area" or "historic site" by the National Shrines Commission, its character as part of a national defense zone or military reservation would not thereby be abated or impaired. A military reservation or national defense zone under the provisions of Commonwealth Act 321[10] can concurrently be used and developed as a national shrine without excluding it from the operation of the said Act. This Act makes the entry of a private person into a national defense zone subject to regulations prescribed by the President, thereby not precluding the possibility that civilians may be permitted to enter and remain in a proclaimed national defense zone under appropriate regulations. Paragraph 1 of EO 58 declares that even portions of battlefield areas declared as national shrines are not to be opened to the public as tourist resorts or recreational centers if they are deemed "absolutely essential for safeguarding the national security."

In the third place, if the President had intended to repeal P-69, he would have done so in an unequivocal manner. If he had intended to remove certain portions of Corregidor island from the ambit of P-69, he would have expressly withdrawn such portions, describing them by specific metes and bounds. This is the uniform pattern of presidential orders modifying the extent of an area previously reserved for a certain public purpose. A typical example is Proclamation No. 208 dated May 28, 1967 (63 OG No. 31, 6614) wherein President Ferdinand E. Marcos excluded from the operation of Proclamation No. 423 dated July 12, 1957 (which had established the Fort Bonifacio military reservation) a certain portion of the land embraced therein situated in Taguig, Rizal, and reserved the same for national shrine purposes under the administration of the National Shrines Commission, subject to private rights, if any, and to future survey.

In the fourth place, admitting in gratia argumenti that the declaration of a certain area as a battlefield area under EO 58 would have the effect of removing it from the operation of P-69, the fact remains that the Corregidor airstrip, where the shooting and wounding of the petitioner allegedly took place, has not been actually delimited and officially declared as a national shrine. In its overall context as well as in its specific phraseology, EO 58 affects and opens to the public only those areas of Corregidor island to be selected, declared, delimited and developed as historic sites by the National Shrines Commission. This official act of the National Shrines Commission is the operative act that can give to any portion of Corregidor island the status of a "national shrine," or "battlefield area" or "historic site." There is no showing that the airstrip in Corregidor has been officially declared by the National Shrines Commission a national shrine, battlefield area, or historic site.

The duty of the Commission to recondition the airstrip in Corregidor (paragraph 6, EO 58) does not, in fact and in law, make the said airstrip itself a "battlefield area" or "historic site" within the contemplation of EO 58. Clearly, the airstrip and resthouses mentioned are only service facilities to promote tourism.

To buttress his claim that Corregidor island, in its entirety, is a battlefield area, the petitioner invokes Executive Order No. 123 dated March 15, 1968, which, amending EO 58, authorizes the National Shrines Commission, with the prior approval of the President, "to enter into any contract for the conversion of areas within national shrines into tourist spots and to lease such areas to any citizen or citizens of the Philippines, or any corporation 60% of the capital stock of which belongs to Filipino citizens." In the absence, however, of the delimitation and marking of the historical sites or battlefield areas and pending the conversion of portions thereof into tourist spots (disposable for lease to private parties), the status and identity of the entire Corregidor island as a National defense zone remain unchanged.

With some vehemence, the petitioner presses the contention that "the entire island of Corregidor, including the airstrip, was a battlefield from the time it was first bombed on December 29, 1941, until its surrender on May 6, 1942." To unmask the emptiness of this conclusion, we have only to recall the requirement of EO 58 that the "Commission shall immediately proceed to determine the historic areas [battlefield areas in Corregidor Island and Bataan province] to be preserved, developed and beautified for the purposes of this order, establish the boundaries thereof and mark them out properly" (par. 4). Such requirement of delimitation would indeed be an absolute superfluity insofar as Corregidor is concerned if this island in its entirety were in fact and in design a battlefield area within the purview of EO 58.

In sum and substance, we do not discern any incompatibility or repugnance between P-69 and EO 58 as would warrant the suggestion that the former has given way to the latter, or that the latter, in legal effect, has obliterated the former.

2. We now proceed to assess the claim of the petitioner that the general court-martial is barred from asserting and exercising jurisdiction because the Court of First Instance of Cavite—a court of concurrent jurisdiction—first acquired jurisdiction over the case.

Let us initially examine the relevant facts.

On March 23 the petitioner filed a criminal complaint with the city fiscal of Cavite City for frustrated homicide against those accused before the general court-martial.

On March 29 the city fiscal of Cavite City sent subpoenas to the aforesaid accused, advising them that the preliminary investigation would be conducted on April 3 at 9:00 a.m.

On April 2 the petitioner wrote to the Commanding Officer, Philippine Army, Fort Bonifacio, Rizal, informing the latter that he was not filing charges with the military authorities against those responsible for his injuries,

because he had already filed the corresponding criminal complaint with the city fiscal of Cavite City.

On April 3 Army lawyers appeared before the city fiscal of Cavite City on behalf of those army personnel involved in the shooting and wounding of the petitioner and requested for transfer of the preliminary investigation which was, accordingly, reset for April 16.

On April 19 the same Army lawyers moved to dismiss Arula's complaint upon the ground that the civil courts had lost jurisdiction because a court-martial had already been convened. This motion was rejected by the city fiscal.

This was the status of the criminal complaint filed by the petitioner with the city fiscal of Cavite City when the present petition was instituted by him. This status has remained static and at present obtains.

On the other hand, the pertinent proceedings had by and before the military authorities may be summarized as follows:

On March 21 the President of the Philippines (as Commander-in-Chief) ordered a full investigation of the Corregidor incident, and, on the following day, March 22, directed the creation of a court-martial to try all officers and enlisted men responsible for any crime or crimes committed in connection with the said incident.

On March 27 Major Eduardo Martelino, et al., were placed under technical arrest and restricted to camp limits.

On April 6 Capt. Alfredo O. Pontejos, pre-trial investigator, submitted his pre-trial report recommending trial by general court-martial of Major Eduardo Martelino, et al. Acting on this recommendation, General Espino, by Special Order 208, appointed a general court-martial to try the case against the said Major Eduardo Martelino, et al., for violation of the 94th and 97th articles of war, and forthwith the corresponding charges and specifications were filed.

On April 14 the pre-trial investigator, Capt. Pontejos, submitted a supplemental report recommending trial by general court-martial of Capt. Solferino Titong alias Capt. Mike, trainee Reynaldo Munar alias Lt. Rey, and trainee Eugenio Alcantara alias Lt. Alcantara.

On April 16 the general court-martial "reconvened."^[11] The first prosecution witness to testify on this day was the petitioner himself. The court-martial then adjourned to meet again on April 19, 1968.

This was the status of the case before the general court-martial when the present action was commenced.

Does our jurisprudence yield any rule of thumb by which we may conclusively resolve the issue generated by the above two sets of facts? It does.

Although for infractions of the general penal laws, military courts and civil courts have concurrent jurisdiction, the rule enunciated in *Crisologo vs. People of the Philippines*^[12] accords to the court first acquiring jurisdiction over the person of the accused by the filing of charges and having him in custody the preferential right to proceed with the trial. Thus—

"As to the claim that the Military Court had no jurisdiction over the case, well known is the rule that when several courts have concurrent jurisdiction of the same offense, the court first acquiring jurisdiction of the prosecution retains it to the exclusion of the others. This rule, however, requires that jurisdiction over the person of the defendant shall have first been obtained by the court in which the first charge was filed (22 C.J.S. pp. 186-187). The record in the present case shows that the information for treason in the People's Court was filed on March 12, 1946, but petitioner had not yet been arrested or brought into the custody of the Court—the warrant of arrest had not been issued—when the indictment for the same offense was filed in the military court

on January 13, 1947. Under the rule cited, mere priority in the filing of the complaint in one court does not give that court priority to take cognizance of the offense, it being necessary in addition that the court where the information is filed has custody or jurisdiction of the person of the defendant. " (italics supplied)

The salutary rule expounded in *Crisologo* was explicitly affirmed in *Quirico Alimajen vs. Pascual Valera, et al.*, L-13722, February 29, 1960. Speaking for the Court, Justice J.B.L. Reyes unequivocally restated the rule in the following words:

"While the choice of the court where to bring an action, where there are two or more courts having concurrent jurisdiction thereon, is a matter of procedure and not jurisdiction, as suggested by the appellant, the moment such choice has been exercised, the matter becomes jurisdictional. Such choice is deemed made when the proper complaint or information is filed with the court having jurisdiction over the crime, and said court acquires jurisdiction over the person of the defendant; from which time the right and power of the court to try the accused attaches (see *People vs. Blanco*, 47 Off. Gaz. No. 7, 3425; *Crisologo vs. People*, 50 Off. Gaz. No. 3, 1021)." (italics supplied)

A thoroughgoing review of American jurisprudence has failed to yield a contrary doctrine. The doctrine restated and re-affirmed in countless decisions of the Federal and State courts in the United States is the same: jurisdiction to try a particular criminal case is vested in a court only when the appropriate charge is filed with it AND when jurisdiction of the person is acquired by it through the arrest of the party charged or by his voluntary submission to the court's jurisdiction.

The record in the present case discloses that on April 6 and thereafter, charges and specifications were preferred against Major Eduardo Martelino and several others including the accused Soteco, Benjamin Munar, Reynaldo Munar and Eugenio Alcantara for violations of the 94th article of war. An order for their arrest and/or custody was issued (annex 13). Reynaldo Munar and Eugenio Alcantara were subsequently, that is, on April 16, placed under technical arrest (annex 14). On the other hand, no indictment has yet been filed with the CFI of Cavite on the basis of the complaint lodged by the petitioner with the City Fiscals Office of Cavite City (see annexes B and C), the same being merely in the preliminary investigation phase. The mere filing of a complaint with the prosecuting fiscal cannot have parity with the filing of such complaint with the court. And even if there could be such parity, the criterion laid down in *Crisologo* is not the mere filing of the complaint or information but the actual taking into custody of the accused under the process of one court or the other.

Evidently, the general court-martial has acquired jurisdiction, which it acquired exclusively as against the CFI of Cavite, not only as to the element of precedence in the filing of the charges, but also because it first acquired custody or jurisdiction of the persons of the accused. Court-martial jurisdiction over the accused having properly attached, such military jurisdiction continues throughout all phases of the proceedings, including appellate review and execution of the sentence.[13]

In the deliberations of this Court on this case, it was suggested that the rule clearly delineated in *Crisologo* and explicitly affirmed in *Alimajen* should be abandoned in the resolution of the present case, because once Arula filed his complaint with the city fiscal of Cavite, the military, as a matter of "comity" and "public policy," should have yielded jurisdiction to the civil courts. This suggestion, to our mind, completely ignores, among other things of fundamental import which we need not dwell on here, the overriding consideration that the military should be accorded, and is entitled to, priority in disciplining its own members.

It was also suggested that this Court adopt a rule which would vest jurisdiction to try a criminal case in a civil court once a complaint has been filed with the proper city or provincial fiscal. This suggestion is, in our view,

unacceptable because it would be productive of absurd results—which would obtain even among civil courts themselves in situations of conflict of jurisdiction, that is, as between one civil court and another civil court having concurrent jurisdiction over the same offense.

Juan de la Cruz kidnaps a woman in Manila and takes her by motor vehicle to Pangasinan, passing the provinces of Rizal, Bulacan, Pampanga and Tarlac. In Pangasinan he slays her. Meanwhile, her relatives learn of the kidnapping, and forthwith file a complaint for kidnapping against Juan de la Cruz with the provincial fiscal of Bulacan. Shortly after the killing which takes place two days after the filing of the complaint by her relatives with the provincial fiscal of Bulacan, the provincial fiscal of Pangasinan files an information for kidnapping with murder against Juan de la Cruz, who is thereafter arrested by virtue of forcible process issued by the court of first instance of Pangasinan. It is true that under these circumstances the courts of first instance of Manila, Rizal, Bulacan, Pampanga, Tarlac and Pangasinan have concurrent jurisdiction over the offense of kidnapping with murder because this felony is a continuing one. But can it be logically argued, can the proposition be reasonably sustained, that because the relatives of the victim had filed with the provincial fiscal of Bulacan a complaint for kidnapping, before the provincial fiscal of Pangasinan filed the information for kidnapping with murder with the CFI of Pangasinan, the latter court could not validly acquire jurisdiction, and the CFI of Bulacan, by the mere filing of a complaint by the victim's relatives with the provincial fiscal of Bulacan, has thereby preempted jurisdiction to the exclusion of the CFI of Pangasinan?

To paraphrase: beyond the pale of disagreement is the legal tenet that a court acquires jurisdiction to try a criminal case only when the following requisites concur: (1) the offense is one which the court is by law authorized to take cognizance of, (2) the offense must have been committed within its territorial jurisdiction, and (3) the person charged with the offense must have been brought into its forum for trial, forcibly by warrant of arrest or upon his voluntary submission to the court. In the case at bar, while the first two requisites are indispensably present with respect to the Court of First Instance of Cavite, the third requisite has not even become viable, because no information has been filed with the court, nor have the accused persons been brought under its jurisdiction. Upon the other hand, all these three requisites obtained, by the latest, as of April 16 in respect to the general court-martial. The charges and specifications were before that day forwarded to the court-martial for trial; all the accused as of that day were already under technical arrest and restricted to camp limits; the offense is one that is cognizable by the court-martial under the authority of article of war 94; the offense was committed within the territorial jurisdiction of the court-martial.

3. The petitioner insists nevertheless that the respondent General Espino acted in excess of his jurisdiction and with grave abuse of discretion "in hastily constituting and convening a general court-martial to try the case involving Arula, without the same being thoroughly investigated by the pre-trial investigator, resulting in the filing of charges against persons without prima-facie evidence in violation of the Constitution, existing laws, and Art. 71[14] of the Articles of War."—The petitioner has not at all elaborated on this contention, although apparently on the basis of this bare accusation, his counsel, in the oral argument had on May 6, expressed in no uncertain terms his apprehension that the trial by the court-martial will be—in the language of those who are not disinclined to be mundane—one big, thorough "whitewash."

We are not impressed by this contention.

It is our view that the respondent Espino acted well within the periphery of his authority as commanding general of the Philippine Army in constituting and convening the general court-martial in question. In issuing Special Order 208 for the purpose of constituting and convening the general court-martial, the respondent Espino was guided by the report and recommendation of Capt. Pontejos, the pre-trial investigating officer. In his report of April 6 (annex 6) Capt. Pontejos gave the abstract of the declarations made by several persons concerning the

Corregidor incident. The said report was accomplished pursuant to the provisions of article of war 71. And so was his supplemental report of April 14 (annex 7).

Moreover, it would appear that the persons who should be most concerned in questioning the absence of a pre-trial investigation, or the unseemly haste with which it was conducted, are those accused before the court-martial—and this not one of the 23 accused has done.

But even a failure to conduct a pre-trial investigation does not deprive a general court-martial of jurisdiction.

The better accepted concept of pre-trial investigation is that it is directory, not mandatory, and in no way affects the jurisdiction of a court-martial. In *Humphrey vs. Smith*, 336 U.S. 695, 93 L ed 986 (1949), the Court said:'

"We do not think that the pre-trial investigation procedure required by Article 70[15] can properly be construed as an indispensable pre-requisite to exercise of Army general court-martial jurisdiction. The Article does serve important functions in the administration of court-martial procedures and does provide safeguards to an accused. Its language is clearly such that a defendant could object to trial in the absence of the required investigation. In that event the court-martial could itself postpone trial pending the investigation. And the military reviewing authorities could consider the same contention, reversing a court-martial conviction where failure to comply with Article 70 has substantially injured an accused. But we are not persuaded that Congress intended to make otherwise valid court-martial judgments wholly void because pre-trial investigations fall short of the standards prescribed by Article 70. That congress has not required analogous pre-trial procedure for Navy court-martial is an indication that the investigatory plan was not intended to be exalted to the jurisdictional level.

... ..

"Shortly after enactment of Article 70 in 1920 the Judge Advocate General of the Army did hold that where there had been no pre-trial investigation, court-martial proceedings were void ab initio. But this holding has been expressly repudiated in later holdings of the Judge Advocate General. This later interpretation has been that the pre-trial requirements of Article 70 are directory, not mandatory, and in no way affect the jurisdiction of a court-martial. The War Department's interpretation was pointedly called to the attention of Congress in 1947 after which Congress amended Article 70 but left unchanged the language here under consideration." (Italics supplied)

A trial before a general court-martial convened without any pre-trial in investigation under article of war 71 would of course be altogether irregular; but the court-martial might nevertheless have jurisdiction.[16] Significantly, this rule is similar to the one obtaining in criminal procedure in the civil courts to the effect that absence of preliminary investigation does not go into the jurisdiction of the court but merely to the regularity of the proceedings.[17]

Likewise, the respondent Espino's authority, as commanding general of the Philippine Army, to refer military charges against members of his command for trial by general court-martial cannot legally be assailed. Under article of war 8,[18] as implemented by the Manual for Courts-Martial (PA) and Executive Order 493, series 1952,[19] the commanding officer of a major command or task force is empowered to appoint general courts-martial.

The referral of charges to a court-martial involves the exercise of judgment and discretion (AW 71). A petition for

certiorari, in order to prosper, must be based on jurisdictional grounds because, as long as the respondent acted with jurisdiction, any error committed by him or it in the exercise thereof will amount to nothing more than an error of judgment which may be reviewed or corrected only by appeal.[20] "Even an abuse of discretion is not sufficient by itself to justify the issuance of a writ of certiorari." [21]

The speedy referral by the appointing authority, herein respondent Espino, of the case to a general court-martial for trial is not jurisdictional error. (See *Flackman v. Hunter*, 75 F. Supp. 871). Speedy trial is a fundamental right accorded by the Constitution (Art. III, Sec. 1[17], the Rules of Court ((Rule 115, Sec. 7[h] and article of war 71 to an accused in all criminal prosecutions.

This right to a speedy trial is given greater emphasis in the military where the right to bail does not exist. In *Ex parte Milligan* (4 Wall [71 US] 1), the Supreme Court of the United States observed that the discipline necessary to the efficiency of the Army required swifter modes of trial than are furnished by the common law courts.

In the military, the right to a speedy trial is guaranteed to an accused by article of war 71 which requires that when a person subject to military law is placed in arrest or confinement, immediate steps shall be taken to try the person accused or to dismiss the charge and release him. This article further requires that, if practicable, the general court-martial charges shall be forwarded to the appointing authority within eight days after the accused is arrested or confined; if the same is not practicable, he shall report to the superior authority the reasons for delay.

The importance of the right to speedy trial is underscored by the fact that an officer who is guilty of negligence or omission resulting in unnecessary delay may be held accountable therefor under article of war 71 (*Reyes v. Crisologo*, 75 Phil. 225).

The apprehension, heretofore adverted to, expressed by the counsel for the petitioner at the hearing on May 6—that the rights of the petitioner will not be fully vindicated—should be dismissed as purely speculative. Such thinking at this stage has no basis in law and in fact. Moreover, it is well-settled that mere apprehension or fear entertained by an individual cannot serve as the basis of injunctive relief.[22] The presumption that official duty will be regularly performed by officers sworn to uphold the Constitution and the law cannot be overthrown by the mere articulation of misgivings to the contrary.

V. Conclusions

We thus ineluctably reach the following conclusions: (1) the airstrip on Corregidor island where the shooting and wounding of the petitioner Arula allegedly took place has not been removed from the ambit of Proclamation No. 69, series of 1948, and is therefore to be properly considered a part of the military reservation that is Corregidor island; (2) because the crime imputed to the accused, who are persons subject to military law, was committed in a military reservation, the general court-martial has jurisdiction concurrent with the Court of First Instance of Cavite to try the offense; and (3) the general court-martial, having taken jurisdiction ahead of the Court of First Instance of Cavite, must be deemed to have acquired jurisdiction to the exclusion of the latter court.

With the view that we take of this case, resolving the issue of whether the petitioner Arula is a person subject to military law would be at best a purposeless exercise in exegesis if not altogether an exercise in futility.

Although it would appear that in the above disquisition we have assumed the existence of legal standing on the part of the petitioner to bring and maintain the present action, we must hasten, without equivocation, to state that we have so assumed, but only ad hoc, that is, solely for the purposes of the present case. We do not here resolve the general abstract issue of whether a complaining witness in any or every criminal prosecution has legal standing to question the jurisdiction of the court trying the case. Happily, in upholding the jurisdiction of the general court-martial to the exclusion of the Court of First Instance of Cavite, in the context of the environmental

circumstances of the case at bar, we have not been pressed by any compelling need to do so.

ACCORDINGLY, the present petition is denied, and the restraining order issued by this Court on April 26, 1968 is hereby lifted. No costs.

Concepcion, C.J., Reyes, J.B.L., Makalintal, Zaldivar and Capistrano, JJ., concur.

Fernando, J., concurs fully in this opinion and submits additional observations in a concurring opinion.

Dizon and Sanchez, JJ., dissents in a separate opinion.

Teehankee and Barredo, JJ., did not take part.

[1] Annex E, pp. 15, 133, rollo.

[2] Unless otherwise specifically stated, all dates mentioned in this decision are of the year 1968.

[3] Col. Manuel V. Reyes (AFP Judge Advocate General), Col. Primitivo D. Chingcuangco, Lieutenant Colonel Pedro V. Malit, Capt. Ciriaco Cruz, Atty. Amelito Mutuc and Solicitor Raul J. Goco also appeared for the respondents.

[4] These four named persons are the intervenors in this case.

[5] See Commonwealth Act 408 as amended.

[6] The respondents' argument that the present remedy does not lie because the petitioner failed to exhaust available administrative remedies is of no consequence, considering that the petitioner questions the jurisdiction of the general court-martial, thereby raising a purely legal issue, and it is well-settled that exhaustion of administrative remedies is not required if the petition raises a question of law. (*Danan vs. Sec. of Agric. & Nat. Resources*, L-19547, Jan. 31, 1967; *Prov. Board of Zamboanga del Norte vs. De Guzman*, L-23523, Nov. 18, 1967; *Mitra vs. Subido*, L-21697, Sept. 15, 1967; *Cariño vs. ACCFA*, L-19808, Sept. 29, 1966.

[7]"Art. 2. Persons Subject to Military Law.— The following persons are subject to these articles and shall be understood as included in the term 'any person subject to military law' or 'persons subject to military law,' whenever used in these articles: "(a) All officers and soldiers in the active service of the Armed Forces of the Philippines or of the Philippine Constabulary; all members of the reserve force, from the dates of their call to active duty and while on such active duty; all trainees undergoing military instructions; and all other persons lawfully called, drafted, or ordered into, or to duty or for training in, the said, service, from the dates they are required by terms of the call, draft, or order to obey the same;

"(b) Cadets, flying cadets, and probationary second lieutenants;

"(c) All retainers to the camp and all persons accompanying or serving with the Armed Forces of the Philippines in the field in time of war or when martial law is declared though not otherwise subject to these articles;

"(d) All persons under sentence adjudged by courts-martial." (Commonwealth Act 408)

[8] Proclamation No. 69

RESERVING FOR MILITARY PURPOSES CORREGIDOR AND THE ADJACENT ISLANDS WHICH HAVE HERETOFORE BEEN CONSIDERED AS PART THEREOF AND DECLARING THE SAME AS NATIONAL DEFENSE ZONE.

WHEREAS, by virtue of the exchange of notes between the Governments of the United States and of the

Philippines, dated October 12, 1947, all rights and title to, as well as possession of, the former United States Military Reservation known as Corregidor (Fort Mills), including the adjacent islands and detached rocks surrounding the same, have been transferred to the Republic of the Philippines; and

WHEREAS, in view of the importance of their strategic location for defense purposes, it is necessary to make Corregidor and said islands and rocks a national defense zone and as depository for war reserves of ammunition, except small arms;

NOW, THEREFORE, pursuant to the authority vested in me by Commonwealth Act No. 321, approved on June 9, 1938, I, Elpidio Quirino, President of the Philippines, do hereby reserve the Islands of Corregidor, Caballo (Fort Hughes), La Monja, El Fraile (Fort Drum), Santa Amalia, Carabao (Fort Frank), and Limbones, as well as all waters and detached rocks surrounding them, for military purposes and declare the same as national defense zone.

I hereby place said reservation under the direct supervision and control of the Armed Forces of The Philippines, subject to the following conditions:

1. That all civilians now residing within the reservation shall be moved out gradually therefrom within two years from the date of this Proclamation;
2. That no civilian shall be permitted to visit or stay within the reservation without a pass from Headquarters National Defense Forces;
3. That certain areas within the reservation shall be declared "off limits" to civilians;
4. That the waters around Corregidor and the adjacent islands above named, except the channel for civilian shipping, shall be declared "off limits" to vessels other than those of the Philippine Naval Patrol;
5. That the harbors of these islands shall be placed under the operational control of the Philippine Naval Patrol;
6. That the air over the entrance to Manila Bay shall be declared "off limits" to any aircraft other than those of the Philippine Air Force;
7. That air photography of the reservation shall be prohibited except by the Philippine Air Force; and
8. That all military installations and fortifications which may be constructed within the reservation shall not be of a permanent character.

The Secretary of National Defense shall, upon the recommendation of the Chief of Staff, Armed Forces of the Philippines issue such rules and regulations as may be necessary to carry into effect the provisions of this Proclamation, subject to the approval of the President of the Philippines, violation of which shall be punished in accordance with the provisions of Section 2 of Commonwealth Act No. 321.

[9]Executive Order No. 58

DECLARING CORREGIDOR AND BATAAN NATIONAL SHRINES, OPENING THEM TO THE PUBLIC AND MAKING THEM ACCESSIBLE AS TOURIST ATTRACTIONS AND SCENES OF POPULAR PILGRIMAGES, AND CREATING A COMMISSION FOR THEIR DEVELOPMENT AND MAINTENANCE.

Pursuant to the powers vested in me by law, I, Ramon Magsaysay President of the Philippines, do hereby order:

1. All battlefield areas in Corregidor Island and Bataan province are hereby declared National Shrines, and except such portions as may be temporarily needed for the storage of ammunition or deemed absolutely essential for safeguarding the national security, are opened to the public, accessible as tourist resorts and attractions, as scenes

of popular pilgrimages and as recreational centers.

2. A Corregidor-Bataan National Shrines Commission is hereby created to lay out plans for the conservation and development of said National Shrines with a view to glorifying the memory and scenes of Philippine-American resistance to aggression and to inspiring the nation as well as the rest of the free world into an unrelenting defense of democracy and freedom throughout the ages.

3. The Commission shall be composed of the Secretary of National Defense, as Chairman, the Secretary of Agriculture and Natural Resources and the Secretary of Commerce and Industry, as Vice-Chairmen, the Secretary of Public Works and Communications, the Chief of Staff of the Armed Forces of the Philippines, the Civil Aeronautics Administrator, the President of the Philippine Association, the President of the Philippine Tourist and Travel Association, the President of the USAFFE Veterans Legion, the Supreme Councilor of the Defenders of Bataan and Corregidor and the Chairman of the Historical Markers Committee, as members.

4. The Commission shall immediately proceed to determine the historic areas to be preserved, developed and beautified for the purposes of this order, establish the boundaries thereof and mark them out properly. Within 30 days from the issuance of this Order, the Chief of Staff of the Armed Forces of the Philippines shall have marked out the areas in the Corregidor-Bataan battlefields to be reserved exclusively for temporary military uses, at the same time taking immediate steps to remove military stores and other dangerous objects especially unexploded mines, bombs and shells along the road leading to or within the historic sites.

5. The Commission shall conduct studies and prepare a general program for the development of national parks embracing all the historic areas and recommend to the President a plan for appropriate memorials or monuments wherever they are deemed desirable, taking into account the topography, vegetation and historical background of the places selected for the purpose.

6. The Commission shall also immediately take steps towards the reconditioning of the air-strip in Corregidor and the construction*of another at a convenient site in Bataan as well as the construction of suitable rest-houses for tourists and visitors in convenient locations in both places. For rest-house purposes, preference shall be given to the reconstruction and restoration to as nearly like the original as possible of the cottage occupied by General MacArthur in Corregidor and of any building in Bataan which has historic background connected with the last war.

7. The Secretary of Public Works and Communications, the Armed Forces of the Philippines and the Civil Aeronautics Administration are hereby directed to give priority to these improvements and to make available for their immediate realization such funds as they may be in a position to dispose of but of their respective current appropriations for similar projects.

8. The Commission may cooperate with the U.S. Bataan-Corregidor Memorial Commission and, if it so deems proper, endeavor to bring about an integration of the plans of both bodies into a common project.

9. The Commission may call on any department, bureau, office, agency or instrumentality of the government for such assistance as it may need in the preparation and execution of its plans or in the maintenance of the services to be established.

10. All executive orders, administrative orders and proclamations or parts thereof inconsistent with any of the provisions and purposes of this Order are hereby repealed or modified accordingly.

This Order shall take effect immediately.

[10] Commonwealth Act No. 321

Section 1. The President of the Philippines is hereby authorized to declare, by proclamation, any area or zone in the Philippines as a national defense zone, and upon the promulgation of such proclamation, it shall be unlawful for any person, excepting public officials and employees of the United States and of the Philippines, to enter such zone, or to remain therein, except under regulations to be prescribed by the President of the Philippines: Provided, however, That in no case shall any person be deprived of his property without just compensation.

Sec. 2. Any violation of the provisions of this Act or of the regulations prescribed by the President of the Philippines pursuant to the authority contained in section one hereof, shall be punished by imprisonment of not exceeding six months or by a fine of not exceeding one thousand pesos, or by both, in the discretion of the court.

Sec. 3. This Act shall take effect upon its approval. Approved, June 9, 1938.

[11] See Annex 5 to Answer, p. 81, rollo.

[12] 50 OG, No. 3, 1021 (1954), 94 Phil. 477, 482.

[13] Mosher vs. Hunter, 143 F2d 745, Cert den 323 US 800, 89 L ed 638, 65 S Ct 552, reh den 325 US 806, 90 L ed 491, 66: S. Ct 8; U.S. ex rel, Mobley v. Handy, 176 F2d 491, cert den 338 US 904, 94 L ed 556, 70 S Ct 306, reh den 338 US 945," 94 L ed 583, 70 S Ct 427; In re Schullz v. District Court of Arizona, 1953, No. Civil-704-Tucson.

[14]"Art. 71. Charges; Action upon.— Charges and specifications must be signed by a person subject to military law, and under oath either that he has personal knowledge of, or has investigated, the matters set forth therein and that the same are true in fact, to the best of his knowledge and belief.

"No charge will be referred to a general court-martial for trial until after a thorough and impartial investigation thereof shall have been made. This investigation will include inquiries as to the truth of the matter set forth in said charges, form of charges, and what disposition of the case should be made in the interest of justice and discipline. At such investigation full opportunity shall be given to the accused to cross-examine witnesses against him if they are available and to present anything he may desire in his own behalf, either in defense or mitigation, and the investigating officer shall examine available witnesses requested by the accused. If the charges are forwarded after such investigation, they shall be accompanied by a statement of the substance of the testimony taken on both sides.

"Before directing the trial of any charge by general court-martial the appointing authority will refer it to his Staff Judge Advocate for consideration and advice.

"When any person subject to military law is placed in arrest or confinement immediate steps will be taken to try the person accused or to dismiss the charge and release him,. Any officer who is responsible for unnecessary delay in investigating or carrying the case to a final conclusion shall be punished as a court-martial may direct. When a person is held for a trial by general court-martial, the commanding officer within eight days after the accused is arrested or confined, if practicable, forward the charges to the officer exercising general court-martial jurisdiction and furnish the accused a copy of such charges. If the same be not practicable, he will report to superior authority the reasons for delay. The trial judge advocate will cause to be served upon the accused a copy of the charges upon which trial is to be had, and a failure so to serve such charges will be ground for a continuance unless the trial be had on the charges furnished the accused as hereinbefore provided. In time of peace no person shall against his objection, be brought to trial before a general court-martial within a period of five days subsequent to the service of charges upon him." (As amended by Republic Act 242).

[15] The Philippine counterpart is article of war 71, Commonwealth Act 408, supra, note 14.

[16] *Becker v. Webster* (1949, 2 Cir NY) 171 F 2d 762, cert den 336 US 968, 93 L ed 1120, 69 S Ct 938; *Henry v. Hodges* (1948, 2d Cir NY) 171 F 2d 401, cert den 336 US 968, 93 L ed 1119, 69 S Ct 937, reh den 337 US 927, 93 L ed 1735, 69 S Ct 1167; *Waite v. Overlade*, 164 F2d 782, 334 US 812; *US v. Richardson* (19 Apr. 48), 77 Board of Review (US) 1, 23; *US v. Floyd* (30 Jan. 43), 17 Board of Review (US) 153.

[17] *Medina vs. Orozco*, L-26723, Dec. 22, 1966, 18 SCRA 1168.

[18] "Art. 8. General courts-martial.—The President of the Philippines, the Chief of Staff of the Armed Forces of the Philippines, the Chief of Constabulary and, when empowered by the President, the commanding officer of a major command or task force, the commanding officer of a division, the commanding officer of a military area, the superintendent of the Military Academy, the commanding officer of a separate brigade or body of troops may appoint general courts-martial; but when any such commander is the accuser or the prosecutor of the person or persons to be tried, the court shall be appointed by superior competent authority.

"The authority appointing a general court-martial shall detail as one of the members thereto a member of the bar, hereafter called lawmember, who shall be an officer of the Judge Advocate General's Service or an officer of some other branch of the service who is a member of the bar and certified by the Judge Advocate General to be qualified for such detail. No general court-martial shall receive evidence or vote upon its findings or sentence in the absence of the law member regularly detailed. The law member, in addition to his duties as a member, shall perform such other duties as the President may by regulations prescribe." (As amended by Republic Acts W. and 516).

[19] "Under the authority of AW 8, as amended by Republic Acts Nos. 242 and 516, the Commanding Officer of a major command or task force, the Commanding Officer of a Division, the Commanding Officer of the Philippine Army Training Command, the Commanding Officer of a Military Area, the Superintendent of the Philippine Military Academy (except for the trial of an officer), and the Commanding Officer of a battalion or a larger unit, or corresponding units of the Air Force and the Navy, assigned for duty in a territory beyond the jurisdiction of the Philippines, are hereby empowered to appoint general courts-martial." (E.O. 493, S. 1952)

[20] *Abig et al. v. Constantino, et al.*, 58 OG No. 51, 8408, Dec. 17, 1962, restating cases.

[21] *Palma, et al. v. Q. & C, Inc., et al.*, L-20366, May 19, 1966.

[22] *Woodward v. Raynor*, 119 Ep. 264, 29 Okl. 493; *Huguley v. White*, Tex. Civ. App. 1025 W 2d 451; see page 576, *Mejia*, Civil Practice and Procedure, Vol. 2, 1958 ed.

CONCURRING OPINION

FERNANDO, J.:

The rule of law would be a meaningless term if governmental agencies are permitted to transcend the boundaries of the powers conferred on them. To paraphrase Justice Miller, in *United States v. Lee*,^[1] the supremacy of the law requires of every public official that he observes the limitation which it imposes upon the exercise of authority which it gives. The military, no less than the civilian authorities, as a matter of fact perhaps much more so because of the force of its command, cannot be allowed to act beyond its pale. Any challenge hurled against any assumption of competence on their part must be inquired into provided of course it comes from a party qualified to do so. In order that he may be heard, he must have standing.

1. I am here speaking of the responsibility resting on the judiciary to assure that there be no tolerance of such an

unwarranted assumption of authority. It cannot be too strongly emphasized, however, that such a role only comes into play when there is an appropriate proceeding instituted by the proper parties.[2]

While joining then the well-written and exhaustive opinion of Justice Castro, I would pursue further the question of standing, not only as a basic postulate of constitutional law but also as an aspect of the far more fundamental principle of separation of powers, with its allocation in broad outlines of the function entrusted to each of the three branches, the executive, the legislative and the judiciary.

For to go back to the concept of the rule of law, in the same way that the legislative and the executive branches are required to act strictly within the bounds of their competence, the judiciary, including this Court, is likewise restricted to its proper domain. The fact that on questions of law it has the final say makes it all the more imperative that in passing upon the question of whether or not it is called upon to act, it takes the utmost care that in assuring compliance with constitutional limitations, it does not, at the same time, ignore the limits of its own authority. The need for such caution is greatest when the decision it might render would have the effect of precluding either of the other two departments from taking official action in the discharge of its functions.

That accounts for the importance of standing not only as a procedural device but much more so as an effective deterrent against the judiciary overstepping the limits of its own authority. To repeat, it is called upon to act only when there is an appropriate case instituted by the proper parties.

This is by no means to tolerate, by judicial timidity and reluctance, overreaching on the part of either the executive or the legislative departments. That would be to condone an infraction of the rule of law and an evasion of a plain duty cast upon the judiciary by the Constitution. It is merely to emphasize that the repercussions, of which this litigation is an instance, of a negative imposed by this Court in the performance of executive and of legislative functions are so fraught with likely governmental paralysis, if not impotence, that such an undesirable result should be most sedulously guarded against.

To be more specific, there should be recognition of the responsibility of the President as Commander-in-Chief to maintain discipline and obedience to the law on the part of the Armed Forces. It would appear that the incident out of which this case arose had indeed entailed a certain diminution of faith in, as well as loss of prestige of, the military arm. With more reason then, are respondents called upon to take the vital and necessary steps not only to punish the guilty but also to restore public faith and confidence.

Apparently, such a step was taken. Petitioner, dissatisfied, would want a halt and would invoke the assistance of this Court. As pointed out in Justice Castro's opinion, he has no legal basis for his plea. It is my view that he should not have been allowed to litigate at all, bereft as he was of any legal standing.

To avoid any misapprehension, I am the first to admit that if this petitioner could show rights which had been disregarded, then he could properly invoke legal protection in an appropriate legal proceeding. For the power of any governmental agency, including that of the presidency, must be shown to exist. It is delegated by the people through the Constitution and applicable statutes.

It is indisputable likewise that the public through the Bill of Rights saw to it that no infringement of any of its provisions can be predicated on the existence of any governmental power. Such constitutional rights are supreme and may not be disregarded. No power contrary to their mandates has been vested in any public official, from the highest to the lowest.

There being no showing that in this particular case such an invasion of any right enjoyed by petitioner does exist, it cannot be said that he possesses the requisite legal standing. To hold otherwise would be to encourage, contrary to settled principles of law, the erection of an insurmountable bar, the effect of which is to doom to futility the

efforts on the part of respondents to penalize the guilty and maintain discipline in the army. I am not prepared to go along with such a view. Hence my full concurrence with the opinion of Justice Castro.

2. This is not to discount the forceful and cogent opinion of Justice Sanchez, with which, however, I am unable to agree in view of what to me is a failure to appreciate fully the importance of the concept of standing in the field of judicial review. Nonetheless, it must be admitted that such an opinion does raise a question of import and significance, the scope and extent of the civilian supremacy over the military. There should not be any dissent to the proposition that it should be broad and comprehensive. There should not be the slightest doubt on the matter. The Constitution has seen to it that the military, except in the very restricted area of its competence, should be at all times subordinate to the civil authorities. That is as it should be.

From such a basic premise, however, I am not led to conclude that by refusing to give due course to this petition, there would be a grave infraction of such a vital principle. Far from it. At the most, it would only signify that on a matter where by virtue of the applicable law the Armed Forces are not denied competence, as in this case, then the prosecuting arm of the government should be precluded from any act of interference. Otherwise, there would be an unseemly conflict which is to be avoided without, of course, allowing either the military or the civilian authorities to intrude into matters outside of their proper domain.

On the above view, there would be no occasion for the grave misgivings of Justice Sanchez that the failure to give due course to this petition would result in the "traditional subordination" of the military to the civil powers being ignored or disregarded. If it were thus, then the opinion of Justice Sanchez should command the assent of all. With due respect, however, for this concern does Justice Sanchez honor, the fear that we are eroding a vital constitutional principle appears to me to be based on conjectures and speculation lacking support in the proven facts of record.

If there were any such basis for the apprehension voiced, then it is time for this Court to announce in language that brooks no misunderstanding that at no time and under no circumstances would it allow any transgression of the basic postulate that the military arm must acknowledge civilian supremacy. Even then, however, again in the light of the separation of powers doctrine, we can only do so in an appropriate case with the proper party raising such a question. Such a party in my opinion we do not have before us.

Before closing this separate opinion, it is not inappropriate to scrutinize with a certain degree of care the eloquent words of Chief Justice Warren and Justices Douglas and Black, the latter speaking for the United States Supreme Court in *United States v. Quarles*,^[3] made much of by Justice Sanchez.

A quotation from Chief Justice Warren is taken from one of the James Madison lectures delivered before the New York University School of Law in 1962. It is true Chief Justice Warren, as noted in the opinion, gave expression to his deeply felt conviction, which civil libertarian must share. As he put it: "Thus it is plain that the axiom of subordination of the military to the civil is not an anachronism. Rather, it is so deeply rooted in our national experience that it must be regarded as an essential constituent of the fabric of our political life."^[4]

Nonetheless, in the very same lecture, the distinguished American Chief Justice did take pains to emphasize: "So far as the relationship of the military to its own personnel is concerned, the basic attitude of the Court has been that the latter's jurisdiction is most limited. Thus, the Supreme Court has adhered consistently to the 1863 holding of *Ex parte Vallandigham* that it lacks jurisdiction to review by certiorari the decisions of military courts. The cases in which the Court has ordered the release of persons convicted by courts martial have, to date, been limited to instances in which it found lack of military jurisdiction over the person so tried, using the term 'jurisdiction' in its narrowest sense. That is, they were all cases in which the defendant was found to be such that he was not constitutionally, or statutorily, amenable to military justice. Such was the classic formulation of the relation

between civil courts and courts martial as expressed in *Dynes v. Hoover*, decided in 1857."^[5]

Why it should be thus, he explained: "This 'hands off attitude has strong historical support, of course. While I cannot here explore the matter completely, there is also no necessity to do so, since it is indisputable that the tradition of our country, from the time of the Revolution until now, has supported the military establishment's broad power to deal with its own personnel. The most obvious reason is that courts are ill-equipped to determine the impact upon discipline that any particular intrusion upon military authority might have. Many of our problems of the military society are, in a sense alien to the problems with which the judiciary is trained to deal."^[6]

Would it not be, therefore, in consonance with the view of Chief Justice Warren if in a case, where as here, the army is seeking to enforce its disciplinary power over its personnel, we should not interpose any obstacle to the exercise of such undeniable authority in accordance with our constitutional scheme? Would there be in such a case a subordination of the civil to the military authorities? The questions would seem to answer themselves.

Nor does the eloquent excerpt from Justice Douglas from the North lecture delivered at Franklin and Marshall College call for a different conclusion. It is true that sedulous care should indeed be taken to restrict and confine the competence of the military to the narrowest limits consistent with the constitutional purpose of giving the Armed Forces disciplinary power over its personnel.^[7] This is such a case; a close and perceptive study of the record would yield that conclusion. Under the circumstances then and in accordance with our oft-reiterated doctrine,^[8] the jurisdiction of the court martial convened must be recognized.

Thus properly construed, the above words of Justice Douglas do not call for a revision of the traditional view. For, as he did emphasize in the very same lecture, what he sought to guard against was the extension of the jurisdiction of the military tribunal over civilians. To quote from his exact language: "Extension of the jurisdiction of military tribunals over civilians, whether in time of peace or war, results in a diminution of the right of the people to be tried by juries in the civilian courts. That is a deep erosion of civil liberties. That is why the class of civilians amenable to military justice' must always be narrowly and closely defined."^[9]

That brings us to the opinion of Justice Black in *United States v. Quarles*. Again, lest there be any misunderstanding, he was careful to point out in the last paragraph thereof: "We hold that Congress cannot subject civilians like Toth to trial by court-martial. They, like other civilians, are entitled to have the benefit of safeguards afforded those tried in the regular courts authorized by Article 111 of the Constitution."^[10]

Again, that is not the problem before us. Those proceeded against by the court martial in this case are not civilians. If they * were, a different question would have arisen. Had such been that case then, there would more than ample justification for the eloquently expressed fear of Justice Sanchez about the emasculation of such fundamental concept as civilian supremacy. Such is not the case at all. Even if, therefore, the question of standing would not be considered as having interposed an insuperable hurdle, still, it seems to me, this petition must fail. I so vote.

[1] 106 US 196 (1882).

[2] Cf. *Angara v. Electoral Commission*, 63 Phil. 139 (1936) and *Gil v. Planas*, 67 Phil. 62 (1939).

[3] 350 US. 11 (1955).

[4] *The Great Rights*, 95 (1963).

[5] *Ibid*, pp. 95-96.

[6] Ibid, p. 96.

[7] Douglas, The Right of the People, 184 (1957).

[8] Cabiling v. Prison Officer, 75 Phil. 1 (1945); Reyes v. Crisologo, 75 Phil. 225 (1945); Yamashita v. Styer, 75 Phil. 563 (1945); Gbitos v. Styer, 76 Phil. 748 (1946); Tubb v. Griess, 78 Phil. 249 (1947); Ognir v. Director of Prisons, 80 Phil. 401 (1948); Kuroda v. Jalandoni, 83 Phil. 171 (1949); Crisologo v. People, 94 Phil. 477 (1954).

[9] Douglas, The Right of the People, 187.

[10] 350 US 11, 23 (1955).

DISSENTING OPINION

DIZON, J.:

Original action for certiorari and prohibition filed by petitioner Arula to declare void the special order issued by respondent Romeo C. Espino, Commanding General of the Philippine Army, constituting and convening a general court martial, and, as a consequence, to restrain and prohibit the latter from trying and deciding the case indorsed to it against several parties, amongst them those charged by petitioner for frustrated murder in a verified complaint filed by him with the Fiscal of Cavite City.

The following are undisputed facts:

On March 23, 1968 Arula filed the aforesaid criminal complaint for frustrated murder against Captain Alberto Soteco, Benjamin Munar, Reynaldo Munar, Reynaldo Alcantara and nine others with the Fiscal of Cavite City. Six days later the latter issued a subpoena addressed to and subsequently served upon the parties charged notifying them that the preliminary investigation of the case would be held on April 3, 1968. On April 2, 1968 Arula advised General Espino in writing that he was not filing with the army authorities any charge against the persons accused before the Fiscal of Cavite City, for the reason that he had already filed the corresponding criminal complaint against them "with the civil authorities of Cavite City."

On April 3, 1968 army lawyers headed by one Captain Magsanoc appeared before the Fiscal of Cavite City, on behalf of the parties charged with frustrated murder and moved for the postponement to some other date of the preliminary investigation set for that day. The Fiscal granted the motion and reset the preliminary investigation for April 16, 1968.

In the meantime General Espino had directed Captain Alfredo O. Pontejos to conduct a pre-trial investigation regarding the same event or events subject of the criminal complaint for frustrated murder mentioned above, and on March 27, 1968 he also issued an order placing the persons accused therein and others, under technical arrest, with the particularity that, for reasons left entirely to one's imagination, he made the technical arrest retroactive to and effective as of March 22, 1968 — precisely one day before Arula filed the criminal complaint with the Fiscal of Cavite City.

On April 6, 1968 Captain Pontejos submitted his report recommending that the parties he had investigated be charged before a general court martial, and on that same day General Espino appointed the officers who would constitute said court. Charges and specifications for violations of Articles of War 94 and 97 were then filed with the latter, Arula's charges being one of the counts. On April 16—the same day when the City Fiscal of Cavite was to conduct the preliminary investigation—the general court martial was reconvened and started its proceedings.

On April 19, 1968 the same army lawyers who sixteen days before had appeared and asked the City Fiscal of Cavite, on behalf of the parties charged with frustrated murder, for the postponement of the preliminary investigation thereof, moved to dismiss the case upon the ground that the civil courts had lost jurisdiction over it by reason of the constitution and convening of a court martial. The Fiscal, however, overruled the motion.

Such are the plain facts which gave rise to the action now before Us. The case—interesting enough by reason of the legal questions involved—acquires more importance when considered in the light of its impact upon the normal and orderly administration of justice in this country.

Among the legal issues relevant to be considered are: (1) Whether or not the City Fiscal of Cavite, when conducting a preliminary investigation in accordance with law, is a judicial or, at least, a quasi-judicial officer; (2) Whether said preliminary investigation constitutes "judicial proceedings"; (3) Whether the case for frustrated murder herein involved must be deemed commenced upon the filing of the criminal complaint with his office; (4) Whether, upon the facts stated heretofore, the parties charged had submitted to the jurisdiction of the City Fiscal of Cavite and the latter had acquired jurisdiction over their person.

Most, if not all the above questions are, in my opinion, fairly debatable. In connection with the second, for instance, it is well known that prior to the American occupation of the Philippines, the Spanish Code of Criminal Procedure provided for a "Sumario" which was considered as a preliminary stage in a criminal prosecution. This stage, however, was deemed abrogated by General Orders No. 58 (U.S. vs. Namit, 38 Phil. 926) which provided for a counterpart or equivalent known as preliminary investigation. On the other hand, the original as well as the Revised Rules of Court promulgated by this Court pursuant to its rule making power likewise provide for a preliminary investigation defined as a preliminary inquiry made before the arrest of a person charged with an offense cognizable by a Court of First Instance, to determine whether there is a reasonable ground to believe that the offense charged has been committed and the accused is probably guilty thereof, so that a warrant of arrest may be issued and the accused held for trial.

While We have consistently held that a preliminary investigation is not part of the formal trial of a criminal case (U.S vs. Rafael et al. 23 Phil. 184; U.S. vs. Marfori 35 Phil. 666; People vs. Datu Galantu etc. et al., 68 Phil. 486; People vs. Magpale 70 Phil. p. 176; People vs. Olarte L-13027, June 30, 1960), We have likewise ruled, in deciding the question of whether or not a particular crime has prescribed, that the filing of a complaint with the proper authorities and the preliminary investigation made in connection therewith constitute judicial or at least quasi-judicial proceedings and operate to suspend the running of the prescriptive period.

In the early case of U.S vs. Lazada (9 Phil. 509) We held that the filing of the complaint with the Justice of the Peace Court was the "institution of criminal proceedings" which suspended the prescriptive period. This view was reiterated in People vs. Joson (46 Phil. 380).

In People vs. Parao (52 Phil. 712) the ruling was that the preliminary investigation or examination is a judicial function, and that the first step taken by the Municipal President of Gigaquit directed towards the investigation of the crime and the apprehension of the criminals partook of the nature of judicial proceedings as required by Article 131 of the Penal Code.

Even in the later case of People vs. Olarte (G. R. No. L-13027, June 30, 1960 and G. R. No. L-22465, February 28, 1967) where We held that a preliminary investigation is not part of the action proper, We said that it is quasi-judicial in nature and that the filing of the complaint with the Justice of the Peace Court interrupted the running of the prescriptive period as regards the crime charged.

Lastly, in U.S. vs. Grant and Kennedy (18 Phil. 122), while holding that a prosecuting attorney conducting a

preliminary investigation acts only in a quasi-judicial capacity, We said that, as between examinations held by justices of the peace and those made by the prosecuting attorneys under the laws then existing, the latter appeared to be more thorough and preferable to all concerned.

It will thus be seen that in at least one of the relevant legal issues, our own rulings are not entirely free from a certain degree of ambiguity. This, however, is of no moment, because even if they were dear, they are not, in my opinion, of decisive and overriding effect upon the central issue before Us—one which, I believe, Should be resolved not on the basis of legal technicalities but rather on the broader and paramount angle of policy —the policy that calls for a full recognition and firm enforcement of our Constitution in so far as it provides for the supremacy of civilian authority over that of the military establishment.

Viewing the case from this angle, I start with the following assumptions:

(a) That the City Fiscal of Cavite with whom Arula filed the criminal complaint for frustrated murder had jurisdiction to take cognizance thereof under the city charter, for the purpose of conducting the corresponding preliminary investigation;

(b) That irrespective of whether in acting in the premises the City Fiscal of Cavite is or is not a judicial officer, the fact is that he is an integral part of, and belongs to the civil authority lawfully constituted in this country; that the proceedings before him, irrespective of whether they are or they are not judicial in character, are part and parcel of the proceedings provided by law for the apprehension and prosecution of parties charged with a criminal offense within the original and exclusive jurisdiction of Courts of First Instance, and for their conviction or acquittal, as the case may be. So true is this that a defendant may not be deprived of his right to have a preliminary investigation without his consent.

(c) That General Espino, as Commanding General of the Philippine Army, had authority to constitute and convene a general court martial to take cognizance of any particular offense charged against an officer or enlisted man of the Armed Forces; that, consequently, the court martial constituted and convened by him, as mentioned above, was lawfully constituted and convened. However, whether in the light of the facts mentioned heretofore, it may proceed to try the army personnel facing a charge for frustrated murder before the Fiscal of Cavite City is precisely the matter involved in the present action.

Now we come to what I consider decisive.

It cannot be denied that after the filing of the criminal complaint for frustrated murder on March 23, 1968, the Fiscal of Cavite City had taken positive steps and had actually exercised jurisdiction over the case, not only by accepting the criminal complaint for docketing, but also (1) by issuing subpoena to the parties charged; (2) by taking cognizance of the motion for postponement filed by the army lawyers who appeared on behalf of the defendants named in the aforesaid criminal complaint and (3) by actually granting their motion for postponement.

All these steps were taken before General Espino received the report of Captain Pontejos; before he convened a general court martial and before he placed several army personnel, amongst them those charged by Arula with frustrated murder, under technical arrest by an order issued on March 27, 1968 but deliberately made retroactive or effective as of March 22, 1968 —five days earlier than the date of its issuance and precisely one day prior to the date when the criminal complaint for frustrated murder was filed by Arula with the City Fiscal of Cavite. Then came the motion of the army lawyers who represented the persons accused of frustrated murder to have the Fiscal of Cavite City dismiss the case upon the ground that the army, through a general court martial, had taken over. This, in my humble opinion, constitutes premeditated undue army interference with the exercise of civilian authority; a step against the rule of law, in general, and destructive of the orderly administration of justice by the

constituted civilian agencies in this country, in particular.

To defeat the present action on yet another technical ground the argument has been advanced that petitioner has no legal capacity or sufficient legal interest to file the action. This is an inane argument with which we disagree.

It is not denied that all the persons charged for frustrated murder in the criminal complaint filed with the City Fiscal of Cavite are also charged before the general court martial referred to above. Neither is it denied that should the court martial proceedings proceed to final judgment and result in their acquittal, they would claim that such acquittal is conclusive upon the Cavite case because to allow it to proceed would place them in jeopardy. While We do not wish to express any final opinion—one way or the other—on this point, We believe that with the certainty that the plea of jeopardy will be raised by the accused, We cannot deny petitioner the right to bring the present action intended to protect his right to prosecute his case to final judgment.

UPON THE FOREGOING, I dissent, my vote being to grant the writs prayed for.

DISSENTING OPINION

SANCHEZ, J.:

In this dissent, we make the prefatory statement that the problem before this Court is not a jurisdictional dispute between two courts of justice created and operating under the same statute—The Judiciary Act of 1948. Rather, we are asked to stop a temporary court-martial convened by military command after criminal proceedings have first been started under civilian authority.

We have no quarrel with the precept that, with respect to the enforcement of penal laws repressible also under the Articles of War, the temporary military court and the permanent ordinary civilian court—in this case, the Court of First Instance of Cavite—wield concurrent jurisdiction over the subject matter. A segment of our jurisprudence has forged the doctrine that the court which first takes cognizance of the case will retain jurisdiction over the same to the exclusion of the other.[1] As amplified in *Crisologo vs. People*, 94 Phil. 477, 482,[2] the court—civil or military—before which an indictment is first levelled against the accused and which acquires custody over the person of the latter retains jurisdiction over the case to the exclusion of the other. And, that court "has priority and the right to conclude the specific litigation." [3] We, however, are of the view that the factual context of this case centers the controversy on which of the two authorities, civil or military, should go forward with the criminal prosecution. We take a second look. There is need for rethinking. A fundamental issue of power to act is involved.

It is in a case like the present where time, the fourth dimension, necessarily comes in. A chronology of the events is then in order. On March 23, 1968, petitioner Jibin Arula filed a criminal complaint for frustrated murder against the accused members of the armed forces before the fiscal of Cavite City.[4] On March 29, the city fiscal issued subpoenae to the accused commanding them to appear at the preliminary investigation to be held on April 3, 1968.[5] On April 2, Arula wrote the commanding officer of the army to advise the latter that he was not filing with the army court any criminal charge against the members of the armed forces for the reason that he had "already filed the corresponding criminal complaint against the said persons with the civil authorities of Cavite City." [6] On April 3, army lawyers, headed by Capt. Jose Magsanoc, appeared before the city fiscal of Cavite, on behalf of the accused, and moved for the postponement of the preliminary investigation to another date. The fiscal obliged and reset the hearing for April 16, 1968.[7]

In the meantime, Commanding General Romeo C. Espino of the Philippine Army directed Capt. Alfredo O. Pontejos to conduct a pre-trial investigation. General Espino had also issued an order, dated March 27, 1968,

placing most of the accused under technical arrest effective March 22, 1968, one day prior to the filing of Arula's complaint with the fiscal's office.[8] On April 6, 1968, Capt. Pontejos submitted his report recommending trial of the accused by general court-martial.[9] On that same day, General Espino appointed the members to constitute the court-martial.[10] Charges and specifications for violations of Articles of War 94 and 97 were then prepared and filed with said army court.[11] Arula's plaint is amongst these charges. On April 16—the very day set by the Cavite City Fiscal for hearing before him—the general court-martial was convened and conducted trial.[12]

Soon thereafter, i.e., on April 19, the same army lawyers— who on April 3 previously sought postponement—moved to dismiss the complaint lodged with the Cavite City Fiscal upon the ground that the civil courts had lost jurisdiction because a court-martial had been convened. The fiscal rejected this motion.[13]

1. It is thus argued that the military court has already acquired jurisdiction over the case, implying the consequence that said court should continue its proceedings. This is anchored on the averment that the military court had priority in point of time over a civil court. The facts which it is claimed operate to fix the jurisdiction of the military court are the levelling of a charge against the accused and the taking of custody over their persons. If strict adherence to technicality were the rule, respondents perhaps may be given the nod. But, for more than one reason, we unhesitatingly label this technicality as meaningless.

We maintain that both the accused military men and the military authority have already waived whatever priority of jurisdiction, if any, the army has over the case.

Cognizance of the case was first taken by the civil authority with the filing of Arula's criminal complaint on March 23 before the fiscal and the initiation of preliminary investigation by the latter. The wheels of civilian justice had thus already started.[14]

On the other hand, the army had still remained inactive. The order of technical arrest dated March 27 but made retroactively effective on March 22—one day before Arula's complaint was lodged with the Cavite City Fiscal—cannot successfully back up the case for respondents. The military command can always make technical arrests of and take custody over its personnel any time it wants to. That arrest is not decisive. When the technical arrest was allegedly made, the military court was not yet convoked. Charges and specifications against the accused were not yet filed. It has been said that the arrest that would confer jurisdiction— over the persons of the accused—on the army court "does not relate to the preliminary arrest or detention of an accused person awaiting the action of higher authority to frame charges and specifications and order a court-martial, but to the arrest resulting from the preferring of the charges by the proper authority and the convening of a court-martial." [15]

The clincher, as stated, is that on the date set for the preliminary investigation, a group of army lawyers headed by Capt. Jose Magsanoc appeared for the accused before the fiscal presumably acting on superior directive, and obviously in obedience to subpoenae to the accused previously released by the fiscal, to ask as they did ask that the hearing on preliminary investigation by the fiscal, an arm of the civil authority, be postponed to another date. They submitted to the fiscal's authority to investigate. And the fiscal, upon their representation, took cognizance thereof in all good faith and reset the date for April 16. We do not hesitate to say that, by this conduct, the military had left and submitted to the civil authority the prosecution of the case against the accused.[16] In *People vs. Mamaril* (C.A.), 45 O.G. No. 8, pp. 3431, 3435, involving a conflict of jurisdiction, the Court of Appeals, thru then Associate Justice Arsenio P. Dizon (now Associate Justice of the Supreme Court), ruled that the U.S. military authorities have "clearly waived whatever jurisdiction they had over them (accused) and the crime they are charged with by allowing the lower court to take cognizance of the case and by allowing their own personnel to testify and push through the prosecution." [17]

We are not to be drawn now into a discussion of the "whitewash" motivation—allegedly because the reputation of

the army could be involved—so vehemently urged upon us by petitioner. That would not enhance analysis. Instead, it would detract us from the thinking we have pursued upon the established facts of this case. We take the view that having cast aside its authority to hear Arula's case in favor of the civil agencies, the army may not make a turn-about thereafter whilst the preliminary investigation is being conducted by the prosecuting attorney of Cavite City. It is in this context that we are persuaded to say that the flow of the fiscal's preliminary investigation should not be arrested by the army lawyers' pose that because the court-martial has since been convened after their motion for postponement was granted, the civil authority should call a halt to that investigation. We are unprepared to scuttle the prosecuting attorney's actuations in this case, much less to tell him to clamp a four-wheel brake, rule himself out and stop his inquiry as the army has taken over.

2. The position we take, we believe, is in consonance with public policy. Conflict should be avoided. As far as is possible we should discourage a race for jurisdiction between the civil authority and the army in the enforcement of the penal laws of this country in those cases where jurisdiction is concurrent. The baneful effects of such a spectacle are easily discernible. It could worsen into a tug-of-war between the two. Rivalries fuel dissension. At the expense of justice itself.

We are not unmindful of the army's protestations that what it had done in the present case was but to render the accused a speedy trial. This is not an overriding consideration. "Speedy trial" only means "one conducted according to fixed rules, regulations, and proceedings of law, free from vexatious, capricious, and oppressive delays." [18] Speed in court-martial proceedings may yet be matched by the regularly established courts.

It results that—because jurisdiction over the person is gauged by time—the time gained by reason of the postponement of the fiscal's investigation may not arguably be seized upon for the purpose of asserting that jurisdiction was conferred/by the time element upon the military tribunal. The two-week respite (postponement was granted on April 3 and the court-martial was convened on April 16) could not have meant to bury the obstacle of priority in taking cognizance of the case.

3. Respondents' position dwindles in strength when we consider that the military authority has practically stepped on the toes of the civil judicature. Of course, it was only a preliminary investigation before the fiscal that was in progress when the army entered the picture.

But the preliminary investigation undertaken by the fiscal cannot be taken as lightly as respondents have. Although such a preliminary investigation is not a trial [19] and is not intended to usurp the function of the trial court, [20] it is not a casual affair. It has been said that the preliminary investigation serves a three-fold purpose: "(1) To inquire concerning the commission of crime and the connection of accused with it, in order that he may be informed of the nature and character of the crime charged against him, and, if there is probable cause for believing him guilty, that the state may take the necessary steps to bring him to trial; (2) to preserve the evidence and keep the witnesses within the control of the state; and (3) to determine the amount of bail, if the offense is bailable." [21] The officer conducting the examination investigates or inquires into facts concerning the commission of a crime with the end in view of determining whether an information may be prepared against the accused. Preliminary investigation indeed provides "a satisfactory means for a realistic judicial appraisal of the merits of the case." [22] Sufficient proof of the accused's guilt must be adduced so that when the case is filed and tried the trial court may not be bound as a matter of law to order an acquittal. [23] A preliminary investigation has thus been called a judicial inquiry; [24] it is a judicial proceeding. [25] After all, an act becomes judicial when there is opportunity to be heard and the production and weighing of evidence and a decision thereon. [26] Importantly, because a preliminary investigation precedes and determines the filing of an information it has been regarded as the commencement of a criminal prosecution. [27] In the words of Mr. Justice Makalintal, speaking for a unanimous court: "Prosecution does not begin with the trial of a case after it is filed in court; it includes the

process of investigation leading to the formal charge." [28]

4. Unless waived, defendant may not be brought to trial on the merits without compliance with the statutory requirement of preliminary investigation. [29] It is, indeed, a part of the judicial process in criminal cases before the ordinary courts. It bears remembering that a criminal prosecution may also start with a complaint by the offended party and initiation or preliminary investigation. [30] That it is conducted by the fiscal, and not by a judge, can have no effect on its nature. For, under particular statutes, [31] the fiscal's authority to preside over a preliminary investigation is no less than that of a municipal judge or even a court of first instance judge. [32]

5. To be emphasized at this point is that in some chartered cities—Cavite City included—the power to conduct preliminary investigations, by their charters, has been taken away from the regular courts and lodged with the prosecuting officials. This is a principle embedded in our case law. All criminal complaints— as distinguished from criminal informations—must first be filed with the City Fiscal. They cannot be lodged directly in court. Under those laws, the courts do not make or conduct a preliminary investigation proper. The City Fiscal's authority in this regard is exclusive. And this, because of specific directives in their charters that the City Fiscal shall investigate all criminal charges. By jurisprudence, such is the rule in Bacolod City, [33] in Manila, [34] and in Cebu City. [35]

Cavite City is unquestionably in a parallel situation. This conclusion is readily extractable from the comparison hereunder made of the Manila and Cavite City charters on this point, viz:

Second paragraph, Section 38, Revised Charter of the City of Manila, Republic Act 409:

Section 24(f), Charter of the City of Cavite, Commonwealth Act 547:

"The fiscal of the city shall cause to be investigated all charges of crimes, misdemeanors, and violations of ordinances and have the necessary informations or complaints prepared or made against the persons accused. He or any of his assistants may conduct such investigations by taking oral evidence of reputed witnesses, and for this purpose may issue subpoena, summon witnesses, to appear and testify under oath before him, and the attendance or evidence of an absent or recalcitrant witness may be enforced by application to the municipal court or the Court of First Instance. No witness summoned to testify under this section shall be under obligation to give any testimony tending to incriminate himself."

"(f) He shall investigate all charges of crimes, misdemeanors, and violations of laws and city ordinances and prepare the necessary informations or make the necessary complaints against the persons accused. He may conduct such investigations by taking oral evidence of reputed witnesses and for this purpose, may, by subpoena, summon witnesses to appear and testify under oath before him, and the attendance or evidence of an absent or recalcitrant witness may be enforced by application to the municipal court or the Court of First Instance."

Since preliminary investigation is regarded as the commencement of the criminal prosecution, a judicial inquiry, a judicial proceeding, and since, in Cavite City, it is only the City Fiscal who can conduct a preliminary

investigation—which is a judicial function—sufficient reasons exist for upholding the Cavite City Fiscal's priority in the premises when he commenced his investigation herein first in point of time.

6. A rule regarding priority of jurisdiction springs essentially from comity,³⁶ "with perhaps no higher sanction than the utility which comes from concord."³⁷ And even if a court has exclusive priority of jurisdiction, it may be waived, and such waiver may be implied.³⁸ By these, a fair sense of justice demands that because inquiry had previously been set on foot by the civilian administration of justice, the military court-martial should give way.

We should not to be understood as saying that the court-martial has no jurisdiction over the subject matter. It has. Only that here the supervening fact of waiver—to try the case and to exercise jurisdiction over the person—has come into play. As the court-martial has been injudiciously convened, it should desist from further proceedings out of courtesy to the civil authority which has the right-of-way. Naturally, if eventually no court action is filed by the City Fiscal, then the court-martial can resume its duties. For, no double jeopardy would as yet attach.

7. To be stressed then is that this matter before us is one of conflict of power between a court-martial and an examining prosecuting attorney whose zone of public duty is part and parcel of the machinery of criminal prosecution, whose preliminary investigation is a judicial proceeding and a part of the judicial process in criminal cases in ordinary courts. No doubt a military court has jurisdiction in peacetime to convene and try cases of those subject to military law. But it should be equally undisputed that city fiscals possess statutory power to take steps by way of commencement of judicial proceedings.

It is in this backdrop that we declare that where, as in the present, defendants subject to military law have, by counsel composed exclusively of army officers, chosen to go to a prosecuting fiscal investigating their case, asked of him to postpone the hearing of the preliminary investigation, thus making a voluntary appearance through army lawyers, it cannot be said that judicial proceedings of civil courts have not started.

Neither can it be said that the army is totally without knowledge of such proceedings commenced by the civil authority. The army lawyers who appeared before the fiscal to seek such postponement, we repeat, must have acted presumably under superior orders, absent any statement to the contrary. Nor do we feel that in the face of these circumstances, the army should thereafter move to constitute a court-martial and confront the civil authority with a *fait accompli*. Since the relationship between the army and the civil authority in the case before us is governed by comity and mutual consideration between equals, there should not be any quibbling as to the fact that priority in taking jurisdiction here resides, with the regular courts of justice created by the latter. A contrary rule carries its own badge of undesirability.

8. We are now in peacetime. We are not under the stress of wartime conditions. It would seem to us that we should focus attention to the legitimate concern of all that justice be done—and fairly. After all, the authority of the army or the civil courts is miniscule compared to the ideal—the people's faith in the dispensation of justice. While the circumstances we are about to relate may not assume relevance on first reading, they may well derail the machinery of justice. If for this reason alone, we feel that we should place on balance the military's understandable concern for discipline in the army and the rights of Arula, a man allegedly subject to military law. The prosecution before the court-martial in his particular case may not prosper without the cooperation of Arula himself. One may not exactly agree with him in his fear of a whitewash and in his stance that he may not obtain justice in the military tribunal. Which, as aforesaid, found expression in his letter of April 2, 1968 to the Commanding General of the Philippine Army, wherein he made it abundantly clear that he has resorted for redress to the civil courts in preference to a military tribunal. Right or wrong, his thinking is that the people whom he believed were responsible for his fate were army men and that the army itself refused him civilian legal aid at a time when he felt that his rights as an offended party could be jeopardized.

We are not to be carried away by these mere allegations made by petitioner. It would not seem out of place though to reproduce in haec verba—if only to draw attention—the following from an opinion delivered by Mr. Justice Black for the Supreme Court of the United States, viz: "Court-martial are typically ad hoc bodies appointed by a military officer from among his subordinates. They have always been subject to varying degrees of 'command influence.' In essence, these tribunals are simply executive tribunals whose personnel are in the executive chain of command. Frequently, the members of the court-martial must look to the appointing officer for promotions, advantageous assignments and efficiency ratings—in short, for their future progress in the service. Conceding to military personnel that high degree of honesty and sense of justice which nearly all of them undoubtedly have, the members of a court-martial, in the nature of things, do not and cannot have the independence of jurors drawn from the general public or of civilian judges." [39]

If the foregoing found space in this dissent, it is but to emphasize our unwillingness to suggest that the Cavite City Fiscal's right to proceed with the investigation should be held junior to that of a court-martial which, in point of time, was created subsequent to the action of said fiscal in starting preliminary investigation proceedings.

9. There should not be any misgivings as to the traditional subordination of military to civil power. Well may we profit from the following observation of Chief Justice Warren of the Supreme Court of the United States, thus: "The history of our country does not indicate that there has ever been a widespread desire to change the relationship between the civil government and the military; and it can be fairly said that, with minor exceptions, military men throughout our history have not only recognized and accepted this relationship in the spirit of the Constitution, but that they have also cheerfully cooperated in preserving it." Chief Justice Warren significantly added: "Thus, it is plain that the axiom of subordination of the military to the civil is not an anachronism. Rather, it is so deeply rooted in our national experience that it must be regarded as an essential constituent of the fabric of our political life." [40]

Mr. Justice Douglas, also of the Supreme Court of the United States, expressed the view that "sedulous care should be taken to restrict and confine the 'cases arising in the land or naval forces' to the narrowest limits consistent with the constitutional purpose of giving the Armed Forces disciplinary power over the troops" as "the contrary course would lead to a widening of the jurisdiction of the military with a consequent loss of liberty of the people." [41]

And, in *U.S. ex rel Toth vs. Quarles*, [42] we read: "There are dangers lurking in military trials which were sought to be avoided by the Bill of Rights and Article 3 of our Constitution. Free countries of the world have tried to restrict military tribunals to the narrowest jurisdiction deemed absolutely essential to maintaining discipline among troops in active service."

The pertinence of the foregoing observations to our system of government cannot simply be shunted aside. For, the subordination of the military to the civil authority is without doubt part of our constitutional structure, reflected in sharp terms in Section 10(2), Article VII of the Constitution, which makes the President of the Philippines commander-in-chief of all our armed forces. [43]

As we now view this case from a detached point, given the circumstances obtaining, the traditional primacy of the civil over the military, and the considerations due regular courts of justice as exalted temples of right, we reach the firm conclusion that the administration of justice here should be left where it started—in the civil judicial system.

10. As we turn back to the preceding pages, we are reminded that all suitors are entitled to nothing short of the cold mentality of an independent, wholly-free, disinterested, and impartial tribunal. [44] This, on the one hand. On the other, we are deeply concerned with the possibility of struggle for power to try a criminal case between the

civil and the military authorities, which must be foreclosed. Combining these laudable ends, it is our purpose now to draw guidelines. Since authority here is upon the broad basis of comity, the desirability of marking out the starting point of priority becomes apparent.

While it is true that a complaint by the offended party may start criminal proceedings, nothing much can be gained by making this the point of beginning. Because the fiscal or the judge, to whom the complaint is addressed, may not act upon it if he is satisfied that the complaint is unmeritorious on its face. Similarly, a complaint lodged with the military authority would serve no purpose if the commanding general is of a similar persuasion, i.e., that the complaint deserves no further action. What really determines the start of proceedings with the army or with the civil authority is the official act taking cognizance of a given criminal case. With the civil authority, the action taken by the fiscal or judge for purposes of conducting a preliminary investigation would suffice. In the case of the army, its authority starts from the moment the superior army officer concerned directs a preliminary investigation of a person subject to military law for purposes of preparing the formal charges and the formation of a court-martial. Army and civil authorities are thus placed on equal footing. And this should be the case because their jurisdiction is concurrent.

The rule that we now set out would clear much of the underbrush which could mar the relations between the army and civilian authorities. First, it would avoid simultaneous preliminary investigations. Defendants and witnesses will not be forced to shuttle from one investigation to another. They will thus be saved the consequent trouble, anxiety, expense and inconvenience, perhaps harassment. Second, there will be no race to reach the goal, the filing of the proper indictment. Because, only one will conduct a preliminary investigation. Friction will thus be avoided. More than this is that the accused will be given a fair chance in that investigation—not attended by undue haste—to show that criminal prosecution should not proceed any further as no probable cause exists. Third, this will do away with a possible inducement to make secure the arrest of the accused by one to prevent the other from acquiring jurisdiction over his person.

In this dissent, we thus express the view that primacy of authority, as between the military and the civil, to pursue a criminal prosecution is to be determined by: (1) waiver, express or implied, by one in favor of the other; or (2) in the absence thereof, which authority, in point of time, first takes official cognizance of the prosecution as here outlined. To the extent that our position here conflicts with *Crisologo vs. People*, 94 Phil. 477, the latter, we believe, should be expressly overruled.^[45] At any rate, the *Crisologo* doctrine of court priority is a mere rule of procedure and, in peacetime, should yield, whenever urged, to the loftier constitutional concept of supremacy of the civil over the military authority.

It is in the light of the foregoing considerations that with all due respect to the majority opinion so ably penned by Mr. Justice Fred Ruiz Castro, we are constrained to dissent. Our dissenting vote is to grant the petition herein for certiorari and prohibition; to declare null and void the special order issued by respondent Commanding General constituting and convening the General Court-Martial, solely and exclusively insofar as it refers to the case for frustrated murder in which petitioner Jibin Arula is the complainant; and, in consequence, to prohibit and restrain the General Court-Martial from proceeding with and trying said case in which Jibin Arula is the offended party.

[1] *People vs. Livara*, 94 Phil. 771, 775.

[2] Cited in *Alimajen vs. Valera*, L-13722, February 29, 1960, a case involving two civil courts, the Justice of the Peace Court and the Court of First Instance.

[3] *Owens vs. Commonwealth*, 105 S.E. 531, 532.

- [4] Annex "A" of the Petition. Corregidor Island where the crime allegedly was committed is within the territorial limits of Cavite City. See: Census of the Philippines. Vol. I, Part II (1954), p. 2131.
- [5] Annex "B" of the Petition.
- [6] Annex "C" of the Petition.
- [7] See: Allegation in par. 11 of the original Petition, p. 3 and admitted in par. 6 of respondents' Answer, p. 2.
- [8] See: Annex 7 of the Answer. Par. 1 thereof states: "Pursuant to AW 70 you are hereby placed under arrest effective as of 22 March 1968 and restricted to camp limits."
- [9] Annex 2 of the Answer; see also supplementary report to pre-trial investigation dated April 14, 1968.
- [10] Annex "E" of the Petition.
- [11] Annex 1 of the Answer.
- [12] Annex 5 of the Answer.
- [13] Annex "C" of Intervenor's Answer; Rollo, pp. 175-177.
- [14] Par. i6 of the Petition avers that the Cavite City Fiscal "is practically through with the preliminary investigation."
- [15] 36 Am. Jur., pp. 252-253, citing United States vs. Smith, 197 U.S. 386, 49 L. ed. 801.
- [16] An examining magistrate obtains jurisdiction over the person of the accused by the latter's voluntary appearance. Commonwealth vs. Poley, 98 A. 2d. 766, 768.
- [17] Italics supplied.
- [18] 21 Am. Jur. 2d., p. 279.
- [19] State vs. Aspinwall , 252 P. 2d. 841, 847; People vs. Podoiski, 52 N.W. 2d. 201, 205; State vs. Wisnewski, 102 N.W. 883; State vs. War, 118 A. 2d. 553, 555.
- [20] People vs. Bieber, 100 N.Y.S. 2d. 821, 824.
- [21] 22 C.J.S., p. 843; State vs. War, supra, at p. 556. People vs. Bieber, supra, at p. 824.
- [23] Id., at p. 823.
- [24] Brisson vs. Warden, 200 A. 2d. 250, 252; State vs. War, supra; State ex rel. Durner vs. Huegin, 85 N.W. 1046, 1058, cited in 21 Am. Jur. 2d. 446.
- [25] 21 Am. Jur. 2d. 447, 450, citing Wood vs. United States, 128 F. 2d. 265, 141 A.L.R. 1318.
- [26] Black's Law Dictionary, p. 1031.
- [27] See: Bustos vs. Lucero, 81 Phil. 640, 650; State vs. Wisnewski, supra.
- [28] People vs. Sayon, L-16986, April 30, 1964; italics supplied.
- [29] U.S vs. Marfori, 35 Phil. 666, 669-670; Conde vs. Judge of First Instance of Tayabas, 45 Phil. 173, 177.
- [30] Section 1, Rule 110, Rules of Court. "The preliminary proceedings are part of a criminal proceeding, and a criminal proceeding generally commences with the preliminary proceedings." 22 C.J.S., p. 790; People vs. Strobe,

272 N.Y.S. 268.

[31] E.g. Charter, Cavite City, Sec. 24(0-

[32] Sections 2 and 13, Rule 112, Rules of Court.

[33] Montelibano vs. Ferrer, 97 Phil. 228, 233.

[34] Sayo vs. Chief of Police, 80 Phil. 859, 869.

[35] Balite vs. People, L-21475, September 30, 1966.

[36] Slamphili vs. U.S., 135 F. 2d. 177, 178; U.S. ex rcl. Pasela vs. Fenno, 76 F. Supp. 203.

[37] Covell vs. Heyman, 111 U.S. 176, 182, 28 L. ed. 390, 393.

[38] 22 C.J.S., p. 306.

[39] Reid vs. Covert, 354 U.S. 1, 36, L.ed. 2d. 1148, 1174 (1957).

[40] The Great Rights, edited by Edmond Cahn, p. 95.

[41] The Rights of the People, William O. Douglas, p. 184.

[42] 350 U.S. 11, 22, 100 L. ed. 8, 17.

[43] Tanada and Fernando, Constitution of the Philippines, 4th ed., vol. 11, p. 1006, citing the opinion of Mr. Justice J.B.L. Reyes in People vs. Pet. CA, G.R. 6990-R, March 10. 1952.

[44] 30 Am. Jur., p. 58.

[45] In Crisologo vs. People, supra, an information was filed on March 12, 1946 in the People's Court against an army captain for treason under Article 114 of the Revised Penal Code. Then, on January 30, 1947, another indictment for the same crime of treason, also a violation of Commonwealth Act 408, otherwise known as the Articles of War, was lodged with a military court created by the Army Chief of Staff. That military court, on May 8, 1947, sentenced the accused to life imprisonment. In the interim, nothing was done at all in the People's Court which was abolished on June 17, 1948 by Republic Act 311, nor in the Court of First Instance of Zamboanga to which the People's Court case was transferred. No warrant of arrest had even been issued by a civil court before sentence was promulgated in the military court. It was alter said sentence that the accused captain was arraigned in the Zamboanga court upon an amended information. He there presented a motion to quash challenging the jurisdiction of the court and pleading double jeopardy because of his previous sentence in the military court. Our ruling was two-fold: (1) the decision of the military court constitutes a bar for further prosecution of the same offense in the civil courts: and (2) the military court, having acquired jurisdiction over the person of the defendant, has jurisdiction of the prosecution to the exclusion of other courts with concurrent jurisdiction of the same offense.

Thus it is, that in Crisologo, judgment had already been rendered by the military court; res judicata had attached. Here, the proceedings—both civil and military— have just commenced. Crisologo then only serves to underscore the known precept that the jurisdiction of civil courts and courts-martial is concurrent. The dispute before us, however, is as to who—between the civil and military authorities—should have preference to carry on the criminal prosecution to its conclusion.

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