

JOSEPH E. ESTRADA, PETITIONER, VS. ANIANO DESIERTO, IN HIS CAPACITY AS OMBUDSMAN, RAMON GONZALES, VOLUNTEERS AGAINST CRIME AND CORRUPTION, GRAFT FREE PHILIPPINES FOUNDATION, INC...

G.R. Nos. 146710-15. April 03, 2001

Ponente: PUNO, J.

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PUNO, J.:

For resolution are petitioner's Motion for Reconsideration in G.R. Nos. 146710-15 and Omnibus Motion in G.R. No. 146738 of the Court's Decision of March 2, 2001.

In G.R. Nos. 146710-15, petitioner raises the following grounds:

"I.

IT DISREGARDED THE CLEAR AND EXPLICIT PROVISIONS OF ART. XI, SECTION 3 (7) OF THE CONSTITUTION AND THE SETTLED JURISPRUDENCE THEREON.

II.

IT HELD THAT PETITIONER CAN BE PROSECUTED NOW, FOR THIS RULING WOULD VIOLATE THE DOUBLE JEOPARDY CLAUSE OF THE CONSTITUTION, CONSIDERING THAT PETITIONER WAS ACQUITTED IN THE IMPEACHMENT PROCEEDINGS.

III. IT HELD THAT PETITIONER IS NO LONGER ENTITLED TO ABSOLUTE IMMUNITY FROM SUIT.

IV.

IT HELD THAT PETITIONER'S DUE PROCESS RIGHTS TO A FAIR TRIAL HAVE NOT BEEN PREJUDICED BY PRE-TRIAL PUBLICITY.

V.

IT HELD THAT THERE IS NOT ENOUGH EVIDENCE TO WARRANT THE COURT TO ENJOIN THE PRELIMINARY INVESTIGATION OF THE INCUMBENT OMBUDSMAN, PETITIONER HAVING FAILED TO PROVE THE IMPAIRED CAPACITY OF THE OMBUDSMAN TO RENDER A BIASED FREE DECISION."

In G.R. No. 146738, petitioner raises and argues the following issues:

- WHETHER PETITIONER RESIGNED OR SHOULD BE CONSIDERED RESIGNED AS OF JANUARY 20, 2001;

- WHETHER THE ANGARA DIARY IS INADMISSIBLE FOR BEING VIOLATIVE OF THE FOLLOWING RULES ON EVIDENCE: HEARSAY, BEST EVIDENCE, AUTHENTICATION,

ADMISSIONS AND RES INTER ALIOS ACTA;

- WHETHER RELIANCE ON NEWSPAPER ACCOUNTS IS VIOLATIVE OF THE HEARSAY RULE;
- WHETHER CONGRESS POST FACTO CAN DECIDE PETITIONER'S INABILITY TO GOVERN CONSIDERING SECTION 11, ARTICLE VII OF THE CONSTITUTION; and
- WHETHER PREJUDICIAL PUBLICITY HAS AFFECTED PETITIONER'S RIGHT TO FAIR TRIAL.

We find the contentions of petitioner bereft of merit.

I

Prejudicial Publicity on the Court

Petitioner insists he is the victim of prejudicial publicity. Among others, he assails the Decision for adverting to newspaper accounts of the events and occurrences to reach the conclusion that he has resigned. In our Decision, we used the totality test to arrive at the conclusion that petitioner has resigned. We referred to and analyzed events that were prior, contemporaneous and posterior to the oath-taking of respondent Arroyo as president. All these events are facts which are well-established and cannot be refuted. Thus, we adverted to prior events that built up the irresistible pressure for the petitioner to resign. These are: (1) the expose of Governor Luis "Chavit" Singson on October 4, 2000; (2) the "I accuse" speech of then Senator Teofisto Guingona in the Senate; (3) the joint investigation of the speech of Senator Guingona by the Blue Ribbon Committee and the Committee on Justice; (4) the investigation of the Singson expose by the House Committee on Public Order and Security; (5) the move to impeach the petitioner in the House of Representatives; (6) the Pastoral Letter of Archbishop Jaime Cardinal Sin demanding petitioner's resignation; (7) a similar demand by the Catholic Bishops conference; (8) the similar demands for petitioner's resignation by former Presidents Corazon C. Aquino and Fidel V. Ramos; (9) the resignation of respondent Arroyo as Secretary of the DSWD and her call for petitioner to resign; (10) the resignation of the members of petitioner's Council of Senior Economic Advisers and of Secretary Mar Roxas III from the Department of Trade and Industry; (11) the defection of then Senate President Franklin Drilon and then Speaker of the House of Representatives Manuel Villar and forty seven (47) representatives from petitioner's Lapiang Masang Pilipino; (12) the transmission of the Articles of Impeachment by Speaker Villar to the Senate; (13) the unseating of Senator Drilon as Senate President and of Representative Villar as Speaker of the House; (14) the impeachment trial of the petitioner; (15) the testimonies of Clarissa Ocampo and former Finance Secretary Edgardo Espiritu in the impeachment trial; (16) the 11-10 vote of the senator-judges denying the prosecutor's motion to open the 2nd envelope which allegedly contained evidence showing that petitioner held a P3.3 billion deposit in a secret bank account under the name of "Jose Velarde"; (17) the prosecutors' walkout and resignation; (18) the indefinite postponement of the impeachment proceedings to give a chance to the House of Representatives to resolve the issue of resignation of their prosecutors; (19) the rally in the EDSA Shrine and its intensification in various parts of the country; (20) the withdrawal of support of then Secretary of National Defense Orlando Mercado and the then Chief of Staff, General Angelo Reyes, together with the chiefs of all the armed services; (21) the same withdrawal of support made by the then Director General of the PNP, General Panfilo Lacson, and the major service commanders; (22) the stream of resignations by Cabinet secretaries, undersecretaries, assistant secretaries and bureau chiefs; (23) petitioner's agreement to hold a snap election and opening of the controversial second envelope. All these prior events are facts which are within judicial notice by this Court. There was no need to cite their news accounts. The reference by the Court to certain newspapers reporting them as they happened does not make them inadmissible evidence for being hearsay. The news account only buttressed these facts as facts. For all his loud protestations, petitioner has not singled out any of these facts as false.

We now come to some events of January 20, 2001 contemporaneous to the oath taking of respondent Arroyo. We

used the Angara Diary to decipher the intent to resign on the part of the petitioner. Let it be emphasized that it is not unusual for courts to distill a person's subjective intent from the evidence before them. Everyday, courts ascertain intent in criminal cases, in civil law cases involving last wills and testaments, in commercial cases involving contracts and in other similar cases. As will be discussed below, the use of the Angara Diary is not prohibited by the hearsay rule. Petitioner may disagree with some of the inferences arrived at by the Court from the facts narrated in the Diary but that does not make the Diary inadmissible as evidence.

We did not stop with the contemporaneous events but proceeded to examine some events posterior to the oath-taking of respondent Arroyo. Specifically, we analyzed the all important press release of the petitioner containing his final statement which was issued after the oath-taking of respondent Arroyo as president. After analyzing its content, we ruled that petitioner's issuance of the press release and his abandonment of Malacañang Palace confirmed his resignation.[1] These are overt acts which leave no doubt to the Court that the petitioner has resigned.

In light of this finding that petitioner has resigned before 12 o'clock noon of January 20, 2001, the claim that the office of the President was not vacant when respondent Arroyo took her oath of office at half past noon of the same day has no leg to stand on.

We also reject the contention that petitioner's resignation was due to duress and an involuntary resignation is no resignation at all.

"x x x [I]t has been said that, in determining whether a given resignation is voluntarily tendered, the element of voluntariness is vitiated only when the resignation is submitted under duress brought on by government action. The three-part test for such duress has been stated as involving the following elements: (1) whether one side involuntarily accepted the other's terms; (2) whether circumstances permitted no other alternative; and (3) whether such circumstances were the result of coercive acts of the opposite side. The view has also been expressed that a resignation may be found involuntary if on the totality of the circumstances it appears that the employer's conduct in requesting resignation effectively deprived the employer of free choice in the matter. Factors to be considered, under this test, are: (1) whether the employee was given some alternative to resignation; (2) whether the employee understood the nature of the choice he or she was given; (3) whether the employee was given a reasonable time in which to choose; and (4) whether he or she was permitted to select the effective date of resignation. In applying this totality of the circumstances test, the assessment whether real alternatives were offered must be gauged by an objective standard rather than by the employee's purely subjective evaluation; that the employee may perceive his or her only option to be resignation - for example, because of concerns about his or her reputation - is irrelevant. Similarly, the mere fact that the choice is between comparably unpleasant alternatives - for example, resignation or facing disciplinary charges - does not of itself establish that a resignation was induced by duress or coercion, and was therefore involuntary. This is so even where the only alternative to resignation is facing possible termination for cause, unless the employer actually lacked good cause to believe that grounds for termination existed. In this regard it has also been said that a resignation resulting from a choice between resigning or facing proceedings for dismissal is not tantamount to discharge by coercion without procedural view if the employee is given sufficient time and opportunity for deliberation of the choice posed. Furthermore, a resignation by an officer charged with misconduct is not given under duress, though the appropriate authority has already determined that the officer's alternative is termination, where such authority has the legal authority to terminate the officer's employment under the particular circumstances, since it is not duress to threaten to do what one has the legal right to do, or to threaten to take any measure authorized by law and the circumstances of the case." [2]

In the cases at bar, petitioner had several options available to him other than resignation. He proposed to the holding of snap elections. He transmitted to the Congress a written declaration of temporary inability. He could not claim he was forced to resign because immediately before he left Malacañang, he asked Secretary Angara:

"Ed, aalis na ba ako?" which implies that he still had a choice of whether or not to leave.

To be sure, pressure was exerted for the petitioner to resign. But it is difficult to believe that the pressure completely vitiated the voluntariness of the petitioner's resignation. The Malacañang ground was then fully protected by the Presidential Security Guard armed with tanks and high-powered weapons. The then Chief of Staff, General Angelo Reyes, and other military officers were in Malacañang to assure that no harm would befall the petitioner as he left the Palace. Indeed, no harm, not even a scratch, was suffered by the petitioner, the members of his family and his Cabinet who stuck it out with him in his last hours. Petitioner's entourage was even able to detour safely to the Municipal Hall of San Juan and bade goodbye to his followers before finally going to his residence in Polk Street, Greenhills. The only incident before the petitioner left the Palace was the stone throwing between a small group of pro and anti Erap rallyists which resulted in minor injuries to a few of them. Certainly, there were no tanks that rumbled through the Palace, no attack planes that flew over the presidential residence, no shooting, no large scale violence, except verbal violence, to justify the conclusion that petitioner was coerced to resign.

II

Evidentiary Issues

Petitioner devotes a large part of his arguments on the alleged improper use by this Court of the Angara Diary. It is urged that the use of the Angara Diary to determine the state of mind of the petitioner on the issue of his resignation violates the rule against the admission of hearsay evidence.

We are unpersuaded. To begin with, the Angara diary is not an out of court statement. The Angara Diary is part of the pleadings in the cases at bar. Petitioner cannot complain he was not furnished a copy of the Angara Diary. Nor can he feign surprise on its use. To be sure, the said Diary was frequently referred to by the parties in their pleadings.[3] The three parts of the Diary published in the PDI from February 4-6, 2001 were attached as Annexes A-C, respectively, of the Memorandum of private respondents Romeo T. Capulong, et al., dated February 20, 2001. The second and third parts of the Diary were earlier also attached as Annexes 12 and 13 of the Comment of private respondents Capulong, et al., dated February 12, 2001. In fact, petitioner even cited in his Second Supplemental Reply Memorandum both the second part of the diary, published on February 5, 2001,[4] and the third part, published on February 6, 2001.[5] It was also extensively used by Secretary of Justice Hernando Perez in his oral arguments. Thus, petitioner had all the opportunity to contest the use of the Diary but unfortunately failed to do so.

Even assuming arguendo that the Angara Diary was an out of court statement, still its use is not covered by the hearsay rule.[6] Evidence is called hearsay when its probative force depends, in whole or in part, on the competency and credibility of some persons other than the witness by whom it is sought to produce it.[7] There are three reasons for excluding hearsay evidence: (1) absence of cross examination; (2) absence of demeanor evidence, and (3) absence of the oath.[8] Not at all hearsay evidence, however, is inadmissible as evidence. Over the years, a huge body of hearsay evidence has been admitted by courts due to their relevance, trustworthiness and necessity.[9] The emergence of these exceptions and their wide spread acceptance is well-explained by Weinstein, Mansfield, Abrams and Berger as follows:

"x x x

On the other hand, we all make decisions in our everyday lives on the basis of other persons' accounts of what happened, and verdicts are usually sustained and affirmed even if they are based on hearsay erroneously admitted, or admitted because no objection was made. See *Shepp v. Uehlinger*, 775 F.2d 452, 454-455 (1st Cir. 1985) (hearsay evidence alone can support a verdict). Although volumes have been written suggesting ways to

revise the hearsay rule, no one advocates a rule that would bar all hearsay evidence. Indeed, the decided historical trend has been to exclude categories of highly probative statements from the definition of hearsay (sections 2 and 3, *infra*), and to develop more class exceptions to the hearsay rule (sections 4-11, *infra*). Furthermore, many states have added to their rules the residual, or catch-all, exceptions first pioneered by the Federal Rules which authorize the admission of hearsay that does not satisfy a class exception, provided it is adequately trustworthy and probative (section 12, *infra*).

Moreover, some commentators believe that the hearsay rule should be abolished altogether instead of being loosened. See, e.g., Note, *The Theoretical Foundation of the Hearsay Rules*, 93 Harv.L.Rev. 1786, 1804-1805, 1815 (1980) (footnotes omitted):

The Federal Rules of Evidence provide that '[a]lthough relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice.' Under this structure, exclusion is justified by fears of how the jury will be influenced by the evidence. However, it is not traditional to think of hearsay as merely a subdivision of this structure, and the Federal Rules do not conceive of hearsay in that manner. Prejudice refers to the jury's use of evidence for inferences other than those for which the evidence is legally relevant; by contrast, the rule against hearsay questions the jury's ability to evaluate the strength of a legitimate inference to be drawn from the evidence. For example, were a judge to exclude testimony because a witness was particularly smooth or convincing, there would be no doubt as to the usurpation of the jury's function. Thus, unlike prejudices recognized by the evidence rules, such as those stemming from racial or religious biases or from the introduction of photographs of a victim's final state, the exclusion of hearsay on the basis of misperception strikes at the root of the jury's function by usurping its power to process quite ordinary evidence, the type of information routinely encountered by jurors in their everyday lives.

...

Since virtually all criteria seeking to distinguish between good and bad hearsay are either incoherent, inconsistent, or indeterminate, the only alternative to a general rule of admission would be an absolute rule of exclusion, which is surely inferior. More important, the assumptions necessary to justify a rule against hearsay ... seem insupportable and, in any event, are inconsistent with accepted notions of the function of the jury. Therefore, the hearsay rules should be abolished.

Some support for this view can be found in the limited empirical research now available - which is, however, derived from simulations - that suggests that admitting hearsay has little effect on trial outcomes because jurors discount the value of hearsay evidence. See Rakos & Landsman, *Researching the Hearsay Rule: Emerging Findings, General Issues, and Future Directions*, 76 Minn.L.Rev. 655 (1992); Miene, Park, & Borgidas, *Jury Decision Making and the Evaluation of Hearsay Evidence*, 76 Minn.L.Rev. 683 (1992); Kovera, Park, & Penrod, *Jurors' Perceptions of Eyewitness and Hearsay Evidence*, 76 Minn.L.Rev. 703 (1992); Landsman & Rakos, *Research Essay: A Preliminary Empirical Enquiry Concerning the prohibition of Hearsay Evidence in American Courts*, 15 Law & Psychol. Rev. 65 (1991).

Others, even if they concede that restrictions on hearsay have some utility, question whether the benefits outweigh the cost:

The cost of maintaining the rule is not just a function of its contribution to justice. It also includes the time spent on litigating the rule. And of course this is not just a cost voluntarily borne by the parties, for in our system virtually all the cost of the court - salaries, administrative costs, and capital costs - are borne by the public. As expensive as litigation is for the parties, it is supported by an enormous public subsidy. Each time a hearsay question is litigated, the public pays. The rule imposes other costs as well. Enormous time is spent teaching and writing about the hearsay rule, which are both costly enterprises. In some law schools, students spend over half their time in evidence classes learning the intricacies of the hearsay rule, and ... enormous academic resources are expended on the rule.

Allen, Commentary on Professor Friedman's Article: The Evolution of the Hearsay Rule to a Rule of Admission, 76 Minn.L.Rev. 797, 800 [1992] (but would abolish rule only in civil cases). See also Friedman, Toward a Partial Economic, Game-Theoretic Analysis of Hearsay, 76 Minn. L. Rev. 723 (1992)."[10]

A complete analysis of any hearsay problem requires that we further determine whether the hearsay evidence is one exempted from the rules of exclusion. A more circumspect examination of our rules of exclusion will show that they do not cover admissions of a party and the Angara Diary belongs to this class. Section 26 of Rule 130 provides that "the act, declaration or omission of a party as to a relevant fact may be given in evidence against him." [11] It has long been settled that these admissions are admissible even if they are hearsay. Retired Justice Oscar Herrera of the Court of Appeals cites the various authorities who explain why admissions are not covered by the hearsay rule:[12]

"Wigmore, after pointing out that the party's declaration has generally the probative value of any other person's assertion, argued that it had a special value when offered against the party. In that circumstance, the admission discredits the party's statement with the present claim asserted in pleadings and testimony, much like a witness impeached by contradictory statements. Moreover, he continued, admissions pass the gauntlet of the hearsay rule, which requires that extrajudicial assertions be excluded if there was no opportunity for the opponent to cross-examine because it is the opponent's own declaration, and 'he does not need to cross examine himself.' Wigmore then added that the Hearsay Rule is satisfied since the party now as opponent has the full opportunity to put himself on the stand and explain his former assertion. (Wigmore on evidence, Sec. 1048 (Chadbourn Rev. 1972), cited in Sec. 154, McCormick)

According to Morgan: 'The admissibility of an admission made by the party himself rests not upon any notion that the circumstances in which it was made furnish the trier means of evaluating it fairly, but upon the adversary theory of litigation. A party can hardly object that he had no opportunity to cross-examine himself or that he is unworthy of credence save when speaking under sanction of an oath.'

A man's acts, conduct, and declaration, wherever made, if voluntary, are admissible against him, for the reason that it is fair to presume that they correspond with the truth, and it is his fault if they do not. (U.S. vs. Ching Po, 23 Phil. 578, 583)."

The Angara Diary contains direct statements of petitioner which can be categorized as admissions of a party: his proposal for a snap presidential election where he would not be a candidate; his statement that he only wanted the five-day period promised by Chief of Staff Angelo Reyes; his statements that he would leave by Monday if the second envelope would be opened by Monday and "Pagod na pagod na ako. Ayoko na, masyado nang masakit. Pagod na ako sa red tape, bureaucracy, intriga. (I am very tired. I don't want any more of this - it's too painful. I'm tired of the red tape, the bureaucracy, the intrigue). I just want to clear my name, then I will go." We noted that days before, petitioner had repeatedly declared that he would not resign despite the growing clamor for his resignation. The reason for the meltdown is obvious - - - his will not to resign has wilted.

It is, however, argued that the Angara Diary is not the diary of the petitioner, hence, non-binding on him. The argument overlooks the doctrine of adoptive admission. An adoptive admission is a party's reaction to a statement or action by another person when it is reasonable to treat the party's reaction as an admission of something stated or implied by the other person.[13] Jones explains that the "basis for admissibility of admissions made vicariously is that arising from the ratification or adoption by the party of the statements which the other person had made." [14] To use the blunt language of Mueller and Kirkpatrick, "this process of attribution is not mumbo jumbo but common sense." [15] In the Angara Diary, the options of the petitioner started to dwindle when the armed forces withdrew its support from him as President and commander-in-chief. Thus, Executive Secretary Angara had to ask Senate President Pimentel to advise petitioner to consider the option of "dignified exit or resignation." Petitioner did not object to the suggested option but simply said he could never leave the country. Petitioner's

silence on this and other related suggestions can be taken as an admission by him.[16]

Petitioner further contends that the use of the Angara diary against him violated the rule on *res inter alios acta*. The rule is expressed in section 28 of Rule 130 of the Rules of Court, viz: "The rights of a party cannot be prejudiced by an act, declaration, or omission of another, except as hereinafter provided."

Again, petitioner errs in his contention. The *res inter alios acta* rule has several exceptions. One of them is provided in section 29 of Rule 130 with respect to admissions by a co-partner or agent.

Executive Secretary Angara as such was an alter ego of the petitioner. He was the Little President. Indeed, he was authorized by the petitioner to act for him in the critical hours and days before he abandoned Malacañang Palace. Thus, according to the Angara Diary, the petitioner told Secretary Angara: "Mula umpisa pa lang ng kampanya, Ed, ikaw na lang pinakikinggan ko. At hanggang sa huli, ikaw pa rin." (Since the start of the campaign, Ed, you have been the only one I've listened to. And now at the end, you still are.)"[17] This statement of full trust was made by the petitioner after Secretary Angara briefed him about the progress of the first negotiation. True to this trust, the petitioner had to ask Secretary Angara if he would already leave Malacañang after taking their final lunch on January 20, 2001 at about 1:00 p.m. The Angara Diary quotes the petitioner as saying to Secretary Angara: "ed, kailangan ko na bang umalis? (Do I have to leave now?)"[18] Secretary Angara told him to go and he did. Petitioner cannot deny that Secretary Angara headed his team of negotiators that met with the team of the respondent Arroyo to discuss the peaceful and orderly transfer of power after his relinquishment of the powers of the presidency. The Diary shows that petitioner was always briefed by Secretary Angara on the progress of their negotiations. Secretary Angara acted for and in behalf of the petitioner in the crucial days before respondent Arroyo took her oath as President. Consequently, petitioner is bound by the acts and declarations of Secretary Angara.

Under our rules of evidence, admissions of an agent (Secretary Angara) are binding on the principal (petitioner).[19] Jones very well explains the reasons for the rule, viz: "What is done, by agent, is done by the principal through him, as through a mere instrument. So, whatever is said by an agent, either in making a contract for his principal, or at the time and accompanying the performance of any act within the scope of his authority, having relation to, and connected with, and in the course of the particular contract or transaction in which he is then engaged, or in the language of the old writers, *dum fervet opus* is, in legal effect, said by his principal and admissible in evidence against such principal." [20]

Moreover, the ban on hearsay evidence does not cover independently relevant statements. These are statements which are relevant independently of whether they are true or not. They belong to two (2) classes: (1) those statements which are the very facts in issue, and (2) those statements which are circumstantial evidence of the facts in issue. The second class includes the following:[21]

- Statement of a person showing his state of mind, that is, his mental condition, knowledge, belief, intention, ill will and other emotions;
- Statements of a person which show his physical condition, as illness and the like;
- Statements of a person from which an inference may be made as to the state of mind of another, that is, the knowledge, belief, motive, good or bad faith, etc. of the latter;
- Statements which may identify the date, place and person in question; and
- Statements showing the lack of credibility of a witness.

Again, Jones tells us why these independently relevant statements are not covered by the prohibition against

hearsay evidence:[22]

"§ 1088. Mental State or Condition - Proof of Knowledge.- There are a number of common issues, forming a general class, in proof of which hearsay is so obviously necessary that it is not customary to refer to its admissibility as by virtue of any exception to the general exclusionary rule. Admissibility, in such cases, is as of course. For example, where any mental state or condition is in issue, such as motive, malice, knowledge, intent, assent or dissent, unless direct testimony of the particular person is to be taken as conclusive of his state of mind, the only method of proof available is testimony of others to the acts or statements of such person. Where his acts or statements are against his interest, they are plainly admissible within the rules hereinabove announced as to admissions against interest. And even where not against interest, if they are so closely connected with the event or transaction in issue as to constitute one of the very facts in controversy, they become admissible of necessity."

As aforesaid, The Angara Diary contains statements of the petitioner which reflect his state of mind and are circumstantial evidence of his intent to resign. It also contains statements of Secretary Angara from which we can reasonably deduce petitioner's intent to resign. They are admissible and they are not covered by the rule on hearsay. This has long been a quiet area of our law on evidence and petitioner's attempt to foment a belated tempest cannot receive our imprimatur.

Petitioner also contends that the rules on authentication of private writings and best evidence were violated in our Decision, viz:

"The use of the Angara diary palpably breached several hornbook rules of evidence, such as the rule on authentication of private writings...

x x x

A. Rule on Proof of Private Writings Violated

The rule governing private documents as evidence was violated. The law provides that before any private writing offered as authentic is received in evidence, its due execution and authenticity must be proved either: a) by anyone who saw the document executed or written, or b) by evidence of the genuineness of the signature or handwriting of the maker.

x x x

B. Best Evidence Rule Infringed

Clearly, the newspaper reproduction is not the best evidence of the Angara diary. It is secondary evidence, of dubious authenticity. It was however used by this Honorable Court without proof of the unavailability of the original or duplicate original of the diary. The "Best Evidence Rule" should have been applied since the contents of the diary are the subject of inquiry.

The rule is that, except in four (4) specific instances, "[w]hen the subject of inquiry is the contents of a document, no evidence shall be admissible other than the original document itself." [23]

Petitioner's contention is without merit. In regard to the Best Evidence rule, the Rules of Court provides in sections 2 to 4 of Rule 130, as follows:

"Sec. 2. Documentary evidence. - Documents as evidence consist of writings or any material containing letters, words, numbers, figures or other modes of written expressions offered as proof of their contents.

Sec. 3. Original document must be produced; exceptions. - When the subject of inquiry is the contents of a document, no evidence shall be admissible other than the original document itself, except in the following cases:

- (a) When the original has been lost or destroyed, or cannot be produced in court, without bad faith on the part of the offeror;
- (b) When the original is in the custody or under the control of the party against whom the evidence is offered, and the latter fails to produce it after reasonable notice;
- (c) When the original consists of numerous accounts or other documents which cannot be examined in court without great loss of time and the fact sought to be established from them is only the general result of the whole; and
- (d) When the original is a public record in the custody of a public officer or is recorded in a public office.

Sec. 4. Original of document. - (a) The original of a document is one the contents of which are the subject of inquiry.

(b) When a document is in two or more copies executed at or about the same time, with identical contents, all such copies are equally regarded as originals.

(c) When an entry is repeated in the regular course of business, one being copied from another at or near the time of the transaction, all the entries are likewise equally regarded as originals."

It is true that the Court relied not upon the original but only copy of the Angara Diary as published in the Philippine Daily Inquirer on February 4-6, 2001. In doing so, the Court, did not, however, violate the best evidence rule. Wigmore, in his book on evidence, states that:

"Production of the original may be dispensed with, in the trial court's discretion, whenever in the case in hand the opponent does not bona fide dispute the contents of the document and no other useful purpose will be served by requiring production.[24]

"x x x

"In several Canadian provinces, the principle of unavailability has been abandoned, for certain documents in which ordinarily no real dispute arises. This measure is a sensible and progressive one and deserves universal adoption (post, sec. 1233). Its essential feature is that a copy may be used unconditionally, if the opponent has been given an opportunity to inspect it." (emphasis supplied)

Francisco's opinion is of the same tenor, viz:

"Generally speaking, an objection by the party against whom secondary evidence is sought to be introduced is essential to bring the best evidence rule into application; and frequently, where secondary evidence has been admitted, the rule of exclusion might have successfully been invoked if proper and timely objection had been taken. No general rule as to the form or mode of objecting to the admission of secondary evidence is set forth. Suffice it to say here that the objection should be made in proper season - that is, whenever it appears that there is better evidence than that which is offered and before the secondary evidence has been admitted. The objection itself should be sufficiently definite to present a tangible question for the court's consideration."[25]

He adds:

"Secondary evidence of the content of the writing will be received in evidence if no objection is made to its reception."[26]

In regard to the authentication of private writings, the Rules of Court provides in section 20 of Rule 132, viz:

"Sec. 20. Proof of private document. - Before any private document offered as authentic is received in evidence, its due execution and authenticity must be proved either:

(a) By anyone who saw the document executed or written; or

(b) By evidence of the genuineness of the signature or handwriting of the maker.

Any other private document need only be identified as that which it is claimed to be."

On the rule of authentication of private writings, Francisco states that:

"A proper foundation must be laid for the admission of documentary evidence; that is, the identity and authenticity of the document must be reasonably established as a pre-requisite to its admission. (Rouw v. Arts, 174 Ark. 79, 294 S.W. 993, 52 A.L.R. 1263, and others) However, a party who does not deny the genuineness of a proffered instrument may not object that it was not properly identified before it was admitted in evidence. (Strand v. Halverson, 220 Iowa 1276, 264 N.W. 266, 103 A.L.R. 835)."[27]

Petitioner cites the case of State prosecutors v. Muro,[28] which frowned on reliance by courts on newspaper accounts. In that case, Judge Muro was dismissed from the service for relying on a newspaper account in dismissing eleven (11) cases against Mrs. Imelda Romualdez Marcos. There is a significant difference, however, between the Muro case and the cases at bar. In the Muro case, Judge Muro dismissed the cases against Mrs. Marcos on the basis of a newspaper account without affording the prosecution "the basic opportunity to be heard on the matter by way of a written comment or on oral argument. . . (this is) not only a blatant denial of elementary due process to the Government but is palpably indicative of bad faith and partiality." In the instant cases, however, the petitioner had an opportunity to object to the admissibility of the Angara Diary when he filed his Memorandum dated February 20, 2001, Reply Memorandum dated February 22, 2001, Supplemental Memorandum dated February 23, 2001, and Second Supplemental memorandum dated February 24, 2001. He was therefore not denied due process. In the words of Wigmore, *supra*, petitioner had "been given an opportunity to inspect" the Angara Diary but did not object to its admissibility. It is already too late in the day to raise his objections in an Omnibus Motion, after the Angara Diary has been used as evidence and a decision rendered partly on the basis thereof.

III

Temporary Inability

Petitioner argues that the Court misinterpreted the meaning of section 11, Article VII, of the Constitution in that congress can only decide the issue of inability when there is a variance of opinion between a majority of the Cabinet and the President. The situation presents itself when majority of the Cabinet determines that the President is unable to govern; later, the President informs Congress that his inability has ceased but is contradicted by a majority of the members of the Cabinet. It is also urged that the president's judgment that he is unable to govern temporarily which is thereafter communicated to the Speaker of the House and the President of the Senate is the political question which this Court cannot review.

We cannot sustain the petitioner. Lest petitioner forgets, he himself made the submission in G.R. No. 146738 that "Congress has the ultimate authority under the Constitution to determine whether the President is incapable of performing his functions in the manner provided for in section 11 of Article VII." [29] We sustained this submission and held that by its many acts, Congress has already determined and dismissed the claim of alleged temporary inability to govern proffered by petitioner. If petitioner now feels aggrieved by the manner Congress exercised its power, it is incumbent upon him to seek redress from Congress itself. The power is conceded by the petitioner to be with Congress and its alleged erroneous exercise cannot be corrected by this Court. The recognition of respondent Arroyo as our *de jure* president made by Congress is unquestionably a political judgment. It is significant that House Resolution No. 176 cited as the bases of its judgment such factors as the

"people's loss of confidence on the ability of former President Joseph Ejercito Estrada to effectively govern" and the "members of the international community had extended their recognition of Her Excellency, Gloria Macapagal-Arroyo as President of the Republic of the Philippines" and it has a constitutional duty "of fealty to the supreme will of the people x x x." This political judgment may be right or wrong but Congress is answerable only to the people for its judgment. Its wisdom is fit to be debated before the tribunal of the people and not before a court of justice. Needless to state, the doctrine of separation of power constitutes an inseparable bar against this court's interposition of its power of judicial review to review the judgment of Congress rejecting petitioner's claim that he is still the President, albeit on leave and that respondent Arroyo is merely an acting President.

Petitioner attempts to extricate himself from his submission that Congress has the ultimate authority to determine his inability to govern, and whose determination is a political question by now arguing that whether one is a de jure or de facto President is a judicial question. Petitioner's change of theory, ill disguised as it is, does not at all impress. The cases at bar do not present the general issue of whether the respondent Arroyo is the de jure or a de facto President. Specific issues were raised to the Court for resolution and we ruled on an issue by issue basis. On the issue of resignation under section 8, Article VII of the Constitution, we held that the issue is legal and ruled that petitioner has resigned from office before respondent Arroyo took her oath as President. On the issue of inability to govern under section 11, Article VII of the Constitution, we held that the Congress has the ultimate authority to determine the question as opined by the petitioner himself and that the determination of Congress is a political judgment which this Court cannot review. Petitioner cannot blur these specific rulings by the generalization that whether one is a de jure or de facto President is a judicial question.

Petitioner now appears to fault Congress for its various acts expressed thru resolutions which brushed off his temporary inability to govern and President-on-leave argument. He asserts that these acts of Congress should not be accorded any legal significance because: (1) they are post facto and (2) a declaration of presidential incapacity cannot be implied.

We disagree. There is nothing in section 11 of Article VII of the Constitution which states that the declaration by Congress of the President's inability must always be a priori or before the Vice-President assumes the presidency. In the cases at bar, special consideration should be given to the fact that the events which led to the resignation of the petitioner happened at express speed and culminated on a Saturday. Congress was then not in session and had no reasonable opportunity to act a priori on petitioner's letter claiming inability to govern. To be sure, however, the petitioner cannot strictly maintain that the President of the Senate, the Honorable Aquilino Pimentel, Jr. and the then Speaker of the House of Representatives, the Honorable Arnulfo P. Fuentebella, recognized respondent Arroyo as the "constitutional successor to the presidency" post facto. Petitioner himself states that his letter alleging his inability to govern was "received by the Office of the Speaker on January 20, 2001 at 8:30 A.M. and the Office of the Senate at 9 P.M. of the same day." [30] Respondent took her oath of office a few minutes past 12 o'clock in the afternoon of January 20. Before the oath-taking, Senate President Pimentel, Jr. and Speaker Fuentebella had prepared a Joint Statement which states:[31]

"Joint Statement of Support
and Recognition from the
Senate President and the Speaker
Of the House of Representatives

We, the elected leaders of the Senate and the House of Representatives, are called upon to address the constitutional crisis affecting the authority of the President to effectively govern our distressed nation. We understand that the Supreme Court at that time is issuing an en banc resolution recognizing this political reality. While we may differ on the means to effect a change of leadership, we however, cannot be indifferent

and must act resolutely. Thus, in line with our sworn duty to represent our people and in pursuit of our goals for peace and prosperity to all, we, the Senate President and the Speaker of the House of Representatives, hereby declare our support and recognition to the constitutional successor to the Presidency. We similarly call on all sectors to close ranks despite our political differences. May God bless our nation in this period of new beginnings.

Mabuhay and Pilipinas at ang mamamayang Pilipino.

(Sgd.) AQUILINO PIMENTEL, JR.

Senate President

(Sgd.) ARNULFO P. FUENTEBELLA

Speaker of the House of Representatives"

This a priori recognition by the President of the Senate and the Speaker of the House of Representatives of respondent Arroyo as the "constitutional successor to the presidency" was followed post facto by various resolutions of the Senate and the House, in effect, confirming this recognition. Thus, Resolution No. 176 expressed "x x x the support of the House of Representatives to the assumption into office by Vice-President Gloria Macapagal-Arroyo as President of the Republic of the Philippines, extending its congratulations and expressing its support for her administration as a partner in the attainment of the nation's goal under the Constitution.[32] Resolution No. 82 of the Senate and Resolution No. 178 of the House of Representatives both confirmed the nomination of then Senator Teofisto Guingona, Jr., as Vice-President.[33] It also passed Resolution No. 83 declaring the impeachment court functus officio.[34] Both Houses sent bills to respondent Arroyo to be signed by her into law as President of the Philippines.[35] These acts of Congress, a priori and post facto, cannot be dismissed as merely implied recognitions of respondent Arroyo, as the President of the Republic. Petitioner's insistence that respondent Arroyo is just a de facto President because said acts of Congress " x x x are mere circumstances of acquiescence calculated to induce people to submit to respondent's exercise of the powers of the presidency"[36] is a guesswork far divorced from reality to deserve further discussion.

Similarly way off the mark is petitioner's point that "while the Constitution has made Congress the national board of canvassers for presidential and vice-presidential elections, this Honorable Court nonetheless remains the sole judge in presidential and vice presidential contests.[37] He thus postulates that "such constitutional provision[38] is indicative of the desire of the sovereign people to keep out of the hands of Congress questions as to the legality of a person's claim to the presidential office." [39] Suffice to state that the inference is illogical. Indeed, there is no room to resort to inference. The Constitution clearly sets out the structure on how vacancies and election contest in the office of the President shall be decided. Thus, section 7 of Article VII covers the instance when (a) the President-elect fails to qualify, (b) if a President shall not have been chosen and (c) if at the beginning of the term of the President, the President-elect shall have died or shall have become permanently disabled. Section 8 of Article VII covers the situation of the death, permanent disability, removal from office or resignation of the President. Section 11 of Article VII covers the case where the President transmits to the President of the Senate and the Speaker of the House of Representatives his written declaration that he is unable to discharge the powers and duties of his office. In each case, the Constitution specifies the body that will resolve the issues that may arise from the contingency. In case of election contest, section 4, Article VII provides that the contests shall be resolved by this Court sitting en banc. In case of resignation of the President, it is not disputed that this Court has jurisdiction to decide the issue. In case of inability to govern, section 11 of Article VII gives the Congress the power to adjudge the issue and petitioner himself submitted this thesis which was shared by this Court. In light of these clear provisions of the Constitution, it is inappropriate, to say the least, for petitioner to make inferences that simply distort their meanings.

IV

Impeachment and Absolute Immunity

Petitioner contends that this Court disregarded section 3 (7) of Article XI of the Constitution which provides:

"(7) Judgment in cases of impeachment shall not extend further than removal from office and disqualification to hold any office under the Republic of the Philippines, but the party convicted should nevertheless be liable and subject to prosecution, trial and punishment according to law."

Petitioner reiterates the argument that he must be first convicted in the impeachment proceedings before he could be criminally prosecuted. A plain reading of the provision will not yield this conclusion. The provision conveys two uncomplicated ideas: first, it tells us that judgment in impeachment cases has a limited reach. . .i.e., it cannot extend further than removal from office and disqualification to hold any office under the Republic of the Philippines, and second, it tells us the consequence of the limited reach of a judgment in impeachment proceedings considering its nature, i.e., that the party convicted shall still be liable and subject to prosecution, trial and punishment according to law. No amount of manipulation will justify petitioner's non sequitur submission that the provision requires that his conviction in the impeachment proceedings is a condition sine qua non to his prosecution, trial and punishment for the offenses he is now facing before the respondent Ombudsman.

Petitioner contends that the private and public prosecutors' walk out from the impeachment proceedings "should be considered failure to prosecute on the part of the public and private prosecutors, and the termination of the case by the Senate is equivalent to acquittal." [40] He explains "failure to prosecute" as the "failure of the prosecution to prove the case, hence dismissal on such grounds is a dismissal on the merits." [41] He then concludes that "dismissal of a case for failure to prosecute amounts to an acquittal for purposes of applying the rule against double jeopardy." [42]

Without ruling on the nature of impeachment proceedings, we reject petitioner's submission.

The records will show that the prosecutors walked out in the January 16, 2001 hearing of the impeachment cases when by a vote of 11-10, the Senator-judges refused to open the second envelope allegedly containing the P3.3 billion deposit of the petitioner in a secret bank account under the name " Jose Velarde". The next day, January 17, the public prosecutors submitted a letter to the Speaker of the House tendering their resignation. They also filed their Manifestation of Withdrawal of Appearance with the impeachment tribunal. Senator Raul Roco immediately moved for the indefinite suspension of the impeachment proceedings until the House of Representatives shall have resolved the resignation of the public prosecutors. The Roco motion was then granted by Chief Justice Davide, Jr. Before the House could resolve the issue of resignation of its prosecutors or on January 20, 2001, petitioner relinquished the presidency and respondent Arroyo took her oath as President of the Republic. Thus, on February 7, 2001, the Senate passed Resolution No. 83 declaring that the impeachment court is functus officio.

Prescinding from these facts, petitioner cannot invoke double jeopardy. Double jeopardy attaches only: (1) upon a valid complaint; (2) before a competent court; (3) after arraignment; (4) when a valid plea has been entered; and (5) when the defendant was acquitted or convicted or the case was dismissed or otherwise terminated without the express consent of the accused. [43] Assuming arguendo that the first four requisites of double jeopardy were complied with, petitioner failed to satisfy the fifth requisite for he was not acquitted nor was the impeachment proceeding dismissed without his express consent. Petitioner's claim of double jeopardy cannot be predicated on prior conviction for he was not convicted by the impeachment court. At best, his claim of previous acquittal may be scrutinized in light of a violation of his right to speedy trial, which amounts to a failure to prosecute. As Bernas points out, a failure to prosecute, which is what happens when the accused is not given a speedy trial, means

failure of the prosecution to prove the case. Hence, dismissal on such grounds is a dismissal on the merits.[44]

This Court held in *Esmeña v. Pogoy*[45], viz:

"If the defendant wants to exercise his constitutional right to a speedy trial, he should ask, not for the dismissal, but for the trial of the case. After the prosecution's motion for postponement of the trial is denied and upon order of the court the fiscal does not or cannot produce his evidence and, consequently fails to prove the defendant's guilt, the court upon defendant's motion shall dismiss the case, such dismissal amounting to an acquittal of the defendant."

In a more recent case, this Court held:

"It is true that in an unbroken line of cases, we have held that the dismissal of cases on the ground of failure to prosecute is equivalent to an acquittal that would bar further prosecution of the accused for the same offense. It must be stressed, however, that these dismissals were predicated on the clear right of the accused to speedy trial. These cases are not applicable to the petition at bench considering that the right of the private respondents to speedy trial has not been violated by the State. For this reason, private respondents cannot invoke their right against double jeopardy."[46]

Petitioner did not move for the dismissal of the impeachment case against him. Even assuming *arguendo* that there was a move for its dismissal, not every invocation of an accused's right to speedy trial is meritorious. While the Court accords due importance to an accused's right to a speedy trial and adheres to a policy of speedy administration of justice, this right cannot be invoked loosely. Unjustified postponements which prolong the trial for an unreasonable length of time are what offend the right of the accused to speedy trial.[47] The following provisions of the Revised Rules of Criminal Procedure are apropos:

"Rule 115, Section 1(h). Rights of accused at the trial. -- In all criminal prosecutions, the accused shall be entitled to the following rights:

(h) To have speedy, impartial and public trial."

"Rule 119, Section 2. Continuous trial until terminated; postponements.-- Trial once commenced shall continue from day to day as far as practicable until terminated. It may be postponed for a reasonable length of time for good cause.

The court shall, after consultation with the prosecutor and defense counsel, set the case for continuous trial on a weekly or other short-term trial calendar at the earliest possible time so as to ensure speedy trial. In no case shall the entire trial period exceed one hundred eighty (180) days from the first day of trial, except as otherwise authorized by the Supreme Court."

Petitioner therefore failed to show that the postponement of the impeachment proceedings was unjustified, much less that it was for an unreasonable length of time. Recalling the facts, on January 17, 2001, the impeachment proceeding was suspended until the House of Representatives shall have resolved the issue on the resignation of the public prosecutors. This was justified and understandable for an impeachment proceeding without a panel of prosecutors is a mockery of the impeachment process. However, three (3) days from the suspension or January 20, 2001, petitioner's resignation supervened. With the sudden turn of events, the impeachment court became *functus officio* and the proceedings were therefore terminated. By no stretch of the imagination can the four-day period from the time the impeachment proceeding was suspended to the day petitioner resigned, constitute an unreasonable period of delay violative of the right of the accused to speedy trial.

Nor can the claim of double jeopardy be grounded on the dismissal or termination of the case without the express consent of the accused. We reiterate that the impeachment proceeding was closed only after the petitioner had

resigned from the presidency, thereby rendering the impeachment court functus officio. By resigning from the presidency, petitioner more than consented to the termination of the impeachment case against him, for he brought about the termination of the impeachment proceedings. We have consistently ruled that when the dismissal or termination of the case is made at the instance of the accused, there is no double jeopardy.[48]

Petitioner stubbornly clings to the contention that he is entitled to absolute immunity from suit. His arguments are merely recycled and we need not prolong the longevity of the debate on the subject. In our Decision, we exhaustively traced the origin of executive immunity in our jurisdiction and its bends and turns up to the present time. We held that given the intent of the 1987 Constitution to breathe life to the policy that a public office is a public trust, the petitioner, as a non-sitting President, cannot claim executive immunity for his alleged criminal acts committed while a sitting President. Petitioner's rehashed arguments including their thinly disguised new spins are based on the rejected contention that he is still President, albeit, a President on leave. His stance that his immunity covers his entire term of office or until June 30, 2004 disregards the reality that he has relinquished the presidency and there is now a new de jure President.

Petitioner goes a step further and avers that even a non-sitting President enjoys immunity from suit during his term of office. He buttresses his position with the deliberations of the Constitutional Commission, viz:

"Mr. Suarez. Thank you.

The last question is with reference to the Committee's omitting in the draft proposal the immunity provision for the President. I agree with Commissioner Nollado that the Committee did very well in striking out this second sentence, at the very least, of the original provision on immunity from suit under the 1973 Constitution. But would the Committee members not agree to a restoration of at least the first sentence that the President shall be immune from suit during his tenure, considering that if we do not provide him that kind of an immunity, he might be spending all his time facing litigations, as the President-in-exile in Hawaii is now facing litigations almost daily?

Fr. Bernas: The reason for the omission is that we consider it understood in present jurisprudence that during his tenure he is immune from suit.

Mr. Suarez: So there is no need to express it here.

Fr. Bernas: There is no need. It was that way before. The only innovation made by the 1973 Constitution was to make that explicit and to add other things.

Mr. Suarez; On the understanding, I will not press for any more query, madam President.

I thank the Commissioner for the clarification."[49]

Petitioner, however, fails to distinguish between term and tenure. The term means the time during which the officer may claim to hold the office as of right, and fixes the interval after which the several incumbents shall succeed one another. The tenure represents the term during which the incumbent actually holds office. The tenure may be shorter than the term for reasons within or beyond the power of the incumbent.[50] From the deliberations, the intent of the framers is clear that the immunity of the president from suit is concurrent only with his tenure and not his term.

Indeed, petitioner's stubborn stance cannot but bolster the belief that the cases at bar were filed not really for petitioner to reclaim the presidency but just to take advantage of the immunity attached to the presidency and thus, derail the investigation of the criminal cases pending against him in the Office of the Ombudsman.

V

Prejudicial Publicity on the Ombudsman

Petitioner hangs tough on his submission that his due process rights to a fair trial have been prejudiced by pre-trial publicity. In our Decision, we held that there is not enough evidence to sustain petitioner's claim of prejudicial publicity. Unconvinced, petitioner alleges that the vivid narration of events in our Decision itself proves the pervasiveness of the prejudicial publicity. He then posits the thesis that "doubtless, the national fixation with the probable guilt of petitioner fueled by the hate campaign launched by some high circulation newspaper and by the bully pulpit of priests and bishops left indelible impression on all sectors of the citizenry and all regions, so harsh and so pervasive that the prosecution and the judiciary can no longer assure petitioner a sporting chance." [51] To be sure, petitioner engages in exaggeration when he alleges that "all sectors of the citizenry and all regions" have been irrevocably influenced by this barrage of prejudicial publicity. This exaggeration collides with petitioner's claim that he still enjoys the support of the majority of our people, especially the masses.

Petitioner pleads that we apply the doctrine of *res ipsa loquitur* (the thing or the transaction speaks for itself) to support his argument. Under the *res ipsa loquitur* rule in its broad sense, the fact of the occurrence of an injury, taken with the surrounding circumstances, may permit an inference or raise a presumption of negligence, or make out a plaintiff's *prima facie* case, and present a question of fact for defendant to meet with an explanation. [52] It is not a rule of substantive law but more a procedural rule. Its mere invocation does not exempt the plaintiff with the requirement of proof to prove negligence. It merely allows the plaintiff to present along with the proof of the accident, enough of the attending circumstances to invoke the doctrine, creating an inference or presumption of negligence and to thereby place on the defendant the burden of going forward with the proof. [53]

We hold that it is inappropriate to apply the rule on *res ipsa loquitur*, a rule usually applied only in tort cases, to the cases at bar. Indeed, there is no court in the whole world that has applied the *res ipsa loquitur* rule to resolve the issue of prejudicial publicity. We again stress that the issue before us is whether the alleged pervasive publicity of the cases against the petitioner has prejudiced the minds of the members of the panel of investigators. We reiterate the test we laid down in *People v. Teehankee*, [54] to resolve this issue, viz:

"We cannot sustain appellant's claim that he was denied the right to impartial trial due to prejudicial publicity. It is true that the print and broadcast media gave the case at bar pervasive publicity, just like all high profile and high stake criminal trials. Then and now, we rule that the right of an accused to a fair trial is not incompatible to a free press. To be sure, responsible reporting enhances an accused's right to a fair trial for, as well pointed out, a responsible press has always been regarded as the handmaiden of effective judicial administration, especially in the criminal field x x x. The press does not simply publish information about trials but guards against the miscarriage of justice by subjecting the police, prosecutors, and judicial processes to extensive public scrutiny and criticism.

Pervasive publicity is not per se prejudicial to the right of an accused to fair trial. The mere fact that the trial of appellant was given a day-to-day, gavel-to-gavel coverage does not by itself prove that the publicity so permeated the mind of the trial judge and impaired his impartiality. For one, it is impossible to seal the minds of members of the bench from pre-trial and other off-court publicity of sensational criminal cases. The state of the art of our communication system brings news as they happen straight to our breakfast tables and right to our bedrooms. These news form part of our everyday menu of the facts and fictions of life. For another, our idea of a fair and impartial judge is not that of a hermit who is out of touch with the world. We have not installed the jury system whose members are overly protected from publicity lest they lost their impartiality. x x x x x x x x. Our judges are learned in the law and trained to disregard off-court evidence and on-camera performances of parties to a litigation. Their mere exposure to publications and publicity stunts does not per se fatally infect their impartiality.

At best, appellant can only conjure possibility of prejudice on the part of the trial judge due to the barrage of publicity that characterized the investigation and trial of the case. In *Martelino, et al. v. Alejandro, et al.*, we rejected this standard of possibility of prejudice and adopted the test of actual prejudice as we ruled 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, the records do not show that the trial judge developed actual bias against appellant as a consequence of the extensive media coverage of the pre-trial and trial of his case. The totality of circumstances of the case does not prove that the trial judge acquired a fixed opinion as a result of prejudicial publicity which is incapable of change even by evidence presented during the trial. Appellant has the burden to prove this actual bias and he has not discharged the burden."

Petitioner keeps on pounding on the adverse publicity against him but fails to prove how the impartiality of the panel of investigators from the Office of the Ombudsman has been infected by it. As we held before and we hold it again, petitioner has completely failed to adduce any proof of actual prejudice developed by the members of the Panel of Investigators. This fact must be established by clear and convincing evidence and cannot be left to loose surmises and conjectures. In fact, petitioner did not even identify the members of the Panel of Investigators. We cannot replace this test of actual prejudice with the rule of *res ipsa loquitur* as suggested by the petitioner. The latter rule assumes that an injury (i.e., prejudicial publicity) has been suffered and then shifts the burden to the panel of investigators to prove that the impartiality of its members has been affected by said publicity. Such a rule will overturn our case law that pervasive publicity is not per se prejudicial to the right of an accused to fair trial. The cases are not wanting where an accused has been acquitted despite pervasive publicity.[55] For this reason, we continue to hold that it is not enough for petitioner to conjure possibility of prejudice but must prove actual prejudice on the part of his investigators for the Court to sustain his plea. It is plain that petitioner has failed to do so.

Petitioner agains suggests that the Court should order a 2-month cooling off period to allow passions to subside and hopefully the alleged prejudicial publicity against him would die down. We regret not to acquiesce to the proposal. There is no assurance that the so called 2-month cooling off period will achieve its purpose. The investigation of the petitioner is a natural media event. It is the first time in our history that a President will be investigated by the Office of the Ombudsman for alleged commission of heinous crimes while a sitting President. His investigation will even be monitored by the foreign press all over the world in view of its legal and historic significance. In other words, petitioner cannot avoid the kleiglht of publicity. But what is important for the petitioner is that his constitutional rights are not violated in the process of investigation. For this reason, we have warned the respondent Ombudsman in our Decision to conduct petitioner's preliminary investigation in a circus-free atmosphere. Petitioner is represented by brilliant legal minds who can protect his right as an accused.

VI

Recusation

Finally, petitioner prays that "the members of this Honorable Court who went to EDSA put on record who they were and consider recusing or inhibiting themselves, particularly those who had ex-parte contacts with those exerting pressure on this Honorable Court, as mentioned in our Motion of March 9, 2001, given the need for the cold neutrality of impartial judges." [56]

We hold that the prayer lacks merit. There is no ground to inhibit the twelve (12) members of the Court who merely accepted the invitation of the respondent Arroyo to attend her oath taking. As mere spectators of a historic event, said members of the Court did not prejudge the legal basis of the claim of respondent Arroyo to the presidency at the time she took her oath. Indeed, the Court in its en banc resolution on January 22, 2001, the first

working day after respondent Arroyo took her oath as President, held in Administrative Matter No. 01-1-05 SC, to wit:

"A.M. No. 01-1-05-SC - In re: Request for Vice President Gloria Macapagal-Arroyo to Take Her Oath of Office as President of the Republic of the Philippines before the Chief Justice - Acting on the urgent request of Vice President Gloria Macapagal-Arroyo to be sworn in as President of the Republic of the Philippines, addressed to the Chief Justice and confirmed by a letter to the Court, dated January 20, 2001, which request was treated as an administrative matter, the court Resolved unanimously to confirm the authority given by the twelve (12) members of the Court then present to the Chief Justice on January 20, 2001 to administer the oath of office to Vice President Gloria Macapagal-Arroyo as President of the Philippines, at noon of January 20, 2001.

This resolution is without prejudice to the disposition of any justiciable case that may be filed by a proper party."

The above resolution was unanimously passed by the 15 members of the Court. It should be clear from the resolution that the Court did not treat the letter of respondent Arroyo to be administered the oath by Chief Justice Davide, Jr., as a case but as an administrative matter. If it were considered as a case, then petitioner has reason to fear that the Court has predetermined the legitimacy of the claim of respondent Arroyo to the presidency. To dispel the erroneous notion, the Court precisely treated the letter as an administrative matter and emphasized that it was "without prejudice to the disposition of any justiciable case that may be filed by a proper party." In further clarification, the Court on February 20, 2001 issued another resolution to inform the parties and the public that it "xxx did not issue a resolution on January 20, 2001 declaring the office of the President vacant and that neither did the Chief Justice issue a press statement justifying the alleged resolution." Thus, there is no reason for petitioner to request for the said twelve (12) justices to recuse themselves. To be sure, a motion to inhibit filed by a party after losing his case is suspect and is regarded with general disfavor.

Moreover, to disqualify any of the members of the Court, particularly a majority of them, is nothing short of pro tanto depriving the Court itself of its jurisdiction as established by the fundamental law. Disqualification of a judge is a deprivation of his judicial power. And if that judge is the one designated by the Constitution to exercise the jurisdiction of his court, as is the case with the Justices of this Court, the deprivation of his or their judicial power is equivalent to the deprivation of the judicial power of the court itself. It affects the very heart of judicial independence.[57] The proposed mass disqualification, if sanctioned and ordered, would leave the Court no alternative but to abandon a duty which it cannot lawfully discharge if shorn of the participation of its entire membership of Justices.[58]

IN VIEW WHEREOF, petitioner's Motion for Reconsideration in G.R. Nos. 146710-15 and his Omnibus Motion in G.R. No. 146738 are DENIED for lack of merit.

SO ORDERED.

Bellosillo, Melo, Quisumbing, Pardo, Buena, Gonzaga-Reyes, and De Leon, Jr., JJ., concur.

Davide, Jr., C.J., no part for reason given in open court and in the extended explanation.

Vitug, J., see separate concurring opinion.

Mendoza, J., see concurring opinion.

Kapunan, J., concurs on the result but strongly reiterate my separate opinion in the case.

Ynares-Santiago, J., concurs in the result but maintains separate opinion in the main Decision.

Sandoval-Gutierrez, J., concurs in the result subject to separate opinion in the main Decision.

Panganiban, J., no part see Extended Explanation of Inhibition prom. on March 8, 2001.

[1] Decision, p. 35.

[2] 63C Am Jur 2d Public Officers and Employees, section 158.

[3] See e.g., Comment of respondents de Vera, Funa and Capulong, p. 26; Rollo, Vol II. p. 204: Memorandum of respondent Capulong Rollo, Vol. III, pp. 661, et seq.

[4] See paragraph 6.1 on p. 5 of petitioner's Second Supplemental Reply Memorandum.

[5] Id., see paragraph 7 on pp. 7-8.

[6] "The myth of hearsay is that no one understands it, and students and practicing lawyers always make mistakes about it." Best, Evidence, 59 (3rd ed., p. 59, 1999).

[7] Francisco, Evidence, 513 citing 33 CJS 919.

[8] Mueller and Kirkpatrick, Evidence under the Rules 116-117 (2nd ed., 1993); McCormick Evidence 93-94

[9] See, generally, Swift, One Hundred Years of Evidence Law Reform: Thayer's Triumph, 88 Cal. L. Rev. No. 6, 2437-2476 (2000). Swift's thesis is that the view of Thayer and other major twentieth century reformers advocating increased discretion of trial judges to admit or exclude evidence has prevailed.

[10] Evidence, Cases and Materials 473-474 (9th ed.). As well put by author Best, supra, p. 87, "the supreme irony of the hearsay doctrine is that a vast amount of hearsay is admissible at common law and under the Federal Rules." Our hearsay rules are American in origin.

[11] Admissions of a party should not be confused with declarations against interest, judicial admission and confessions.

Admission distinguished from declaration against interest. - An admission is distinguishable from a declaration against interest in several respects. The admission is primary evidence and is receivable, although the declarant is available as a witness; it is competent only when the declarant, or someone identified in legal interest with him, is a party to the action; and need not have been considered by the declarant as opposed to his interest at the time when it was made. The declaration against interest is in the nature of secondary evidence, receivable only when the declarant is unavailable as a witness; it is competent in any action to which it is relevant, although the declarant is not a party to, or in privity with, any party to the action; and it must have been, when made, to the knowledge of the declarant, against his obvious and real interest. (VIII Francisco, Evidence, 304 [1997 ed.])

Admission distinguished from confession.- The term admission is distinguished from that of confession. The former is applied to civil transactions and to matters of fact in criminal cases not involving criminal intent, the latter to acknowledgements of guilt in criminal cases. (id., p. 303)

Judicial and extra-judicial admission defined.- A judicial admission is one so made in pleadings filed or in the progress of a trial as to dispense with the introduction of evidence otherwise necessary to dispense with some rules of practice necessary to be observed and complied with.

Extra-judicial admission is one made out of court.

The most important distinction between judicial and other admissions, is that strictly, judicial admissions are conclusive upon the party making them, while other admissions are, as a rule and where the elements of estoppel are not present, disputable. (id., p. 90)

[12] Herrera, Evidence, 315-316.

[13] Best, op cit., p. 90.

[14] Herrera, op cit., p. 371, citing 2 Jones Sec. 13-28.

[15] Evidence Under the Rules, 216 (2nd ed., 1993).

[16] Section 32, Rule 130 provides: "An act or declaration made in the presence and within the hearing or observation of a party who does or says nothing when the act or declaration is such as naturally to call for action or comment if not true, and when proper and possible for him to do so, may be given in evidence against him."

[17] Phil. Daily Inquirer, February 5, 2001, p. A6.

[18] Id., February 6, 2001, p. 1; Rollo, Vol. II, p. 250.

[19] Section 29, Rule 130 states: "the act or declaration of a partner or agent of the party within the scope of his authority and during the existence of the partnership or agency, may be given in evidence against such party after the partnership or agency is shown by evidence other than such act or declaration. The same rule applies to the act or declaration of a joint owner, joint debtor, or other person jointly interested with the party.

[20] Jones on Evidence, S. 944, p. 1741.

[21] Moran, Evidence³, 298.

[22] Jones, op cit., S. 1088, p. 2010.

[23] Omnibus Motion, pp. 24-25, footnotes omitted.

[24] Wigmore on Evidence, sec. 1191, p. 334.

[25] Francisco, The Revised Rules of Court in the Philippines: Evidence 139 (1999), citing I Jones on Evidence, 390-391.

[26] Id., citing People v. Stuckrath, 64 Cal. App. 84, 220, p. 433; see also Suddayao, et al.v. Agatep, et al., 46 Off. Gaz. 1119.

[27] Francisco, supra, p.129.

[28] 236 SCRA 505 (1994).

[29] See Decision, p. 41.

[30] See Petition in G.R. No. 146738, p. 7, further stating that "no one apparently was around or willing to receive the letter to the Senate President earlier."

[31] See Annex A-1, Petition in G.R. No. 146738.

[32] Decision, p. 12.

[33] Decision, p. 13.

[34] Ibid.

[35] Decision, p. 12.

[36] Omnibus Motion, p. 37.

[37] Id., pp. 38-39.

[38] Id., p. 39.

[39] Section 4, Article VII of the Constitution states in part: "The Supreme Court sitting en banc, shall be the sole judge of all contests relating to the election, returns, and qualifications of the President or Vice-President, and may promulgate its rules for the purpose."

[40] Motion for Reconsideration, p. 5.

[41] Id., p. 5, citing Bernas, *The 1987 Constitution of the Philippines: A Commentary*, 1996, p. 532.

[42] Id., p. 5, citing *People v. Diaz*, 94 Phil. 714 and *People v. Robles*, 105 Phil. 1016.

[43] *Tecson v. Sandiganbayan*, 318 SCRA 80 (1999).

[44] Bernas, *The Constitution of the Republic of the Philippines: A Commentary*, 1987, p. 470.

[45] 102 SCRA 861 (1981), citing 4 Moran's *Comments on the Rules of Court*, 1980 Ed., p. 202, citing *Gandicela v. Lutero*, 88 Phil. 299, 307 and *People v. Diaz*, 94 Phil. 714, 717.

[46] *People v. Leviste*, 255 SCRA 238 (1996), citing *People v. Tampal*, 244 SCRA 202 (1995).

[47] *Tai Lim v. Court of Appeals*, 317 SCRA 521 (1999).

[48] *People v. Quizada*, 160 SCRA 516; *Sta. Rita v. Court of Appeals*, 247 SCRA 484; *People v. Leviste*, supra.

[49] Motion for Reconsideration, GR Nos. 146710-15, p. 17.

[50] *Topacio Nueno, et al. vs. Angeles, et al.*, 76 Phil. 12, 21- 22.

[51] Motion for Reconsideration, p. 27.

[52] 57B Am Jur 2d 493 (1989).

[53] Ibid., pp. 502-503.

[54] 249 SCRA 54 (1995); see *Martelino et al. v. Alejandro, et al.*, 32 SCRA 106 (1970); *Webb v. de Leon, etc.*, 247 SCRA 652 (1995); *Larranaga v. CA, et al.*, 289 SCRA 581 (1998).

[55] *People v. Ritter*, 194 SCRA 690 (1991).

[56] Omnibus Motion, p.55.

[57] *Vargas v. Rilloraza, et al.*, 80 Phil. 297 (1948).

[58] *Abbas, et al., v. Senate Electoral Tribunal*, 166 SCRA 651 (1988).

SEPARATE CONCURRING OPINION

VITUG, J.:

By a vote of 13-0, the Supreme Court, in its decision promulgated on 02 March 2001, confirmed the legitimacy of the Arroyo government.

The motion for reconsideration submitted by Mr. Joseph E. Estrada seeks to have a more circumspect statement of the facts and conclusions given by the Court on the ascendancy of Mme. Gloria Macapagal-Arroyo to the highest post of the land. It is basically argued that minute details and hairline distinctions would show that the departure

from Malacañang of the former President could not have possibly fallen under any of the circumstances of vacancy enumerated in the Constitution so as to legally allow the takeover of the office by the now incumbent. All the other material allegations really wrangle on this point.

There, truly, might never be a definitive consensus, let alone unanimity, on the fine and valid issues heretofore submitted by petitioner. To dissect the event into miniscule parts for microscopic scrutiny, however, could in the end be just begging the question. The varying versions of the events and their differing interpretations notwithstanding, one circumstance still remained clear, and it was that a convergence and confluence of events, sparked by a civilian dissent which set into motion a domino effect on the government itself, plagued the presidency. The things that occurred were no longer to be yet in dispute but were matters of fact. *Contra factum non valet argumentum*.

At little past noon on 20 January 2001, then incumbent Vice-President Gloria Macapagal-Arroyo would take her oath of office to become the 14th President of the Republic of the Philippines. She would take over the reins of government for the remaining tenure of her predecessor, President Joseph Ejercito Estrada, still then the incumbent. Mr. Estrada had by then practically lost effective control of the government. Within hours after a controversial Senate decision that ended abruptly the impeachment proceedings against Mr. Estrada, an irate people came in force to the site of the previous uprising in 1986 - EDSA that toppled the 20-year rule of former President Ferdinand E. Marcos - and this time demanded the immediate ouster of Mr. Estrada. Shortly thereafter, civic leaders and government personalities, including most of the cabinet members, and still later the military establishment and the national police, joined cause with the mass of people.

When the formal oath-taking finally came, Mme. Gloria Macapagal-Arroyo officially assumed the Office of the President, and Mr. Estrada forthwith ceased to govern. The alarming unrest and turmoil ended with the assumption of the new leadership. The tenor of the oath actually taken by Mme. Macapagal-Arroyo and the farewell message of Mr. Estrada to the nation upon his leaving the seat of power rested the reality. *Intentio mea imponet nomen operi meo*.

The primordial question that emerged was no longer whether the transfer of power had, in fact, occurred - it did - or whether it was ideal or bereft of equanimity but whether the change was within Constitutional parameters - the 1987 Constitution its letter, intent and spirit - or was revolutionary in character. To be sure, the debate will persist on end. For, indeed, the events were such that it could have well been one or the other. It was a critical close call. The indications would seem that much also depended, by good margin, on how the power-holders would have wanted it to be at the time. The circumstances that prevailed would have likely allowed them to declare a revolutionary government, to dismantle the old, and to have a new one installed, thereby effectively abrogating the Constitution until yet another if minded Respondent could have, so enjoying a show of overwhelming civilian and military support as she did, forever silenced any legal challenge to her leadership by choosing a previously-tested path trodden by then President Corazon C. Aquino fifteen years before - declaring a revolutionary government, doing away with the constitution and railroading all extant democratic institutions and, once ensconced in power, rule by decree. The large group of people, already then impatient after a four-day vigil at EDSA and later at Mendiola, could have given in to the popular passions and impulses that prevailed, stormed Malacañang gates, bodily removed petitioner from office and, in his place, sworn in respondent, or any other person or group not so dictated by the Charter as the successor.

It was fortunate that the play of events had it otherwise, more likely by design than not, and the Constitution was saved, personas transposed. The succession by Mme. Macapagal-Arroyo resulted neither in the rupture nor in the abrogation of the legal order. The ascension to power was by the duly-elected Vice-President of the Republic. The Armed Forces of the Philippines and the Philippine National Police felt that there were so acting only in

obedience to their mandate as the protector of the people. The constitutionally-established government structure, embracing various offices under the executive branch, the judiciary, the legislature, the constitutional commissions and still other entities, including the local governments, remained intact and functioning. Immediate stability was achieved, violence was averted, and the country was spared from possible catastrophe.

It, as Mr. Estrada would so have it, the takeover of the Presidency could not be constitutionally justified, then, unavoidably, one would have to hold that the Arroyo government, already and firmly in control then and now, would be nothing else but revolutionary. And, if it were, the principal points brought up in the petitions for and in behalf of Mr. Estrada, predicated on constitutional grounds, would then be left bare as there would, in the first place, be no Constitution to speak of. The invocation alone of the jurisdiction of this Court would itself be without solid foundation absent its charter.

To go back then to the basic question, in either way it is addressed, whether affirmatively or negatively, the dismissal of the subject petitions, earlier decreed by the Court, will have to be sustained.

But the EDSA II phenomenon must not end there. We might ask ourselves - have we, as a people, really shown to the world enough political maturity? Or have we now found ourselves trapped and strangled in an epidemic of political instability? Or, is perhaps our culture or psyche, as a nation, after all, incompatible with the kind of democracy we have plucked from Western soil? EDSA II will be more than just an exercise of people prerogative; it will also be a time for reflection and re-examination of values and commitments. It is frightening to think that the sensitive cord of the social fiber that binds us all as one people might so unwittingly be struck and severed. Such a damage would be irreparable.

MENDOZA, J., concurring:

For the reasons given in my concurring opinion in these cases, I am of the opinion that, having lost the public trust and the support of his own cabinet, the military and the national police, petitioner Joseph Ejercito Estrada became personally disabled from continuing as President of the Philippines and that respondent Gloria Macapagal-Arroyo, being then the Vice-President, legally succeeded to the presidency pursuant to Art. VII, §8 of the Constitution.

My concern in this separate opinion is with petitioner's claim in G.R. Nos. 146710-15 that he must be deemed acquitted of the charges against him because the Senate impeachment proceedings against him were terminated not at his instance, and, consequently, he cannot be prosecuted again for the same offense(s) without violating his right not to be placed in double jeopardy.

Petitioner cites Art. XI, §3(7) of the Constitution which provides that-

Judgement in cases of impeachment shall not extend further than removal from office and disqualification to hold any office under the Republic of the Philippines, but the party convicted shall nevertheless be liable and subject to prosecution, trial and punishment according to law.

Petitioner argues that the purpose of the provision allowing subsequent prosecution and trial of a party convicted in an impeachment trial is precisely to preclude a plea of double jeopardy by the accused in the event he is convicted in the impeachment trial.

Petitioner's contention cannot be sustained. In the first place, the impeachment proceedings against petitioner were terminated for being *functus officio*, since the primary purpose of impeachment is the removal of respondent from office and his disqualification to hold any other office under the government.

In the second place, the proviso that an impeached and convicted public official would "nevertheless" be subject

to criminal prosecution serves to qualify the clause that "judgment in cases of impeachment shall not extend further than removal from office and disqualification to hold any office under the Republic of the Philippines." In other words, the public official convicted in an impeachment trial is nevertheless subject to criminal prosecution because the penalty which can be meted out on him cannot exceed removal from office and disqualification to hold office in the future. Consequently, where, as in this case, the impeachment proceedings did not result in petitioner's conviction, there can be no objection to his subsequent trial and conviction in a criminal case. The rule that an impeachable officer cannot be criminally prosecuted for the same offenses which constitute grounds for impeachment presupposes his continuance in office.[1] as Professor Tribe has written:

. . .[I]t should also be possible for an official to be acquitted by the Senate in an impeachment trial but subsequently convicted of the same underlying acts in a federal court. The Senate's acquittal, after all, could well represent a determination merely that the charged offenses were not impeachable, or that the nation would be harmed more than protected by pronouncing the official guilty.[2]

Hence, the moment he is no longer in office because of his removal, resignation, or permanent disability, there can be no bar to his criminal prosecution in the courts.

Indeed, tested by the ordinary rules of criminal procedure, since petitioner was neither convicted nor acquitted in the impeachment proceedings, nor the case against him dismissed without his consent, his prosecution in the Sandiganbayan for the same offense for which he was impeached cannot be barred.[3]

For these reasons, I concur in the denial of the motions for reconsideration filed on behalf of petitioner in these cases.

[1]Jarque v. Desierto, 250 SCRA xi (1995); Lecaroz v. Sandiganbayan, 128 SCRA 324 (1984).

[2]1 LAURENCE II. TRIBE, AMERICAN CONSTITUTIONAL LAW 160 (3[rd] ed. 2000).

[3]RULE 117, §7.

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