NATALIO P. AMARGA, PROVINCIAL FISCAL OF SULU, PETITIONER VS. HONORABLE MACAPANTON ABBAS, AS JUDGE, OF THE COURT OF FIRST INSTANCE OF SULU, RESPONDENT.

G.R. No. L-8666. March 28, 1956

Ponente: PARAS, C.J.

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PARAS, C.J.:

The petitioner, the Provincial Fiscal of Sulu, filed in the Court of First Instance of Sulu an information for murder (criminal case No. 1131, People of the Philippines vs. Madpirol, Awadi, Rajah, Sali, Insa and Maharajah Bapayani). At the foot of the information the petitioner certified under oath that "he has conducted the necessary preliminary investigation pursuant to the provisions of Republic Act No. 732." As the only supporting affidavit was that of Iman Hadji Rohmund Jubair, to the effect that the latter "was told that the deceased was shot and killed by three persons named: Hajirul Appang, Rajah Appang and Awadi Bagali," and the petitioner had failed or refused to present other evidence sufficient to make out a prima facie case, the respondent judge issued an order the dispositive part of which reads as follows: "In view of the foregoing considerations, and considering that the only affidavit supporting the information does not make out a prima fade case, this case is hereby ordered dismissed without prejudice to reinstatement should the provincial fiscal support his information with record of his investigation which in the opinion of the court may support a prima facie case."

Whereupon the petitioner instituted in this court the present petition for certiorari and mandamus, wherein it is contended that, as he had already conducted a preliminary investigation, it became the ministerial function of the respondent judge to issue the corresponding warrant of arrest upon the filing of the information in criminal case No. 1131.

Upon the other hand, the respondent judge argues that the issuance of a warrant of arrest involves a judicial power which necessarily imposes upon him the legal duty of first satisfying himself that there is probable cause, independently of and notwithstanding the preliminary investigation made by the provincial fiscal under Republic Act No. 732; and to that end he may require the fiscal to submit such evidence as may be sufficient to show at least a prima facie case.

Section 1, paragraph 3, of Article III of the Constitution provides that "no warrant shall issue but upon probable cause, to be determined by the judge after examination under oath or affirmation of the complainant and the witnesses he may produce." As was said in the case of U.S. vs. Ocampo, 18 Phil., 1, 41-42, "The question whether 'probable cause' exists or not must depend upon the judgment and discretion of the judge or magistrate issuing the warrant. It does not mean that particular facts must exist in each particular case. It simply means that sufficient facts must be presented to the judge or magistrate issuing the warrant to convince him, not that the particular person has committed the crime, but that there is probable cause for believing that the person whose arrest is sought committed the crime charged. No rule can be laid down which will govern the discretion of the court in this matter. If he decides, upon the proof presented, that probable cause exists, no objection can be made upon

constitutional grounds against the issuance of the warrant. His conclusion as to whether 'probable cause' existed or not is final and conclusive. If he is satisfied that 'probable cause' exists from the facts stated in the complaint, made upon the investigation by the prosecuting attorney, then his conclusion is sufficient upon which to issue the warrant for arrest. He may, however, if he is not satisfied, call such witnesses as he may deem necessary before issuing the warrant. The issuance of the warrant of arrest is prima fade evidence that, in his judgment at least, there existed 'probable cause' for believing that the person against whom the warrant is issued is guilty of the crime charged. There is no law which prohibits him from reaching the conclusion that 'probable cause' exists from the statement of the prosecuting attorney alone, or any other person whose statement or affidavit is entitled to credit in the opinion of the judge or magistrate.

The preliminary investigation conducted by the petitioner under Republic Act No. 732 which formed the basis for the filing in the Court of First Instance of Sulu of criminal case No. 1131 does not, as correctly contended by the respondent judge, dispense with the latter's duty to exercise his judicial power of determining, before issuing the corresponding warrant of arrest, whether or not probable cause exists therefor. The Constitution vests such power in the respondent judge who, however, may rely on the facts stated in the information filed after preliminary investigation by the prosecuting attorney.

While the respondent Judge was within his right in requiring the petitioner to submit further evidence so as to show probable cause for the issuance of a warrant of arrest, he exceeded his jurisdiction in dismissing the case which was filed with the Court of First Instance of Sulu not merely for purposes of preliminary investigation. In other words, the failure or refusal of the petitioner to present further evidence, although good as a ground for the respondent Judge not to issue a warrant of arrest, is not a legal cause for dismissal.

Wherefore, the petition is granted and the respondent Judge ordered to proceed with criminal case No. 1131 in accordance with law, it being understood that, if within ten days after notice by the respondent Judge, the petitioner still fails or refuses to present other necessary evidence, the dismissal will stand for lack of prosecution. Without costs.

Reyes, A., Batuista Angelo, Labrador, Concepcion, Reyes, J. B. L., and Endencia, JJ., concur.

DISSENTING

PADILLA, J.,

I agree with Mr. Justice Montemayor and wish to add that, if the preliminary investigation conducted by the provincial fiscal, as provided for in section 1687 of the Revised Administrative Code, as amended by Republic Act No. 732, takes the place of, or dispenses with, the preliminary investigation referred

Petition to annul and set aside the order of dismissal and to direct the respondent court to issue a warrant of arrest, so that it may acquire jurisdiction over the defendants and proceed with their trial, should be granted.

DISSENTING:

MONTEMAYOR, J.,

The majority opinion seeks to lay down a fundamental doctrine of far-reaching implications and effects which would result in the scrapping and abandonment of laws and of the general practice and followed these many

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years, regarding the issuance of a warrant of arrest. Because I disagree to such doctrine, in my opinion, unreasonable and unwarranted, I find it necessary not only to dissent but also to give my reasons for the same. The facts involved in the present case are without dispute.

Petitioner Natalio P. Amarga, as provincial fiscal of Sulu, after conducting a preliminary investigation in a case of murder where on Dugusan Paspasan was alleged to have been killed by about six Moros in his house in the municipal district of Indana, province of Sulu, filed the corresponding information in criminal case No. 1131 in the Court of First Instance of Sulu. certifying that he had conducted the preliminary investigation pursuant to the provisions of Republic Act No. 732 and that in his opinion the accused herein was probably guilty of the crime charged. According to petitioner, respondent Judge Macapanton Abbas of the Court of First Instance of Sulu asked him for the affidavits and testimonies of the witnesses examined by him in order to satisfy himself (respondent) that there was probable cause. According to petitioner, not desiring to reveal all the evidence in his possession, "for strategic reasons," he delivered to respondent Judge only the affidavit of one Iman Hadji Mohamad Jubair. Said affidavit is to the effect that the affiant had examined the body of the deceased and found gunshot wounds on the same, and that while he was examining the body, he was told that the deceased had been. shot and killed by three persons who are included in the information. Respondent after reading the affidavit was of the opinion that that portion of the same referring to what affiant had been told about the killing of the deceased and the identity of the killers was hearsay, and concluding that there was no probable cause, he dismissed the case for not making out a prima facie case, without prejudice to reinstatement "should the provincial fiscal support his information with record of his investigation which in the opinion of the court may support a prima facie case." Claiming that respondent had gravely exceeded and abused his powers and unlawfully neglected the performance of an act to issue the corresponding warrant of arrest against the persons accused in the information, petitioner provincial fiscal has filed the present petition asking us to order respondent to lift his order of dismissal and to immediately issue the corresponding warrant of arrest in criminal case No. 1131.

In his answer, respondent Judge contends that the issuance of a warrant of arrest involves judicial 'power and that the magistrate called upon to issue said warrant has the right to exercise discretion before issuing the warrant; that even where the fiscal had already conducted the preliminary investigation it is still within the power of the judge before whom the information is filed to satisfy himself that there is probable cause, and that for said purpose, said judge may require additional evidence or affidavits to be presented before issuing the warrant of arrest.

In our study of the present case, we have found no judicial authority or jurisprudence on this particular legal point. What we have found are decisions to the effect that a preliminary investigation conducted by the city fiscal of the City of Manila under its Charter as amended by Act No. 612 of the Philippine Commission is sufficient in law for the purpose of proceeding to the trial of the case; that a person accused in an information filed by the city fiscal of Manila is not entitled to the preliminary investigation provided for in the old criminal procedure (General Orders No. 58) ; and that when a judge issues a warrant of arrest on the strength of a certificate of the city fiscal of Manila that he had conducted the necessary preliminary investigation, the issuance of said warrant of arrest is proof that there was probable cause, because the magistrate before issuing the warrant of arrest is supposed to satisfy himself and find that there was really probable cause. In the City of Manila I have not come across any case where any judge of the city had declined or refused to issue the warrant of arrest on the strength of the certificate filed by the city fiscal that he had conducted the necessary preliminary investigation.

The majority opinion maintains that under our Constitution, particularly section 1, paragraph 3 of Article III thereof, before a warrant of arrest can issue, a judge must first determine whether there is probable cause and he must examine under oath or affirmation the complainant and the witnesses he may produce, and that the question whether probable cause exists or not must depend upon the judgment and discretion of the magistrate issuing the

warrant; and it then proceeds to reproduce but partially the following provisions of the Constitution: "* * *", and no warrants shall issue but upon probable cause, to be determined by the judge after examination under oath or affirmation of the complainant and the witnesses he may produce, and particularly describing the place to be searched, and the persons or things to be seized." The trouble is that the majority has contented itself with reproducing only a part of said section 1, paragraph 3 of Article III of the Constitution. For purposes of reference, we should reproduce the whole paragraph 3 of said section which reads thus:

> "(3) The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures shall not be violated and no warrants shall issue but upon probable cause, to be determined by the judge after examination under oath or affirmation. The complainant and the witnesses he may produce, and particularly describing the place to be searched, and the persons or things to be seized." (Italics supplied.)

Before the promulgation of our Constitution, the provisions in our basic law regarding security against unreasonable searches and seizures and the issuance of warrant upon probable cause were contained in the Philippine Bill of 1902, as amended, and the Jones Law of 1916. They are as follows:

> "That the right to be secure against unreasonable searches and seizures shall not be violated.
> * * * * * *
>
> "That no warrant shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized" (Section 5, Philippine Bill of 1902.)
>
> "That the right to be secure against unreasonable searches and seizures shall not be violated.
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> * * * * * *
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> "That no warrant shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be .searched and the persons or things to be seized." (Section S, Jones Law.)

Our Constitution has combined the two provisions in the Philippine Bill of 1902 and the Jones Law into one single paragraph now contained in section 1, paragraph 3, Article III, above reproduced. It will be noticed that neither in the Philippine Bill of 1902 nor in the Jones Law was it required that before issuing a warrant a judge or magistrate should first determine probable cause by examining under oath or affirmation the complainant and the witnesses he may produce. All that was then required was that the probable cause be supported by oath or affirmation. The question now to determine is whether this new requirement in our Constitution section 1, paragraph 3, Article III, that a magistrate before issuing a warrant must first determine probable cause by examining under oath the complainant and the witnesses he may produce, refers to both warrant of arrest and search warrant, or only to the latter.

I maintain that the new requirement refers to the issuance of a search warrant only and that that was the intention of the members of the Constitutional Convention as may be gathered from their discussion of the draft and the amendment thereto which was finally approved as section 1, paragraph 3, of Article III of the Constitution. Professor Jose A, Aruego, a member of the Constiutional Convention in his book entitled "The Framing of the Philippine Constitution", Vol. I, p. 160 under the heading Security Against Unreasonable Searches, etc. says:

* * * * * *

> "During the debates on the draft, Delegate Francisco proposed an amendment which was adopted by the Convention, the amendment being the insertion of the words, to be determined by the judge after examination under oath or affirmation of the comlainant and the witnesses he may produce. The idea in the Francisco amendment was not new in the Philippines; for it was provided for in the Code of Criminal Procedure of the

> Philippines. The dignification of the idea into constitutional provision was zealously insisted upon, in order to make the principle more sacred to the judges and to prosecuting officials. The amendment was intended to be a remedy for the evils pointed out in the debates, caused by the issuance of search warrants, many of which were in blank, upon mere affidavits on facts most of which are generally found afterwards to be false."

As to the debates on this particular subject of search warrants Atty. Salvador Araneta's Proceedings of the Constitutional Convention, Vol. 6, p. 3006, we find the following:

> SR. FRANCISCO. Senor Presidente, caballeros de la conversion bajo el proyecto del comite de 7, se puede expedir mandamientos de registro, con tal de que la peticion vaya acompanada de un affidavit, en el que aparezcan hechos y circunstancias que demuestren causas probables. Bajo mi enmienda, un juez no puede expidir un mandamiento de registro sino solo despues de haber examinado al denunciante y a sus testigos bajo juramento. Parece ser que la diferencia es grande. El texto en ingles del proyecto dice:
>
> '* * * and no warrants shall issue but upon probable cause, supported by oath or affirmation and particularly describing the place to be searched, and the persons or things to be seized."
>
> Esta expresion ha sido interpretada por los tribunales de America en el sentido de que el juez tiene dos medios: o puede tomar en cuenta para la expedicion de un mandamiento de registro un affidavit en que consten hechos y demuestre la causa probable, o mediante examen del denunciante. Someto a la consideracion de esta asamblea que es completamente peligroso permitir que un juez expida mandamiento de registro, ateniendose exclusivamente o lo que consta en un affidavit. Esta idea de que se puede expedir mandamiento de registro mediante affidavit, o sea, solamente mediante un documento jurado en el que aparezcan hechos probables. No ha sido aceptada en esta jurisdiccion no solamente en la practica sino tambien por la orden general No. 58. Esta convencion, creo que se habia fijado quien en dicha general No. 58 esta disposition que aparece en el proyecto del comite de 7 que es una reproduccion o copia del precepto que aparece en el bill de Filipinas y luego en la ley Jones, aparece reproducido, como ya he dicho, en la orden general No. 58, como articulo 27. (sic) Este articulo 27 (sic), dice lo siguiente: 'No se expedira mandamiento de registro sino por causa probable y por falta de peticion apoyada por juramento.' [Note: this is part of section 97, General Orders No. 58.] Como ya he dicho, "Peticion apoyada por juramento" puede ser testimonio del tcstigo o affidavit. Considerandose, sin embargo, que esto es verdaderamente peligroso para el derecho que tiene un individuo a la seguridad de sus bienes y papeles, nuestro mismo Codigo de Procedimiento Civil [Note: should be. Criminal] inserta en su articulo 28 [Note: should be 98] una disposicion exige como requisito 'sine qua non' el que el juez no puede expidir mandamiento de registro sino mediante el examen de testigos, especialmente del denunciante. Este articulo viene a ser el articulo 28 [98] del codigo de procedimiento civil [criminal] que dice lo siguiente 'El juez de primera instancia o el juez de pazj debera, antes de expidir el mandamiento, examinar bajo juramento al denunciante o a los testigos que presente, eonsignando sus declaraciones por escrito.' De modo que mi enmienda es a tenor o en consonancia con esta disposicion legal.
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> Como ya he dicho, 'si mantuvieramos el precepto del proyecto de constitution, esta disposicion de la orden general No. 58 podra en cierto modo ser contradictoria el precepto del proyecto de constitucion, y nosotros sabemos muy bien que si se aprobara una constitucion en la forma como, este el precepto, cuya enmienda pido, y si encontrara una discrepancia sustancial entre dicho precepto y el codigo de procedimiento civil [criminal] creo que este utilmo tendria que quedarsc derogado 6 al menos no puede mantenerse cste precepto por anti constitucional. Pero yo creo que ninguno de los raiembros de csta asamblea vera que mi enmienda no responde a una razon fundamental y a una necesidad que se ha sentido en la practica. Los abogados, que estamos en el ejercicio de la profesion hemos visto muchas veces casos en que agentes secretos eonsiguen mandamientos de registro solamente mediante la presentation de affidavit que reune los requisites de la ley. Pero que expedido el registro e impugnados despues los terminos del affidavit se descubre que los hechos que aparecen en el mismo son completamente falsos. De ahi que si queremos salvaguardar en todo lo posible derecho de un individuo a arrestos o registros arbitrarios; si queremos que el derecho del individuo a la seguridad de s.us bienes o papeles

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> este rodeado de todas las garantias que puedan impedir o que impidan la peticion de registros imotivados o infundidos que queden dar Iugar a molestias o vejaciones injustas o irreparables, creo que debomos hacer que en nuestra constitucion se consigne el precepto tal como yo propongo que se enmienda." (Araneta, Vol. VI, Proceedings of the Constitutional Convention, pp. 3006-3008.)

The attitude and stand of the framers of the Constitution was conservative, that is, not to incorporate in the Constitution new ideas or principles regarding the issuance of search warrants but merely to incorporate in said document, legislation already existing on the subject-matter so as to make it part of the basic law. This may be gleaned from the statements of delegate Jose P. Laurel, Chairman of the Committee on Bill of Rights, which are as follows:

> "EL SR. LAUREL. * * * ES preciso y que determinemos clararaente, ya que de todos modos queremos rodear de todas las garantias ese derecho importante del ciudadano con respeeto a la propiedad y a la libertad, no debe haber objecion que esa disposision que ya existc actualmente en nuestra legislation, sea incorporada que en nuestra constitucion que vamos a adoptar. (Idem. 3014-15.)
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> * * * * * *
>
> "SR. LAUREL. * * * Si las garantias que deben rodear a esa constitucion son esenciales, hay que incorporarlas en la constitucion, ya que de todos modos exiate esa legislation. (3015.)" (Italics supplied.)

Professor Aruego himself attests to this policy of the Convention not to depart from the then existing legislation because of the philosophy of conservatism. He says:

> "The report of the committee on bill of rights was largely a reproduction of the provisions of the bill of rights of the Jones Law, which is in turn were borrowed from American constitutions. Other provisions of the committee report were drawn from the Malolos constitution and from the constitutions of the Republic of Spain, Italy and Japan.
>
> "The report was struck on a philosophy of conservatism, the same philosophy that pervaded the debates on the same in the Convention. In submitting its draft of the bill of rights to the President of the Convention, the committee on the bill of rights said:
>
> 'Adoption and adaptation have been the relatively facile work of your committee in the formulation of a bill or declaration of rights to be incorporated in the Constitution of the Philippine Islands. No attempt has been made to incorporate new or radical changes. Radicalism, no matter how democratic, may prove detrimental. It were better that we "keep close to the shore; let others venture on the deep."
>
> 'The enumeration of individual rights in the present organic law (Acts of Congress of July 1, 1902, August 29, 1916) is considered ample, comprehensive and precise enough to safeguard abuses or encroachments of the Government, its powers or agents. Your committee, therefore, has not been allured by attractive innovations that are found in some modern constitutions, lest our constitution suffer from the defect of an admixture of "declaration and declamations" in the enunciation of constitutional dogmas.
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> 'Modifications of changes in phraselogy have been avoided, where-ever possible. This is because the principles must remain couched in a language expressive of their historical background nature, extent and limitations, as construed and expounded by the great statesmen and jurists that have vitalized them.'" (Aruego, Vol. I, The Framing of the Philippine Constitution, pp. 149-150.)

Now, what was that existing legislation which the framers of the Constitution wanted to incorporate into that instrument? It is sections 97 and 98 of General Orders No.. 58 which I reproduce below, and which are found under Chapter XIII—search warrant:

> "SEC. 97. A search warrant shall not issue except for probable cause and upon application supported by oath

particularly describing the place to be searched and the person or thing to be seized."

"SEC. 98. The judge or justice must before issuing the warrant, examine on oath the complainant and any witnesses he may produce and tlreir deposition in writing. (Italics supplied.)

From all this, to me it is clear that in drafting, amending, and finally approving section 1, paragraph 3, Article III of the Constitution, the delegates to the Constitutional Convention were satisfied with the practice and procedure then existing about the issuance of warrants of arrest based merely on probable cause supported by oath or affirmation; but they were deeply concerned with issuance of search warrants which according to them had been gravely abused because search warrants had previously been issued on the strength of mere affidavits which later proved to be false; and so to guard against and prevent further abuses they imposed this constitutional requirement that a judge or magistrate before issuing a search warrant must first examine under oath the complainant and the witnesses he may produce. And it will be observed that the phraseology of the requirement in section 1, paragraph 3 of Article III of the Constitution, namely, "examination under oath or affirmation of the complainant and the witnesses he may produce, is a virtual reproduction of the clause "examine on oath the complainant and any witnesses he may produce," contained in Section 98 of General Orders No. 58, on the subject of search warrants.

The framers of the Constitution were fully warranted in surrounding the issuance of search warrants with this additional safeguard and guaranty. A search warrant implies the invasion of the sanctity of a man's home which is said to be his castle. Under a search warrant one's privacy is intruded on, his affairs pried into, his secrets discovered, his papers and personal documents may be ransacked and taken to court and later may be used against him in a criminal prosecution. Searches and seizures under a search warrant are intimately linked with the fundamental rights of a citizen not to be compelled to testify against himself. A citizen is practically helpless against a search warrant and its effects. Papers and documents and articles seized thereunder once taken to court are beyond his reach. He cannot prevent their being utilized as evidence against him. This is why, the framers of the Constitution showed so much concern and solicitude in their discussion on the subject of search warrant, and knowing the abuses and excesses that in the past had been committed under it, decided to surround its issuance with constitutional safeguards. Not so with a warrant of arrest. A person illegally or wrongly arrested under a warrant of arrest improvidently issued, has a ready and simple remedy. He can always sue out a writ of habeas corpus to secure his release from arbitrary or illegal detention. So, there is really no necessity for surrounding the issuance of a warrant of arrest with constitutional safeguards as was done with the issuance of a search warrant. Besides, why make elaborate and render difficult the issuance of a warrant of arrest by a constitutional requirement that a judge must first examine under oath the complainant and his witnesses, when the policy of the Government and the intention of the law has always been to effect arrests quickly and easily, presumably in aid keeping peace and order. Under our law, a warrant of arrest is in many cases not only a peace officer but even a private citizen may without warrant, arrest a person when that person to be arrested has committed, is actually committing1, or is about to commit an offense in his presence; or when an offense has in fact been committed, and he has reasonable ground to believe that the person to be arrested has committed it; or when the person to be arrested is a prisoner who has escaped from a penal establishment. (Section 6, Rule 109, Rules of Court).

But one may ask, if the provision in section 1, paragraph 3, Article III of the Constitution requiring that a judge must examine under oath or affirmation the complainant and the witnesses he may produce, refers only to a search warrant, why is it that the part of said section reading "and particularly describing the place to be searched and the persons or things to be seized" mentions the word "persons") which would convey the idea that warrant of arrest of a person was also contemplated? The mention or inclusion of the word "persons" in the said clause does not necessarily mean arrest. It will be noticed that this same word "person" is contained in section 97 of General Orders No. 58 regarding search warrant, which as already stated, was incorporated into the Constitution under section 1, paragraph 3, Article III. The purpose of a search warrant is to search for and seize personal property

which is alleged to have been stolen or embezzled, and other proceeds or fruits of the offense and property used or intended to be used for committing an offense. (Section 96, General Orders No. 58 and section 1, Rule 122, of the Rules of Court.) Should the official serving a search warrant find in the possession or on the person of the party searched personal properties such as stolen or prohibited articles like counterfeit money, lottery tickets, opium, etc., said party must necessarily be taken to court with such articles because their possession implies the commission of a crime hy him unless satisfactorily explained. Should he convince the judge that opium found in his possession belongs to and was left there by another, or that the stolen goods were bought by him without knowing their illegal origin, or that the counterfeit money found on his person was received by him in payment and without knowing that it was counterfeit, he would be released. In other words, a person's apprehension under a search warrant is made not because he has committed a crime and therefore subject to arrest but because his possession of the goods subject of the search warrant establishes a prima facie connection and link with the commission of a crime which however may be satisfactorily explained and rebutted, resulting in his release.

Judge Cooley in his book entitled Constitutional Limitation, Vol. I, p. 622, under the topic "Unreasonable Searches and Seizures" says:

> "The warrant must also command that the goods or other articles to be searched for, if found, together with the party in whose custody they are found, be brought before the magistrate, to the end that, upon further examination into the facts, the goods, and the party in whose custody they were, may bs disposed of according to law." (Italics supplied.)

This may be the reason why the law and the constitutional provision on search warrants require that such a warrant must particularly describe the place to be searched and the persons or things to be seized.

The apprehension of a person under a warrant of arrest is, however, different. In asking for a warrant of arrest the complainant alleges the commission of a crime and points to a certain person aa the one committing it. Stated differently, a person is expressly and clearly accused of the commission of a crime not clearly linked with the possession of a prohibited article.

Respondent Judge Abbas in refusing to issue the warrant of arrest in the present case claims that the determination of probable cause justifying the issuance of a warrant of arrest is a judicial prerogative or judicial power and he cites the case of U. S. vs. Ocampo, 18 Phil., 42; and the majority opinion sustains him in his contention saying that the determination of probable cause before the issuance of a warrant of arrest is a judicial power. It is interesting, however, to note that when this same case of U. S. vs. Ocampo was appealed to the Supreme Court of the United States, that Tribunal held that it is only a quasi-judicial function or power which can be exercised not only by a judge or magistrate but can be delegated to an executive officer.

> "It is insisted that the finding of probable cause is a judicial act, and cannot properly be delegated to a prosecuting attorney. We think, however, that it is erroneous to regard this function, as performed by committing magistrates generally, or under General Orders, No. 58, as being judicial in the proper sense. There is no definite adjudication. A finding that there is no probable cause is not equivalent to an acquittal, but only entitles the accused to his liberty for the present, leaving him subject to rearrest. It is expressly so provided by section 14 of General Orders, No. 58, as it is by section 2 of Act 194, above quoted. Such was the nature of the duty of a committing magistrate in the common law practice, and it is recognized in Revised Statistics section 1014. U.S. Comp. Stat. 1901, p. 716. Benson vs. McMahon, 127 U.S. 457, 462, 463, 32 L. ed. 234, 236, 237, 8 Supp. Ct. Rep. 1240; Re Otciza y Cortes, 136 U.S. 330, 335, 34 L. ed. 464, 467, 10 Sup. Ct. Rep. 1031, 8 Am. Crim. Rep. 241; Todd us. United States, 158 U.S. 278, 283, 39 L. ed. 982, 15 Sup Ct. Rep. 889. In., short, the function of determining that probable cause exists for the arrest of a person accused is only quasi judicial, and not such that, because of its nature, it must necessarily be confined to a strictly judicial officer or tribunal." (Ocampo vs. U.S., 58 L. ed. 1231, 1235.)

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The case of U. S. vs. Ocampo involved among other things the question of whether a fiscal of the City of Manila under authority of Act No. 612 of the Philippine Commission could determine-probable cause so as to justify the issuance of a warrant of arrest and whether said function devolves exclusively to a judge or magistrate. As already stated, that function of determining probable cause is only a quasi-judicial function or involves only an exercise of quasi-judicial power which may well be performed by a non-judicial officer. This same duty and authority of the fiscal of the City of Manila to conduct preliminary investigation so as to determine probable cause was extended to provincial fiscals conducting preliminary investigations over offenses which fall under the jurisdiction of the Court of First Instance and so we may say that under the authority of Ocampo vs. U. S., supra, the determination of probable cause by the provincial fiscal is the exercise of only a quasi judicial power and can properly be performed by him.

Now,, what was the purpose of delegating this function for determining probable cause through a preliminary investigation to the fiscal of the City of Manila. It was to relieve the Municipal Court and Court of First Instance judges of Manila of this tedious task of conducting preliminary investigation so as to give those judges more time to devote to the trial and determination of criminal cases.

This practice of delegating the conduct of preliminary-investigations to determine probable cause, to the Manila City Fiscal was found apparently so satisfactory and advantageous to the administration of justice that Congress by means of Republic Act No. 732 extended the same function and practice to Provincial Fiscals. But were we to follow the rule and doctrine laid down by the majority in the present case that only a judge or magistrate can determine probable cause, and that to do so he must examine under oath the complainant and the witnesses he may produce, then we could have to scrap and annul Act No. 612 and Republic Act No. 732 and take away from Fiscals the right and authority to conduct preliminary investigations to determine probable cause and require judges to devote their valuable time to said work. This would be a veritable retrogression and a reversion to the old practice and system which experience has shown to be slow and inefficient and which the lawmaking body had corrected by the promulgation of Act No. 612 and Republic Act No. 732. The baneful effects of such a rule could only be imagined. I cannot bring myself to believe that the framers of the Constitution ever contemplated, much less intended it.

But the majority, presumably realizing the adverse effects of such a rule on an efficient and speedy administration of justice, suggests that a judge need not examine under oath the complainant and his witnesses to determine probable cause before issuing a warrant of arrest but that he may rely on the facts stated in the information filed by the fiscal after the preliminary investigation made by said official. I quote the majority opinion on this point. "The preliminary investigation conducted by the petitioner under Republic Act No. 732 which formed the basis for the filing in the Court of First Instance of Sulu of criminal case No. 1131 does not, correctly contended by the respondent judge, dispense with the latter's duty to exercise his judicial power of determining", before issuing the corresponding warrant of arrest, whether or not probable cause exists therefor. The Constitution vests such power in the respondent judge who, however, may rely on the facts stated in the information filed after preliminary investigation by the prosecuting attorney." (Italics supplied.) But how could a judge rely on the facts stated in the information filed by the fiscal, when the Constitution itself, according to the same majority, requires the judge himself to examine under oath the complainant and his witnesses for the purpose of determining probable cause? If as ascerted in the majority opinion above quoted, the determination of probable cause.before issuing a warrant of arrest by examining the complainant and his witnesses under oath, is a duty imposed by the Constitution, then that duty must of necessity be performed. There is no choice or alternative allowed by the Constitution. The judge cannot and may not dispense with and shirk said duty and merely rely on what the fiscal alleges in the information. That would be a clear violation of the Constitution because it would be depriving a person of the

constitutional protection and guarantee extended to a citizen that before a warrant of arrest can be issued against him, judge must first examine under oath the complainant and his witnesses to determine probable cause. This is another reason, in my opinion, why we should hold that this constitutional provision cannot have been intended to refer to the issuance of warrants of arrest.

Let us now consider the question of whether a judge of a Court of First Instance after receiving an information subscribed hy the fiscal with a certification that he had conducted a preliminary investigation and found probable cause, may as was done by respondent judge, refuse to issue the corresponding warrant of arrest. The majority opinion says that he may decline to issue the warrant of arrest because the issuance of that warrant is discretionary, resting upon the judgment or discretion of the judge or magistrate issuing the warrant. I believe, however, that the issuance of a warrant of arrest by a judge or magistrate after receiving the corresponding information and the certification by the Fiscal is mandatory and that said Judge or magistrate must issue the warrant of arrest, unless he questions the regularity or validity of the preliminary investigation conducted by the fiscal. As I have already stated, the Determination of probable cause after preliminary investigation is not purely judicial function but only a quasi-judicial one which can be performed by a non-judicial officer, as held by the Federal Supreme Court in the Ocampo case. The rule and practice in the United States under the jury system is for the Grand Jury to receive evidence about the commission of an offense. If it finds probable cause, it prepares the corresponding indictment and upon presentation thereof to the judge or magistrate, the latter is in duty bound to issue the corresponding warrant of arrest. No judicial discretion is involved.

> * * * Where an indictment fair on its face is returned by the grand jury, the court to which it is returned should issue a warrant for the arrest of the accused as a matter of course." (22 C. J. S., Criminal Law, section 317, p. 469).

In the case of Ex parte United States, 287 U. S. 241, 77 L. ed, 283, decided by the Supreme Court of the United States, the facts were:

> "On March 10, 1932, a grand jury for the district, duly empaneled, returned an indictment against Wingert, charging him with violating certain provisions of the banking laws of the United States. No question is raised as to the regularity of the proceedings before the grand jury, or as to the sufficiency of the indictment. On March 22, the United States attorney presented to the court a written petition praying that a bench warrant issued for Wingert's arrest. The district court, with nothing before it, so far as the record discloses but the petition and the indictment, denied the petition and refused to issue the warrant. The sole ground alleged in the return for such denial is that the matter was within the judicial discretion of the court, and, therefore, not subject to mandamus proceedings." (77 L. ed. 284-285.)

In granting the application for a writ of mandamus, the U. S. Supreme Court made the following pertinent rulings:

> "2. The theory of the court below is that its denial of the petition of the government for a bench warrant was an exercise of its judicial discretion, and, therefore, not reviewable by mandamus. This view of the matter cannot be sustained. The question whether there was probable cause for putting the accused on trial was for the grand jury to determine, and the indictment being fair on its face, the court to which it was returned, upon the application of the United States attorney, should have issued the warrant as a matter of course. Cases are cited said to be the contrary, but they are not in point. * * *
>
> "It reasonably cannot be doubted that, in the court to which the indictment is returned, the finding of an indictment, fair upon its face, by a properly constituted grand jury, conclusively determines the existence of probable cause for the purpose of holding the accused to answer. (Cases cited.) The refusal of the trial court to issue a warrant of arrest under such circumstances is, in reality and effect, a refusal to permit the case to come to a hearing upon either questions of law or of fact, and falls little short of a refusal to permit the enforcement of the law. The authority conferred upon the trial judge to issue a warrant of arrest upon an indictment does

> not, under the circumstances here disclosed, carry with it the power to decline to do so under the guise of judicial discretion; or, as this court suggested in Ex parte United States, 242 U.S. 27, 61 L. ed. 129, 355, the power to enforce does not inherently beget a discretion permanently to refuse to enforce. * * *" (Ex Parte United States, 77 L. ed. 283, 287.)

The jury system was never implanted in these Islands The determination of probable cause thru preliminary investigation before the issuance of a warrant of arrest originally devolved on justices of the peace and judges of Courts of First Instance. Later, however, for purposes of efficiency and time-saving the duty and function was delegated to the Fiscal in the City of Manila under Act No. 612 and later to Provincial Fiscals under Republic Act No. 732. Under these two Acts, the function exercised by the Grand Jury in the United States now correspond to the Fiscal of the City of Manila and Provincial Fiscal. And, just as under the jury system in the United States, after a grand jury has found probable cause and prepared the corresponding indictment the judge or magistrate is bound to issue the corresponding warrants of arrest, so, under legal system and judicial procedure after the Fiscal, counter part of the grand jury, has conducted the preliminary investigation, found probable cause and filed the corresponding information with a certification that he had conducted the preliminary investigation and found probable cause, the judge of the court of First Instance is bound to issue the corresponding warrant of arrest, and if he refuses to do so, he may be compelled by writ of mandamus.

This is the first time to my knowledge that a judge of the Court of First Instance has refused to issue a warrant of arrest despite the fact that the fiscal has filed an information and certified that he had conducted the preliminary investigation and found probable cause. Since the promulgation of Act No. 612 under which the fiscal of the City of Manila exercised this function of conducting preliminary investigation, way back in 1903 until the present, I know of no instance where a judge of the Court of First Instance of Manila has refused to issue the corresponding warrant of arrest on the ground that despite the certificate of the fiscal he is not convinced that there existed probable cause and so he must conduct said investigation by himself.

We must assume that when the framers of the Constitution, many of them able constitutional lawyers, drafted, amended and finally approved the constitutional provision now found in section 1, paragraph 3 of Article III of the Constitution, they were aware of the practice adopted and being followed in the City of Manila since 1903, to the effect that the determination of probable cause thru preliminary investigation was delegated to the city fiscal, and that upon his filing the information and the corresponding certification, the judge invariably issued the corresponding warrant of arrest. Said framers of the Constitution could not by the drafting and by the approval of section 1, paragraph 3, of Article III have intended it to refer to warrants of arrest, because by so doing they would be radically changing, yea, abolishing the practice found efficient and satisfactory in the City of Manila under Act No. 612 for so many years. In this connection, it is interesting to note that in June, 1952, Congress passed Republic Act No. 732 extending to the provinces the practice and procedure in Manila under Act No. 612, and to provincial fiscals the authority of the Manila city fiscal to determine probable cause by conducting preliminary investigations. A good number of the members of Congress who approved Republic Act No. 732 were delegates to the Constitutional Convention and were lawyers. They could not have extended the practice and procedure in Manila under Act No. 612 to the provinces if under section 1, paragraph 3, Article III of the Constitution which they drafted,, they had already abolished said practice.

Before concluding I wish to emphasize that the requirement that a judge must first examine under oath the complainant and his witnesses cannot possibly refer to a warrant of arrest. As shown by the proceedings in the Constitutional Convention, the delegates in considering the subject of the issuance of warrants, discussed only search warrants. They referred to and deplored the abuses that had been committed in the past in the issuance of search warrants and sought to prevent and do away with said abuses by requiring that the judge before issuing a warrant (search warrant) should not be satisfied with mere affidavits but must examine under oath the

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complainant and his witnesses. Nothing, absolutely nothing was said about issuance of warrants of arrest ever having been abused. So the requirement about examination of the complainant and his witnesses under oath by the judge was not designed and could not have been intended to include and cover warrants of arrest for the simple reason that there was neither occasion nor necessity for it.

There might be other reasons or argument but I believe that those already adduced in the present modest dissent are sufficiently adequate to suport the stand that, that portion of section 1, paragraph 3, Article III of the Constitution requiring a judge or magistrate to examine under oath a complainant and his witnesses before issuing the warrant, refers not to warrants of arrest but only to search warrants; that the function of determining probable cause so as to justify the issuance of a warrant of arrest and require the accused to stand trial is only a quasi judicial function which may be exercised by a non-judicial officer, like the Fiscal or prosecuting attorney and that the exercise of such function is properly and lawfully delegated to the city fiscal of Manila under Act No. 612 and provincial fiscals under Republic Act No. 732; that once the fiscal, after conducting the preliminary investigation, finds probable cause, files the information and his certification before a judge, the latter is bound to issue the warrant of arrest, unless he questions the regularity and validity of the preliminary investigation conducted by the Fiscal, because otherwise, the only thing remaining to be done by the judge is for him to determine the legal question whether the facts alleged in the information constitute an offense or violation of ordinance, and issue a warrant of commitment if they do, or of release if they do not. (Sayo vs. Chief of Police, 80 Phil., 859; 45 Off. Gaz., 4889) and lastly, that if a judge refuses to issue the warrant of arrest under said circumstances, as respondent judge has done, he may be compelled to do so by means of a writ of mandamus.

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