

HUBERT J. P. WEBB, PETITIONER, VS. HONORABLE RAUL E. DE LEON, THE PRESIDING JUDGE OF THE REGIONAL TRIAL COURT OF PARAÑAQUE, BRANCH 258, HONORABLE ZOSIMO V. ESCANO, THE PRESIDING...*G.R. No. 121234. August 23, 1995*

Ponente: PUNO, J.

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Before the Court are petitions for the issuance of the extraordinary writs of certiorari, prohibition and mandamus with application for temporary restraining order and preliminary injunction to: (1) annul and set aside the Warrants of Arrest issued against petitioners by respondent Judges Raul E. de Leon and Amelita Tolentino in Criminal Case No. 95-404; (2) enjoin the respondents from conducting any proceeding in the aforementioned criminal case; and (3) dismiss said criminal case or include Jessica Alfaro as one of the accused therein.[1]

From the records of the case, it appears that on June 19, 1994, the National Bureau of Investigation (NBI) filed with the Department of Justice a letter-complaint charging petitioners Hubert Webb, Michael Gatchalian, Antonio J. Lejano and six (6) other persons,[2] with the crime of Rape with Homicide. Forthwith, the Department of Justice formed a panel of prosecutors headed by Assistant Chief State Prosecutor Jovencio R. Zuño to conduct the preliminary investigation[3] of those charged with the rape and killing on June 30, 1991 of Carmela N. Vizconde,[4] her mother Estrellita Nicolas-Vizconde,[5] and her sister Anne Marie Jennifer[6] in their home at Number 80 W. Vinzons, St., BF Homes, Parañaque, Metro Manila.

During the preliminary investigation, the NBI presented the following: (1) the sworn statement dated May 22, 1995 of their principal witness, Maria Jessica M. Alfaro who allegedly saw the commission of the crime;[7] (2) the sworn statements of two (2) of the former housemaids of the Webb family in the persons of Nerissa E. Rosales and Mila S. Gaviola;[8] (3) the sworn-statement of Carlos J. Cristobal who alleged that on March 9, 1991 he was a passenger of United Airlines Flight No. 808 bound for New York and who expressed doubt on whether petitioner Webb was his co-passenger in the trip; (4) the sworn statement of Lolita Birrer, a former live-in partner of Gerardo Biong, who narrated the manner of how Biong investigated and tried to cover up the crime at bar;[9] (5) the sworn statements of Belen Dometita and Teofilo Minoza, two of the Vizconde maids, and the sworn statements of Normal White, a security guard and Manciano Gatmaitan, an engineer. The autopsy reports of the victims were also submitted and they showed that Carmela had nine (9) stab wounds, Estrellita twelve (12) and Jennifer nineteen (19).[10] The genital examination of Carmela confirmed the presence of spermatozoa.[11]

Before submitting his counter-affidavit, petitioner Webb filed with the DOJ Panel a Motion for Production and Examination of Evidence and Documents for the NBI to produce the following:

"(a) Certification issued by the U.S. Federal Bureau of Investigation on the admission to and stay of Hubert Webb in the United States from March 9, 1991 to October 22, 1992;

- (b) Laboratory Report No. SN-91-17 of the Medico Legal Officer, Dr. Prospero A. Cabanayan, M.D.;
- (c) Sworn Statements of Gerardo C. Biong (other than his Sworn Statement dated October 7, 1991);
- (d) Photographs of fingerprints lifted from the Vizconde residence taken during the investigation;
- (e) Investigation records of NBI on Engr. Danilo Aguas, et al.;
- (f) List of names of 135 suspects/persons investigated by the NBI per Progress Report dated September 2, 1991 submitted by Atty. Arlis Vela, Supervising Agent;
- (g) Records of arrest, interview, investigation and other written statements of Jessica Alfaro (other than the May 22, 1995 Sworn Statement) conducted by the NBI and other police agencies;
- (h) transmittal letter to the NBI, including the report of the investigation conducted by Superintendent Rodolfo C. Sison, Regional Deputy Director, NCRC;
- (i) The names of NBI officials/agents composing the Task Force Jecares, including their respective positions and duties;
- (j) Statements made by other persons in connection with the crime charged."

The motion was granted by the DOJ Panel and the NBI submitted photocopies of the documents. It alleged it lost the original of the April 28, 1995 sworn statement of Alfaro. This compelled petitioner Webb to file Civil Case No. 951099 in the Regional Trial Court (RTC) of Makati, Br. 63, for the purpose, among others, of obtaining the original of said sworn statement. He succeeded, for in the course of its proceedings, Atty. Arturo L. Mercader, Jr., produced a copy of said original in compliance with a subpoena duces tecum. The original was then submitted by petitioner Webb to the DOJ Panel together with his other evidence. It appears, however, that petitioner Webb failed to obtain from the NBI the copy of the Federal Bureau of Investigation (FBI) Report despite his request for its production.

Petitioner Webb claimed during the preliminary investigation that he did not commit the crime at bar as he went to the United States on March 1, 1991 and returned to the Philippines on October 27, 1992.[12] His alibi was corroborated by Honesto Aragon, Lecinia Edrosolano, Sylvia Climaco, Gina Roque, Sonia Rodriguez, Edgardo Ventura and Pamela Francisco.[13] To further support his defense, he submitted documentary evidence that he bought a bicycle and a 1986 Toyota car while in the United States on said dates[14] and that he was issued by the State of California Driver's License No. A8818707 on June 14, 1991.[15] Petitioner Webb likewise submitted the letter dated July 25, 1995 of Mr. Robert Heafner, Legal Attache of the US Embassy, citing certain records tending to confirm, among others, his arrival at San Francisco, California on March 9, 1991 as a passenger in United Airlines Flight No. 808.

The other respondents — Hospicio "Pyke" Fernandez, Michael Gatchalian, Antonio "Tony Boy" Lejano, Peter Estrada, Miguel Rodriguez and Gerardo Biong — submitted sworn statements, responses, and a motion to dismiss denying their complicity in the rape-killing of the Vizcondes.[16] Only the respondents Joey Filart and Artemio "Dong" Ventura failed to file their counter-affidavits though they were served with subpoena in their last known address.[17] In his sworn statement, petitioner Gatchalian alleged that from 11 o'clock in the evening of June 29, 1991 until 3 o'clock in the morning of the following day, he was at the residence of his friends, Carlos and Andrew Syypap, at New Alabang Village, Muntinlupa watching video tapes. He claimed that his co-petitioner Lejano was with him.

On August 8, 1995, the DOJ Panel issued a 26-page Resolution "finding probable cause to hold respondents for trial" and recommending that an Information for rape with homicide be filed against petitioners and their

co--respondents.[18] On the same date, it filed the corresponding Information[19] against petitioners and their co--accused with the Regional Trial Court of Parañaque. The case was docketed as Criminal Case No. 95-404 and raffled to Branch 258 presided by respondent judge Zosimo V. Escano. It was, however, the respondent judge Raul de Leon, pairing judge of Judge Escano, who issued the warrants of arrest against the petitioners. On August 11, 1995, Judge Escano voluntarily inhibited himself from the case to avoid any suspicion about his impartiality considering his employment with the NBI before his appointment to the bench. The case was re-raffled to Branch 274, presided by Judge Amelita Tolentino who issued new warrants of arrest against the petitioners and their co--accused. On August 11, 1995, petitioner Webb voluntarily surrendered to the police authorities at Camp Ricardo Papa Sr., in Bicutan, Taguig. Petitioners Gatchalian and Lejano likewise gave themselves up to the authorities after filing their petitions before us.

In their petitions at bar, petitioners contend: (1) respondent Judges de Leon and Tolentino gravely abused their discretion when they failed to conduct a preliminary examination before issuing warrants of arrest against them; (2) the DOJ Panel likewise gravely abused its discretion in holding that there is probable cause to charge them with the crime of rape with homicide; (3) the DOJ Panel denied them their constitutional right to due process during their preliminary investigation; and (4) the DOJ Panel unlawfully intruded into judicial prerogative when it failed to charge Jessica Alfaro in the Information as an accused.

We find the petitions bereft of merit.

I

Petitioners fault the DOJ Panel for its finding of probable cause. They insist that the May 22, 1995 sworn statement of Jessica Alfaro is inherently weak and uncorroborated. They hammer on alleged material inconsistencies between her April 28, 1995 and May 22, 1995 sworn statements. They assail her credibility for her misdescription of petitioner Webb's hair as semi-blonde. They also criticize the procedure followed by the DOJ Panel when it did not examine witnesses to clarify the alleged incredulities and inconsistencies in the sworn statements of the witnesses for the NBI.

We start with a restatement of the purpose of a preliminary investigation. Section 1 of Rule 112 provides that a preliminary investigation should determine "x x x x whether there is a sufficient ground to engender a well-grounded belief that a crime cognizable by the Regional Trial Court has been committed and that the respondent is probably guilty thereof, and should be held for trial." Section 3 of the same Rule outlines the procedure in conducting a preliminary investigation, thus:

"SEC. 3. Procedure. - Except as provided for in Section 7 hereof, no complaint or information for an offense cognizable by the Regional Trial Court shall be filed without a preliminary investigation having been first conducted in the following manner:

(a) The complaint shall state the known address of the respondent and be accompanied by affidavits of the complainant and his witnesses as well as other supporting documents, in such number of copies as there are respondents, plus two (2) copies for the official file. The said affidavits shall be sworn to before any fiscal, state prosecutor or government official authorized to administer oath, or, in their absence or unavailability, a notary public, who must certify that he personally examined the affiants and that he is satisfied that they voluntarily executed and understood their affidavits.

(b) Within ten (10) days after the filing of the complaint, the investigating officer shall either dismiss the same if he finds no ground to continue with the inquiry, or issue a subpoena to the respondent, attaching thereto a copy of the complaint, affidavits and other supporting documents. Within ten (10) days from receipt thereof, the respondent shall submit counter-affidavits and other supporting documents. He shall have the right to

examine all other evidence submitted by the complainant.

(c) Such counter-affidavits and other supporting evidence submitted by the respondent shall also be sworn to and certified as prescribed in paragraph (a) hereof and copies thereof shall be furnished by him to the complainant.

(d) If the respondent cannot be subpoenaed, or if subpoenaed, does not submit counter-affidavits within the ten (10) day period, the investigating officer shall base his resolution on the evidence presented by the complainant.

(e) If the investigating officer believes that there are matters to be clarified, he may set a hearing to propound clarificatory questions to the parties or their witnesses, during which the parties shall be afforded an opportunity to be present but without the right to examine or cross-examine. If the parties so desire, they may submit questions to the investigating officer which the latter may propound to the parties or witnesses concerned.

(f) Thereafter, the investigation shall be deemed concluded, and the investigating officer shall resolve the case within ten (10) days therefrom. Upon the evidence thus adduced, the investigating officer shall determine whether or not there is sufficient ground to hold the respondent for trial."

Section 4 of Rule 112 then directs that "if the investigating fiscal finds cause to hold the respondent for trial, he shall prepare the resolution and corresponding information. He shall certify under oath that he, or as shown by the record, an authorized officer, has personally examined the complainant and his witnesses, that there is reasonable ground to believe that a crime has been committed and that the accused is probably guilty thereof x x x."

The need to find probable cause is dictated by the Bill of Rights which protects "the right of the people to be secure in their persons x x x against unreasonable searches and seizures of whatever nature x x x." [20] An arrest without a probable cause is an unreasonable seizure of a person, and violates the privacy of persons which ought not to be intruded by the State. [21] Probable cause to warrant arrest is not an opaque concept in our jurisdiction. Continuing accretions of case law reiterate that they are facts and circumstances which would lead a reasonably discreet and prudent man to believe that an offense has been committed by the person sought to be arrested. [22] Other jurisdictions utilize the term man of reasonable caution [23] or the term ordinarily prudent and cautious man. [24] The terms are legally synonymous and their reference is not to a person with training in the law such as a prosecutor or a judge but to the average man on the street. [25] It ought to be emphasized that in determining probable cause, the average man weighs facts and circumstances without resorting to the calibrations of our technical rules of evidence of which his knowledge is nil. Rather, he relies on the calculus of common sense of which all reasonable men have an abundance.

Applying these basic norms, we are not prepared to rule that the DOJ Panel gravely abused its discretion when it found probable cause against the petitioners. Petitioners belittle the truthfulness of Alfaro on two (2) grounds: (a) she allegedly erroneously described petitioner Webb's hair as semi-blond and (b) she committed material inconsistencies in her two (2) sworn statements, thus: [26]

"x x x x x x x x x x

"To illustrate, the following are some examples of inconsistencies in the two sworn statements of Alfaro:
On whether Alfaro knew Carmela before the incident in question

First Affidavit: She had NOT met Carmela before June 29, 1991.

Second Affidavit: 'I met her in a party sometime in February, 1991.'

On whether Alfaro saw the dead bodies

First Affidavit: She did not see the three dead persons on that night. She just said 'on the following day I read in the newspaper that there were three persons who were killed x x x'

Second Affidavit: 'I peeped through the first door on the left. I saw two bodies on top of the bed, bloodied, and in the floor, I saw Hubert on top of Carmela.'

On the alleged rape of Carmela Vizconde

First Affidavit: She did not see the act of rape.

Second Affidavit: She saw Hubert Webb 'with bare buttocks, on top of Carmela and pumping, her mouth gagged and she was moaning and I saw tears on her eyes.'

On how Webb, Lejano, and Ventura entered the Vizconde house

First Affidavit: 'by jumping over the fence, which was only a little more than a meter high.'

Second Affidavit: They 'entered the gate which was already open.'

On whether Alfaro entered the Vizconde house

First Affidavit: She never entered the house.

Second Affidavit: 'I proceeded to the iron grill gate leading to the dirty kitchen.'"

In its Resolution, the DOJ Panel ruled that these alleged misdescription and inconsistencies did not erode the credibility of Alfaro. We quote the pertinent ruling, viz:[27]

"x x x. x x x x x x

"As regards the admissibility of Alfaro's statements, granting for purposes of argument merely that she is a co-conspirator, it is well to note that confessions of a co-conspirator may be taken as evidence to show the probability of the co-conspirator's participation in the commission of the crime (see *People vs. Lumahang*, 94 Phil. 1084).

Furthermore, it is a well-established doctrine that conspiracy need not be proved by direct evidence of prior agreement to commit the crime. Indeed, 'only rarely would such a prior agreement be demonstrable since, in the nature of things, criminal undertakings are only rarely documented by agreements in writing. Thus, conspiracy may be inferred from the conduct of the accused before, during and after the commission of the crime, showing that the several accused had acted in concert or in unison with each other, evincing a common purpose or design.' (*Angelo vs. Court of Appeals*, 210 SCRA 402 [1992], citations omitted; *People vs. Molleda*, 86 SCRA 699).

Neither can we discredit Alfaro merely because of the inconsistencies in her two sworn statements. In *Angelo*, the Court refused to discredit the testimony of a witness accusing therein petitioner for the slaying of one Gaviano Samaniego even though said witness failed to name Angelo in his affidavit which was executed five (5) months earlier. Granting, the Court continued, that a part of the witness' testimony is untrue, such circumstance is not sufficient to discredit the entire testimony of the witness.

On August 7, 1995, another counsel for respondent Webb submitted his memorandum suggesting that the instant complaint 'should not be decided within the month to give time to the NBI to coordinate with the FBI on the latter's inquiry into the whereabouts of Hubert Webb x x x and to check on our U.S. based witnesses.'

In said memorandum, counsel for respondent Webb calls for the application of the maxim *falsus in uno, falsus in omnibus* arising from the inconsistencies of Alfaro's statements, among others. This is untenable. As held in *Angelo*:

"There is no rule of law which prohibits a court from crediting part of the testimony of a witness as worthy of

belief and from simultaneously rejecting other parts which the court may find incredible or dubious. The maxim falsus in uno, falsus in omnibus is not a rule of law, let alone a general rule of law which is universally applicable. It is not a legal presumption either. It is merely a latinism describing the conclusion reached by a court in a particular case after ascribing to the evidence such weight or lack of weight that the court deemed proper.'

In the case before us, complainant reasoned out that Alfaro was then having reservations when she first executed the first statement and held back vital information due to her natural reaction of mistrust. This being so, the panel believes that the inconsistencies in Alfaro's two sworn statements have been sufficiently explained especially so where there is no showing that the inconsistencies were deliberately made to distort the truth. Consequently, the probative value of Alfaro's testimony deserves full faith and credit. As it has been often noted, ex parte statements are generally incomplete because they are usually executed when the affiant's state of mind does not give her sufficient and fair opportunity to comprehend the import of her statement and to narrate in full the incidents which transpired (People vs. Sarellana, 233 SCRA 31 [1994]; Angelo vs. Court of Appeals, supra). In the case at bar, there is no dispute that a crime has been committed and what is clear before us is that the totality of the evidence submitted by the complainant indicate a prima facie case that respondents conspired in the perpetration of the imputed offense."

We note that the May 22, 1995 sworn statement of Alfaro was given with the assistance of counsel[28] and consists of six (6) pages, in single space reciting in rich details how the crime was planned and then executed by the petitioners. In addition, the DOJ Panel evaluated the supporting sworn statements of Nerissa Rosales and Mila Gaviola, former housemaids of the Webbs, Carlos J. Cristobal, a passenger in United Airlines Flight No. 808 and Lolita Birrer, a paramour of Gerardo Biong. The Panel assayed their statements as follows:[29]

"x x x x x x x x x x

"According to Nerissa E. Rosales, a former housemaid of the Webb family, on June 29, 1991, between 7:00 o'clock and 8:00 o'clock in the evening, Hubert was at home inside his room with two male visitors. She knew it because she and her co-housemaid, Loany, were instructed by Hubert to bring them three glasses of juice. It was the last time she saw Hubert and was later told by then Congressman Webb that Hubert was in the United States.

While Mila S. Gaviola, another former housemaid of the Webb family and who served as a laundry woman, claims, aside from corroborating the statement of Nerissa Rosales, that on June 30, 1991, she woke up at around 4:00 in the morning and as what she used to do, she entered the rooms of the Webbs to get their clothes to be washed. As a matter of fact, in that early morning, she entered Hubert's room and saw Hubert, who was only wearing his pants, already awake and smoking while he was sitting on his bed. She picked up Hubert's scattered clothes and brought them together with the clothes of the other members of the family to the laundry area. After taking her breakfast, she began washing the clothes of the Webbs. As she was washing the clothes of Hubert Webb, she noticed fresh bloodstains in his shirt. After she finished the laundry, she went to the servant's quarters. But feeling uneasy, she decided to go up to the stockroom near Hubert's room to see what he was doing. In the said stockroom, there is a small door going to Hubert's room and in that door there is a small opening where she used to see Hubert and his friends sniffing on something. She observed Hubert was quite irritated, uneasy, and walked to and from inside his room.

On that day, she noticed Hubert left the house at around 1:00 in the afternoon and came back at around 4:00 in the same afternoon and went inside his room using the secret door of the house. It was the last time that she saw Hubert until she left the Webb family.

On the other hand, Carlos J. Cristobal, alleged that on March 9, 1991, at about 10:00 in the morning, he was at the

Ninoy Aquino International Airport as he was then scheduled to take the United Airlines Flight No. 808 at 2:00 in the afternoon for New York. At the airport's lobby, he saw then Congressman Freddie Webb with a male companion. He greeted him and Webb answered: 'Mabuti naman, at ito, ihahatid ko ang anak ko papuntang Florida.' He knew Freddie Webb because he often watched him then in a television show 'Chicks to Chicks.' He observed that the man whom Freddie Webb referred to as his son, was of the same height as Freddie. The son referred to has fair complexion with no distinguishing marks on his face. He (son of Webb) was then wearing a striped white jacket. When he and his children were already inside the plane, he did not see Freddie anymore, but he noticed his son was seated at the front portion of the economy class. He never noticed Freddie Webb's son upon their arrival in San Francisco. He claims that while watching the television program 'DONG PUNO LIVE' lately, he saw the wife of Freddie Webb with her lawyer being interviewed, and when she described Hubert as 'moreno' and small built, with a height of five feet and seven inches tall, and who was the one who left for United States on March 9, 1991, he nurtured doubts because such description does not fit the physical traits of the son of Freddie, who left with him for United States on the same flight and date.

Lolita Birrer, alleged that she know Gerardo Biong because she had an affair with him for almost three (3) years and in fact, she had a child with him who is now four (4) years old. Their relationship started in February, 1991 until she broke up with him in September 1993. She recalls that on June 29, 1991, at around 6:00 p.m., Biong invited her to play mahjong at the canteen of a certain Aling Glo located at the back of the Parañaque Municipal Hall.

At about 2:30 in the early morning of June 30, 1991, the radio operator of the Parañaque police told Biong that he has a phone call. Before Biong went to the radio room, she was instructed to take him over and after somebody won the game, she followed Biong at the radio room where she overheard him uttering, 'Ano? Saan?, Mahirap yan, Paano, o sige, aantayin kita, O ano?, dilaw na taxi, o sige.' When he put the phone down, Biong told her, 'Mayroon lang akong rerespondehan, ikaw muna ang maupo' and then, he went outside the canteen apparently waiting for somebody. Twenty minutes later, a taxi, colored yellow, arrived with a male passenger sitting at the backseat and parked near the canteen. After it made some signals by blinking its headlight, Biong rode thereat at the front seat beside the driver and then, they left. She was not able to recognize the male passenger because the window of the taxi was tinted. Biong came back at around 7:00 of the same morning and when he arrived, he immediately washed his hands and face, and took his handkerchief from his pocket which he threw at the trash can. She asked him why he threw his handkerchief and he answered, 'Hmp... amoy tae.' She inquired what happened in BF Homes and he replied, 'Putang inang mga batang iyon, pinahirapan nila ako.'

Biong later invited her for breakfast, but they first went to his office where she observed him doing something in his steel cabinet while he appeared to be uneasy. Moments later, Galvan, another policeman of Parañaque, arrived and said, 'Oy Biong, may tatlong patay sa BF, imbestigahan mo' to which Biong answered, 'Oo susunod na ako.' Biong went to the office of Capt. Don Bartolome who offered to accompany him and with whom she asked permission to go with them. Before they proceeded to the place where the killings happened, she asked Biong if he knew the exact address and the latter immediately responded, 'Alam ko na yon.' She was surprised because Galvan never told him the place of the incident.

As soon as they arrived at the Vizconde's residence, Biong instructed the housemaids to contact the victim's relatives, while the security guard fetched the barangay chairman and the president of the Homeowners Association. When all these persons were already in the house, Biong started recording the wounds of the victim. Inside the master's bedroom, she saw Biong took a watch from the jewelry box. Because she could not tolerate the foul odor, she and Capt. Bartolome went out of the room and proceeded to the dining area. On top of the dining table, she saw the scattered contents of a shoulder bag. Moments later, Biong came out from the room and

proceeded to the front door to remove the chain lock; asked the keys from the housemaid and it was only then that the main door was opened. Biong noticed a stone in front of the broken glass of the door and requested Capt. Bartolome to go inside the servant's quarters as he doubted the housemaids' claim that they heard nothing unusual. Using the handle of his gun, Biong broke the remaining glass of the door panel. Bartolome then came out of the room and told Biong that he can hear the sound of the glass being broken. At the garage, Biong also noticed same marks on the hood of the car.

On the following day, at around 12:00 noon, Biong arrived in her house together with the Vizconde housemaids. When Biong was preparing to take a bath, she saw him remove from his pocket the things she also saw from Vizconde's residence, to wit: calling cards, driver's license, ATM card, a crossed check worth P80,000.00, earrings, a ring, bracelet, necklace, and the watch he took from the jewelry box inside the room of the Vizcondes. These jewelry items were later pawned by Biong for P20,000.00 at a pawnshop in front of Chow-Chow restaurant in Santos Avenue, Parañaque. The next day, she saw Biong took from his locker at the Parañaque Police Station an imported brown leather jacket, which the latter claimed to have been given to him by the person who called him up in the early morning of June 30, 1991.

Since then, Biong has been wearing said jacket until they broke up sometime in 1993. She observed that Biong seemed not interested in pursuing the investigation of the Vizconde case. In fact, when Biong and this group picked up Mike Gatchalian and brought him to the Parañaque Police Station, she was surprised that Biong halted the investigation when Gatchalian was profusely sweating while being interrogated. After the father of Gatchalian talked to Colonel Pureza, the latter called up and instructed Biong to bring Gatchalian to him (Colonel Pureza) and that was the last thing she remembered regarding this case."

The DOJ Panel then weighed these inculpatory evidence against the exculpatory evidence of petitioners. It ruled:[30]

"x x x x x x x x x x"

"The voluminous number of exhibits submitted by respondent Webb to support his defense of denial and alibi notwithstanding, the panel, after a careful and thorough evaluation of the records, believes that they cannot outweigh the evidence submitted by the complainant. Alibi cannot prevail over the positive identification made by a prosecution witness. Verily, alibi deserves scant consideration in the face of positive identification especially so where the claim of alibi is supported mainly by friends and relatives (People vs. Apolonia, 235 SCRA 124 [1994]; People vs. Lucas, 181 SCRA 316 and a long line of cases).

Similarly, denial is a self-serving negative which cannot be given greater evidentiary weight than the declaration of a credible witness who testified on affirmative matters (People vs. Carizo, 233 SCRA 687 [1994]) Indeed, denial, like alibi, is weak and becomes even more weaker when arrayed against the positive identification by the witness for the prosecution (People vs. Onpaid, 233 SCRA 62 [1994]).

Surprisingly, Gatchalian's defense of alibi was not corroborated by Lejano, whom he claimed was with him watching video tapes at the Syyp residence. Other than claiming that he "was not and could not have been at or near the area of the Vizconde residence at the time of the alleged commission of the crime," respondent Lejano proffered no evidence to substantiate his claim of alibi.

x x x x x x x x x x"

On the other hand, respondent Webb seeks to enhance the acceptability of his alibi in the form of documents tending to show that he was thousands of miles away when the incident occurred. We have carefully deliberated and argued on the evidence submitted by respondent Webb in support of his absence from the country since

March 9, 1991 to October 26, 1992 and found the same wanting to exonerate him of the offense charged. The material dates in this case are June 29 and 30, 1991. While respondent Webb may have submitted proof tending to show that he was issued a California driver's license on June 14, 1991, there is no showing that he could not have been in the country on the dates above mentioned. Neither do we find merit in the allegation that respondent Webb personally bought a bicycle on June 30, 1991 in California in view of his positive identification by Alfaro and the two (2) househelps of the Webb family who testified that he was here in the country on said dates. Additionally, the issuance of receipt evidencing the purchase of a bicycle in California is no conclusive proof that the name appearing thereon was the actual buyer of the merchandise."

Given these conflicting pieces of evidence of the NBI and the petitioners, we hold that the DOJ Panel did not gravely abuse its discretion when it found probable cause against the petitioners. A finding of probable cause needs only to rest on evidence showing that more likely than not a crime has been committed and was committed by the suspects. Probable cause need not be based on clear and convincing evidence of guilt, neither on evidence establishing guilt beyond reasonable doubt and definitely, not on evidence establishing absolute certainty of guilt. As well put in *Brinegar v. United States*,^[31] while probable cause demands more than "bare suspicion," it requires "less than evidence which would justify x x x conviction." A finding of probable cause merely binds over the suspect to stand trial. It is not a pronouncement of guilt.

Considering the low quantum and quality of evidence needed to support a finding of probable cause, we also hold that the DOJ Panel did not gravely abuse its discretion in refusing to call the NBI witnesses for clarificatory questions. The decision to call witnesses for clarificatory questions is addressed to the sound discretion of the investigator and the investigator alone. If the evidence on hand already yields a probable cause, the investigator need not hold a clarificatory hearing. To repeat, probable cause merely implies probability of guilt and should be determined in a summary manner. Preliminary investigation is not a part of trial and it is only in a trial where an accused can demand the full exercise of his rights, such as the right to confront and cross-examine his accusers to establish his innocence. In the case at bar, the DOJ Panel correctly adjudged that enough evidence had been adduced to establish probable cause and clarificatory hearing was unnecessary.

II

We now come to the charge of petitioners that respondent Judge Raul de Leon and, later, respondent Judge Amelita Tolentino issued warrants of arrest against them without conducting the required preliminary examination. Petitioners support their stance by highlighting the following facts: (1) the issuance of warrants of arrest in a matter of few hours; (2) the failure of said judges to issue orders of arrest; (3) the records submitted to the trial court were incomplete and insufficient from which to base a finding of probable cause; and (4) that even Gerardo Biong who was included in the Information as a mere accessory had a "NO BAIL" recommendation by the DOJ Panel. Petitioners postulate that it was impossible to conduct a "searching examination of witnesses and evaluation of the documents" on the part of said judges.

The issuance of a warrant of arrest interferes with individual liberty and is regulated by no less than the fundamental law of the land. Section 2 of Article III of the Constitution provides:

"Sec. 2. 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 be inviolable, and no search warrant or warrant of arrest shall issue except upon probable cause to be determined personally 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 aforequoted provision deals with the requirements of probable cause both with respect to issuance of warrants

of arrest and search warrants. The similarities and differences of their requirements ought to be educational. Some of them are pointed out by Professors LaFave and Israel, thus:[32] "It is generally assumed that the same quantum of evidence is required whether one is concerned with probable cause to arrest or probable cause to search. But each requires a showing of probabilities as to somewhat different facts and circumstances, and thus one can exist without the other. In search cases, two conclusions must be supported by substantial evidence: that the items sought are in fact seizable by virtue of being connected with criminal activity, and that the items will be found in the place to be searched. It is not also necessary that a particular person be implicated. By comparison, in arrest cases there must be probable cause that a crime has been committed and that the person to be arrested committed it, which of course can exist without any showing that evidence of the crime will be found at premises under that person's control." Worthy to note, our Rules of Court do not provide for a similar procedure to be followed in the issuance of warrants of arrest and search warrants. With respect to warrants of arrest, section 6 of Rule 112 simply provides that "upon filing of an information, the Regional Trial Court may issue a warrant for the arrest of the accused." In contrast, the procedure to be followed in issuing search warrants is more defined. Thus, Sections 3, 4 and 5 of Rule 126 provide:

"x x x x x x x x

"Sec. 3. Requisites for issuing search warrant. - A search warrant shall not issue but upon probable cause in connection with one specific offense to be determined personally 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 things to be seized.

Sec. 4. Examination of complainant; record. -The judge must, before issuing the warrant, personally examine in the form of searching questions and answers, in writing and under oath the complainant and any witnesses he may produce on facts personally known to them and attach to the record their sworn statements together with any affidavits submitted.

Sec. 5. Issuance and form of search warrant. - If the judge is thereupon satisfied of the facts upon which the application is based, or that there is probable cause to believe that they exist, he must issue the warrant, which must be substantially in the form prescribed by these Rules."

We discussed the difference in the procedure of issuing warrants of arrest and search warrants in *Soliven vs. Makasiar*,^[33] thus:

"x x x

"The second issue, raised by Beltran, calls for an interpretation of the constitutional provision on the issuance of warrants of arrest. The pertinent provision reads:

'Art. III, Sec. 2. 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 be inviolable, and no search warrant or warrant of arrest shall issue except upon probable cause to be determined personally 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 addition of the word 'personally' after the word 'determined' and the deletion of the grant of authority by the 1973 Constitution to issue warrants to 'other responsible officers as may be authorized by law,' has apparently convinced petitioner Beltran that the Constitution now requires the judge to personally examine the complainant and his witnesses in his determination of probable cause for the issuance of warrants of arrest. This is not an accurate interpretation.

What the Constitution underscores is the exclusive and personal responsibility of the issuing judge to satisfy

himself of the existence of probable cause. In satisfying himself of the existence of probable cause for the issuance of a warrant of arrest, the judge is not required to personally examine the complainant and his witnesses. Following established doctrine and procedure, he shall: (1) personally evaluate the report and the supporting documents submitted by the fiscal regarding the existence of probable cause and, on the basis thereof, issue a warrant of arrest; or (2) if on the basis thereof he finds no probable cause, he may disregard the fiscal's report and require the submission of supporting affidavits of witnesses to aid him in arriving at a conclusions as to the existence of probable cause.

Sound policy dictates this procedure, otherwise judges would be unduly laden with the preliminary examination and investigation of criminal complaints instead of concentrating on hearing and deciding cases filed before their courts."

Clearly then, the Constitution, the Rules of Court, and our case law[34] repudiate the submission of petitioners that respondent judges should have conducted "searching examination of witnesses" before issuing warrants of arrest against them. They also reject petitioners' contention that a judge must first issue an order of arrest before issuing a warrant of arrest. There is no law or rule requiring the issuance of an Order of Arrest prior to a warrant of arrest.

In the case at bar, the DOJ Panel submitted to the trial court its 26-page report, the two (2) sworn statements of Alfaro and the sworn statements of Carlos Cristobal and Lolita Birrer[35] as well as the counter affidavits of the petitioners. Apparently, the painstaking recital and analysis of the parties' evidence made in the DOJ Panel Report satisfied both judges that there is probable cause to issue warrants of arrest against petitioners. Again, we stress that before issuing warrants of arrest, judges merely determine personally the probability, not the certainty of guilt of an accused. In doing so, judges do not conduct a *de novo* hearing to determine the existence of probable cause. They just personally review the initial determination of the prosecutor finding a probable cause to see if it is supported by substantial evidence. The sufficiency of the review process cannot be measured by merely counting minutes and hours. The fact that it took the respondent judges a few hours to review and affirm the probable cause determination of the DOJ Panel does not mean they made no personal evaluation of the evidence attached to the records of the case.[36]

Petitioners' reliance on the case of *Allado vs. Diokno*[37] is misplaced. Our *Allado* ruling is predicated on the utter failure of the evidence to show the existence of probable cause. Not even the *corpus delicti* of the crime was established by the evidence of the prosecution in that case. Given the clear insufficiency of the evidence on record, we stressed the necessity for the trial judge to make a further personal examination of the complainant and his witnesses to reach a correct assessment of the existence or non-existence of probable cause before issuing warrants of arrest against the accused. The case at bar, however, rests on a different factual setting. As priorly discussed, the various types of evidence extant in the records of the case provide substantial basis for a finding of probable cause against the petitioner. The *corpus delicti* of the crime is a given fact. There is an eyewitness account of the imputed crime given by Alfaro. The alibi defense of petitioner Webb is also disputed by sworn statements of their former maids. It was therefore unnecessary for the respondent judges to take the further step of examining *ex parte* the complainant and their witnesses with searching questions.

III

Petitioners also complain about the denial of their constitutional right to due process and violation of their right to an impartial investigation. They decry their alleged hasty and malicious prosecution by the NBI and the DOJ Panel. They also assail the prejudicial publicity that attended their preliminary investigation.

We reject these contentions. The records will show that the DOJ Panel did not conduct the preliminary

investigation with indecent haste. Petitioners were given fair opportunity to prove lack of probable cause against them. The fairness of this opportunity is well stressed in the Consolidated Comment of the Solicitor General, viz:

"Again, there is no merit in this contention. Petitioners were afforded all the opportunities to be heard. Petitioner Webb actively participated in the preliminary investigation by appearing in the initial hearing held on June 30, 1995 and in the second hearing on July 14, 1995; and by filing a "Motion for Production and Examination of Evidence and Documents" on June 27, 1995 (p. 4, Petition), a "Reply to the Compliance and Comment/Manifestation to the Motion for Production and Examination of Evidence" on July 5, 1995 (p. 6, Petition), a "Comment and Manifestation" on July 7, 1995 (p. 6, Petition), his "Counter-Affidavit" on July 14, 1995 (pp. 6-7, Petition) and a "Motion to Resolve" on August 1, 1995. Numerous letter-requests were also sent by the petitioner Webb's counsel to the DOJ Panel requesting the latter to furnish him a copy of the reports prepared by the FBI concerning the petitioner's whereabouts during the material period (Annexes "L", "L-1" and "L-2" of the Supplemental Petition dated August 14, 1995). In fact, not satisfied with the decision of the DOJ Panel not to issue subpoena duces tecum to Atty. Arturo Mercader, Jr., petitioner Webb filed a "Petition for Injunction, Certiorari, Prohibition and Mandamus" with the Regional Trial Court, Branch 63 of Makati in order to compel said Atty Mercader, Jr. to produce the first sworn statement of Alfaro for submission to the DOJ Panel. (p. 4, Petition) The said court dismissed the petition after Mercader produced and submitted to the DOJ Panel the first sworn statement of Alfaro, without ruling on the admissibility and credence of the two (2) conflicting and inconsistent sworn statements of the principal witness, Alfaro. (Attached hereto is a copy of the order of Judge Ruben A. Mendiola, RTC-Makati, Branch 63 dated July 28, 1995) marked as Annex "F."

It must also be pointed out that despite the declaration by the DOJ Panel that the preliminary investigation was to be terminated after the hearing held on July 14, 1995, the panel continued to conduct further proceedings, e.g., comparison of the photo-copies of the submitted documents with the originals on July 17, 1995. (p. 7, Petition) The panel even entertained the "Response" submitted by accused Miguel Rodriguez on July 18, 1995. (p. 17, Resolution) In addition to these, the panel even announced that any party may submit additional evidence before the resolution of the case. (p. 8, Petition) From the time the panel declared the termination of the preliminary investigation on July 14, 1995, twenty-seven (27) days elapsed before the resolution was promulgated, and the information eventually filed in the Regional Trial Court of Parañaque on August 10, 1995. This notwithstanding the directive of Section 3(f) Rule 112 of the Revised Rules of Court that the investigating officer shall resolve the case within ten (10) days from the termination of the preliminary investigation. The DOJ Panel precisely allowed the parties to adduce more evidence in their behalf and for the panel to study the evidence submitted more fully. This directly disputes the allegation of the petitioners that the resolution of the preliminary investigation was done with indecent haste in violation of the rights of the petitioners. During the period of twenty-seven (27) days, the petitioners were free to adduce and present additional evidence before the DOJ Panel.

Verily, petitioners cannot now assert that they were denied due process during the conduct of the preliminary investigation simply because the DOJ Panel promulgated the adverse resolution and filed the Information in court against them."

Petitioners cannot also assail as premature the filing of the Information in court against them for rape with homicide on the ground that they still have the right to appeal the adverse resolution of the DOJ Panel to the Secretary of Justice. The filing of said Information is in accord with Department of Justice Order No. 223, series of 1993, dated June 25, 1993. We quote its pertinent sections, viz:

"SECTION 4. Non-Appealable Cases; Exceptions. - No appeal may be taken from a resolution of the Chief State Prosecutor/Regional State Prosecutor/Provincial or City Prosecutor finding probable cause except upon showing of manifest error or grave abuse of discretion. Notwithstanding the showing of manifest error or grave abuse of discretion, no appeal shall be entertained where the appellant had already been arraigned. If the appellant is arraigned during the pendency of the appeal, said appeal shall be dismissed *motu proprio* by the

Secretary of Justice.

An appeal/motion for reinvestigation from a resolution finding probable cause, however, shall not hold the filing of the information in court.

SECTION 2. When to Appeal. -The appeal must be filed within a period of fifteen (15) days from receipt of the questioned resolution by the party or his counsel. The period shall be interrupted only by the filing of a motion for reconsideration within ten (10) days from receipt of the resolution and shall continue to run from the time the resolution denying the motion shall have been received by the movant or his counsel." (Italics supplied)

Without doubt then, the said DOJ Order No. 223 allows the filing of an Information in court after the consummation of the preliminary investigation even if the accused can still exercise the right to seek a review of the prosecutor's recommendation with the Secretary of Justice.

Next, petitioners fault the DOJ Panel for not including Alfaro in the Information considering her alleged conspiratorial participation in the crime of rape with homicide. The non-inclusion of Alfaro is anchored on Republic Act No. 6981, entitled "An Act Providing For A Witness Protection, Security And Benefit Program And For Other Purposes" enacted on April 24, 1991. Alfaro qualified under its Section 10, which provides:

"X X X X X X X X

"Sec. 10. State Witness. -Any person who has participated in the commission of a crime and desires to be a witness for the State, can apply and, if qualified as determined in this Act and by the Department, shall be admitted into the Program whenever the following circumstances are present:

- (a) the offense in which his testimony will be used is a grave felony as defined under the R.P.C. or its equivalent under special laws;
- (b) there is absolute necessity for his testimony;
- (c) there is no other direct evidence available for the proper prosecution of the offense committed;
- (d) his testimony can be substantially corroborated on its material points;
- (e) he does not appear to be most guilty; and
- (f) he has not at anytime been convicted of any crime involving moral turpitude.

An accused discharged from an information or criminal complaint by the court in order that he may be a State Witness pursuant to Sections 9 and 10 of Rule 119 of the Revised Rules of Court may upon his petition be admitted to the Program if he complies with the other requirements of this Act. Nothing in this Act shall prevent the discharge of an accused so that he can be used as a Witness under Rule 119 of the Revised Rules of Court."

Upon qualification of Alfaro to the program, Section 12 of the said law mandates her non-inclusion in the criminal Complaint or Information, thus:

"X X X X X X X X

Sec. 12. Effect of Admission of a State Witness into the Program. - The certification of admission into the Program by the Department shall be given full faith and credit by the provincial or city prosecutor who is required NOT TO INCLUDE THE WITNESS IN. THE CRIMINAL COMPLAINT OR INFORMATION and if included therein, to petition the court for his discharge in order that he can be utilized as a State Witness. The court shall order the discharge and exclusion of the said accused from the information.

Admission into the Program shall entitle such State Witness to immunity from criminal prosecution for the offense or offenses in which his testimony will be given or used and all the rights and benefits provided under Section 8 hereof.

The validity of these provisions is challenged by petitioner Webb. It is urged that they constitute "x x x an intrusion into judicial prerogative for it is only the court which has the power under the Rules on Criminal Procedure to discharge an accused as a state witness." The argument is base on Section 9, Rule 119[38] which gives the court the prerogative to approve the discharge of an accused to be a state witness. Petitioner's argument lacks appeal for it lies on the faulty assumption that the decision whom to prosecute is a judicial function, the sole prerogative of courts and beyond executive and legislative interference. In truth, the prosecution of crimes appertains to the executive department of government whose principal power and responsibility is to see that our laws are faithfully executed. A necessary component of this power to execute our laws is the right to prosecute their violators. The right to prosecute vests the prosecutor with a wide range of discretion — the discretion of whether, what and whom to charge, the exercise of which depends on a smorgasbord of factors which are best appreciated by prosecutors. We thus hold that it is not constitutionally impermissible for Congress to enact R.A. No. 6981 vesting in the Department of Justice the power to determine who can qualify as a witness in the program and who shall be granted immunity from prosecution.[39] Section 9 of Rule 119 does not support the proposition that the power to choose who shall be a state witness is an inherent judicial prerogative. Under this provision, the court is given the power to discharge a state witness only because it has already acquired jurisdiction over the crime and the accused. The discharge of an accused is part of the exercise of jurisdiction but is not a recognition of an inherent judicial function. Moreover, the Rules of Court have never been interpreted to be beyond change by legislation designed to improve the administration of our justice system. R.A. No. 6981 is one of the much sought penal reform laws to help government in its uphill fight against crime, one certain cause of which is the reticence of witnesses to testify. The rationale for the law is well put by the Department of Justice, viz: "Witnesses, for fear of reprisal and economic dislocation, usually refuse to appear and testify in the investigation/prosecution of criminal complaints/cases. Because of such refusal, criminal complaints/cases have been dismissed for insufficiency and/or lack of evidence. For a more effective administration of criminal justice, there was a necessity to pass a law protecting witnesses and granting them certain rights and benefits to ensure their appearance in investigative bodies/courts." [40] Petitioner Webb's challenge to the validity of R.A. No. 6981 cannot therefore succeed.

Further, petitioners charge the NBI with violating their right to discovery proceedings during their preliminary investigation by suppressing the April 28, 1995 original copy of the sworn statement of Alfaro and the FBI Report. The argument is novel in this jurisdiction and as it urges an expansive reading of the rights of persons under preliminary investigation it deserves serious consideration. To start with, our Rules on Criminal Procedure do not expressly provide for discovery proceedings during the preliminary investigation stage of a criminal proceeding.[41] Sections 10 and 11 of Rule 117 do provide an accused the right to move for a bill of particulars and for production or inspection of material evidence in possession of the prosecution.[42] But these provisions apply after the filing of the Complaint or Information in court and the rights are accorded to the accused to assist them to make an intelligent plea at arraignment and to prepare for trial.[43]

This failure to provide discovery procedure during preliminary investigation does not, however, negate its use by a person under investigation when indispensable to protect his constitutional right to life, liberty and property. Preliminary investigation is not too early a stage to guard against any significant erosion of the constitutional right to due process of a potential accused. As aforediscussed, the object of a preliminary investigation is to determine the probability that the suspect committed a crime. We hold that the finding of a probable cause by itself subjects the suspect's life, liberty and property to real risk of loss or diminution. In the case at bar, the risk to the liberty of petitioners cannot be understated for they are charged with the crime of rape with homicide, a non-bailable offense when the evidence of guilt is strong.

Attuned to the times, our Rules have discarded the pure inquisitorial system of preliminary investigation. Instead, Rule 112 installed a quasi-judicial type of preliminary investigation conducted by one whose high duty is to be fair and impartial.[44] As this Court emphasized in *Rolito Go vs. Court of Appeals*,[45] "the right to have a preliminary investigation conducted before being bound over for 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." A preliminary investigation should therefore be scrupulously conducted so that the constitutional right to liberty of a potential accused can be protected from any material damage. We uphold the legal basis of the right of petitioners to demand from their prosecutor, the NBI, the original copy of the April 28, 1995 sworn statement of Alfaro and the FBI Report during their preliminary investigation considering their exculpatory character, and hence, unquestionable materiality to the issue of their probable guilt. The right is rooted on the constitutional protection of due process which we rule to be operational even during the preliminary investigation of a potential accused. It is also implicit in section (3) (a) of Rule 112 which requires during the preliminary investigation the filing of a sworn complaint which shall "x x x state the known address of the respondent and be accompanied by affidavits of the complainant and his witnesses as well as other supporting documents x x x."

In laying down this rule, the Court is not without enlightened precedents from other jurisdictions. In the 1963 watershed case of *Brady v. Maryland*[46] the United States Supreme Court held that "suppression of evidence favorable to an accused upon request violates due process where the evidence is material to guilt or punishment, irrespective of the good faith or bad faith of the prosecution." Its progeny is the 1935 case of *Mooney v. Holohan*[47] which laid down the proposition that a prosecutor's intentional use of perjured testimony to procure conviction violates due process. Thus, evolved jurisprudence firming up the prosecutor's duty to disclose to the defense exculpatory evidence in its possession.[48] The rationale is well put by Justice Brennan in *Brady*[49] --- "society wins not only when the guilty are convicted but when criminal trials are fair." Indeed, prosecutors should not treat litigation like a game of poker where surprises can be sprung and where gain by guile is not punished.

But given the right of petitioners to compel the NBI to disclose exculpatory evidence in their favor, we are not prepared to rule that the initial non-production of the original sworn statement of Alfaro dated April 28, 1995 could have resulted in the reasonable likelihood that the DOJ Panel would not have found probable cause. To be sure, the NBI, on July 4, 1995, upon request of petitioners, submitted a photocopy of Alfaro's April 28, 1995 sworn statement. It explained it cannot produce the original as it had been lost. Fortunately, petitioners, on July 28, 1995, were able to obtain a copy of the original from Atty. Arturo Mercader in the course of the proceedings in Civil Case No. 951099.[50] As petitioners admit, the DOJ Panel accepted the original of Alfaro's April 28, 1995 sworn statement as a part of their evidence.[51] Petitioners thus had the fair chance to explain to the DOJ Panel then still conducting their preliminary investigation the exculpatory aspects of this sworn statement. Unfortunately for petitioners, the DOJ Panel still found probable cause to charge them despite the alleged material discrepancies between the first and second sworn statements of Alfaro. For reasons we have expounded, this finding of probable cause cannot be struck down as done with grave abuse of discretion.[52] On the other hand, the FBI Report while corroborative of the alibi of petitioner Webb cannot by itself reverse the probable cause finding of the DOJ Panel in light of the totality of evidence presented by the NBI.

Finally, we come to the argument of petitioner that the DOJ Panel lost its impartiality due to the prejudicial publicity waged in the press and broadcast media by the NBI.

Again, petitioners raise the effect of prejudicial publicity on their right to due process while undergoing preliminary investigation. We find no procedural impediment to its early invocation considering the substantial risk to their liberty while undergoing a preliminary investigation.

In floating this issue, petitioners touch on some of the most problematic areas in constitutional law where the

conflicting demands of freedom of speech and of the press, the public's right to information, and an accused's right to a fair and impartial trial collide and compete for prioritization. The process of pinpointing where the balance should be struck has divided men of learning as the balance keeps moving either on the side of liberty or on the side of order as the tumult of the time and the welfare of the people dictate. The dance of the balance is a difficult act to follow.

In democratic settings, media coverage of trials of sensational cases cannot be avoided and oftentimes, its excessiveness has been aggravated by kinetic developments in the telecommunications industry. For sure, few cases can match the high volume and high velocity of publicity that attended the preliminary investigation of the case at bar. Our daily diet of facts and fiction about the case continues unabated even today. Commentators still bombard the public with views not too many of which are sober and sublime. Indeed, even the principal actors in the case - the NBI, the respondents, their lawyers and their sympathizers - have participated in this media blitz. The possibility of media abuses and their threat to a fair trial notwithstanding, criminal trials cannot be completely closed to the press and the public. In the seminal case of *Richmond Newspapers, Inc. v. Virginia*,^[53] it was wisely held:

"x x x x x x x x

"(a) The historical evidence of the evolution of the criminal trial in Anglo-American justice demonstrates conclusively that at the time this Nation's organic laws were adopted, criminal trials both here and in England had long been presumptively open, thus giving assurance that the proceedings were conducted fairly to all concerned and discouraging perjury, the misconduct of participants, or decisions based on secret bias or partiality. In addition, the significant community therapeutic value of public trials was recognized: when a shocking crime occurs, a community reaction of outrage and public protest often follows, and thereafter the open processes of justice serve an important prophylactic purpose, providing an outlet for community concern, hostility, and emotion. To work effectively, it is important that society's criminal process 'satisfy the appearance of justice,' *Offutt v. United States*, 348 US 11, 14, 99 L Ed 11, 75 S Ct 11, which can best be provided by allowing people to observe such process. From this unbroken, uncontradicted history, supported by reasons as valid today as in centuries past, it must be concluded that a presumption of openness inheres in the very nature of a criminal trial under this Nation's system of justice, Cf., e.g., *Levine v. United States*, 362 US 610, 4 L Ed 2d 989, 80 S Ct 1038.

(b) The freedoms of speech, press, and assembly, expressly guaranteed by the First Amendment, share a common core purpose of assuring freedom of communication on matters relating to the functioning of government. In guaranteeing freedoms such as those of speech and press, the First Amendment can be read as protecting the right of everyone to attend trials so as to give meaning to those explicit guarantees; the First Amendment right to receive information and ideas means, in the context of trials, that the guarantees of speech and press, standing alone, prohibit government from summarily closing courtroom doors which had long been open to the public at the time the First Amendment was adopted. Moreover, the right of assembly is also relevant, having been regarded not only as an independent right but also as a catalyst to augment the free exercise of the other First Amendment rights with which it was deliberately linked by the draftsmen. A trial courtroom is a public place where the people generally - and representatives of the media - have a right to be present, and where their presence historically has been thought to enhance the integrity and quality of what takes place.

(c) Even though the Constitution contains no provision which by its terms guarantees to the public the right to attend criminal trials, various fundamental rights, not expressly guaranteed, have been recognized as indispensable to the enjoyment of enumerated rights. The right to attend criminal trials is implicit in the guarantees of the First Amendment; without the freedom to attend such trials, which people have exercised for centuries, important aspects of freedom of speech and of the press could be eviscerated."

Be that as it may, we recognize that pervasive and prejudicial publicity under certain circumstances can deprive an accused of his due process right to fair trial. Thus, in *Martelino, et al. vs. Alejandro, et al.*,^[54] we held that to warrant a finding of prejudicial publicity there must be allegation and proof that the judges have been unduly influenced, not simply that they might be, by the barrage of publicity. In the case at bar, we find nothing in the records that will prove that the tone and content of the publicity that attended the investigation of petitioners fatally infected the fairness and impartiality of the DOJ Panel. Petitioners cannot just rely on the subliminal effects of publicity on the sense of fairness of the DOJ Panel, for these are basically unbeknown and beyond knowing. To be sure, the DOJ Panel is composed of an Assistant Chief State Prosecutor and Senior State Prosecutors. Their long experience in criminal investigation is a factor to consider in determining whether they can easily be blinded by the klieg lights of publicity. Indeed, their 26-page Resolution carries no indubitable indicia of bias for it does not appear that they considered any extra-record evidence except evidence properly adduced by the parties. The length of time the investigation was conducted despite its summary nature and the generosity with which they accommodated the discovery motions of petitioners speak well of their fairness. At no instance, we note, did petitioners seek the disqualification of any member of the DOJ Panel on the ground of bias resulting from their bombardment of prejudicial publicity.

It all remains to state that the Vizconde case will move to a more critical stage as petitioners will now have to undergo trial on the merits. We Stress that probable cause is not synonymous with guilt and while the light of publicity may be a good disinfectant of unfairness, too much of its heat can bring to flame an accused's right to fair trial. Without imposing on the trial judge the difficult task of supervising every specie of speech relating to the case at bar, it behooves her to be reminded of the duty of a trial judge in high profile criminal cases to control publicity prejudicial to the fair administration of justice.^[55] The Court reminds judges that our ability to dispense impartial justice is an issue in every trial and in every criminal prosecution, the judiciary always stands as a silent accused. More than convicting the guilty and acquitting the innocent, the business of the judiciary is to assure fulfillment of the promise that justice shall be done and is done — and that is the only way for the judiciary to get an acquittal from the bar of public opinion.

IN VIEW WHEREOF, the petitions are dismissed for lack of showing of grave abuse of discretion on the part of the respondents. Costs against petitioners.

SO ORDERED.

Regalado, J., concur.

Narvasa, (Chairman), J., on leave.

Mendoza, J., concurs in the majority opinion of J. Puno and in the separate opinion of J. Francisco.

Francisco, J., see concurring opinion.

[1] Petitioner Webb filed his petition on August 11, 1995; petitioner Gatchalian on August 14, 1995 and petitioner Lejano on August 16, 1995. Mr. Lauro Vizconde intervened on August 17, 1995.

[2] The six (6) others were Miguel "Ging" Rodriguez, Joey Filart, Hospicio "Pyke" Fernandez, Artemio "Dong" Ventura, Peter Estrada and Gerardo Biong.

[3] The other members of the Panel were Senior State Prosecutor Leonardo C. Guiab, Jr., State Prosecutor Roberto A. Lao and State Prosecutor Pablo C. Formaran, III.

[4] Then 19 years of age.

- [5] Then 51 years of age.
- [6] Then 7 years of age.
- [7] Resolution of the Zuño Panel, Annex "A" Petition, pp. 2-7.
- [8] Ibid, pp. 7-8.
- [9] Ibid, pp. 8-12.
- [10] Ibid, p. 13.
- [11] Ibid.
- [12] Ibid, pp. 13-14.
- [13] Ibid, pp. 13-14.
- [14] Ibid, pp. 14-16.
- [15] Ibid, p. 15.
- [16] Ibid, pp. 16-18.
- [17] Ibid, p. 18.
- [18] Except Gerardo Biong who was recommended to be charged as an accessory.
- [19] Annex "B", Petition.
- [20] Section 2, Article III of the 1987 Constitution.
- [21] Yee Sue Koy v. Almeda, 70 Phil. 141 [1940].
- [22] Bernas, The Constitution of the Republic of the Philippines, a Commentary, Vol. I, 1987 ed., pp. 86--87.
- [23] Brinegar v. US, 338 US 160 [1949].
- [24] Del Carmen, Criminal Procedure, Law and Practice, 3rd ed., p. 86.
- [25] Ibid.
- [26] Petition, pp. 18-19.
- [27] Annex "A," Petition, pp. 25-27.
- [28] Atty. Florante Dizon, a counsel of choice.
- [29] Annex "A," Petition, pp. 11-17.
- [30] Annex "A," Petition, pp. 23-24.

[31] 338 US 160 [1949].

- [32] LaFave and Israel, Criminal Procedure, Hornbook Series, 1985 ed., pp. 109-110.

[33] 167 SCRA 397-398.

[34] See also Cruz, Jr. . . People, 233 SCRA 439 [1994].

[35] See Annex "A," Consolidated Comment of the Solicitor General.

[36] See Enrile v . . Salazar, 186 SCRA 217 [1990].

[37] 232 SCRA 192 [1994].

[38] SEC. 9. Discharge of accused to be state witness. - When two or more persons are jointly charged with the commission of any offense, upon motion the prosecution before resting its case, the court may direct one or more of the accused to be discharged with their consent so that they may be witnesses for the state when after requiring the prosecution to present evidence and the sworn statement of each proposed state witness at a hearing in support of the discharge, the court is satisfied that:

- (a) There is absolute necessity for the testimony of the accused whose discharge is requested;
- (b) There is no other direct evidence available for the proper prosecution of the offense committed, except the testimony of said accused;
- (c) The testimony of said accused can be substantially corroborated in its material points;
- (d) Said accused does not appear to be the most guilty;
- (e) Said accused has not at any time been convicted of any offense involving moral turpitude.

Evidence adduced in support of the discharge shall automatically form part of the trial. If the court denies the motion for discharge of the accused as state witness, his sworn statement shall be inadmissible in evidence.

[39] See Primer on the Witness Protection Security and Benefit Act, (R.A. No. 6981) Department of Justice, p. 1.

[40] Op cit.

[41] In contrast, our Rules provide pre-trial discovery proceedings in civil actions. See Rule 24 on Depositions and Discovery; Rule 25 on Interrogatories to Parties; Rule 26 on Admission by Adverse Party; Rule 27 on Production or Inspection of Documents or Things; Rule 28 on Physical and Mental Examination of Persons and Rule 29 on Refusal to Make Discovery.

[42] SEC. 10. Bill of particulars. -Accused may, at or before arraignment, move for a bill of particulars to enable him properly to plead and to prepare for trial. The motion shall specify the alleged defects and the details desired. (6a, R?116)

SEC. 11. Production or inspection of material evidence in possession of prosecution. - On motion of the accused showing good cause and with notice to all parties, the court, in order to prevent surprise, suppression, or alteration, may order the prosecution to produce and permit the inspection and copying or photographing, of any written statements given by the complainant and other witnesses in any investigation of the offense conducted by the prosecution or any other investigating officers, as well as of any designated documents, papers, books, accounts, letters, photographs, objects or tangible things, not otherwise privileged, which constitute or contain evidence material to any matter involved in the case, and which are in the possession or under the control of the prosecution, the police, or any other law investigating agencies. (8a, R-118)

[43] Note that Rule 116 is entitled Arraignment and Plea.

[44] Cruz, Jr. v. People, 233 SCRA 439.

[45] 206 SCRA 138 [1992].

[46] 373 US 83, 83 S. Ct. 1194, 10 L. Ed. 2d, 216 [1983].

[47] 294 US 103, 55 S. Ct. 340, 79 L. Ed. 791 [1935].

[48] See US v. Augurs, 427 US 97, 96 S. Ct. 2392, 49 L. Ed 2d 342 [1976]; US v. Bagley, 473 US 667, 105 S. Ct. 3375, 87 L. Ed. 2d 481 [1985]; Pennsylvania v. Ritchie, 480 US 39, 107 S. Ct. 989, 94 L. Ed. ed 40 [1987].

[49] Op cit.

[50] Filed in Br. 63, RTC, Makati entitled Hubert Webb vs. Mercader, et al.

[51] See Petition, page 7, par. 3.16.

[52] We note that petitioner Webb does not complain that the xerox copy submitted by the NBI is different from the original produced by Atty. Mercader.

[53] 445 US 555, 100 S. Ct. 2814, 65 L. Ed. 2d 973 [1980]

[54] L-30894, March 25, 1970, 32 SCRA 106

[55] Sheppard v. Maxwell, 384 US 333, 86 S. Ct. 1507, 16 L. Ed. 600 [1966]

CONCURRING OPINION

FRANCISCO, J.:

The thrust of petitioners' arguments involve the validity and exercise of the prosecutory powers of the State. Maintaining their innocence, petitioners assert that the filing of an information and the issuance of warrants of arrest against them were without probable cause. Petitioners, in my considered view, failed to make a case to warrant the Court's interference.

Preliminary investigation, unlike trial, is summary in nature, the purpose of which is merely to determine whether a crime has been committed and whether there is probable cause to believe that the accused is guilty thereof (Paderanga v. Drilon, 196 SCRA 86, 92 [1991]). It is not intended to find guilt beyond reasonable doubt. Courts should give deference, in the absence of a clear showing of arbitrariness, as in this case, to the finding and determination of probable cause by prosecutors in preliminary investigations. If not, the functions of the courts will be unduly hampered by innumerable petitions compelling the review of the exercise of discretion on the part of fiscals or prosecuting attorneys if each time they decide to file an information in court their finding can be immediately brushed aside at the instance of those charged (Ocampo IV v. Ombudsman, 225 SCRA 725, 730 [1993]). The Court, therefore, must look askance at unmeritorious moves that could give a dent in the efficient and effective administration of justice.

Petitioners characterize the evidence against them to be inherently weak and uncorroborated vis-a-vis their defenses. The weight or sufficiency of evidence, to my mind, is best assayed in the trial proper. In the search for truth, a trial has distinct merits over a preliminary investigation. We have had occasion to stress that trial is to be preferred to ferret out the truth (Abugotal v. Tiro, 66 SCRA 196, 201 [1975]). The validity and merits of a party's defense or accusation as well as the admissibility or inadmissibility of testimonies and evidence are better ventilated during the trial stage than in the preliminary investigation level. The ineluctable media attention

notwithstanding, truth as to their innocence or guilt is still best determined at the trial.

With respect to petitioners' contention that public respondent judge failed to personally examine and determine the existence of probable cause for the issuance of a warrant, suffice it to say that the judge does not have to personally examine the complainant and his witnesses in order to issue a warrant of arrest as he can rely on the certification of the prosecutor/s (Circular No. 12-Guidelines on Issuance of Warrants of Arrests [June 30, 1987]; *Soliven v. Makasiar*, 167 SCRA 393, 398 [1988]). There is ample evidence and sufficient basis on record that support the trial court's issuance of the warrant as petitioners themselves do not contend that the prosecutors' certification was unaccompanied by the records of the preliminary investigation to take their case outside the ambit of the rule. Moreover, contrary to what the petitioners imply, the Court may not determine how cursory or exhaustive the judge's examination of the certification, report and findings of the preliminary investigation and its annexes should be as this depends not only upon the sound exercise of the judge's discretion in personally determining the existence of probable cause, but also from the circumstances of each case (*Lim, Sr. v. Felix*, 194 SCRA 292, 306 [1991]). Besides, respondent judge, being a public officer, enjoys the presumption of regularity in the performance of his duties (Rule 131, Sec. 3 [m], Rules of Court). The issuance of the warrants of arrest against petitioners thus can not be said to be whimsical or arbitrary.

Lastly, the law in this jurisdiction is lopsided in favor of the accused. The 1987 Constitution and the Rules of Court enumerate an array of rights upon which an accused can seek protection and solace. To mention a few: he has the right to be presumed innocent until the contrary is proved, the right against self-incrimination, the right to remain silent, to confront and cross-examine the witnesses against him, to have a speedy, impartial and public trial, to be heard by himself and counsel, to have competent and independent counsel preferably of his own choice. These rights are afforded to the accused and not to the complainant. Therefore, petitioners need not be distressed if they henceforth go to trial.

I vote to dismiss the petitions.

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