

ROLITO GO Y TAMBUNTING, PETITIONER, VS. THE COURT OF APPEALS; THE HON. BENJAMIN V. PELAYO, PRESIDING JUDGE, BRANCH 168, REGIONAL TRIAL COURT, NCJR PASIG, M.M.; AND PEOPLE OF THE...

G.R. No. 101837. February 11, 1992

Ponente: FELICIANO, J.

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FELICIANO, J.:

According to the findings of the San Juan Police in their Investigation Report,[1] on 2 July 1991, Eldon Maguan was driving his car along Wilson St., San Juan, Metro Manila, heading towards P. Guevarra St. Petitioner entered Wilson St., where it is a one-way street and started travelling in the opposite or "wrong" direction. At the corner of Wilson and J. Abad Santos Sts., petitioner's and Maguan's cars nearly bumped each other. Petitioner alighted from his car, walked over and shot Maguan inside his car. Petitioner then boarded his car and left the scene. A security guard at a nearby restaurant was able to take down petitioner's car plate number. The police arrived shortly thereafter at the scene of the shooting and there retrieved an empty shell and one round of live ammunition for a 9mm caliber pistol. Verification at the Land Transportation Office showed that the car was registered to one Elsa Ang Go.

The following day, the police returned to the scene of the shooting to find out where the suspect had come from; they were informed that petitioner had dined at Cravings Bake Shop shortly before the shooting. The police obtained a facsimile or impression of the credit card used by petitioner from the cashier of the bake shop. The security guard of the bake shop was shown a picture of petitioner and he positively identified him as the same person who had shot Maguan. Having established that the assailant was probably the petitioner, the police launched a manhunt for petitioner.

On 8 July 1991, petitioner presented himself before the San Juan Police Station to verify news reports that he was being hunted by the police; he was accompanied by two (2) lawyers. The police forthwith detained him. An eyewitness to the shooting, who was at the police station at that time, positively identified petitioner as the gunman. That same day, the police promptly filed a complaint for frustrated homicide[2] against petitioner with the Office of the Provincial Prosecutor of Rizal. First Assistant Provincial Prosecutor Dennis Villa Ignacio ("Prosecutor") informed petitioner, in the presence of his lawyers, that he could avail himself of his right to preliminary investigation but that he must first sign a waiver of the provisions of Article 125 of the Revised Penal Code. Petitioner refused to execute any such waiver.

On 9 July 1991, while the complaint was still with the Prosecutor, and before an information could be filed in court, the victim, Eldon Maguan, died of his gunshot wound(s).

Accordingly, on 11 July 1991, the Prosecutor, instead of filing an information for frustrated homicide, filed an information for murder[3] before the Regional Trial Court. No bail was recommended. At the bottom of the information, the Prosecutor certified that no preliminary investigation had been conducted because the accused

did not execute and sign a waiver of the provisions of Article 125 of the Revised Penal Code.

In the afternoon of the same day, 11 July 1991, counsel for petitioner filed with the Prosecutor an omnibus motion for immediate release and proper preliminary investigation,[4] alleging that the warrantless arrest of petitioner was unlawful and that no preliminary investigation had been conducted before the information was filed. Petitioner also prayed that he be released on recognizance or on bail. Provincial Prosecutor Mauro Castro, acting on the omnibus motion, wrote on the last page of the motion itself that he interposed no objection to petitioner being granted provisional liberty on a cash bond of P100,000.00.

On 12 July 1991, petitioner filed an urgent ex-parte motion for special raffle[5] in order to expedite action on the Prosecutor's bail recommendation. The case was raffled to the sala of respondent Judge, who, on the same date, approved the cash bond[6] posted by petitioner and ordered his release.[7] Petitioner was in fact released that same day.

On 16 July 1991, the Prosecutor filed with the Regional Trial Court a motion for leave to conduct preliminary investigation[8] and prayed that in the meantime all proceedings in the court be suspended. He stated that petitioner had filed before the Office of the Provincial Prosecutor of Rizal an omnibus motion for immediate release and preliminary investigation, which motion had been granted by Provincial Prosecutor Mauro Castro, who also agreed to recommend cash bail of P100,000.00. The Prosecutor attached to the motion for leave a copy of petitioner's omnibus motion of 11 July 1991.

Also on 16 July 1991, the trial court issued an Order[9] granting leave to conduct preliminary investigation and cancelling the arraignment set for 15 August 1991 until after the prosecution shall have concluded its preliminary investigation.

On 17 July 1991, however, respondent Judge *motu proprio* issued an Order,[10] embodying the following: (1) the 12 July 1991 Order which granted bail was recalled; petitioner was given 48 hours from receipt of the Order to surrender himself; (2) the 16 July 1991 Order which granted leave to the prosecutor to conduct preliminary investigation was recalled and cancelled; (3) petitioner's omnibus motion for immediate release and preliminary investigation dated 11 July 1991 was treated as a petition for bail and set for hearing on 23 July 1991.

On 19 July 1991, petitioner filed a petition for certiorari, prohibition and mandamus before the Supreme Court assailing the 17 July 1991 Order, contending that the information was null and void because no preliminary investigation had been previously conducted, in violation of his right to due process. Petitioner also moved for suspension of all proceedings in the case pending resolution by the Supreme Court of his petition; this motion was, however, denied by respondent Judge.

On 23 July 1991, petitioner surrendered to the police.

By a Resolution dated 24 July 1991, this Court remanded the petition for certiorari, prohibition and mandamus to the Court of Appeals.

On 16 August 1991, respondent Judge issued an order in open court setting the arraignment of petitioner on 23 August 1991.

On 19 August 1991, petitioner filed with the Court of Appeals a motion to restrain his arraignment.

On 23 August 1991, respondent judge issued a Commitment Order directing the Provincial Warden of Rizal to admit petitioner into his custody at the Rizal Provincial Jail. On the same date, petitioner was arraigned. In view, however, of his refusal to enter a plea, the trial court entered for him a plea of not guilty. The trial court then set the criminal case for continuous hearings on 19, 24 and 26 September; on 2, 3, 11 and 17 October; and on 7, 8,

14, 15, 21 and 22 November 1991.[11]

On 27 August 1991, petitioner filed a petition for habeas corpus[12] in the Court of Appeals. He alleged that in view of public respondents' failure to join issues in the petition for certiorari earlier filed by him, after the lapse of more than a month, thus prolonging his detention, he was entitled to be released on habeas corpus.

On 30 August 1991, the Court of Appeals issued the writ of habeas corpus.[13] The petition for certiorari, prohibition and mandamus, on the one hand, and the petition for habeas corpus, upon the other, were subsequently consolidated in the Court of Appeals.

The Court of Appeals, on 2 September 1991, issued a resolution denying petitioner's motion to restrain his arraignment on the ground that that motion had become moot and academic.

On 19 September 1991, trial of the criminal case commenced and the prosecution presented its first witness.

On 23 September 1991, the Court of Appeals rendered a consolidated decision[14] dismissing the two (2) petitions, on the following grounds:

- a. Petitioner's warrantless arrest was valid because the offense for which he was arrested and charged had been "freshly committed." His identity had been established through investigation. At the time he showed up at the police station, there had been an existing manhunt for him. During the confrontation at the San Juan Police Station, one witness positively identified petitioner as the culprit.
- b. Petitioner's act of posting bail constituted waiver of any irregularity attending his arrest. He waived his right to preliminary investigation by not invoking it properly and seasonably under the Rules.
- c. The trial court did not abuse its discretion when it issued the 17 July 1991 Order because the trial court had the inherent power to amend and control its processes so as to make them conformable to law and justice.
- d. Since there was a valid information for murder against petitioner and a valid commitment order (issued by the trial judge after petitioner surrendered to the authorities whereby petitioner was given to the custody of the Provincial Warden), the petition for habeas corpus could not be granted.

On 3 October 1991, the prosecution presented three (3) more witnesses at the trial. Counsel for petitioner also filed a "Withdrawal of Appearance"[15] with the trial court, with petitioner's conformity.

On 4 October 1991, the present Petition for Review on Certiorari was filed. On 14 October 1991, the Court issued a Resolution directing respondent Judge to hold in abeyance the hearing of the criminal case below until further orders from this Court.

In this Petition for Review, two (2) principal issues need to be addressed: first, whether or not a lawful warrantless arrest had been effected by the San Juan Police in respect of petitioner Go; and second, whether petitioner had effectively waived his right to preliminary investigation. We consider these issues seriatim.

In respect of the first issue, the Solicitor General argues that under the facts of the case, petitioner had been validly arrested without warrant. Since petitioner's identity as the gunman who had shot Eldon Maguan on 2 July 1991 had been sufficiently established by police work, petitioner was validly arrested six (6) days later at the San Juan Police Station. The Solicitor General invokes *Nazareno v. Station Commander, etc., et al.*[16] one of the seven (7) cases consolidated with *In the Matter of the Petition for Habeas Corpus of Roberto Umil, etc. v. Ramos, et al.*[17] where a majority of the Court upheld a warrantless arrest as valid although effected fourteen (14) days after the killing in connection with which *Nazareno* had been arrested. Accordingly, in the view of the Solicitor General, the provisions of Section 7, Rule 112 of the Rules of Court were applicable and because petitioner had declined to waive the provisions of Article 125 of the Revised Penal Code, the Prosecutor was legally justified in

filing the information for murder even without preliminary investigation.

On the other hand, petitioner argues that he was not lawfully arrested without warrant because he went to the police station six (6) days after the shooting which he had allegedly perpetrated. Thus, petitioner argues, the crime had not been "just committed" at the time that he was arrested. Moreover, none of the police officers who arrested him had been an eyewitness to the shooting of Maguan and accordingly none had the "personal knowledge" required for the lawfulness of a warrantless arrest. Since there had been no lawful warrantless arrest, Section 7, Rule 112 of the Rules of Court which establishes the only exception to the right to preliminary investigation, could not apply in respect of petitioner.

The reliance of both petitioner and the Solicitor General upon *Umil v. Ramos* is, in the circumstances of this case, misplaced. In *Umil v. Ramos*, by an eight-to-six vote, the Court sustained the legality of the warrantless arrests of petitioners made from one (1) to fourteen (14) days after the actual commission of the offenses, upon the ground that such offenses constituted "continuing crimes." Those offenses were subversion, membership in an outlawed organization like the New Peoples Army, etc. In the instant case, the offense for which petitioner was arrested was murder, an offense which was obviously commenced and completed at one definite location in time and space. No one had pretended that the fatal shooting of Maguan was a "continuing crime."

Secondly, we do not believe that the warrantless "arrest" or detention of petitioner in the instant case falls within the terms of Section 5 of Rule 113 of the 1985 Rules on Criminal Procedure which provides as follows:

"Sec. 5. Arrest without warrant; when lawful. -- A peace officer or a private person may, without a warrant, arrest a person;

(a) When, in his presence, the person to be arrested has committed, is actually committing, or is attempting to commit an offense;

(b) When an offense has in fact just been committed, and he has personal knowledge of facts indicating that the person to be arrested has committed it; and

(c) When the person to be arrested is a prisoner who has escaped from a penal establishment or place where he is serving final judgment or temporarily confined while his case is pending, or has escaped while being transferred from one confinement to another.

In cases falling under paragraphs (a) and (b) hereof, the person arrested without a warrant shall be forthwith delivered to the nearest police station or jail, and he shall be proceeded against in accordance with Rule 112, Section 7."

Petitioner's "arrest" took place six (6) days after the shooting of Maguan. The "arresting" officers obviously were not present, within the meaning of Section 5(a), at the time petitioner had allegedly shot Maguan. Neither could the "arrest" effected six (6) days after the shooting be reasonably regarded as effected "when [the shooting had] in fact just been committed" within the meaning of Section 5 (b). Moreover, none of the "arresting" officers had any "personal knowledge" of facts indicating that petitioner was the gunman who had shot Maguan. The information upon which the police acted had been derived from statements made by alleged eyewitnesses to the shooting -- one stated that petitioner was the gunman; another was able to take down the alleged gunman's car's plate number which turned out to be registered in petitioner's wife's name. That information did not, however, constitute "personal knowledge."^[18]

It is thus clear to the Court that there was no lawful warrantless arrest of petitioner within the meaning of Section 5 of Rule 113. It is clear too that Section 7 of Rule 112, which provides:

"Sec. 7. When accused lawfully arrested without warrant. When a person is lawfully arrested without a warrant

for an offense cognizable by the Regional Trial Court the complaint or information may be filed by the offended party, peace officer or fiscal without a preliminary investigation having been first conducted, on the basis of the affidavit of the offended party or arresting office or person.

However, before the filing of such complaint or information, the person arrested may ask for a preliminary investigation by a proper officer in accordance with this Rule, but he must sign a waiver of the provisions of Article 125 of the Revised Penal Code, as amended, with the assistance of a lawyer and in case of non-availability of a lawyer, a responsible person of his choice. Notwithstanding such waiver, he may apply for bail as provided in the corresponding rule and the investigation must be terminated within fifteen (15) days from its inception.

If the case has been filed in court without a preliminary investigation having been first conducted, the accused may within five (5) days from the time he learns of the filing of the information, ask for a preliminary investigation with the same right to adduce evidence in his favor in the manner prescribed in this Rule." (Underscoring supplied)

is also not applicable. Indeed, petitioner was not arrested at all. When he walked into the San Juan Police Station, accompanied by two (2) lawyers, he in fact placed himself at the disposal of the police authorities. He did not state that he was "surrendering" himself in all probability to avoid the implication he was admitting that he had slain Eldon Maguan or that he was otherwise guilty of a crime. When the police filed a complaint for frustrated homicide with the Prosecutor, the latter should have immediately scheduled a preliminary investigation to determine whether there was probable cause for charging petitioner in court for the killing of Eldon Maguan. Instead, as noted earlier, the Prosecutor proceeded under the erroneous supposition that Section 7 of Rule 112 was applicable and required petitioner to waive the provisions of Article 125 of the Revised Penal Code as a condition for carrying out a preliminary investigation. This was substantive error for petitioner was entitled to a preliminary investigation and that right should have been accorded him without any conditions. Moreover, since petitioner had not been arrested, with or without a warrant, he was also entitled to be released forthwith subject only to his appearing at the preliminary investigation.

Turning to the second issue of whether or not petitioner had waived his right to preliminary investigation, we note that petitioner had from the very beginning demanded that a preliminary investigation be conducted. As earlier pointed out, on the same day that the information for murder was filed with the Regional Trial Court, petitioner filed with the Prosecutor an omnibus motion for immediate release and preliminary investigation. The Solicitor General contends that that omnibus motion should have been filed with the trial court and not with the Prosecutor, and that petitioner should accordingly be held to have waived his right to preliminary investigation. We do not believe that waiver of petitioner's statutory right to preliminary investigation may be predicated on such a slim basis. The preliminary investigation was to be conducted by the Prosecutor, not by the Regional Trial Court. It is true that at the time of filing of petitioner's omnibus motion, the information for murder had already been filed with the Regional Trial Court: it is not clear from the record whether petitioner was aware of this fact at the time his omnibus motion was actually filed with the Prosecutor. In *Crespo v. Mogul*,^[19] this Court held:

"The preliminary investigation conducted by the fiscal for the purpose of determining whether a prima facie case exists warranting the prosecution of the accused is terminated upon the filing of the information in the proper court. In turn, as above stated, the filing of said information sets in motion the criminal action against the accused in Court. Should the fiscal find it proper to conduct a reinvestigation of the case, at such stage, the permission of the Court must be secured. After such reinvestigation the finding and recommendations of the fiscal should be submitted to the Court for appropriate action. While it is true that the fiscal has the quasi judicial discretion to determine whether or not a criminal case should be filed in court or not, once the case had already been brought to Court whatever disposition the fiscal may feel should be proper in the case thereafter should be addressed for the consideration of the Court. The only qualification is that the action of the Court

must not impair the substantial rights of the accused, or the right of the People to due process of law.

x x x x x x x x

The rule therefore in this jurisdiction is that once a complaint or information is filed in Court any disposition of the case [such] as its dismissal or the conviction or acquittal of the accused rests in the sound discretion of the Court. Although the fiscal retains the direction and control of the prosecution of criminal cases even while the case is already in Court he cannot impose his opinion on the trial court. The Court is the best and sole judge on what to do with the case before it. x x x"[20] (Citations omitted; underscoring supplied)

Nonetheless, since petitioner in his omnibus motion was asking for preliminary investigation and not for a re-investigation (Crespo v. Mogul involved a re-investigation), and since the Prosecutor himself did file with the trial court on the 5th day after filing the information for murder, a motion for leave to conduct preliminary investigation (attaching to his motion a copy of petitioner's omnibus motion), we conclude that petitioner's omnibus motion was in effect filed with the trial court. What was crystal clear was that petitioner did ask for a preliminary investigation on the very day that the information was filed without such preliminary investigation, and that the trial court was five (5) days later apprised of the desire of the petitioner for such preliminary investigation. Finally, the trial court did in fact grant the Prosecutor's prayer for leave to conduct preliminary investigation. Thus, even on the (mistaken) supposition apparently made by the Prosecutor that Section 7 of Rule 112 of the Revised Court was applicable, the 5-day reglementary period in Section 7, Rule 112 must be held to have been substantially complied with.

We believe and so hold that petitioner did not waive his right to a preliminary investigation. While that right is statutory rather than constitutional in its fundament since it has in fact been established by statute, it is a component part of due process in criminal justice.²⁰ The right to have a preliminary investigation conducted before being bound over to trial for a criminal offense and hence formally at risk of incarceration or some other penalty, is not a mere formal or technical right; it is a substantive right. The accused in a criminal trial is inevitably exposed to prolonged anxiety, aggravation, humiliation, not to speak of expense; the right to an opportunity to avoid a process painful to any one save, perhaps, to hardened criminals, is a valuable right. To deny petitioner's claim to a preliminary investigation would be to deprive him of the full measure of his right to due process.

The question may be raised whether petitioner still retains his right to a preliminary investigation in the instant case considering that he was already arraigned on 23 August 1991. The rule is that the right to preliminary investigation is waived when the accused fails to invoke it before or at the time of entering a plea at arraignment.^[21] In the instant case, petitioner Go had vigorously insisted on his right to preliminary investigation before his arraignment. At the time of his arraignment, petitioner was already before the Court of Appeals on certiorari, prohibition and mandamus precisely asking for a preliminary investigation before being forced to stand trial.

Again, in the circumstances of this case, we do not believe that by posting bail, petitioner had waived his right to preliminary investigation. In *People v. Selfaison*,^[22] we did hold that appellants there had waived their right to preliminary investigation because immediately after their arrest, they filed bail and proceeded to trial "without previously claiming that they did not have the benefit of a preliminary investigation."^[23] In the instant case, petitioner Go asked for release on recognizance or on bail and for preliminary investigation in one omnibus motion. He had thus claimed his right to preliminary investigation before respondent Judge approved the cash bond posted by petitioner and ordered his release on 12 July 1991. Accordingly, we cannot reasonably imply waiver of preliminary investigation on the part of petitioner. In fact, when the Prosecutor filed a motion in court asking for leave to conduct preliminary investigation, he clearly if impliedly recognized that petitioner's claim to

preliminary investigation was a legitimate one.

We would clarify, however, that contrary to petitioner's contention the failure to accord preliminary investigation, while constituting a denial of the appropriate and full measure of the statutory process of criminal justice, did not impair the validity of the information for murder nor affect the jurisdiction of the trial court.[24]

It must also be recalled that the Prosecutor had actually agreed that petitioner was entitled to bail. This was equivalent to an acknowledgment on the part of the Prosecutor that the evidence of guilt then in his hands was not strong. Accordingly, we consider that the 17 July 1991 order of respondent Judge recalling his own order granting bail and requiring petitioner to surrender himself within forty-eight (48) hours from notice, was plainly arbitrary considering that no evidence at all -- and certainly no new or additional evidence -- had been submitted to respondent Judge that could have justified the recall of his order issued just five (5) days before. It follows that petitioner was entitled to be released on bail as a matter of right.

The final question which the Court must face is this: how does the fact that in the instant case, trial on the merits has already commenced, the Prosecutor having already presented four (4) witnesses, impact upon, firstly, petitioner's right to a preliminary investigation and secondly, petitioner's right to be released on bail? Does he continue to be entitled to have a preliminary investigation conducted in respect of the charge against him? Does petitioner remain entitled to be released on bail?

Turning first to the matter of preliminary investigation, we consider that petitioner remains entitled to a preliminary investigation although trial on the merits has already begun. Trial on the merits should be suspended or held in abeyance and a preliminary investigation forthwith accorded to petitioner.[25] It is true that the Prosecutor might, in view of the evidence that he may at this time have on hand, conclude that probable cause exists; upon the other hand, the Prosecutor conceivably could reach the conclusion that the evidence on hand does not warrant a finding of probable cause. In any event, the constitutional point is that petitioner was not accorded what he was entitled to by way of procedural due process.[26] Petitioner was forced to undergo arraignment and literally pushed to trial without preliminary investigation, with extraordinary haste, to the applause from the audience that filled the courtroom. If he submitted to arraignment and trial, petitioner did so "kicking and screaming," in a manner of speaking. During the proceedings held before the trial court on 23 August 1991, the date set for arraignment of petitioner, and just before arraignment, counsel made very clear petitioner's vigorous protest and objection to the arraignment precisely because of the denial of preliminary investigation.[27] So energetic and determined were petitioner's counsel's protest and objection that an obviously angered court and prosecutor dared him to withdraw or walkout, promising to replace him with counsel de oficio. During the trial, just before the prosecution called its first witness, petitioner through counsel once again reiterated his objection to going to trial without preliminary investigation; petitioner's counsel made of record his "continuing objection." [28] Petitioner had promptly gone to the appellate court on certiorari and prohibition to challenge the lawfulness of the procedure he was being forced to undergo and the lawfulness of his detention.[29] If he did not walkout on the trial, and if he cross-examined the prosecution's witnesses, it was because he was extremely loath to be represented by counsel de oficio selected by the trial judge, and to run the risk of being held to have waived also his right to use what is frequently the only test of truth in the judicial process.

In respect of the matter of bail, we similarly believe and so hold that petitioner remains entitled to be released on bail as a matter of right. Should the evidence already of record concerning petitioner's guilt be, in the reasonable belief of the Prosecutor, strong, the Prosecutor may move in the trial court for cancellation of petitioner's bail. It would then be up to the trial court, after a careful and objective assessment of the evidence on record; to grant or deny the motion for cancellation of bail.

To reach any other conclusion here, that is, to hold that petitioner's rights to a preliminary investigation and to bail were effectively obliterated by evidence subsequently admitted into the record would be to legitimize the deprivation of due process and to permit the Government to benefit from its own wrong or culpable omission and effectively to dilute important rights of accused persons well-nigh to the vanishing point. It may be that to require the State to accord petitioner his rights to a preliminary investigation and to bail at this point, could turn out ultimately to be largely a ceremonial exercise. But the Court is not compelled to speculate. And, in any case, it would not be idle ceremony; rather it would be a celebration by the State of the rights and liberties of its own people and a re-affirmation of its obligation and determination to respect those rights and liberties.

ACCORDINGLY, the Court Resolved to GRANT the Petition for Review on Certiorari. The Order of the trial court dated 17 July 1991 is hereby SET ASIDE and NULLIFIED, and the Decision of the Court of Appeals dated 23 September 1991 hereby REVERSED.

The Office of the Provincial Prosecutor is hereby ORDERED to conduct forthwith a preliminary investigation of the charge of murder against petitioner Go, and to complete such preliminary investigation within a period of fifteen (15) days from commencement thereof. The trial on the merits of the criminal case in the Regional Trial Court shall be SUSPENDED to await the conclusion of the preliminary investigation.

Meantime, petitioner is hereby ORDERED released forthwith upon posting of a cash bail bond of One Hundred Thousand Pesos (P100,000.00). This release shall be without prejudice to any lawful order that the trial court may issue, should the Office of the Provincial Prosecutor move for cancellation of bail at the conclusion of the preliminary investigation.

No pronouncement as to costs. This Decision is immediately executory.

SO ORDERED.

Narvasa, C.J., Gutierrez, Jr., Bidin, Medialdea, Romero, and Nocon, JJ., concur.

Melencio-Herrera, Paras, Padilla, Regalado, and Davide, Jr., JJ., join J. Griño-Aquino in her dissenting opinion. Cruz, J., see separate concurrence.

[1] Annex "A" of Petition; Rollo, pp. 29-32.

[2] Rollo, p. 28.

[3] Annex "B" of Petition, Rollo, pp. 33-34.

[4] Annex "C" of Petition, Rollo, pp. 35-43.

[5] Annex "D" of Petition, Rollo, pp. 44-45.

[6] Annexes "E" and "E-1" of Petition, Rollo, pp. 46-48.

[7] Annex "F" of Petition, Rollo, p. 49.

[8] Annex "G" of Petition, Rollo, pp. 50-51.

[9] Annex "G-1" of Petition, Rollo, p. 52.

[10] Annex "H" of Petition, Rollo, pp. 54-55.

[11] Annex "J" of Petition, Rollo, pp. 57-58.

[12] Annex "K" of Petition, Rollo, pp. 59-66.

[13] Annex "K-1" of Petition, Rollo, pp. 67-68.

[14] Annex "N" of Petition, Rollo, pp. 109-120.

[15] Annex "A" of Comment, Rollo, p. 154.

[16] G.R. No. 86332.

[17] G.R. No. 81567, promulgated 3 October 1991.

[18] *People v. Burgos*, 144 SCRA 1 (1986).

[19] 151 SCRA 462 (1987).

[20] 151 SCRA at 469-471.

20 *Doromal v. Sandiganbayan*, 177 SCRA 354 (1989); *San Diego v. Hernandez*, 24 SCRA 110 (1968); *People v. Monton*, 23 SCRA 1024 (1968); *People v. Oandasan*, 25 SCRA 277 (1968); *Lozada v. Hernandez*, 92 Phil. 1051 (1953); *U.S. v. Banzuela*, 31 Phil. 564 (1915).

[21] *People v. Monteverde*, 142 SCRA 668 (1986); *People v. Gomez*, 117 SCRA 72 (1982); *People v. Marquez*, 27 SCRA 808 (1969); *People v. de la Cerna*, 21 SCRA 569 (1967).

[22] 110 Phil. 839 (1961).

[23] 110 Phil. at 848.

[24] *People v. Gomez*, supra: *People v. Yutila*, 102 SCRA 264 (1981); *People v. Casiano*, 111 Phil. 73 (1961).

[25] In *Rodis, Sr. v. Sandiganbayan*, 2nd Division (166 SCRA 618 [1988]), the Court said:

"x x x And while the absence of preliminary investigations does not affect the court's jurisdiction over the case (n)or do they impair the validity of the information or otherwise render it defective, but, if there were no preliminary investigations and the defendants, before entering their plea, invite the attention of the court to their absence, the court, instead of dismissing the information, should conduct such investigation, order the fiscal to conduct it or remand the case to the inferior court so that the preliminary investigation may be conducted. In this case, the Tanodbayan has the duty to conduct the said investigation.

Thus, although the Sandiganbayan was correct in ruling that the absence of a preliminary investigation is not a ground for quashing an information, it should have held the proceedings in the criminal cases in abeyance pending resolution by the Tanodbayan of petitioner's petition for reinvestigation, as alternatively prayed for by him in his motion to quash. (166 SCRA at 623-624)

In *Paredes v. Sandiganbayan* (193 SCRA 464 [1991]), the Court stated:

"x x x The remedy of the accused in such a case is to call the attention of the court to the lack of a preliminary investigation and demand, as a matter of right, that one be conducted. The court, instead of dismissing the information, should merely suspend the trial and order the fiscal to conduct a preliminary investigation. Thus did we rule in *Ilagan v. Enrile*, 139 SCRA 349." (193 SCRA at 469)

[26] Section 14 (1), Article III, 1987 Constitution: "No person should be held to answer for a criminal offense without due process of law."

[27] ATTY. ARMOVIT:

x x x. We are sad to make the statement that it would seem that the government now in this proceeding would like to become the law breaker. Why do we say this, Your Honor. The Information for a serious crime of murder was filed against the accused without the benefit of the preliminary investigation. As a matter of fact, Your Honor, the want of preliminary investigation has been admitted by no less than the Investigating Fiscal himself. x x x

x x x x x x x x

ATTY. ARMOVIT:

Why do we say the government becomes a law breaker. We have a case of US vs. Marfori. It says and I quote (counsel reading said portion in open court). x x x Likewise in San Diego v. Hernandez, the Supreme Court says and I quote, (counsel reading said portion in open court). All of these doctrines had been recently quoted in the case of Doromal v. Sandiganbayan. In addition to this, we have filed a motion before this Court. The Motion to Suspend Proceedings and Transfer Venue which is set for hearing on 28 August 1991. The arguments we cited in this motion to suspend proceedings and to transfer venue are not invention of this counsel.

ATTY. FLAMINIANO:

He is talking to the motion which is set for August 28, Your Honor.

ATTY. ARMOVIT:

I want to be heard, Your Honor.

ATTY. FLAMINIANO:

The Motion is set for August 28 and he is now arguing on that motion.

COURT:

I am going to stop you. You concentrate on the motion before the Court.

FISCAL VILLA IGNACIO:

The pending incident is for the arraignment of the accused, Your Honor.

COURT:

What we are doing are not pertinent to the issue. This would be unprocedural.

ATTY. ARMOVIT:

What we are trying to say, Your Honor, why do you rush with the arraignment of the accused when there are several unresolved incidents. The special civil action before the Court of Appeals where we questioned the very validity

COURT:

Until now the Court of Appeals has not given due course regarding that.

ATTY. ARMOVIT:

The government rushes with the proceedings here. In the Court of Appeals they filed a motion for extension of ten days from August 19 or until August 29 to comment on that special civil action. There are dozens of cases which languishes 2, 3, 4 to 5 years. Why so special and selective in the treatment of this case. I ask that question.

COURT:

Before you proceed, can you cite an incident before this Court where the preliminary investigation has been delayed.

FISCAL VILLA IGNACIO:

The information was filed last July 11, 1991. Today is August 23. Where is the rush in arraigning the accused.

COURT:

Heard enough. Proceed with the arraignment of the accused.

ATTY. ARMOVIT:

In my 30 years of practice, this is the first time I am stopped by the Court in the middle of my arguments.

FISCAL VILLA IGNACIO:

You are wasting the time of the court.

COURT:

Order in the court. Order in the court.

ATTY. ARMOVIT:

I want to make of record that there has been clapping after the manifestation of the Hon. Fiscal, Your Honor.

COURT:

Let us proceed with the arraignment.

ATTY. ARMOVIT:

May I conclude citing, Your Honor, the Supreme Court decision.

COURT:

I have made my ruling. The accused is entitled to speedy trial. That is the reason why this arraignment was set for today.

ATTY. ARMOVIT:

May I move for a reconsideration, Your Honor.

COURT:

The motion for reconsideration is denied. Proceed with the arraignment of the accused.

ATTY. ARMOVIT:

Your Honor, may we move that we be given a period of five days to file a motion to quash information.

FISCAL VILLA IGNACIO:

This is plain dilatory tactics, Your Honor.

COURT:

In view of the refusal of the accused to enter a plea on account of the advice of his lawyer, let therefore a plea of not guilty be entered into the record of this case.

ATTY. ARMOVIT:

I would like to move for a ruling on our motion to be given five days to file a motion to quash. We did not hear the ruling on that point, Your Honor.

COURT:

As prayed for, counsel for accused is hereby given a period of five days from today within which to file his Motion to Quash, x x x.

It is understood that the Motion to Quash will not in anyway affect the arraignment of the accused.

ATTY. ARMOVIT:

Considering the favorable ruling of the Court that we were given five days to file a motion to quash, may we move that the Court order the entering a plea of not guilty of the accused be expunged from the record, otherwise, we will deem to have waived our right to file a motion to quash.

x x x x x x x x

ATTY. ARMOVIT:

With due respect considering that there are very serious criminal law question involved in this proceedings, we respectfully submit that it is premature. Besides, I have unresolved motion to inhibit the Presiding Judge.

COURT:

I will cut you there x x x assuming you were given five days to file a motion to quash, it doesn't mean the arraignment is considered moot and academic. The arraignment stands including the plea of not guilty to the offense as charged. I am asking you whether you are availing the pre-trial without prejudice to filing a motion to quash.

ATTY. ARMOVIT:

Consistently, there is no valid proceedings before this Court. I would rather not participate in this case. But if it is the Court's order then we'll have to submit, but from this representation we will not voluntarily submit.

x x x x x x x x

ATTY. ARMOVIT:

This representation manifested that I would rather not participate in this case. But if it is the Court's order we would submit to the Order of this Court because we are officers of the law not that we are already representing the accused. May we respectfully move to strike out from the record the inofficious order of the Hon. Prosecutor to appoint a counsel de oficio. The accused is entitled to counsel de parte.

FISCAL VILLA IGNACIO:

But counsel de parte refuses to participate, in which the incumbent court can appoint a PAO lawyer in case of the absence of counsel de parte.

COURT:

The objection of the Public Prosecutor is well taken. That is the procedure of the Court, that if the accused has no counsel de parte we always appoint a counsel de oficio for the accused.

ATTY. ARMOVIT:

We respectfully submit that accused in criminal case is entitled to his counsel of his own choice. May we at least allow the accused to express his opinion or decision on matters as to who should give him legal representation.

COURT:

You just said earlier you don't want to participate in the proceedings.

ATTY. ARMOVIT:

That is not what I said. I said that we'll not voluntarily participate but if it is the Court's order, certainly the accused has the right of his own counsel of choice.

COURT:

The Court will now reiterate ordering the trial of this case.

x x x x x x x x" (TSN, 23 August 1991, pp. 2-9; underscoring supplied)

During the hearing held on 4 September 1991, before the Court of Appeals, in the Petition for Habeas Corpus, counsel for petitioner recounted in detail what took place before the trial court and stressed the objection entered by the petitioner before the trial court and that petitioner participated in the proceedings below not voluntarily but under the coercive power of the trial judge. Counsel concluded:

"x x x Again I said, Your Honors, we are not participating in this proceedings, but we will submit to what the Judge rules because that is all we can do. While we object we have to submit. That is why, Your Honors, dates were set out of compulsion not because we voluntarily participated but we reserved our right, Your Honors, to pursue our special civil action and so that is why these dates came about." (TSN, 4 September 1991, Records in C.A.-G.R. Nos. SP-25800 and 25530, pp. 37-39; underscoring supplied).

[28] The relevant portion of transcript of stenographic notes reads as follows:

"COURT:

And considering that the Court has not been restrained by the Court of Appeals despite the petition, let the trial of this case proceed.

ATTY. ARMOVIT:

Your Honor please may we just record a continuing objection on the grounds that are cited in our petition for habeas corpus and certiorari to conduct the further proceedings this Court and by the way Your Honor, we do not consider unfortunate the deliberation and serious thoughts our higher courts are giving in respect to a consideration of the constitutional right of the accused invoked before that body rather it is the most judicial act of uplifting the highest court of our land.

COURT:

Alright proceed.

PP VILLA IGNACIO:

We call on our first witness to the witness stand, Mr. Nicanor Bayhona. (TSN, 19 September 1991, p. 6; underscoring supplied).

[29] In *People v. Lambino* (103 Phil. 504 [1958]), Lambino, before commencement of trial, demanded his right to preliminary investigation. His motion for preliminary investigation was denied by the trial court which, in due course of time, convicted Lambino. On appeal, the Supreme Court held that the trial court did not err in denying Lambino's motion for preliminary investigation because said motion was filed after he had entered a plea of not guilty and because he took no steps to bring the matter to a higher court to stop the trial of the case. The Supreme Court said:

"x x x Again, before the commencement of the trial, appellant reiterated his petition for a preliminary investigation, which was overruled, nevertheless appellant took no steps to bring the matter to higher courts and stop the trial of the case; instead he allowed the prosecution to present the first witness who was able to testify and show the commission of the crime charged in the information. By his conduct, we held that he waived his right to a preliminary investigation and is estopped from claiming it." (103 Phil. at 508; underscoring supplied)

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CONCURRING OPINION**CRUZ, J.:**

I was one of the members of the Court who initially felt that the petitioner had waived the right to preliminary investigation because he freely participated in his trial and his counsel even cross-examined the prosecution witnesses. A closer study of the record, however, particularly of the transcript of the proceedings footnoted in the ponencia, reveals that he had from the start demanded a preliminary investigation and that his counsel had reluctantly participated in the trial only because the court threatened to replace him with a counsel de oficio if he did not. Under these circumstances, I am convinced that there was no waiver. The petitioner was virtually compelled to go to trial. Such compulsion and the unjustified denial of a clear statutory right of the petitioner vitiated the proceedings as violative of procedural due process.

It is true that the ruling we lay down here will take the case back to square one, so to speak, but that is not the petitioner's fault. He had a right to insist that the procedure prescribed by the Rules of Court be strictly observed. The delay entailed by the procedural lapse and the attendant expense imposed on the Government and the defendant must be laid at the door of the trial judge for his precipitate and illegal action.

It appears that the trial court has been moved by a desire to cater to public opinion to the detriment of the impartial administration of justice. The petitioner as portrayed by the media is not exactly a popular person. Nevertheless, the trial court should not have been influenced by this irrelevant consideration, remembering instead that its only guide was the mandate of the law.

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DISSENTING OPINION

AQUINO, J.:

I regret that I cannot agree with the majority opinion in this case. At this point, after four (4) prosecution witnesses have already testified, among them an eyewitness who identified the accused as the gunman who shot Eldon Maguan inside his car in cold blood, and a security guard who identified the plate number of the gunman's car, I do not believe that there is still need to conduct a preliminary investigation the sole purpose of which would be to ascertain if there is sufficient ground to believe that a crime was committed (which the petitioner does not dispute) and that he (the petitioner) is probably guilty thereof (which the prosecutor, by filing the information against him, presumably believed to be so).

In the present stage of the presentation of the prosecution's evidence, to return the case to the Prosecutor to conduct a preliminary investigation under Rule 112 of the 1985 Rules on Criminal Procedure would be supererogatory.

This case did not suffer from a lack of previous investigation. Diligent police work, with ample media coverage, led to the identification of the suspect who, seven (7) days after the shooting, appeared at the San Juan police station to verify news reports that he was the object of a police manhunt. Upon entering the station, he was positively identified as the gunman by an eyewitness who was being interrogated by the police to ferret more clues and details about the crime. The police thereupon arrested the petitioner and on the same day, July 8, 1991, promptly filed with the Provincial Prosecutor of Rizal, a complaint for frustrated homicide against him. As the victim died the next day, July 9, 1991, before an information could be filed, the First Assistant Prosecutor, instead of filing an information for frustrated homicide, filed an information for murder on July 11, 1991 in the Regional Trial Court, with no bail recommended.

However, the Provincial Prosecutor, acting on the petitioner's omnibus motion for preliminary investigation and release on bail (which was erroneously filed with his office instead of the court), recommended a cash bond of P100,000 for his release, and submitted the omnibus motion to the trial court for resolution.

Respondent Judge Benjamin Pelayo must have realized his impetuosity shortly after he had issued: (a) his order of July 12, 1991 approving the petitioner's cash bail bond without a hearing, and (b) his order of July 16, 1991 granting the Prosecutor leave to conduct a preliminary investigation, for he motu proprio issued on July 17, 1991 another order rescinding his previous orders and setting for hearing the petitioner's application for bail.

The cases cited in page 15 of the majority opinion in support of the view that the trial of the case should be suspended and that the prosecutor should now conduct a preliminary investigation, are not on all fours with this case. In *Doromal vs. Sandiganbayan*, 177 SCRA 354 and *People vs. Monton*, 23 SCRA 1024, the trial of the criminal case had not yet commenced because motions to quash the information were filed by the accused. *Lozada vs. Hernandez*, 92 Phil. 1053; *U.S. vs. Banzuela*, 31 Phil. 565; *San Diego vs. Hernandez*, 24 SCRA 110 and *People vs. Oandasan*, 25 SCRA 277 are also inapplicable because in those cases preliminary investigations

had in fact been conducted before the informations were filed in court.

It should be remembered that as important as is the right of the accused to a preliminary investigation, it is not a constitutional right. Its absence is not a ground to quash the information (*Doromal vs. Sandiganbayan*, 177 SCRA 354). It does not affect the court's jurisdiction, nor impair the validity of the information (*Rodis vs. Sandiganbayan*, 166 SCRA 618), nor constitute an infringement of the right of the accused to confront witnesses (*Bustos vs. Lucero*, 81 Phil. 640).

The petitioner's motion for a preliminary investigation is not more important than his application for release on bail, just as the conduct of such preliminary investigation is not more important than the hearing of the application for bail. The court's hearing of the application for bail should not be subordinated to the preliminary investigation of the charge. The hearing should not be suspended, but should be allowed to proceed for it will accomplish a double purpose. The parties will have an opportunity to show not only: (a) whether or not there is probable cause to believe that the petitioner killed Eldon Maguan, but more importantly (b) whether or not the evidence of his guilt is strong. The judge's determination that the evidence of his guilt is strong would naturally foreclose the need for a preliminary investigation to ascertain the probability of his guilt.

The bail hearing may not be suspended because upon the filing of an application for bail by one accused of a capital offense, "the judge is under a legal obligation to receive evidence with the view of determining whether evidence of guilt is so strong as to warrant denial of bond." (*Payao vs. Lesaca*, 63 Phil. 210; *Hadhirul Tahil vs. Eisma*, 64 SCRA 378; *Peralta vs. Ramos and Provincial Fiscal of Isabela*, 71 Phil. 271; *Padilla vs. Enrile*, 121 SCRA 472; *Ilagan vs. Ponce Enrile*, 139 SCRA 349; *People vs. Albofera*, 152 SCRA 123.)

The abolition of the death penalty did not make the right to bail absolute, for persons charged with offenses punishable by reclusion perpetua, when evidence of guilt is strong, are not bailable (Sec. 3, Art. III, 1987 Constitution). In *People vs. Dacudao*, 170 SCRA 489, we called down the trial court for having granted the motion for bail in a murder case without any hearing and without giving the prosecution an opportunity to comment or file objections thereto.

Similarly, this Court held in *People vs. Bocar*, 27, SCRA 512:

"x x x due process also demands that in the matter of bail the prosecution should be afforded full opportunity to present proof of the guilt of the accused. Thus, if it were true that the prosecution in this case was deprived of the right to present its evidence against the bail petition, or that the order granting such petition was issued upon incomplete evidence, then the issuance of the order would really constitute abuse of discretion that would call for the remedy of certiorari." (Emphasis supplied.)

The petitioner may not be released pending the hearing of his petition for bail for it would be incongruous to grant bail to one who is not in the custody of the law (*Feliciano vs. Pasicolan*, 2 SCRA 888).

I respectfully take exception to the statements in the ponencia that the "petitioner was not arrested at all" (p. 12) and that "petitioner had not been arrested, with or without a warrant" (p. 130). Arrest is the taking of a person into custody in order that he may be bound to answer for the commission of an offense (Sec. 1, Rule 113, Rules of Court). An arrest is made by an actual restraint of the person to be arrested, or by his submission to the custody of the person making the arrest (Sec. 2, Rule 113, Rules of Court). When Go walked into the San Juan Police Station on July 8, 1991, and placed himself at the disposal of the police authorities who clamped him in jail after he was identified by an eyewitness as the person who shot Maguan, he was actually and effectively arrested. His filing of a petition to be released on bail was a waiver of any irregularity attending his arrest and estops him from questioning its validity (*Callanta vs. Villanueva*, 77 SCRA 377; *Bagcal vs. Villaraza*, 120 SCRA 525).

I, vote to dismiss the petition and affirm the trial court's order of July 17, 1991.

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CONCURRING OPINION

GUTIERREZ, JR., J.:

I concur in the majority decision penned by Mr. Justice Florentino P. Feliciano but am at a loss for reasons why an experienced Judge should insist on proceeding to trial in a sensational murder case without a preliminary investigation inspite of the vigorous and continued objection and reservation of rights of the accused and notwithstanding the recommendations of the Prosecutor that those rights must be respected. If the Court had faithfully followed the Rules, trial would have proceeded smoothly and if the accused is really guilty, then he may have been convicted by now. As it is, the case has to go back to square one.

I agree with Justice Isagani Cruz "that the trial court has (apparently) been moved by a desire to cater to public opinion to the detriment of the impartial administration of justice." Mass media has its duty to fearlessly but faithfully inform the public about events and persons. However, when a case has received wide and sensational publicity, the trial court should be doubly careful not only to be fair and impartial but also to give the appearance of complete objectivity in its handling of the case.

The need for a trial court to follow the Rules and to be fair, impartial, and persistent in getting the true facts of a case is present in all cases but it is particularly important if the accused is indigent; more so, if he is one of those unfortunates who seem to spend more time behind bars than outside. Unlike the accused in this case who enjoys the assistance of competent counsel, a poor defendant convicted by wide and unfavorable media coverage may be presumed guilty before trial and be unable to defend himself properly. Hence, the importance of the court always following the Rules.

While concurring with Justice Feliciano's ponencia, I am constrained to add the foregoing observations because I feel they form an integral part of the Court's decision.

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