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WILFREDO V. LAPID  
Division Clerk of Court  
Third Division

THIRD DIVISION

AUG 17 2018

**G.R. Nos. 235937-40 – JOHANNE EDWARD B. LABAY, Petitioner v. SANDIGANBAYAN, THIRD DIVISION, AND PEOPLE OF THE PHILIPPINES, Respondents.**

Promulgated:

July 23, 2018

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**DISSENTING OPINION**

**LEONEN, J.:**

I dissent. This case should have been elevated to the Court *En Banc* as it is contrary to the doctrine established in *De Lima v. Reyes*,<sup>1</sup> *Pemberton v. De Lima*,<sup>2</sup> *Napoles v. De Lima*,<sup>3</sup> and *Cambe v. Office of the Ombudsman*.<sup>4</sup>

Petitioner was not deprived of due process in the preliminary investigation before the Office of the Ombudsman. Not having been deprived of due process, there is no reason for the Office of the Ombudsman to conduct a reinvestigation of the complaint against him. In any case, the filing of the Information with the Sandiganbayan already vests the Sandiganbayan with jurisdiction to determine the existence of probable cause. The issuance of a warrant of arrest already renders moot any irregularities that may have occurred during the preliminary investigation.

**I**

This Court should not confuse the constitutional rights accorded to an accused in a criminal prosecution and the rights accorded to a respondent in a preliminary investigation. Due process in a preliminary investigation is not a constitutional right but merely a statutory privilege. In *Lozada v. Hernandez*.<sup>5</sup>

It has been said time and again that a preliminary investigation is not properly a trial or any part thereof but is merely preparatory thereto, its only purpose being to determine whether a crime has been committed and whether there is probable cause to believe the accused guilty thereof. The right to such investigation is not a fundamental right guaranteed by the

<sup>1</sup> 776 Phil. 623 (2016) [Per J. Leonen, Second Division].

<sup>2</sup> 784 Phil. 918 (2016) [Per J. Leonen, Second Division].

<sup>3</sup> 790 Phil. 161 (2016) [Per J. Leonen, Second Division].

<sup>4</sup> G.R. Nos. 212014-15, December 6, 2016  
<<http://sc.judiciary.gov.ph/pdf/web/viewer.html?file=/jurisprudence/2016/december2016/212014-15.pdf>> [Per J. Perlas-Bernabe, En Banc].

<sup>5</sup> 92 Phil. 1051 (1953) [Per J. Reyes, En Banc].



constitution. At most, it is statutory. And rights conferred upon accused persons to participate in preliminary investigations concerning themselves depend upon the provisions of law by which such rights are specifically secured, rather than upon the phrase “due process of law.”<sup>6</sup>

The rules governing the procedure for the conduct of a preliminary investigation are those outlined in Rule 112, Section 3 of the Rules of Court, which are reproduced in the Rules of Procedure of the Office of the Ombudsman:<sup>7</sup>

RULE 112  
Preliminary Investigation

. . . .

Section 3. Procedure. — The preliminary investigation shall be conducted in the following manner:

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

(b) Within ten (10) days after the filing of the complaint, the investigating officer shall either dismiss it if he finds no ground to continue with the investigation, or issue a subpoena to the respondent attaching to it a copy of the complaint and its supporting affidavits and documents.

The respondent shall have the right to examine the evidence submitted by the complainant which he may not have been furnished and to copy them at his expense. If the evidence is voluminous, the complainant may be required to specify those which he intends to present against the respondent, and these shall be made available for examination or copying by the respondent at his expense.

Objects as evidence need not be furnished a party but shall be made available for examination, copying, or photographing at the expense of the requesting party.

(c) Within ten (10) days from receipt of the subpoena with the complaint and supporting affidavits and documents, the respondent shall submit his counter-affidavit and that of his witnesses and other supporting documents relied upon for his defense. The counter-affidavits shall be

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<sup>6</sup> Id. at 1053, citing *U.S. v. Yu Tuico*, 34 Phil. 209 (1916) [Per J. Moreland, Second Division]; *People v. Badilla*, 48 Phil. 718 (1926) [Per J. Ostrand, En Banc]; II MORAN, RULES OF COURT 673 (1952); and *U.S. v. Grant and Kennedy*, 18 Phil. 122 (1910) [Per J. Trent, En Banc].

<sup>7</sup> Adm. O. No. 7 (1990).

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subscribed and sworn to and certified as provided in paragraph (a) of this section, with copies thereof furnished by him to the complainant. The respondent shall not be allowed to file a motion to dismiss in lieu of a counter-affidavit.

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

(e) The investigating officer may set a hearing if there are facts and issues to be clarified from a party or a witness. The parties can be present at the hearing but without the right to examine or cross-examine. They may, however, submit to the investigating officer questions which may be asked to the party or witness concerned.

The hearing shall be held within ten (10) days from submission of the counter-affidavits and other documents or from the expiration of the period for their submission. It shall be terminated within five (5) days.

(f) Within ten (10) days after the investigation, the investigating officer shall determine whether or not there is sufficient ground to hold the respondent for trial.

The Revised Rules of Criminal Procedure state that the investigating prosecutor, in proceeding with the investigation, shall “issue a subpoena to the respondent attaching to it a copy of the complaint and its supporting affidavits and documents.”<sup>8</sup> This is mandatory. However, the Rules of Procedure do not state that the subpoena must be sent to respondent repeatedly until respondent submits a counter-affidavit. They only mandate that the investigating prosecutor must issue a subpoena to the respondent to file his or her counter-affidavit. Thus, Rule 112, Section 3(d) of the Rules of Court provides:

(d) If the respondent cannot be subpoenaed, or if subpoenaed, does not submit counter-affidavits within the ten (10) day period, *the investigating officer shall resolve the complaint based on the evidence presented by the complainant.* (Emphasis supplied)

In this case, petitioner was sent copies of the Joint Order dated September 1, 2015, where the Ombudsman directed respondents to file their respective counter-affidavits, at two (2) of his addresses on record.<sup>9</sup> The Ombudsman has already complied with what was required by the Rules of Court.

This case cannot be similar to that in *Duterte v. Sandiganbayan*.<sup>10</sup> In *Duterte*, petitioners were merely ordered to comment on the complaints

<sup>8</sup> REVISED RULES OF CRIMINAL PROCEDURE, Rule 112, sec. 3(b).

<sup>9</sup> *Ponencia*, p. 2.

<sup>10</sup> 352 Phil. 557 (1998) [Per J. Kapunan, Third Division].

against them. They were not specifically ordered to file their respective counter-affidavits. Thus, they had reasonable ground to believe that a preliminary investigation had been conducted against them:

In the 12 November 1991 Order of Graft Investigator Manriquez, petitioners were merely directed to submit a point-by-point comment under oath on the allegations in Civil Case No. 20,550-91 and on SAR No. 91-05. The said order was not accompanied by a single affidavit of any person charging petitioners of any offense as required by law. They were just required to comment upon the allegations in Civil Case No. 20,550-91 of the Regional Trial Court of Davao City which had earlier been dismissed and on the COA Special Audit Report. Petitioners had no inkling that they were being subjected to a preliminary investigation as in fact there was no indication in the order that a preliminary investigation was being conducted. If Graft Investigator Manriquez had intended merely to adopt the allegations of the plaintiffs in the civil case or the Special Audit Report (whose recommendation for the cancellation of the contract in question had been complied with) as his bases for criminal prosecution, then the procedure was plainly anomalous and highly irregular. As a consequence, petitioners' constitutional right to due process was violated.<sup>11</sup> (Citation omitted)

What this Court emphasized in *Duterte* was the egregious failure of the Office of the Ombudsman to follow its own rules of procedure. In this instance, Administrative Order No. 7 mandates the Office of the Ombudsman to issue a subpoena for respondents to file their respective counter-affidavits. The Ombudsman, in this case, has already complied with this mandate.

It must likewise be emphasized that while the Ombudsman found probable cause to charge petitioner even before he was aware of the investigation against him, *this finding of probable cause was not yet final*. There was no information yet against petitioner filed with any court.

According to the facts in the *ponencia*, the Ombudsman issued a Resolution dated May 10, 2016 finding probable cause to charge petitioner with conspiracy in the commission of two (2) counts of Violation of Section 3(e) of Republic Act No. 3019, one (1) count of Malversation of Public Funds and one (1) count of Malversation thru Falsification.<sup>12</sup> Petitioner alleged that he was made aware of this only in October 2016. Upon a letter request to the Ombudsman, the Ombudsman, on October 10, 2016, furnished petitioner with a copy of the May 10, 2016 Resolution.<sup>13</sup>

However, instead of merely furnishing petitioner with a copy of the Resolution finding probable cause, the Ombudsman allowed petitioner to

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<sup>11</sup> Id. at 573.

<sup>12</sup> *Ponencia*, p. 2.

<sup>13</sup> Id. at 3.



file a motion for reconsideration of the Resolution within five (5) days from receipt. In other words, *the Ombudsman gave petitioner the opportunity to overturn her finding of probable cause by giving him time to submit his counter-affidavit and any other controverting evidence he might have.*

Petitioner was in an even better position than his co-respondents to refute the charges against him since he would have already been made aware, through the May 10, 2016 Resolution, of the specific evidence the Ombudsman found to have been convincing enough to find probable cause. He would have known exactly what evidence he needed to submit to controvert the findings against him, instead of merely guessing what the Ombudsman might find convincing, as he would have done during the preliminary investigation. Instead of taking this opportunity, petitioner instead filed an Omnibus Motion for Reinvestigation and Deferment of Filing of Information with Request for Copies of Complaint-Affidavit and Supporting Documents.<sup>14</sup> Thus, in denying this Motion, the Ombudsman stated:

The filing by Labay of the *Omnibus Motion for Reinvestigation* on 16 November 2016 cured whatever defect in the observance of due process. Denial of due process cannot be successfully invoked by a party who has had the opportunity to be heard on his motion for reconsideration.<sup>15</sup>

This Court has stated that “the essence of due process is simply an opportunity to be heard, or an opportunity to explain one’s side or an opportunity to seek for a reconsideration of the action or ruling complained of.”<sup>16</sup> Petitioner was granted an opportunity to be heard. Thus, he was not denied the right to due process.

## II

Even assuming that there were irregularities in the conduct of the preliminary investigation, any petition filed to question these irregularities would already be rendered moot once the court issues a warrant of arrest against the accused.

There are two (2) stages in the determination of probable cause. The first stage is the executive determination of probable cause, which is done by the prosecutor in a preliminary investigation. The second stage is the judicial determination of probable cause. Once information has been

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<sup>14</sup> Id.

<sup>15</sup> Id. at 4.

<sup>16</sup> *Resurreccion v. People*, 738 Phil. 704 (2014) [Per J. Brion, Second Division] citing *Ray Peter O. Vivo v. Philippine Amusement and Gaming Corporation (PAGCOR)*, 721 Phil. 34 (2013) [Per J. Bersamin, En Banc].

submitted to the court, the court acquires full jurisdiction over the case.<sup>17</sup> Therefore, any question must be addressed to its sound discretion. In *Crespo v. Mogul*:<sup>18</sup>

The rule therefore in this jurisdiction is that once a complaint or information is filed in Court any disposition of the case as its dismissal or the conviction or acquittal of the accused rests in the sound discretion of the Court. Although the fiscal retains the direction and control of the prosecution of criminal cases even while the case is already in Court he cannot impose his opinion on the trial court. The Court is the best and sole judge on what to do with the case before it. The determination of the case is within its exclusive jurisdiction and competence. A motion to dismiss the case filed by the fiscal should be addressed to the Court who has the option to grant or deny the same. It does not matter if this is done before or after the arraignment of the accused or that the motion was filed after a reinvestigation or upon instructions of the Secretary of Justice who reviewed the records of the investigation.<sup>19</sup>

The court's finding of probable cause is arrived at independent of the prosecutor's findings. Thus, any perceived irregularity in the conduct of the preliminary investigation does not affect the court's acquisition of jurisdiction. In *People v. Narca*:<sup>20</sup>

It must be emphasized that the preliminary investigation is not the venue for the full exercise of the rights of the parties. This is why preliminary investigation is not considered as a part of trial but merely preparatory thereto and that the records therein shall not form part of the records of the case in court. Parties may submit affidavits but have no right to examine witnesses though they can propound questions through the investigating office. In fact, a preliminary investigation may even be conducted ex-parte in certain cases. Moreover, in Section 1 of Rule 112, the purpose of a preliminary investigation is only to determine a well grounded belief if a crime was "probably" committed by an accused. *In any case, the invalidity or absence of a preliminary investigation does not affect the jurisdiction of the court which may have taken cognizance of the information nor impair the validity of the information or otherwise render it defective.*<sup>21</sup> (Emphasis supplied)

In this case, Informations were already filed against petitioner with the Sandiganbayan. In its July 10, 2017 Resolution, the Sandiganbayan found the existence of probable cause and issued a warrant of arrest against him.<sup>22</sup>

<sup>17</sup> See *People v. Castillo and Mejia*, 607 Phil. 754 (2009) [Per J. Quisumbing, Second Division].

<sup>18</sup> 235 Phil. 465 (1987) [Per J. Gancayco, En Banc].

<sup>19</sup> Id. at 476.

<sup>20</sup> 341 Phil. 696 (1997) [Per J. Francisco, Third Division].

<sup>21</sup> Id. at 705, citing *Lozada v. Hernandez*, 92 Phil. 1051 (1953) [Per J. Reyes, En Banc]; RULES OF COURT, Rule 112, sec. 8; RULES OF COURT, Rule 112, sec. 3(e); RULES OF COURT, Rule 112, sec. 3(d); *Mercado v. Court of Appeals*, 315 Phil. 657 (1995) [Per J. Quiason, First Division]; *Rodriguez v. Sandiganbayan*, 306 Phil. 567 (1983) [Per J. Escolin, En Banc]; *Webb v. De Leon*, 317 Phil. 758 (1995) [Per J. Puno, Second Division]; *Romualdez v. Sandiganbayan*, 313 Phil. 870 (1995) [Per C.J. Narvasa, En Banc]; and *People v. Gomez*, 202 Phil. 395 (1982) [Per J. Relova, First Division].

<sup>22</sup> *Ponencia*, p. 5.

*The Sandiganbayan, independent of the findings of the Ombudsman in the preliminary investigation, found that based on the records, there was probable cause to arrest petitioner.* Thus, any question on the conduct of the preliminary investigation was already rendered moot by the July 10, 2017 Resolution.

Thus, in *De Lima v. Reyes*,<sup>23</sup> this Court dismissed a Petition for Review on Certiorari questioning the Secretary of Justice's finding of probable cause against the accused for being moot:

Here, the trial court has already determined, independently of any finding or recommendation by the First Panel or the Second Panel, that probable cause exists for the issuance of the warrant of arrest against respondent. Probable cause has been judicially determined. Jurisdiction over the case, therefore, has transferred to the trial court. *A petition for certiorari questioning the validity of the preliminary investigation in any other venue has been rendered moot by the issuance of the warrant of arrest and the conduct of arraignment.*

The Court of Appeals should have dismissed the Petition for Certiorari filed before them when the trial court issued its warrant of arrest. Since the trial court has already acquired jurisdiction over the case and the existence of probable cause has been judicially determined, a petition for certiorari questioning the conduct of the preliminary investigation ceases to be the "plain, speedy, and adequate remedy" provided by law. Since this Petition for Review is an appeal from a moot Petition for Certiorari, it must also be rendered moot.

The prudent course of action at this stage would be to proceed to trial. Respondent, however, is not without remedies. He may still file any appropriate action before the trial court or question any alleged irregularity in the preliminary investigation during pre-trial.<sup>24</sup> (Emphasis supplied)

The same ruling was applied in *Pemberton v. De Lima*,<sup>25</sup> *Napoles v. De Lima*,<sup>26</sup> and *Cambe v. Office of the Ombudsman*.<sup>27</sup> There are no special circumstances in this case to re-visit this Court's ruling in these cases.

Even assuming further that the irregularities were enough to warrant a reinvestigation, it was within the Sandiganbayan's discretion to order its conduct. In *Baltazar v. Ombudsman*,<sup>28</sup> this Court emphasized that "courts are given wide latitude to accord the accused ample opportunity to present controverting evidence even before trial as demanded by due process."<sup>29</sup>

<sup>23</sup> 776 Phil. 623 (2016) [Per J. Leonen, Second Division].

<sup>24</sup> Id. at 652–653, citing RULES OF COURT, Rule 65, sec 1.

<sup>25</sup> 784 Phil. 918 (2016) [Per J. Leonen, Second Division].

<sup>26</sup> 790 Phil. 161 (2016) [Per J. Leonen, Second Division].

<sup>27</sup> G.R. Nos. 212014-15, December 6, 2016  
<<http://sc.judiciary.gov.ph/pdf/web/viewer.html?file=/jurisprudence/2016/december2016/212014-15.pdf>> [Per J. Perlas-Bernabe, En Banc].

<sup>28</sup> 539 Phil. 131 (2006) [Per J. Velasco, Jr., Third Division].

<sup>29</sup> Id. at 144.

Here, if indeed the Sandiganbayan found that petitioner was deprived of due process, it would have ordered a reinvestigation. However, the Sandiganbayan found that due process had already been accorded to petitioner but that petitioner squandered the opportunities given to submit his defense:

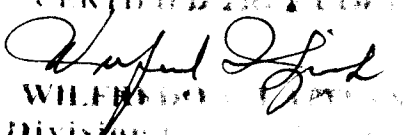
The essence of due process is that a party is afforded a reasonable opportunity to be heard in support of his case. What the law abhors and prohibits is the absolute absence of the opportunity to be heard. When the party seeking due process was in fact given several opportunities to be heard and to air his side, but it was by his own fault or choice that he squandered these chances, then his cry for due process must fail.<sup>30</sup>


The right to due process applies equally to the State and to the defense. In *People v. Court of Appeals and Jonathan Cerbo*:<sup>31</sup>

The rights of the people from what could sometimes be an “oppressive” exercise of government prosecutorial powers do need to be protected when circumstances so require. But just as we recognize this need, we also acknowledge that the State must likewise be accorded due process. Thus, when there is no showing of nefarious irregularity or manifest error in the performance of a public prosecutor’s duties, courts ought to refrain from interfering with such lawfully and judicially mandated duties.<sup>32</sup>

A defect in procedure is not automatically assumed as a deprivation of what is at most a statutory right. Irregularities in the executive determination of probable cause do not necessarily affect the judicial determination of probable cause. Once the Sandiganbayan has determined that there is probable cause to issue the warrant of arrest, any question as to the conduct of the preliminary investigation is already moot.

Accordingly, I vote to **DENY** the Petition for Certiorari. The Sandiganbayan should proceed with the resolution of Criminal Case Nos. SB-17-CRM-0642 to 0643 and Criminal Case Nos. SB-17-CRM-0644 to 0645 with due and deliberate dispatch.

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 WILFREDO E. REYES  
 DIVISION CHIEF

  
 MARVIC M. V. F. LEONEN  
 Associate Justice

<sup>30</sup> *Ponencia*, p. 13, the Sandiganbayan July 10, 2017 Resolution.

<sup>31</sup> 361 Phil. 401 (1999) [Per J. Panganiban, Third Division].

<sup>32</sup> *People v. Court of Appeals and Jonathan Cerbo*, 361 Phil. 401 (1999) [Per J. Panganiban, Third Division].