

CRISTOPHER GAMBOA, PETITIONER, VS. HON. ALFREDO CRUZ, JUDGE OF THE COURT OF FIRST INSTANCE OF MANILA, BR. XXIX, RESPONDENT.

G.R. No. 56291. June 27, 1988

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Petition for certiorari and prohibition, with prayer for a temporary restraining order, to annul and set aside the order dated 23 October 1980 of the Court of First Instance of Manila. Branch XXIX, in Criminal Case No. 47622, entitled "People of the Philippines, Plaintiff vs. Cristopher Gamboa v Gonzales, Accused," and to restrain the respondent court from proceeding with the trial of the aforementioned case.

Petitioner alleges that:

On 19 July 1979, at about 7:00 o'clock in the morning, he was arrested for vagrancy, without a warrant of arrest, by

Patrolman Arturo Palencia. Thereafter, petitioner was brought to Precinct 2, Manila, where he was booked for vagrancy and then detained therein together with several others.

The following day, 20 July 1979, during the lineup of five (5) detainees, including petitioner, complainant Erlinda B. Bernal pointed to petitioner and said, "that one is a companion." After the identification, the other detainees were brought back to their cell but petitioner was ordered to stay on. While the complainant was being interrogated by the police investigator, petitioner was told to sit down in front of her.

On 23 July 1979, an information for robbery was filed against the petitioner.

On 22 August 1979, petitioner was arraigned. Thereafter, hearings were held. On 2 April 1980, the prosecution formally offered its evidence and then rested its case.

On 14 July 1980, petitioner, by counsel, instead of presenting his defense, manifested in open court that he was filing a Motion to Acquit or Demurrer to Evidence. On 13 August 1980, petitioner filed said Motion predicated on the ground that the conduct of the line-up, without notice to, and in the absence of, his counsel violated his constitutional rights to counsel and to due process.

On 23 October 1980, the respondent court issued the following order (assailed in the petition at bar) denying the Motion to Acquit:

"For resolution is a motion to acquit the accused based on the grounds that the constitutional rights of the said accused, to counsel and to due process, have been violated. After considering the allegations and arguments in support of the said motion in relation to the evidence presented, the Court finds the said motion to be without merit and, therefore, denies the same.

"The hearing of this case for the purpose of presenting the evidence for the accused is hereby set on November 28, 1980. at 8:30 o'clock in the morning."

Hence, the instant petition.

On 3 March 1981, the Court issued a temporary restraining order "effective as of this date and continuing until otherwise ordered by the court." [1]

Petitioner contends that the respondent judge acted in excess of jurisdiction and with grave abuse of discretion, in issuing the assailed order. He insists that said order, in denying his Motion To Acquit, is null and void for being violative of his rights to counsel and to due process. [2]

We find no merit in the contentions of petitioner.

To begin with, the instant petition is one for certiorari, alleging grave abuse of discretion, amounting to lack of jurisdiction, committed by the respondent judge in issuing the questioned order dated 23 October 1980.

It is basic, however, that for certiorari to lie, there must be a capricious, arbitrary and whimsical exercise of power, the very antithesis of judicial prerogative in accordance with centuries of both civil law and common law traditions. [3] To warrant the issuance of the extraordinary writ of certiorari, the alleged lack of jurisdiction, excess thereof, or abuse of discretion must be so gross or grave, as when power is exercised in an arbitrary or despotic manner by reason of passion, prejudice or personal hostility, or the abuse must be so patent as to amount to an evasion of positive duty, or to a virtual refusal to perform a duty enjoined by law, or to act at all, in contemplation of law. [4] This is not the situation in the case at bar. The respondent court considered petitioner's arguments as well as the prosecution's evidence against him, and required him to present his evidence.

The rights to counsel and to due process of law are indeed two (2) of the fundamental rights guaranteed by the Constitution, whether it be the 1973 or 1987 Constitution. In a democratic society, like ours, every person is entitled to the full enjoyment of the rights guaranteed by the Constitution.

On the right to counsel, Sec. 20, Art. IV of the Bill of Rights of the 1973 Constitution, reads:

"No person shall be compelled to be a witness against himself. Any person under investigation for the commission of an offense shall have the right to remain silent and to counsel, and to be informed of such right. No force, violence, threat, intimidation, or any other means which vitiates the free will shall be used against him. Any confession obtained in violation of this section shall be inadmissible in evidence."

The same guarantee, although worded in a different manner, is included in the 1987 Constitution. Section 12 (1, 2 & 3), Article III thereof provides:

"Sec. 12 (1) Any person under investigation for the commission of an offense shall have the right to be informed of his right to remain silent and to have competent and independent counsel preferably of his own choice. If the person cannot afford the services of counsel, he must be provided with one. These rights cannot be waived except in writing and in the presence of counsel.

(2) No torture, force, violence, threat, intimidation, or any other means which vitiate the free will shall be used against him. Secret detention places, solitary, incommunicado, or other similar forms of detention are prohibited.

(3) Any confession or admission obtained in violation of this or the preceding section shall be inadmissible in evidence against him."

The right to counsel attaches upon the start of an investigation, i.e. when the investigating officer starts to ask questions to elicit information and/or confessions or admissions from the respondent/accused. At such point or stage, the person being interrogated must be assisted by counsel to avoid the pernicious practice of extorting false or coerced admissions or confessions from the lips of the person undergoing interrogation, for the commission of an offense.

Any person under investigation must, among other things, be assisted by counsel. The above-cited provisions of the Constitution are clear. They leave no room for equivocation. Accordingly, in several cases, this Court has consistently held that no custodial investigation shall be conducted unless it be in the presence of counsel, engaged by the person arrested, or by any person in his behalf, or appointed by the court upon petition either of the detainee himself or by anyone in his behalf, and that, while the right may be waived, the waiver shall not be valid unless made in writing and in the presence of counsel.⁵

As aptly observed, however, by the Solicitor General, the police line-up (at least, in this case) was not part of the custodial inquest, hence, petitioner was not yet entitled, at such stage, to counsel. The Solicitor General states:

"When petitioner was identified by the complainant at the police line-up, he had not been held yet to answer for a criminal offense. The police line-up is not a part of the custodial inquest, hence, he was not yet entitled to counsel. Thus, it was held that when the process had not yet shifted from the investigators to the accusatory as when police investigation does not elicit a confession the accused may not yet avail of the services of his lawyer (*Escobedo v. Illinois* of the United States Federal Supreme Court, 378 US 478, 1964). Since petitioner in the course of his identification in the police line-up had not yet been held to answer for a criminal offense, he was, therefore, not deprived of his right to be assisted by counsel because the accusatory process had not yet set in. The police could not have violated petitioner's right to counsel and due process as the confrontation between the State and him had not begun. In fact, when he was identified in the police line-up by complainant he did not give any statement to the police. He was, therefore, not interrogated at all as he was not facing a criminal charge. Far from what he professes, the police did not, at that stage, exact a confession to be used against him. For it was not he but the complainant who was being investigated at that time. He "was ordered to sit down in front of the complainant while the latter was being investigated" (par. 3.03, Petition). Petitioner's right to counsel had not accrued."^[6]

Even under the constitutional guarantees obtaining in the United States, petitioner would have no cause for claiming a violation of his rights to counsel and due process. In *Kirby vs. Illinois*,^[7] the facts of the case and the votes of the Justices therein are summarized as follows:

"After arresting the petitioner and a companion and bringing them to a police station, police officers learned that certain items found in their possession had been stolen in a recent robbery. The robbery victim was brought to the police station and immediately identified the petitioner and his companion as the robbers. No attorney was present when the identification was made, and neither the petitioner nor his companion had asked for legal assistance or had been advised of any right to the presence of counsel. Several weeks later, the petitioner and his companion were indicted for the robbery. At trial in an Illinois state court, the robbery victim testified that he had seen the petitioner and his companion at the police station, and he pointed them out in the courtroom and identified them as the robbers. The petitioner and his companion were convicted, and the Illinois Appellate Court, First District, affirmed the petitioner's conviction, holding that the constitutional rule requiring the exclusion of evidence derived from out of-court identification procedures conducted in the absence of counsel did not apply to preindictment identifications (121 Ill App 2d 323, 257 NEE 2d 589).

"On certiorari, the United States Supreme Court, although not agreeing on an opinion, affirmed. In an opinion by STEWART, J., announcing the judgment of the court and expressing the view of four members of the court, it was held that the constitutional right to counsel did not attach until judicial criminal proceedings were commenced, and that the exclusionary rule relating to out-of-court identifications in the absence of counsel did not apply to identification testimony based upon a police station show-up which took place before the accused had been indicted or otherwise formally charged with any criminal offense.

"BURGER, Ch. J., concurring, joined in the plurality opinion and expressed his agreement that the right to counsel did not attach until criminal charges were formally made against an accused.

"POWELL, J., concurred in the result on the ground that the exclusionary rule should not be extended.

"BRENNAN, J., joined by DOUGHLAS and MARSHALL, JJ., dissented on the grounds that although Supreme Court decisions establishing the exclusionary rule happened to involve post indictment identifications, the rationale behind the rule was equally applicable to the present case.

"WHITE, J., dissented on the grounds that Supreme Court decisions establishing the exclusionary rule governed the present case."⁸

Mr. Justice Stewart, expressing his view and that of three other members⁹ of the Court, said:

"In a line of constitutional cases in this Court stemming back to the Court's landmark opinion in *Powell v. Alabama*, 287 US 45, 77 L Ed 158, 53 S Ct 55, 84 ALR 527, it has been firmly established that a person's Sixth and Fourteenth Amendment right to counsel attaches only at or after the time that adversary judicial proceedings have been initiated against him. See *Powell v. Alabama*, supra; *Johnson v. Zerbst*, 304 US 458, 82 L Ed 1461, 58 S Ct 1019, 146 ALR 357; *Hamilton v. Alabama*, 368 US 52, 7 L Ed 2d 114, 82 S Ct 157; *Gideon v. Wainwright*, 372 US 335, 9 L Ed 2d 799, 83 S Ct 792, 92 ALR 2d 733; *White v. Maryland*, 373 US 59, 10 L Ed 2d 193, 83 S Ct 1050; *Massiah v. United States*, 377 US 201, 12 L Ed 246, 84 S Ct 1199; *United States v. Wade*, 388 US 218, 18 L Ed 1149, 87 S Ct 1926; *Gilbert v. California*, 388 US 263, 18 L Ed 2d 1178, 87 S Ct 1951; *Coleman v. Alabama*, 399 US 1, 26 L Ed 2d 387, 90 S Ct. 1999.

This is not to say that a defendant in a criminal case has a constitutional right to counsel only at the trial itself. The *Powell* case makes clear that the right attaches at the time of arraignment and the Court has recently held that it exists also at the time of a preliminary hearing. *Coleman v. Alabama*, supra. But the point is that, while members of the court have differed as to existence of the right to counsel in the contexts of some of the above cases, all of those cases have involved points of time at or after the initiation of adversary judicial criminal proceedings - whether by way of formal charge, preliminary hearing, indictment, information, or arraignment. (Italics supplied).[10]

As may be observed, the 1973 and 1987 Philippine Constitutions go farther and beyond the guarantee of the right to counsel under the Sixth and Fourteenth Amendments to the U.S. Constitution. For while, under the latter, the right to counsel "attaches only at or after the time that adversary judicial proceedings have been initiated against him (the accused)," under the 1973 and 1987 Philippine Constitutions, the right to counsel attaches at the start of investigation against a respondent and, therefore, even before adversary judicial proceedings against the accused have begun.

Given the clear constitutional intent in the 1973 and 1987 Constitutions, to extend to those under police investigation the right to counsel, this occasion may be better than any to remind police investigators that, while the Court finds no real need to afford a suspect the services of counsel during a police line-up, the moment there is a move or even an urge of said investigators to elicit admissions or confessions or even plain information which may appear innocent or innocuous at the time, from said suspect, he should then and there be assisted by counsel, unless he waives the right, but the waiver shall be made in writing and in the presence of counsel.

On the right to due process, the Court finds that petitioner was not, in any way, deprived of this substantive and constitutional right, as he was duly represented by a member of the Bar. He was accorded all the opportunities to be heard and to present evidence to substantiate his defense; only that he chose not to, and instead opted to file a Motion to Acquit after the prosecution had rested its case. What due process abhors is the absolute lack of opportunity to be heard.[11] The case at bar is far from this situation.

In any event, certiorari and prohibition are not the proper remedies against an order denying a Motion To Acquit. Section 1, Rule 117 of the Rules of Court provides that, upon arraignment, the defendant shall immediately either move to quash the complaint or information or plead thereto, or do both and that, if the defendant moves to quash,

without pleading, and the motion is withdrawn or overruled, he should immediately plead, which means that trial must proceed. If, after trial on the merits, judgment is rendered adversely to the movant (in the motion to quash), he can appeal the judgment and raise the same defenses or objections (earlier raised in his motion to quash) which would then be subject to review by the appellate court.

An order denying a Motion to Acquit (like an order denying a motion to quash) is interlocutory and not a final order. It is, therefore, not appealable. Neither can it be the subject of a petition for certiorari. Such order of denial may only be reviewed, in the ordinary course of law, by an appeal from the judgment, after trial. As stated in *Collins vs. Wolfe*,^[12] and reiterated in *Mill vs. Yatco*,^[13] the accused, after the denial of his motion to quash, should have proceeded with the trial of the case in the court below, and if final judgment is rendered against him, he could then appeal, and, upon such appeal, present the questions which he sought to be decided by the appellate court in a petition for certiorari.

In *Acharon vs. Purisima*,^[14] the procedure was well defined, thus:

"Moreover, when the motion to quash filed by Acharon to nullify the criminal cases filed against him was denied by the Municipal Court of General Santos his remedy was not to file a petition for certiorari but to go to trial without prejudice on his part to reiterate the special defenses he had invoked in his motion and, if, after trial on the merits, an adverse decision is rendered, to appeal therefrom in the manner authorized by law. This is the procedure that he should have followed as authorized by law and precedents. Instead, he took the usual step of filing a writ of certiorari before the Court of First Instance which in our opinion is unwarranted it being contrary to the usual course of law."^[15]

Conformably with the above rulings, whether or not petitioner was, afforded his rights to counsel and to due process is a question which he could raise, as a defense or objection, upon the trial on the merits, and, if that defense or objection should fail, he could still raise the same on appeal.

On the other hand, if a defendant does not move to quash the complaint or information before he pleads, he shall be taken to have waived all objections which are grounds for a motion to quash, except where the complaint or information does not charge an offense, or the court is without jurisdiction of the same.^[16]

Here, petitioner filed a Motion To Acquit only after the prosecution had presented its evidence and rested its case. Since the exceptions, above-stated, are not applicable, petitioner is deemed to have waived objections which are grounds for a motion to quash.

Besides, the grounds relied upon by petitioner in his Motion to Acquit are not among the grounds provided in Sec. 2, Rule 117 of the Rules of Court for quashing a complaint or information. Consequently, the lower court did not err in denying petitioner's Motion to Acquit.

WHEREFORE, the petition is DISMISSED. The temporary restraining order issued on 3 March 1981 is LIFTED. The instant case is remanded to the respondent court for further proceedings to afford the petitioner-accused the opportunity to present evidence on his behalf. This decision is immediately executory. With costs against the petitioner.

SO ORDERED.

Fernan, Narvasa, Melencio-Herrera, Paras, Feliciano, Bidin, Cortes, Griño-Aquino, and Medialdea, JJ., concur.
Gutierrez, Jr., J., concurs pro hac vice.

Cruz, J., see separate opinion.

Yap, C.J. and Sarmiento, J., dissents, see separate opinion.

Gancayco, J., concurs in the dissent of Justice Sarmiento.

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- [1] Rollo, p. 33.
- [2] Memorandum of Petitioner, p. 17.
- [3] Phil. Virginia Tobacco Administration vs. Lucero, 125 SCRA 337, 343 citing the case of Panaligan vs. Adolfo, 67 SCRA 176.
- [4] F.S. Divinagracia Agro-Commercial, Inc. vs. Court of Appeals, 104 SCRA 180, 191 citing the cases of Abig vs. Constantino, 2 SCRA 299; Abad Santos vs. Province of Tarlac, 67 Phil. 480 and Alafritz vs. Wable, 72 Phil. 278.
- [5] People vs. Galit, 135 SCRA 465. 472 citing the case of Morales, Jr. vs. Enrile, 121 SCRA 538, 554.
- [6] Memorandum for public respondent, Rollo, pp. 6-7.
- [7] 406 US 682, 32 L Ed 2d 411, 92 S Ct 1877.
- [8] 32 L Ed 2d at 411-412.
- [9] Mr. Chief Justice Burger, Mr. Justice Blackmun and Mr. Justice (now Chief Justice) Rehnquist; Mr. Justice Powell concurred in the result.
- [10] 32 L Ed 2d at 417.
- [11] Fariscal vda. de Emnas vs. Emnas, 95 SCRA 470. 475; Tajonera vs. Lamarosa, 110 SCRA 438. 448.
- [12] 4 Phil. 534.
- [13] 101 Phil. 599.

[14] 13 SCRA 309.

- [15] Ibid., pp. 311-312.
- [16] Sec. 8. Rule 117 of the Rules of Court.

CONCURRING OPINION

CRUZ, J.,

I concur because it does not appear from the narration of the facts in this case that improper suggestions were made by the police to influence the witnesses in the identification of the accused.

In *United States v. Wade*, 388 U.S. 218, the U.S. Supreme Court observed through Justice Brennan:

"What facts have been disclosed in specific cases about the conduct of pretrial confrontations for identification illustrate both the potential for substantial prejudice to the accused at that stage and the need for its revelation at trial- A commentator provides some striking examples:

'In a Canadian case . . . the defendant had been picked out of a line-up of six men, of which he was the only Oriental. In other cases, a black-haired suspect was placed among a group of light-haired persons, tall suspects have been made to stand with short non-suspects, and, in a case where the perpetrator of the crime was known to be a youth, a suspect under twenty was placed in a line-up with five other persons, all of whom were forty or

over.'

"Similarly state reports, in the course of describing prior identifications admitted as evidence of guilt, reveal numerous instances of suggestive procedures, for example, that all in the line-up but the suspect were known to the identifying witness, that the other participants in a lineup were grossly dissimilar in appearance to the suspect, that only the suspect was required to wear distinctive clothing which the culprit allegedly wore, that the witness is told by the police that they have caught the culprit after which the defendant is brought before the witness alone or is viewed in jail, that the suspect is pointed out before or during a lineup, and that the participants in the lineup are asked to try on an article of clothing which fits only the suspect.

I reserve my judgment on any subsequent case where the question raised here is submitted anew and the same or similar circumstances as those described above are present.

DISSENTING OPINION

YAP, C. J.,

I am constrained to dissent from the majority opinion. In my opinion, after the police line-up with other detainees in which the accused was pointed out by the complainant as one of the "companions" of those who allegedly committed the crime of robbery, the investigatory part of the proceedings started when the accused was singled out and "ordered to sit down in front of the complainant" while the latter gave her statement which led to the filing of the information. The majority opinion holds that the police line-up was not part of the custodial inquest, hence, petitioner (the herein accused) was not yet entitled to counsel. But this overlooks the fact that the incident objected to took place after the police line-up, when the accused was made to confront the complainant, and the latter made her statement which became the basis of the information filed against the accused. At this point, it can be said that the custodial investigation had already begun.

The applicable provision of the 1973 Constitution states that "any person under investigation for the commission of an offense shall have the right to counsel, and to be informed of such rights." (Sec. 20, Art. IV, Bill of Rights). A similar provision has been incorporated in the 1987 Constitution. I do not agree with the view that since the accused was not asked any question, he was not "under investigation." The investigation commenced the moment he was taken from the police line-up and made to sit in front of the complainant, while the latter made her statement to the police.

Neither do I agree with the view of the Solicitor General, which is sustained by the majority opinion, that the accused at that point was not entitled to be informed of his right to counsel, because "the police did not, at that stage, exact a confession to be used against him." The right to counsel must be afforded to the accused the moment he is under custodial investigation, and not only when a confession is being exacted from him.

For these reasons, I am of the opinion that the petitioner should have been informed, at that stage, of his constitutional right to counsel, and accordingly, I vote to grant the petition.

DISSENTING OPINION

SARMIENTO, J,

Insofar as the majority would deny the accused the right to counsel (at an in-custody confrontation) in this particular case, I am constrained to dissent.

The accused was arrested, without a warrant, for vagrancy, on July 19, 1979. It is clear that at that time, no probable cause to indict him for robbery existed. For this reason, he was "booked" for vagrancy alone and thereafter detained.

Unexplainably, he was made to take part in a line-up the following day, July 20, 1979, upon the behest, apparently, of the complainant, who unabashedly pointed to him as a "companion" in a certain robbery case. He was later made to "sit down in front of the said complainant while the latter gave her statement which led to the filing of the information.

It is the view of the majority that "the police line-up (at least, in this case) was not part of the custodial inquest, hence, petitioner was not yet entitled, at such stage, to counsel." it is my own-view, however, that given the particular circumstances of this case, he was entitled to counsel pursuant to the provisions of Section 12, of Article III, of the Bill of Rights.

It is noteworthy that the accused was already in custody at the time. And although he was detained for some other cause (vagrancy), it left him little or no choice other than to face his accuser. It cannot be then gainsaid that as far as he was concerned, the situation had reached what American jurisprudence refers to as the "critical stage"[1] of the inquiry, in which the confrontation becomes an accusation rather than a routine procedure preliminary to a formal prosecution. He was in custody not for the "usual questioning" but for an existing charge, although the investigation was in connection with another offense. The confrontation, exacerbated by the pressure of actual custody, had become adversarial rather than informational, and the assistance of counsel to the accused, a matter of Constitutional necessity. That he was being held for vagrancy whereas the line-up involved a complaint for robbery does not make a difference to him. He was under detention, a development that made him vulnerable to pressures, whatever offense was involved.

While I am not prepared to hold that a police line-up per se amounts to a critical stage of the investigation, for in most cases, it merely forms part of the evidence-gathering process, the fact that the accused herein stood charged for an offense and has been detained therefor should make this case different.[2]

So also is it noteworthy that the accused was made to confront the complainant in an interrogation following the line-up. It is my belief that, other than such a line-up, the subsequent confrontation had reinforced his need for legal assistance. Verily, he was an unwilling audience to his accuser, if a mute witness to his own prosecution. In *People v. Hassan*,[3] we struck down a similar confrontation for repugnancy to the Constitution. This Court said therein:

The manner by which Jose Samson, Jr. was made to confront and identify the accused alone at the funeral parlor, without being placed in a police line-up, was "pointedly suggestive, generated confidence where there was none, activated visual imagination, and, all told, subverted his reliability as eyewitness. This unusual, coarse, and highly singular method of identification, which revolts against the accepted principles of scientific crime detection, alienates the esteem of every just man, and commands neither our respect nor acceptance."

Moreover, the confrontation arranged by the police investigator between the self-proclaimed eyewitness and the accused did violence to the right of the latter to counsel in all stages of the investigation into the commission of a crime especially at its most crucial stage — the identification of the accused.

As it turned out, the method of identification became just a confrontation. At that critical and decisive moment,

the scales of justice tipped unevenly against the young, poor, and disadvantaged accused. The police procedure adopted in this case in which only the accused was presented to witness Samson, in the funeral parlor, and in the presence of the grieving relatives of the victim, is as tainted as an uncounselled confession and thus falls within the same ambit of the constitutionally entrenched protection. For this infringement alone, the accused-appellant should be acquitted.⁴[4]

It is in such cases indeed that the more questions are asked, the more convinced is the complainant of the accused's guilt, and in extreme cases, the better "convinced" is the accused himself that he is truly guilty. The presence of counsel would have obviated the one-sidedness of the investigation.

To be sure, the majority itself would concede that something is amiss in such a procedure, at least in this case ("this occasion may be better than any to remind police investigators that, while the Court finds no real need to afford a suspect the services of counsel during a police line-up, the moment there is a move or even an urge of said investigators to elicit admissions or confessions or even plain information which may appear innocent or innocuous at the time, from said suspect, he should then and there be assisted by counsel, unless he waives the right, but the waiver shall be made in writing and in the presence of counsel").⁵

The point, however, is that such a police procedure is invariably intended to secure admissions from the accused (assuming that he is identified), unless the authorities are possessed of other evidence. They would not be so obtuse to do a useless act.

To my mind, the accused herein was not only denied the right to counsel which I hold to be available under the circumstances, he was deprived of due process the day he was arrested. Albeit it does not appear to have been put in issue in his petition, he was not apprised of his rights when he was apprehended for vagrancy. The next day, he was placed in a line-up upon a complaint for robbery. To my mind, he was a ready-made suspect for an offense in which no probable cause existed to warrant a custodial interrogation. If this is a customary police procedural, I do not hesitate to condemn it for Constitutional reasons.

While it is true that he was not denied the right to present his defense, it does not cure the defect surrounding his arrest, or make admissible whatever evidence gathered in the course of the confrontation and investigation. The resulting unfairness has deprived him of the opportunity to prepare a meaningful defense.

I agree that in terms of the provisions of the Rules of Court, the accused may not challenge, on certiorari, a denial of a motion to acquit. But it seems to me that the case, for all its Constitutional implications, should stand on its merits and not on the errors of the counsel for the accused on his choice of judicial remedies. Accordingly, I am for denying the Rules of their rigidity and for deciding on the petition on Constitutional grounds.

I vote to grant the petition.

[1] U.S. v. Wade, 388 US 218 (1967).

[2] In *People vs. Olvis* (G.R. No. 71092, September 30, 1987). the Court implied that line-ups are not by themselves offensive to the Constitution.

[3] G.R. No. 68969, January 22. 1988.

[4] *Supra*,13-14.

[5] G.R. No. 56291. 9-10.

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