

**ANTONIO MARINAS, ANTONIO MONTANO AND GREGORIO RUPISAN,
PETITIONERS, VS. HON. ANDRES S. SIOCHI, PRESIDING JUDGE OF
THE MUNICIPAL COURT OF PASIG, RIZAL, VICTORIA LASIN VDA. DE
ATI...**

G.R. Nos. L-25707 & 25753-25754. May 14, 1981

Ponente: MELENCIO-HERRERA, J.

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MELENCIO-HERRERA, J.:

Before us is a Petition for Certiorari with Pre-liminary Injunction seeking to annul the proceedings held in Criminal Cases Nos. 12943 and 12945 for Theft, and Criminal Case No. 12944 for Grave Coercion, before the Municipal Court of Pasig, Rizal; to annul the warrants of arrest issued in the said cases; and to declare as unconstitutional and void Section 5, Rule 112 of the Rules of Court in so far as it denies the accused the right of notice and opportunity to be heard in the preliminary examination.

The present controversy arose out of the issuance by the Municipal Court of Pasig, Rizal, of a Writ of Execution in Civil Case No. 938 for Ejectment, entitled Jose C. Zulueta vs. Gregorio Atienza. On December 13, 1965, petitioner Antonio Marinas, Deputy Sheriff of Rizal, with his co-petitioners Antonio Montano and Gregorio Rupisan, enforced said Writ of Execution by levying upon the personal properties and chattels of private respondents Victoria Lasin Vda. de Atienza and Rosario L. Atienza, and taking out said properties from their (respondents') rented house at #23 General Malvar St., Antonio Village, Pasig, Rizal. Respondents were also ejected from said house. On the same date, respondent Victoria Lasin Vda. de Atienza reported to the police authorities of Pasig that her jewelry worth P590.00 had been taken by petitioners without issuing any receipt therefor,[1] and in connection therewith, she executed a written Statement which was sworn to before Special Counsel Lucila P. Alcoba.[2]

On January 28, 1966, respondents re-entered the house they had been ejected from after securing a Court Order for that purpose. Respondent Rosario L. Atienza then discovered that several pieces of her jewelry and other personal items, with a total value of P1,018.00, were missing. She reported the loss to the authorities on February 2, 1966, and her Statement was taken. She subscribed and swore to the same before respondent Municipal Judge Andres S. Siochi.[3]

On February 3, 1966, respondents, armed with a Court Order authorizing them to enter the premises of the said house, did so again to get their remaining un-levied properties. They claimed, however, that on the said date petitioners and their companions forcibly compelled them to deliver the unlevied personal properties found therein, hauled said articles into a truck and left. Private respondents reported the incident to the police authorities at Pasig.[4] Victoria Lasin executed a Statement[5] alleging that the personal properties forcibly taken from them by petitioners, amounting to P2,645.00, were not included in the levy. Her son, Tranquilino Atienza, also executed an Affidavit corroborating her declaration.[6] Both Statements were subscribed and sworn to before respondent Judge.

On February 7, 1966, two separate charges for Theft, docketed as Criminal Cases Nos. 12943 and 12945, were filed against petitioners and Carlos Quintana before the Municipal Court of Pasig, Rizal, respondent Judge, pre-siding.[7] A Complaint for Grave Coercion (Crim. Case No. 12944) was also lodged against petitioners and three Does on the same date.[8] The three Complaints were filed by Lt. Jose S. Lontoc, Chief of the Criminal Investigation Section of the Police Department of Pasig, Rizal, for and on behalf of the Chief of Police. These Complaints contained an annotation on the lower left hand corner reading: "APPROVED AFTER PRELIMINARY EXAMINATION: (SGD) Lucila P. Alcoba, Special Counsel." The Complaints in Criminal Cases Nos. 12943 and 12944 for Theft and Grave Coercion, respectively, were subscribed and sworn to by Lt. Jose S. Lontoc before respondent Judge. The Complaint in Criminal Case No. 12945 for Theft does not show the jurat on its face, but respondents state that it was also attested to by Lt. Lontoc before respondent Judge and that this appears on the dorsal side of the Complaint. On February 8, 1966, warrants for the arrest of petitioners were issued by respondent Judge in all three cases[9] after preliminary examination conducted by him in Criminal Cases Nos. 12943 and 12944, and by Special Counsel Lucila P. Alcoba in Criminal Case No. 12945.

Petitioners took exception to the issuance of the warrants of arrest against them and instituted the present Petition raising the following issues:

1. When Section 87, Republic Act No. 296, as amended by Republic Act No. 3828, provides that when the penalty provided by law does not exceed prison correccional, then the Municipal Judge in the capitals of the provinces shall have "like jurisdiction as the Court of First Instance" to try the offense, does the Municipal Court in such cases follow the procedure for Municipal Courts or that for Courts of First Instance?
2. Is preliminary investigation a part of due process?
3. Can there be due process without the presence of the accused during the preliminary investigation?[10]

On February 23, 1966, we required respondents to file an Answer, and ordered the issuance of a Writ of Preliminary Injunction restraining respondent Judge from enforcing the warrants of arrest issued in Criminal Cases Nos. 12943, 12944 and 12945.

Section 87, paragraph 4 of the Judiciary Act of 1948 (R.A. 296), as amended by Republic Acts Nos. 2613 and 3828, provides:

"Municipal judges in the capitals of provinces and judges of city courts shall have like jurisdiction as the Court of First Instance to try parties charged with an offense committed within their respective jurisdiction, in which the penalty provided by law does not exceed prison correccional or imprisonment for not more than six years or fine not exceeding six thousand pesos or both, and in the absence of the district judge, shall have like jurisdiction within the province as the Court of First Instance to hear application for bail."

Pursuant to the foregoing provision, both Criminal Cases Nos. 12943 and 12945, for Theft of P590.00 and P1,018.00, respectively, fall under the concurrent jurisdiction of the Municipal Court of Pasig and the Court of First Instance of Rizal, as the penalty provided for said crimes, pursuant to Article 309 (3) of the Revised Penal Code, is prison correccional in its minimum and medium periods.

Criminal Case No. 12944 for Grave Coercion, with a penalty, under Article 286 of the Revised Penal Code, of arresto mayor and a fine not exceeding P500.00, also falls under the concurrent jurisdiction of the Municipal Court of Pasig and the Court of First Instance of Rizal.[11]

It is petitioners' submission that because of this concurrent jurisdiction, a Municipal Court acts in reality as a Court of First Instance and, consequently, it cannot issue warrants of arrest without first giving the accused a chance to be heard; and that the Information filed should carry a certification under oath that defendant was given

a chance to appear in person at said examination and investigation. Continuing, petitioners argue that since Special Counsel Lucila P. Alcoba of the Office of the Provincial Fiscal of Rizal, in Criminal Cases Nos. 12943 and 12945, merely signed the Complaints for these two cases below the notation, "Approved after preliminary examination", her failure to make the certification under oath to the effect that the accused were given a chance to appear in person or by counsel at said examination and investigation, was violative of the due process clause, and, therefore, the warrants of arrest issued thereafter should be quashed.

Section 14, Rule 112 of the Rules of Court, relied upon by petitioners, provides:

"Section 14. Preliminary examination and investigation by provincial or city fiscal or by state attorney in cases cognizable by the Court of First Instance. – Except when an investigation has been conducted by a judge of first instance, justice of the peace or other officer in accordance with the provisions of the preceding sections, no information for an offense cognizable by the Court of First Instance shall be filed by the provincial or city fiscal, or state attorney, without first giving the accused a chance to be heard in a preliminary investigation conducted by him or by his assistant by issuing a corresponding subpoena. If the accused appears, the investigation shall be conducted in his presence and he shall have the right to be heard, and to cross-examine the complainant and his witnesses, and to adduce evidence in his favor. If he cannot be subpoenaed, or if subpoenaed he does not appear before the fiscal, the investigation shall proceed without him.

The fiscal or state attorney shall certify under oath in the information to be filed by him that the defendant was given a chance to appear in person or by counsel at said investigation and examination."

On the other hand, respondents contend that the governing proviso is the second paragraph of Section 10, Rule 112, referring to the right of an accused to preliminary investigation after arrest, reading: "in cases triable in the municipal or city courts, the accused shall not be entitled as a matter of right to a preliminary investigation in accordance with this section" and that this rule applies whether the case is within the exclusive original jurisdiction of the Municipal Court or within its concurrent jurisdiction with the Court of First Instance.

The issue of whether or not an accused is entitled to appear and present evidence in a preliminary investigation in cases falling within the concurrent jurisdiction of the Municipal Court and the Court of First Instance has been squarely resolved in the negative by this Court, speaking through Mr. Justice Claudio Teehankee, in the cases of *People vs. Abejuela* and *People vs. Endan*,^[12] reiterated in the case of *Banzon vs. Cabato*, 64 SCRA 419 (1975), which decisively held, that even though the offense be one falling within the concurrent jurisdiction of the City Courts and Courts of First Instance, the accused is not entitled as a matter of right to be heard in a preliminary investigation under section 10, Rule 112. The reason is because the case goes to trial already after the arrest of the accused and his delivery to the Court.^[13] "The ensuing trial on the merits takes the place of preliminary investigation, without needless waste or duplication of time and effort, and a final verdict on the innocence (or guilt) of the accused is thereupon rendered, rather than an inconclusive dismissal of the charge by the fiscal in a preliminary investigation which would not constitute jeopardy."^[14] To reiterate and to re-state the rule, therefore, there is no right of preliminary investigation in cases triable by inferior Courts, without distinction as to whether such case be of their exclusive or concurrent jurisdiction.^[15]

What was conducted by the respondent Judge in these cases is the preliminary examination before the issuance of a warrant of arrest pursuant to section 1, Rule 112. The 1935 Constitution, in section 1 (3), Article III, provides that no warrant shall issue but upon probable cause to be determined by the Judge after examination of witnesses under oath or affirmation of the complainant and the witnesses he may produce. Conformably thereto, Section 87, paragraph 3, of the Judiciary Act, as amended by Republic Act No. 3828, provides that: before a Municipal Judge may issue a warrant of arrest, the following conditions must first be fulfilled: (1) he must examine the witness or witnesses personally; (2) the examination must be under oath; and (3) the examination must be reduced

to writing in the form of searching questions and answers.

These requirements have been met in the three criminal cases involved herein. As explained by re-spondent Judge in his Answer:

"Before the warrants of arrest were issued by the respondent Judge in Criminal Cases Nos. 12944 and 12945 (actually 12943 and 12944), he first conducted, on February 8, 1966, the necessary preliminary examination required by Section 1 of Rule 112 by adopting, as his own questions, and by asking the complainants and their witnesses, the same or identical questions asked of them by the Investigating Police officer in their written state-ments before the said Police Investi-gator, Annexes '4', '5', and '7' hereof, and thereafter the respondent Judge required them (the complainants and their witnesses) to subscribe before and make oath to him as to the truth of the answers given by them to the Police Investigator as shown by the fact that in said Annexes '4', '5', and '7', the deponents signed their respec-tive names twice, once before the Investigating Police Officer and the second time before the respondent Judge who also required them to take the jurat to the oath, thereby complying to the requirements of Section 87 of the Judiciary Act of 1948, as amended, providing therein that 'no warrant of arrest shall be issued by any justice of the peace in any criminal case filed with him unless he first examines the witness or witnesses personally, and the examination shall be under oath and reduced to writing in the form of searching questions and answers.'[16]

By "searching questions and answers" is meant:

"the term 'searching questions and answers' means only, taking into consideration the purpose of the preliminary examination which is to determine 'whether there is a reasonable ground to believe that an offense 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', such questions as have tendency to show the commission of a crime and the perpetrator thereof. What would be searching questions would depend on what is sought to be in-quired into, such as: the nature of the offense, the date, time, and place of its commission, the possible motives for its commission; the sub-ject, his age, education, status, financial and social circumstances, his attitude toward the investigation, social attitudes, opportunities to commit the offense; the victim, his age, status, family responsibilities, financial and social circumstances, characteristics, etc. The points that are the subject of inquiry may dif-fer from case to case. The questions, therefore, must to a great degree depend upon the Judge making the investigation. At any rate, the court a quo found that respondent Judge was 'satisfied that the questions and answers contained in the sworn statements taken by T-Sgt. Patosa partake of the nature of his searching questions and answers as required by law,' so the respondent Judge adopted them."[17]

In the language of this Court in *De Mulata vs. Irizari*, 61 SCRA 210, 213 (1974):

"The requirement that the investigating judge must examine the witnesses personally, which examination shall be under oath and reduced to writing in the form of searching questions and answers, is fulfilled where the municipal judge examined under oath the witnesses by asking questions that were adopted from a previous investigation and considered by him as sufficient-ly searching and, which questions and the answers thereto, were in writing and sworn to before him prior to his issuance of the order of arrest."

In regards Criminal Case No. 12945 for Theft, respondent Judge had this to say:

"As regards Criminal Case No. 12943 (actually 12945), although the respondent Judge did not take the oath of the complainant and her witness on the statement given by them to the Police Investigator, Annexes '1' and '2' hereof, Special Counsel Lucila P. Alcoba of the Office of the Provincial Fiscal of Rizal conducted the necessary prelimi-nary examination required by Section 1 of Rule 112 in that, as can be seen from said Annexes '1' and '2', she asked the same or identical questions appearing in said annexes to the deponents and adopted the questioning of the Police Investigator as her own interrogations of the com-plainant and her witness, and thereafter she required them to subscribe their respective names and to swear before her as to the truth of the answers given by them to each and every question appear-ing in said Annexes '1' and '2' and,

although there was no certi-fication, in the exact form required by law, by Special Counsel Lucila P. Alcoba that she conducted the required preliminary examination of the complainant and her witness, it is admitted that her certi-fication in the body of the complaint stating 'Approved after preliminary examination', accompanied by the oath taken by her before the respondent Judge after making such certi-fication, is a substantial compliance to the requirements of the law although it can be said that the same is somewhat defective in form". (pp. 46-47, Rollo)

x x x x

From the foregoing explanation, it may be deduced that respondent Judge was satisfied that the questions and answers in a previous investi-gation by Special Counsel Alcoba partook of the nature of his searching questions and answers and made them his own. As held in *Luna vs. Plaza*, supra, the Judiciary Act as amended by Republic Act No. 3828, does not prohibit the Municipal Judge from adopting the questions asked by a previous investi-gator. For, in the final analysis, whether or not probable cause exists or not depends upon the judg-ment and discretion of the Judge issuing the warrant of arrest (*De Mulata vs. Irizari*, supra). In Crim-inal Case No. 12945 below, respondent Judge had con-vinced himself that probable cause existed before he issued the warrant of arrest. Under the attendant circumstances, respondent Judge may not be said to have acted arbitrarily.

We reiterate, however, the reminder in the *Luna* case (supra), reading:

"We wish to stress, however, that what has been stated in this opinion is certainly not intended to sanction the return to the former practice of municipal judges of simply relying upon affidavits or sworn statements that are made to accompany the complaints that are filed before them, in determining whether there is a probable cause for the issuance of a warrant of arrest. That practice is precisely what is sought to be voided by the amendment of Section 87(c) of Republic Act 296 (Judiciary Act of 1948) which requires that before a municipal judge issues a warrant of arrest he should first satisfy himself that there is a probable cause by examining the witnesses personally, and that the examination must be under oath and reduced to writing in the form of searching questions and answers. It is obvious that the purpose of this amendment is to prevent the issuance of a warrant of arrest against a person based simply upon affidavits of witnesses who made, and swore to, their statements before a person or persons other than the judge before whom the criminal complaint is filed. We wish to emphasize strict compliance by municipal or city judges of the provision of Section 87(c) of the Judiciary Act of 1948, as amended by Republic Act 3828, in order to avoid malicious and/or unfounded criminal prosecution of persons (*Luna vs. Plaza*, supra p. 323).

Petitioners further maintain that Section 5 of Rule 112 of the Rules of Court, in so far as it authorizes the Municipal Court to conduct a preliminary examination before the issuance of a Warrant of Arrest without pre-vious notice to the accused, is unconstitutional as it violates the guarantee of equal protection of the laws, and Section 1 (15), Art. III of the 1935 Constitution which states, "No person shall be held to answer for a criminal offense without due process of law." Section 5, Rule 112 provides:

"The municipal, the city judge, the fiscal or the municipal mayor who conducts the preliminary examination as provided in these rules must take under oath, either in the presence or in the ab-sence of the accused, the testimony of the complainant and his witnesses. The testimony of the complain-ant and his witnesses shall be reduced to writing and signed by them."

The preliminary examination referred to is defined, under Section 1 of Rule 112, as a previous inquiry or examination made before the arrest of the accused by a Judge or officer authorized to conduct the same, with whom a Complaint or Information has been filed imputing the commission of an offense cognizable by the Court of First Instance, for the purpose of determining whether there is a reasonable ground to believe that an offense 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. This section does not refer to the preliminary investigation proper provided for under

Section 10, Rule 112, in which the accused is given access to the testimony and evidence presented against him at the preliminary examination, and to present evidence if he so desires.

From Section 5 of Rule 112, *supra*, it is clear that, unlike in the preliminary investigation proper, an accused is not entitled as a matter of right to be present, during the preliminary examination nor to cross-examine the witnesses presented against him before his arrest, the purpose of said examination being merely to determine whether or not there is sufficient reason to issue a warrant of arrest.[18] Section 1 (3), Article III of the 1935 Constitution commanding the determination of probable cause prior to issuance of a warrant arrest, requires no notice to an accused. A preliminary examination is generally a proceeding *ex-parte* in which the person charged has no right to participate or be present. The right to confrontation of witnesses neither applies to a preliminary hearing. The reason therefor has been explained thus:

"x x x It can not be seriously contended that an accused person has a right to be present during this stage of the proceedings. To hold that he had such a right and to reverse a judgment of conviction on this ground would have the effect of destroying the very purpose of that part of the criminal law. It would be against public policy. It is frequently essential that such investigations be kept secret and that the accused should have no suspicion of any complaint against him, otherwise he might avoid punishment for his crime by escaping before arrest." (U.S. vs. Grant, et al., 18 Phil. 122, 147)

"x x x it is often the only means of discovering the persons who may reasonably be charged with the crime so as to enable the fiscal to prepare his complaint or information, x x x." (People vs. Badilla, 48 Phil., 719, 731)

While section 1(3) Art. III of the 1935 Constitution does require, before the issuance of a warrant of arrest, the determination of probable cause by the Judge after examination of witnesses under oath or affirmation of the complainant and the witnesses he may produce, the curtailment of the presence of an accused during that preliminary examination entails no infringement of the constitutional right to due process of law nor to equal protection of the laws. Thus, in *Manzano vs. Villa*,[19] this Court categorically held:

"The preliminary examination conducted by the municipal judge was essentially a procedural matter and no substantial rights of the accused were violated just because he had not been given an opportunity to examine the witnesses against him. The first stage of the preliminary investigation is 'not the occasion for full and exhaustive presentation of parties' evidence but only such as may engender well-grounded belief that an offense has been committed and that the accused is probably guilty thereof.' The proceeding is usually held *ex-parte*, for under section 5 of Rule 112 all that is required is for the judge conducting such examination to 'take under oath, either in the presence or absence of the accused, the testimony of the complainant and his witnesses,' said testimony to be reduced to writing and signed by them. Hence, the absence of the accused during the preliminary examination was not a denial of due process of law."

Neither can the withholding of the right of preliminary investigation from the accused in cases triable by inferior Courts be termed an unjust or unfair distinction, as explained in *People vs. Abejuela*, *supra*:

"x x x The loss of time entailed in the conduct of preliminary investigations, with the consequent extension of deprivation of the accused's liberty, in case he fails to post bail, which at times outlasts the period of the penalty provided by law for the offense, besides the mental anguish suffered in protracted litigations, are eliminated with the assurance of a speedy and expeditious trial for the accused, upon his arraignment (without having to undergo the second stage of the preliminary investigation), and of a prompt verdict on his guilt or innocence. On the other hand, the so-called first stage of preliminary investigation or the preliminary examination, conducted by the duly authorized officer, as borne out by the examination and sworn written statements of the complainants and their witnesses, generally suffices to establish the existence of reasonable ground to charge the accused with having committed the offense complained of."

Attention should also be called to the fact that neither the 1935 nor the 1973 Constitution requires the holding of a preliminary investigation. It is settled doctrine that the right thereto is of statutory character and may be invoked only when specifically created by statute.[20] It is not a fundamental right and may be waived expressly or by silence.[21]

In a nutshell, the proceedings in these three criminal cases conformed to law and jurisprudence. But even conceding that petitioners were entitled to a preliminary investigation, the proper forum before which absence thereof should have been raised and ventilated was in the trial Court, not in an appellate Court because the absence of preliminary investigation does not go to the jurisdiction of the Court but merely to the regularity of the proceedings, and bearing in mind that preliminary investigation can be waived, as in fact, it is frequently waived.[22]

WHEREFORE, the Petition is hereby denied and the Writ of Preliminary Injunction heretofore issued is hereby lifted.

Costs against petitioners.

SO ORDERED.

Teehankee, Makasiar, Fernandez, Guerrero, Abad Santos, and De Castro, JJ., concur.

Fernando, C.J., filed a separate opinion of concurrence with a partial dissent.

Barredo, J., concurs in the above opinion and joins the opinion of Justice Aquino.

Aquino, J., see concurring opinion.

Concepcion, Jr., J., on leave.

[1] p. 60, Rollo.

[2] pp. 57-58, *ibid*.

[3] pp. 67-69, *ibid*.

[4] pp. 65-66, *ibid*.

[5] pp. 61-63, *ibid*.

[6] p. 64, *ibid*.

[7] pp. 16 & 17, *ibid*.

[8] p. 18, *ibid*.

[9] pp. 19-21, *ibid*.

[10] pp. 2-3, Petitioners' Memorandum, pp. 115-116, Rollo.

[11] *People vs. Fernando*, 23 SCRA 867 (1968).

[12] 38 SCRA 324 (1971).

[13] *People vs. Abejuela*, *supra*.

[14] *Banzon vs. Cabato*, *supra*.

[15] *People vs. Abejuela*, *supra*.

[16] pp. 45-46, Rollo.

[17] Luna vs. Plaza, 26 SCRA 313, 320-321 (1968).

[18] De Mulata vs. Irizari, 61 SCRA 210 (1974).

[19] 46 SCRA 711 (1972).

[20] People vs. Abejuela, supra.

[21] People vs. Mabuyo, 63 SCRA 532 (1975).

[22] Medina vs. Orozco, 18 SCRA 1168 (1966).

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CONCURRING OPINION

AQUINO, J.:

I concur in the result. It is lamentable and deplorable that the three non-capital criminal cases filed against the petitioners (two theft cases and a grave coercion case) have been pending for more than fifteen years and have not been tried due to the baseless procedural technicality raised by the petitioners for dilatory purposes. That maneuver is a monkey wrench which disrupted the proceedings in the municipal court.

The delay in cases like the instant case is one factor which undermines public confidence in the expeditious and effective administration of justice.

Notwithstanding petitioners' pretension, no issue of due process or denial of a constitutional right is involved in those cases.

Since respondent municipal judge conducted the requisite preliminary examination (first stage of the preliminary investigation) in conformity with Republic Act No. 3828, he has the right to try the case. The petitioners are not entitled to demand that the second stage of the preliminary investigation be held.

After the preliminary examination and the arraignment, the cases can be tried by the municipal court. The second stage of the preliminary investigation would overlap with the trial of the cases. Such overlapping should be avoided. (See *Natividad vs. Robles*, 87 Phil. 834; *People vs. Colicio*, 88 Phil. 196.)

The preliminary examination conducted by the municipal judge is a sufficient safeguard against hasty, malicious and oppressive prosecutions and is intended to prevent the innocent from being subjected to a useless, vexatious and expensive trial.

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SEPARATE OPINION OF CONCURRENCE WITH A PARTIAL DISSENT

FERNANDO, C.J.:

It is with regret that I am unable to concur fully with the scholarly and exhaustive opinion of Justice Melencio-Herrera. It is quite evident, for me at least, that the question before us calls for the expression of views on the two stages of preliminary investigation, first the preliminary examination before the issuance of the warrant of arrest and thereafter the preliminary investigation proper. There has been at times a blurring of the distinction in our decisions. It is my submission that as in all other legal issues, reliance on what the Constitution ordains supplies the needed clarification.

1. It is gratifying to note that there is again a reaffirmance in this decision of the constitutional aspect of the preliminary examination. The present Constitution is quite clear: "The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures of whatever nature and for any purpose shall not be violated, and no search warrant or warrant of arrest shall issue except upon probable cause to be determined by the judge, or such other responsible officer as may be authorized by law, after examination under oath or affirm-ation 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." [1] It used to be, under the 1935 Consti-tution, the fundamental law in force at the time petitioners were indicted, the sole prerogative of a judge. Now the phrase, "such other responsible officer as may be authorized by law," has been added. It is not for me an improvement insofar as the right to personal freedom is concerned. It is, however, provided for, and once such responsible officer is so authorized, he could issue a warrant of arrest, but always after examination under oath or affirmation of the complainant and the witnesses he may produce. No such official of the government has been vested with such competence.

2. Respondent judge admitted that in Criminal Case No. 12945 for theft, he "did not take the oath of the complainant and her witnesses on the statement given by them to the Police Investigator," having allowed a special counsel of the Office of the Provincial Fiscal to conduct the preliminary examination, with such counsel asking merely "the same or identical questions," and adopting "the questioning of the Police Investigator as her own interrogations of the complainant and her witness," with the sole safeguard that she required them to swear before her as to the truth of their answers. I am not prepared to accept the view that the constitutional requirement has been satisfied. To that extent, I cannot join the opinion of the Court.

3. I subscribe fully to the ruling of the Court that under the 1935 Constitution, as is likewise the case under the present Charter, the presence of the accused at the preliminary examination when a judge has to determine the existence of a probable cause to justify the issuance of a warrant of arrest is not necessary. It suffices that the complainant and the witnesses he may produce be examined, to satisfy which requirement the applicable statute has wisely provided that the examination be reduced to writing in the form of searching questions and answers. [2] The allegation, there-fore, that there is a denial of due process finds no support in the wording of the Constitution. Nor is there any merit to the contention that solely because of such absence, the accused could invoke the equal protection guarantee.

4. I must qualify my concurrence with the paragraph of the opinion of the Court immediately before the dispositive portion. It reads thus: "In a nutshell, the proceedings in these three criminal cases conformed to law and jurisprudence. But even conceding that petitioners were entitled to a preliminary investigation, the proper forum before which absence thereof should have been raised and ventilated was in the trial Court, not in an

appellate Court because the absence of preliminary investigation does not go to the jurisdiction of the Court but merely to the regularity of the proceedings, and bearing in mind that preliminary investigation can be waived, as in fact, it is frequently waived." [3] If all that it signifies is that the absence of a preliminary investigation does not of itself raise a constitutional question, then I am in full agreement. Where, however, a preliminary investigation was in fact conducted, the proceedings had, if infected by unfairness or arbitrariness could, to my mind, raise a due process question. In which case, there may be a resort to an appellate tribunal. It is true that in *People v. Abejuela*, [4] the earlier case of *People v. Monton*, where a preliminary investigation, although admittedly not a constitutional requirement, could raise a due process question, was, in the language of this Court, "deemed to have been overturned by the Court's later pronouncements in the series of cases above cited." [5] I would qualify such pronouncement, however, by the principle that the fundamental postulate that any actuation by a public official if vitiated by an infirmity amounting to injustice or unfairness condemned by the due process guarantee justifies the filing of the appropriate special civil action in an appellate tribunal. Hence my qualified concurrence.

[1] Article IV, Section 3.

[2] Cf. Section 87, par. (c) of Republic Act No. 296, as amended (1948).

[3] Opinion, 15.

[4] L-29715, March 31, 1971, 38 SCRA 324.

[5] Ibid, 336. The cases cited are *People v. Figueroa*, L-24273, April 30, 1949, 27 SCRA 1239; *People v. Marquez*, L-23654, March 28, 1969, 27 SCRA 808; *Zacarias v. Cruz*, L-25899, November 29, 1969, 30 SCRA 728; *Bandiala v. Court of First Instance*, L-24652, September 30, 1970, 35 SCRA 237; *People v. La Caste*, L-29083, February 27, 1971, 37 SCRA 767.

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