cise of the option. A similar approach here would have been more convincing than a summary analogy with the cited cases. Or should we take the decision to imply that the obligor's marriage to a woman not the mother of the minor will justify the restriction of the optional right?

MINERVA GONZAGA

CRIMINAL LAW AND PROCEDURE—

I. EVIDENT PREMEDITATION

In *People v. Visagar*,[1] the Supreme Court held that a "brief" period of time intervening between challenge and actual shooting sufficed to preclude the circumstance of evident premeditation in the commission of the crime. The case arose out of a dispute between the accused and the deceased, Pedro Basilio, when the latter fenced his lot, depriving Visagar of a passageway for his jeep. During the ocular inspection of the premises in an attempt at an amicable settlement, Visagar suddenly rushed at Basilio with the apparent intention of attacking him. A spectator stopped him and he was temporarily pacified. As Basilio remained adamant in his decision to close the passageway, Visagar faced him saying, "You Indong, you are always like that, do you want a fight with guns?" And he ran towards the house, got his .45 caliber automatic pistol and went to look for Basilio who was leaning against the kitchen door with his arms akimbo. At a distance of about three meters, and without uttering any word, Visagar fired two shots wounding Basilio mortally.

The general rule is that for evident premeditation to exist there must be a period sufficient in a judicial sense to afford full opportunity for meditation and sufficient to allow the conscience of the actor to overcome the resolution of his will if he desires to hearken to its warnings.[2] Certain requisites must be established before the court may properly take evident premeditation into account: (a) the time when the offender determined to commit the crime, (b) an act manifestly indicating that the culprit has clung to his determination, (c) a lapse of time between the determination and the execution, sufficient to allow him to reflect upon the consequences of his act.[3]

In the case at bar there were some facts which tended to show the existence of evident premeditation. At one of their prior attempts to settle the dispute, the wife of the accused was heard to remark, "If that is what you wish something may happen." Visagar who was nearby said, "My wife told me that she is downtrodden, abused * * * I better go to jail, there is no more use, if I cannot let my jeep enter my house and it is prohibited to park the jeep in the street I better go to jail." Such a remark, coupled with his attempt

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[1] G. R. No. L-5384, prom. June 12, 1953.
[2] *U.S. v. Gil* (1909), 13 Phil. 531.
[3] *People v. Leano* (C. A.), 36 O. G. No. 53, 1120.

to attack Basilio during the ocular inspection, would seem to indicate evident premeditation. The court in considering the required time for evident premeditation to exist took into account only the period from the challenge to the actual shooting, disregarding the previous acts and utterances of the accused. The challenge was probably merely the climax of what he had, for some time, intended to do.[4] The Supreme Court has not laid down fixed rules for the determination of what constitutes a "sufficient lapse of time." [5] Rather it has considered the circumstances in each particular case. In *People v. Mostales* [6] the court held the lapse of three and a half hours before the commission of the crime sufficient to constitute evident premeditation. The intervention of four hours between the defendant's anger and aggression in *People v. Lozada* [7] was held to show the presence of the circumstance. And where the accused had the whole morning and up to five o'clock in the afternoon to think over his criminal object the Court properly found evident premeditation.[8]

II. ENTRAPMENT

The Supreme Court in *People v. Hilario* [9] said:

> "While it has been said that the practice of entrapping persons into crime for the purpose of instituting criminal prosecution is to be deplored, and while instigation, as distinguished from mere entrapment, has often been condemned and has sometimes been held to prevent the act from being criminal or punishable, the general rule is that it is no defense to the perpetrator of a crime that facilities for its commission were purposely placed in his way, or that the criminal act was done at the 'decoy solicitation' of persons seeking to expose the criminal, or that detectives feigning complicity in the act were present and apparently assisting in its commission. Especially is this true in that class of cases where the offense is one of a kind habitually committed, and the solicitation merely

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[4] Prior repeated statements of the defendant that the hour of reckoning of the victim was near, and the fact of enmity existing between them have sufficed to find the circumstance present; see *People v. Lopez*, (1939) 69 Phil. 298, also *People v. Diokno*, (1936) 63 Phil. 601.

[5] Compare *Commonwealth v. Webster*, 5 Cush. (Mass.) 295; 52 Am. Dec. 711 (quoted in CLARK, W. L. AND MARSHALL, W. L., A TREATISE ON THE LAW OF CRIMES, 4th ed., 1940 p. 289):

"It is not the less malice aforethought, within the meaning of the law, because the act is done suddenly after the intention to commit the homicide is formed. It is sufficient that the malicious intention precedes and accompanies the act of homicide. It is manifest, therefore, that the words 'malice aforethought' in the description of murder do not imply deliberation, or the lapse of considerable time between the malicious intent to take life and the actual execution of that intent, but rather denotes purpose and design, in contradistinction to accident and mischance."

[6] G. R. No. L-2880, prom. March 31, 1950.

[7] 70 Phil. 525 (1940).

[8] *People v. Dosal*, G. R. Nos. L-4215 and 4216, prom. April 17, 1953.

[9] G. R. No. L-5085, prom. June 27, 1953, quoting with approval *People v. Lua Chu* (1931), 56 Phil. 44 at52.

> **furnishes evidence of a course of conduct. Mere deception by the detective will not shield defendant, if the offense was committed by him free from the influence or instigation of the detective."**

Although in its nature, entrapment is at least as reprehensible as the "third degree" since it involves the "creation of a criminal by a governmental agency," [10] courts in the United States have rejected it as a defense where the accused was apprehended in a habitual course of conduct, regardless of the motives which prompted the officers of the law to act.[11] *U.S. v. Siegel* [12] is an example. This was a prosecution for violation of the Harrison-Anti-Narcotic Act. The government's evidence showed a purchase of morphine from the defendant by an addict. The defendant moved for a directed verdict on the ground of entrapment. The motion was denied. Then the government by leave of court reopened its case and introduced evidence to show that its officers had been informed by drug addicts of prior illicit sales by the defendant. Defendant appealed on the ground that this evidence was inadmissible. The Court held that after the plea of entrapment was set up, the prosecution could introduce such evidence to show that the government officials, prior to the entrapment, had reasonable grounds to suspect the defendant of the crime. However, the government is estopped from prosecuting for a conspiracy where there is no evidence of prior misconduct by the defendant and the government officials themselves induced the offense.[13]

III. CORPUS DELICTI

In *People v. Moros Ansang*,[14] several Moros were seen sailing from the shore of Sangbay presumably to fish. When the two Moros returned, they no longer had the hand grenades they had gone out with, nor did they bring any fish. Berto, against whom Jubail had a grudge, and his companions never returned from that trip and the wreckage of his vinta were later seen on the shore. Ansang, Jubail and Jaho confessed to the crime. Appellant's counsel contended that a conviction could not be based on extrajudicial confession without

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[10] "The very essence of the defense of entrapment is that the crime originated in the mind of the officer rather than the accused." See *Note*, (1930) 44 *Harv. L. Rev.* at 110.

[11] *Ibid* at 109 and 112.

[12] 16 F. (2d) 134 (1926).

[13] See *O'Brien v. U.S.* (1931), 51 F. (2d) 674; see *Note* (1927) *Col. L. Rev.* at 6003: "Courts sanction the devise of entrapment where its purpose is merely to aid in the detection of crime the prior commission of which is suspected. On the other hand, courts have, as a matter of policy, upheld the defense of entrapment where the officers conceive the original criminal design and foster its execution for the sole purpose of prosecuting the defendant, or assuming a suspicion of prior unlawful acts, unduly influence him to recommit them. But the defense has also been extended to that class of cases where the method used to detect the crime involves the perpetration of an act which the court considers as much opposed to public policy as the crime itself."

[14] G. R. No. L-4847, prom. May 15, 1953.

proof of the *corpus delicti*. The Supreme Court held that here the *corpus delicti* was shown by the facts established by evidence independent of the confession.

The general rule is that *corpus delicti* [15] must be proved by evidence independent of the confession of the defendant. This evidence may be circumstantial, but there should be some evidence corroborating the confession.[16] And when the evidence is circumstantial, the proof must not only be consistent with and point to the prisoner's guilt beyond a reasonable doubt but must exclude every other reasonable hypothesis but the single one of guilt.[17] But this rule does not mean that every element of the crime must be made out by proof apart from the confession, but merely that there should be some evidence apart from the confession, tending to show that a crime has been committed. The rule requiring independent proof of *corpus delicti* is merely intended to guard against conviction upon false confession.[18]

IV. ROBBERY WITH HOMICIDE

The cases of *People v. Ramirez*,[19] and *People v. Libre*,[20] both involved the crime of robbery with homicide. In the first case the accused, together with other companions, planned to steal some boats from the U.S. Navy. However, on the night they attempted to steal the boats, one of the guards spotted them. In order to be able to escape from the place one of the accused killed the guard. In the second case Libre, the accused, asked for some money from a certain person named Ombolero. When Ombolero could not give Libre and his companions any money (because he did not have any at the moment) and instead offered to give them some food, the accused shot him to death.

Robbery with homicide is one indivisible felony and is punishable by one distinct penalty—*reclusion perpetua* to death.[21] The killing may take place before or during the robbery, but it must be by reason or on the occasion of the robbery. Since the crime is one distinct and indivisible felony the presence of treachery does not qualify the homicide into murder.[22] The Supreme Court has in the past spoken of the "complex crime of robbery with homicide" [23] and of "the complex special crime of robbery with homicide." [24] This is probably

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[15] *Corpus delicti* is defined as "the body of the offense; the offense itself, as distinguished from the participation of any person therein." CYCLOPEDIC LAW DICTIONARY (1912), p. 210.

[16] *U.S. v. Cruz* (1903), 2 Phil. 148.

[17] *U.S. v. Douglas* (1903), 2 Phil. 461.

[18] *People v. Bantagan* (1930), 54 Phil. 834.

[19] G. R. No. L-5875, prom. May 15, 1953.

[20] G. R. No. L-5195, prom. May 4, 1953.

[21] Art. 294 par. 1, Rev. Penal Code; Padilla, Criminal Law (1951 ed.) 863; see also *People v. Mantawar* 45 O. G. Supp. No. 9, 437.

[22] *People v. Manuel* (1922) 44 Phil. 333; see also *People v. Madrid* G. R. No. L-3023 prom. January 3, 1951.

[23] *U.S. v. Devela* (1904), 3 Phil. 625; *U.S. v. Ibañez* (1911), 19 Phil. 463; *People v. Daos*, (1934) 60 Phil. 143.

[24] *People v. Hernandez* (1924), 46 Phil. 48.

a loose use of terms. Robbery with homicide penalized under article 294, paragraph 1 of the Revised Penal Code is theoretically distinct from a complex crime of robbery and homicide under article 48 of the Code. Under article 48, there is a complex crime when a single act constitutes two or more grave or less grave felonies or when one offense is a necessary means for committing the other. Where homicide then is a *necessary means for committing a robbery,* a complex crime exists under article 48. But this very same situation seems to be covered also by article 294, paragraph 1 since a homicide which is "a necessary means for committing robbery" is also a homicide committed "by reason or on the occasion of" a robbery. The problem may not be merely academic, since the appropriate penalty would differ in each case. The penalty provided for in article 48 is the penalty for the more serious offense in its maximum period. If a simple homicide is deemed judicially separate from the robbery, it would be the more serious offense, and the appropriate penalty would be *reclusion temporal* in its maximum period.[25]

V. CONTINUANCE OF TRIAL

The Supreme Court in *People v. Romero* [26] was of the opinion that the lower court did not exercise judicial discretion [27] and revoked the order of dismissal of the lower court. In this case, the trial was postponed twice on motion of the defense. At the trial, the prosecution began presenting its evidence by putting the doctor who performed the autopsy of victim in the murder case, on the witness stand. In the course of the testimony, the pellet to be exhibited was discovered missing. Through oversight it had been left in Manila. The fiscal moved for continuance and the motion was granted. In preparation for the trial the fiscal saw to it that the corresponding subpoenas were issued and did what he could to insure the coming of his witnesses. When the cases were called for hearing, not one of the principal witnesses appeared. The fiscal asked the court to order the arrest of the absent witnesses and to postpone trial until their arrival. The trial judge denied the motion and dismissed the cases in open court. It was established that all the witnesses actually tried to attend the trial but were held up due to various causes, mainly transportation trouble. In fact the presence of the doctor in the courtroom was noted by the presiding judge himself a little while after the dismissal of the said case.

Justice Reyes, speaking for the Court, said:

> "With the above facts in mind, we think the trial court acted rather hastily in refusing a continuance and dismissing the cases. As the Solicitor General observes, considering that the accused was charged with se-

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[25] Art. 249, Rev. Penal Code.

[26] G. R. No. 4517-4520 prom. May 25, 1953.

[27] In *U.S. v. Ramirez* (1919) 39 Phil. 738, 714-742, Justice Malcolm said, "Applications for continuance are addressed to the sound discretion of the court. In this respect, it may be said that the discretion which the trial court exercises must be judicial and not arbitrary. It is the guardian of the rights of the accused as well as those of the people at large, and should not unduly force him to trial, nor for light causes jeopardize the rights or interests of the public."

> rious offenses, one of them capital, and that he was out on bail, the trial court before dismissing the four cases 'should have first ordered the arrest of the absent government witnesses, as requested by the prosecution, and only after it had become apparent that even the coercive powers and processes of the court were unavailing to secure the witnesses' attendance and that any further delay would constitute a denial of the accused's right to a speedy trial, could the court have justifiably dismissed the cases against the accused.' At any rate, the least that the trial court should have done, considering that the trial was set for 8 consecutive days, was to adjourn the hearing until next day to make allowance for possible delay, in the arrival of witnesses who had to come from distant places, and this would have been the proper measure under the circumstances. (*Municipality of Dingras v. Bonoan*, 47 Off. Gaz., 3542.)"

It is heartening assurance that our Supreme Court is ever on the look-out for deviations from tested principles.

VI. DISCHARGE BY COMPETENT COURT

In *People v. Ibañez*,[28] Judge Fidel Ibañez refused to grant discharge of one of the defendants, Quirab, whose testimony was alleged by the prosecution indispensable to the proper prosecution of the case. Respondent judge opined, "The court thinks that what the prosecution will establish as evidence can be established even without the testimony of Mr. Quirab. Frankly speaking, the presiding judge of this Court is by nature very kind and always favors the accused. But if Melecio Quirab can be made a Government witness, why not the other accused, the mayor, be made also a Government witness against Melecio Quirab? The Court is sorry to make that observation because the court seems to think that this may be said to be a persecution, not prosecution. The importance of the signature of Mr. Quirab in the payment of that payroll is just as important as the signature of Mr. Salcedo."

The Supreme Court upheld Judge Ibañez's order as a "wise and cautious exercise of his judgment."

Though there has been some controversy as to the power of the fiscal to produce as witnesses persons who have taken part in the crime without including them in the information and later discharging them,[29] it seems to be well settled in our jurisdiction that upon the filing of an information against the defendants, it is the court who has the say on whether a defendant should be discharged to be used as a state witness.[30]

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[28] G. R. No. L-5242, prom. April 20, 1953.

[29] *U.S. v. Enriquez* (1919) 40 Phil. 603. Majority was for the admission of this kind of witnesses and the dissent for their non-admission.

[30] *U.S. v. Barredo* (1915) 32 Phil. 444, 450 "In this jurisdiction provincial fiscals are not clothed with power, without the consent of court, to dismiss or *nolle prosequi* crimnial actions actually instituted, and pending further proceedings. The power to dismiss is vested solely in the courts, that is to say in the presiding judge thereof." *People v. Bautista* (1926) 49 Phil. 389; *U.S. v. Bonete* (1920) 40 Phil. 908; *U.S. v. Guzman* (1915) 30 Phil. 416; *U.S. v. Abanzado* (1918) 37 Phil. 658.

For the rule in the United States, see HARNO, CASES AND PRINCIPLES ON CRIMINAL LAW AND PROCEDURE (1950), p. 733. "This rule changed existing law in the federal courts. The law was that a *nolle prosequi* was within the discretion of the pros-

However, a court's unreasonable refusal to grant such a discharge may possibly stymie the prosecution of a case so that it is submitted that as in the granting of continuance of trial, the courts should be guided by "judicial discretion."

VII. DISMISSAL ON REQUEST OF THE ACCUSED

In *People v. Chang*,[31] appellant, an agent of American Factor (Phil.) Inc., collected from various customers the value of certain merchandise amounting to ₱5,786.83. He failed to turn over the amount to the company and was prosecuted for estafa in the Court of First Instance of Manila. The case was amicably settled between appellant and the offended party whereby appellant was allowed to pay ₱5,786.83 in installments at ₱200.00 a month. The case was provisionally dismissed. Appellant failed to make good the whole amount, and he was prosecuted for estafa, the origin of the present appeal.

Justice Angelo Bautista said:

> "The first information was provisionally dismissed because appellant has asked the offended party to drop the case against him on condition that he would pay the whole amount he misappropriated and provided further that his obligation be guaranteed by a bonding company. The amicable settlement was predicated upon the understanding that once arrived at, the case would be dismissed. It is apparent therefore that the first information was dismissed not only with his express consent but upon his own initiative. And as such dismissal was ordered with his express consent, it follows that the same does not operate as a bar to another prosecution."

Previously, the Supreme Court had held in *People v. Maparao* [32] that if the accused himself asked for dismissal before a judgment for conviction or acquittal could have been rendered, he is not entitled to invoke the defense of double jeopardy.

Courts in the United States follow the same rule.[33] As no one should profit by his mistake, so should no one be allowed to set up his own act as an excuse, in this case, a dismissal upon his own initiative.

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ecuting officer. *U. S. v. Brokaw* (1945), 60 F. Supp. 100. The rule is in accord with the position taken by a number of state courts; e.g. *People v. Newcomer* (1918), 284 Ill. 315." In the United States Rule 48 of the Federal Rules of Criminal Procedure, (1946) states: "The attorney general may by *leave of court* file a dismissal of an indictment, information, or complaint and the prosecution shall thereupon terminate."

[31] G. R. No. L-5839 prom. April 29, 1953.

[32] G. R. No. L-2600 prom. March 30, 1950.

[33] *Commonwealth v. Micheli* (1927), 154 N.E. 589. "If the dismissal had been heard, his plea of former acquittal would have to be sustained. When such a jury is discharged at the defendant's request or with his consent, and for his benefit, he may be tried again for the same offense."; *State v. Slorah* (1919) 4 A. L. R., 1256 "Certain conditions, if arising in the trial of the case, have come to be well recognized as constituting that 'urgent necessity' which will bar a plea of former jeopardy: (1) the consent of the respondent."