THE BAILABILITY OF THE ACCUSED IN CAPITAL OFFENSES WHEN THE EVIDENCE OF GUILT IS STRONG

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In the case of *Pareja v. Gomez*,[1] the Supreme Court of the Philippines held that Section 98 (b) of the Rules of Court promulgated July 1, 1940 is not decisive in applications for bail because "this section governs the quantum of evidence essential for 'conviction' for which guilt must be established beyond reasonable doubt, whereas to forfeit the constitutional right to bail in capital offenses, it is enough that the evidence of guilt is strong." Section 98 (b) treats of the quantum of circumstantial evidence sufficient to convict; when its requirements are met, a court would then be justified in rendering a conviction just as any other evidence not circumstantial would convict. This section has been respectably preserved in Section 5, Rule 133 of the present Revised Rules of Court (which was made effective beginning January, 1964) thereby making the pronouncement of the Supreme Court in the above case unaffected and still soundly controlling. In overall result and, as applied in that case, the decision was sound, but there are some vague premises which were left equally soundly disturbing.

The facts of the case follows:

> Pareja and others were accused of the murder of Antonio Abad Tormis, a local newspaperman in Cebu City, in the Court of First Instance of Cebu. Upon his arrest and detention, Pareja petitioned that he be provisionally released on bail. The prosecution opposed the petition on the ground that the evidence of guilt was "strong".
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> To support its opposition, the prosecution established that the revolver used in killing Tormis was found in the safe of Pareja (petitioner for bail) and this same gun was given by Pareja to one Oroñgan, the triggerman, also one of the defendants, to kill Tormis with it.
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> The judge trying the case held that if the facts established by the prosecution stood unimpeached, there would be sufficient ground for conviction and denied bail. On certiorari grounded

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[1] G.R. No. 18733, July, 1962.

on abuse of discretion, the Supreme Court sustained the trial judge and made the ruling on the applicability of Section 98, Rule 123 (now Section 5, Rule 133 of the Revised Rules of Court that if the confessions of his co-accused were disregarded, the remaining evidence would be purely circumstantial and would not satisfy the requirements of Section 98 of Rule 123 of the Rules of Court

Section 98, Rule 123 provides:

"Sec. 98. *Circumstantial evidence, when sufficient.* — Circumstantial evidence is sufficient for conviction if:

(a) There is more than one circumstance;

(b) The facts from which the inferences are derived are proven; and

(c) The combination of all the circumstances is such as to produce a conviction *beyond reasonable doubt.*" (Italics ours)

The words "beyond reasonable doubt" in paragraph (c) above which the Supreme Court meant in its decision in the case of *Pareja v. Gomez*[2] aforestated, is actually the one provided for in Section 95, Rule 123 (now Section 2, Rule 133, Revised Rules of Court) which reads as follows:

"Sec. 2. *Proof beyond reasonable doubt.* — In a criminal case, the defendant is entitled to an acquittal, unless his guilt is shown beyond a reasonable doubt. *Proof beyond reasonable doubt* does not mean such a degree of proof as, excluding possibility of error, produces absolute certainty. Moral certainty only is required, or that degree of proof which produces conviction in an unprejudiced mind." (Italics ours)

To understand the point made by the Supreme Court above, it is necessary to make a side by side comparison of Section 6, Rule 110 (now Section 6, Rule 114 of the Revised Rules of Court) with Section 98, Rule 123 (now Section 5, Rule 133, Revised Rules of Court):

"Sec. 6. *Capital offenses not bailable.* — No person in custody for the commission of a capital offense shall be admitted to bail if the *evidence of his guilt is strong.*" (Italics ours)

This leads to the question of the proper interpretation which should be accorded by courts to the phrase "evidence of guilt is strong." The immediate impression which one gathers from a reading of the phrase is the seeming duality of its applicability. It would seem that if "the evidence of guilt is strong" and it is the same evidence which is considered after the trial on the merits, there is no difference between it and "proof beyond reasonable

[2] *supra.*

doubt." And yet nothing can be more legally wrong than such an assertion because their meanings are clearly poles apart.

But can there a point where the meanings of the two phrases merge or become identical? We have already explained that in view of the separateness of the domains over which they hold their respective sway, their meanings can never merge and for the same reason they can never be identical. But there may be cases where the amount of proof sufficient to establish the one and the other may be the same in the same case. This may further be clarified by resorting to a hypothetical example —

> A is murdered inside a room by B. The only witness to the killing was C, who identified the dagger used in the murder, which B left, thinking that nobody saw him. He was able to leave the scene of the crime undetected.
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> On the strength of the sworn statement given by C, the fiscal filed the information. Upon his arrest and detention, B filed a petition for bail.
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> During the hearing of the bail petition, the only witness presented by the fiscal was C. The court denied bail. The fiscal presented one more witness, a court official, to prove recidivism, and forthwith rested the case for the prosecution. B was convicted.

In the above example, the only testimony which resulted in the conviction was the testimony of C because the testimony of the court official did not and could not in any way strengthen the evidence of the state that it was really B who killed A. And it was this same testimony upon which the court based its denial of the bail petition. Here, the amount of proof used to prove that the "evidence of guilt is strong" which the court used in denying bail was the same amount of "proof beyond reasonable doubt" that was used as a basis for conviction.

In legal usage, the phrase "evidence of guilt is strong" has always been associated with the amount of proof in bail proceedings. Its history, application and usage have fixed its place and identification with bail proceedings and with no other in criminal procedure. If a court decides a case on its merits, it finds out from a consideration of the records of the case whether the accused is "guilty beyond reasonable doubt" and not whether the "evidence of guilt is strong". In doing so, the court applies Section 2 and, in applicable cases, Section 5, Rule 133 of the Revised Rules of Court (Section 95 and 98, Rule 123 of the old Rules) and it does this in deciding all criminal cases. It will have occasion to consider whether the "evidence of guilt is strong" only in a bail proceeding, in a capital case. And the amount of proof

it will need in this respect is less than for conviction. This was what the Supreme Court meant in the above case of *Pareja v. Gomez*. The net result is the phrase "evidence of guilt is strong" has a meaning all its own which should be dissociated from "'evidence sufficient for conviction" or "proof beyond reasonable doubt" or "moral certainty of guilt". These latter phrases begin to stir with life only when the court begins to decide a case on the basis of the entire evidence on the guilt or innocence of the accused after the case has been submitted to the court for a decision on the merits. They have no recognizable kinship with the first. In criminal law they have their own respective functions and their own independent beings. But to point this out is simply to come back to the question: For purposes of bail, how much is "strong" if, as the Supreme Court says, it is less than for conviction? What amount of proof is strong enough to be "strong" in bail proceeding in capital offenses?

Origin of the Phrase and of the Law

The provisions of the Rules of Court (subsequently adopted by the Revised Rules of Court) on the bailability of capital offenses was substantially an adoption of Section 63 of General Orders No. 58 which follows:

> "Section 63. All prisoners shall be bailable before conviction, except those charged with the commission of capital offenses when proof of guilt is strong."

Note that the section is an exception to the general rule that all persons accused of crimes are bailable. Section 63 is identical with most of the state constitutions in the United States.[3]

This is the same definition adopted by Philippine law.[4] The Revised Rules of Court provides:

> "Sec. 5 — *Capital offenses defined.* — A capital offense, as the term is used in this rule, is an offense which under the law existing at the time of its commission and at the time of the application to be admitted to bail, may be punished by death." (Rule 144)

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[3] Dissenting opinion of Justice Malcolm in *Montalbo v. Santamaria*, 54 Phil. 955 (1930). In the United States the usual definition of a capital offense is —

"A capital offense is one which is punishable — that is to say, liable to punishment — with death." (*Ex Parte Welsh*, 162 S.W. 2d 358, (1942)

"... The general rule is that if the offense is of such character that the penalty of death may be inflicted, the offense is a capital offense." (6 Am. Jur. 2d, Bailments, Sec. 27, Rev. ed., 1950)

[4] Rules of Court, Rule 114, Section 5, (adopted without any change from the Rules of Court of 1940).

And, in the United States, the words "when proof of guilt is evident or presumption of guilt is strong" have been construed to mean —

> "The 'proof evident' or 'evident proof' in this connection has been held to mean clear, strong evidence which leads a well-guarded dispassionate judgment to the conclusion that the offense has been committed as charged, that accused is the guilty agent and that *he probably will be punished capitally if the law is administered.* 'Presumption great' exists when the circumstances testified to are such that the inference of guilt naturally to be drawn therefrom is strong, clear and convincing to an unbiased judgment and excludes all reasonable probability of any other conclusion".[5] (Italics ours).

General Orders No. 58 which served as the Philippine Code of Criminal Procedure until replaced by another, was promulgated on April 23, 1900. On July 1, 1902, however, an organic act was enacted by the Congress of the United States, which provided, among other things:

> "Sec. 5. ... That all persons shall before conviction be bailable by sureties, *except for capital offenses.*" (Italics ours)[6]

The Jones Law enacted by the same Congress in 1916 preserved this provision of the Philippine Bill without any change. Both laws contained the same peremptory words "except for capital offenses" without any qualifications. Did the Philippine Bill and later on the Jones Law therefore repeal Section 53 of General Orders No. 58? This question had to be asked in view of the fact that General Orders No. 58 remained in full force and effect during the entire regime of the two laws mentioned above.

This question was settled by the case of *Montalbo v. Santamaria,*[7] where the accused, who was charged with murder with the qualifying circumstances of premeditation and treachery, upon being arrested and detained, petitioned for bail in accordance with Section 63 of General Orders No. 58. Without a preliminary investigation, bail was denied. Thereafter the accused brought mandamus proceedings in the Supreme Court contending that inasmuch as the granting of bail was a matter of judicial discretion, a hearing was necessary to enable the judge to determine whether proof is evident or the presumption of guilt is strong. The accused claimed that in declining to proceed with the investigation of the proofs of the prosecution, the judge had "illegally divested himself of the power and jurisdiction conferred upon him by the Jones Law . . .". The City Fiscal of Manila opposed the petition for bail on the ground

[5] 8 C.J.S. Bail, Sec. 34(3) (1962).
[6] 32 Stat. 691 (1902).
[7] 54 Phil. 955 (1930).

that Section 3 of the Jones Law repealed Section 63 of General Orders No. 58 and the judge no longer had any authority to grant bail to an accused charged with a capital offense.

The Supreme Court held:

> "...The provisions quoted from the Jones Law were merely intended not to restrict, but to secure the right to bail. The Jones Law provision is manifestly a more concise statement of Section 63 of General Orders No. 58... But under this provision and under the provisions of the Jones Law...a judicial investigation is proper upon application for bail, in order to ascertain if the crime or murder has really been committed and whether the proof of guilt is evident or the presumption of guilt is strong."

The relevance of this question to the present discussion is that if these two laws repealed Section 63 of General Orders No. 58, a total prohibition to the admission to bail in capital offenses would have been the result and the mere charge or relation in the information that a capital offense had been committed would be sufficient to deny bail to the accused.[8] And "the alleged common practice of some prosecuting officials of prosecuting offenders for a crime more serious than that what the proofs adduced . . . as murder instead of homicide . . . in view of the principle that a man charged with murder could be convicted of homicide but not vice versa" could have gone unabated.[9]

The first step in the determination whether the offense is captial — the allegations of the information —

The information will set out with definiteness the offense charged. If the offense charged is attended with qualifying circumstances, all of them will be alleged. It is elementary that if there are two or more qualifying circumstances, only one of them will qualify the offense and the other or others will aggravate it.[10] From the prosecution's point of view, the more qualifying circumstances there are, the more solid the ground on which it stands become, for any one of these qualifying circumstances is just as dangerous and lethal as the others. It is equally fatal to the prosecution to fail to allege a qualifying circumstance in the information because a qualifying circumstance not alleged cannot be

[8] There are views to the effect that the court need not go beyond the relation in the information to deny bail. The position of the City Fiscal of Manila in the above related case of Montalbo v. Santamaria was, as a matter of fact, supported by some cases in the United States aside from the fact that a bare reading of the provision of the Jones Law would seem to sustain it.

[9] I Aruego, The Framing of the Philippine Constitution, 184 (1936).

[10] People v. Ubiña, 97 Phil. 515 (1955).

proved during the trial. This is so because a qualifying circumstance is an integral part of the offense.[11]

There are only a few crimes under our laws the commission of any one of which brings the offender within the shadow of the death penalty. These crimes are: treason,[12] qualified piracy,[13] parricide,[14] murder,[15] infanticide,[16] kidnapping and serious illegal detention,[17] robbery with homicide,[18] and violation of the Anti-Subversion Act by certain persons.[19] All other crimes are bailable.

When an accused charged with any of these offenses files a petition for bail, the first step which the judge, before whom it is filed, takes is a careful reading of the information itself and its allegations. This examination will immediately furnish the judge with a provisional hypothesis to base his immediately urgent actions on. Its rough mechanics may be outlined as follows:

Say that A has been accused of murder. The information alleges evident premeditation and treachery as qualifying circumstances, and obvious ungratefulness, uninhabited place and consideration of price, reward or promise, as aggravating circumstances.

It is at once apparent that the issue of whether the accused is entitled to bail or not militates against him. For, if both the qualifying circumstances of evident premeditation and treachery are proved, one of them would qualify the offense as murder and the other would be considered as an aggravating circumstance. Together with the other aggravating circumstances alleged in the information, there is no question that on the allegations of the information alone, A is within the shadow of the death penalty and there is a strong cause to hold him without bail pending his application and showing that the evidence of guilt is not strong.

In some jurisdictions in the United States the mere fact alone that the offense charged may be punished capitally has a great weight in influencing judicial discretion to grant bail.[20]

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[11] I AQUINO, THE REVISED PENAL CODE 274 (1961 ED.)
[12] Rev. Pen. Code, art. 114 (1930).
[13] Rev. Pen. Code, art. 123 (1930).
[14] Rev. Pen. Code, art. 246 (1930).
[15] Rev. Pen. Code, art. 248 (1930).
[16] Rev. Pen. Code, art. 255 (1930).
[17] Rev. Pen. Code, art. 267 (1930).
[18] Rev. Pen. Code, art. 294, par. 1 (1930).
[19] Rep. Act No. 1700, section 4 (1957).
[20] "The fact that the penalty which may be imposed may be instead of death, imprisonment for life or for a term of years, has been held not to change the capital character of the offense, so as to entitle a person charged therewith to bail, under a constitutional provision that all persons shall be bailable except for capital offenses. This rule has been recorded as applicable even where it was stipulated between counsel for the state and for

In the Philippines, the allegations of the information is not decisive in the issue whether bail should be granted or not upon application as there must be a hearing consequent to the petition for bail. If at all, it is only a guide in the initial ascertainment of the judge whether he should grant bail outright or not. Upon application, the allegations of the information must be proved at least prima facie in the ensuing hearing to warrant denial. Failure does not give the judge any choice but to order its grant.

The late Professor Emiliano R. Navarro held the opinion that the mere allegation in the information of the offense committed can be sufficient to deny bail. He contended that "since aggravating circumstances may be proven although not alleged in the information, it would be sufficient to charge crimes so as to make the offenses capital.[21] But this opinion does not seem to find support in our law which, as we have previously stated, expressly requires a hearing.

An instance, should now be given where the right to bail is immediately apparent, an instance where, as a matter of strict law, it is obvious from the face of the information itself that there is a strong case for the grant of bail.

A is accused of murder. The information alleges only the qualifying circumstance of treachery without any aggravating circumstance.

Here, if no aggravating circumstances are proved during the trial, the maximum penalty that can be meted out by the court is life imprisonment, the medium period for murder. It being only life imprisonment the offender is removed from the possibility of the death penalty and becomes entitled to bail.

In the two examples given above, it is of course assumed that only the allegations of the information are proved during the bail proceedings or during the trial. A little difficulty is encountered where, as in the second instance, the case for its denial is not very strong. In the second case the judge must rely heavily on the recommendation of the fiscal who, after all, is in possession of the evidence in the case. It is not improbable that the fiscal may have drawn the information when the piece of evidence which may prove to be an aggravating circumstance was not yet in his possession and, therefore, could not have made the corresponding allegation. If, as has been said, the offense, as related in the information, may

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the defendant, with the consent of the trial court, that in case of conviction the penalty of death would not be inflicted." (6 Am. Jur. 2d, Bailments, sec. 27 (Rev. ed. 1950).

[21] Navarro, Criminal Procedure, 238 (2nd ed., 1960).

not justify the imposition of the supreme penalty, the judge may grant bail but the fiscal may at any time move for its cancellation when the requisite evidence comes into his possession. In these instances, the fiscal may be faced with the choice of filing an amended information or letting well enough alone. If the evidence which had lately come into his possession is one which may prove a qualifying circumstance, he has very little choice if he wants to use it as such, he must move for the amendment of the information. He must decide how he would utilize the new piece of evidence. If he feels safe with the other qualifying circumstances he has already alleged, he may decide to use it merely as generic aggravating circumstance. In this case, it is not necessary to amend the information. The State is free to prove any generic aggravating circumstance any time during the progress of the trial even if not alleged in the information.[22] Whether he would utilize it as an additional qualifying circumstance or merely as a generic aggravating circumstance may be dictated by strategical considerations. If the evidence is still in wraps or should his witness want to remain unknown till the precise moment that he takes the witness stand for reasons of security (or for any other reason), the fiscal must be content with merely employing it as a generic mitigating circumstance for this will enable him to avoid the danger of having the identity of his witnesses discovered by an amendment of the information. Indeed, whether to present a certain piece of evidence during the bail proceedings or in the trial on the merits is a matter that only the responsible appreciation by the fiscal of the circumstances peculiar to the case can decide. A case may be strong on the merits but can be made to appear weak during the bail proceedings by the fiscal. But a fiscal so doing must do so only for strong reasons since it need not be pointed out what danger he exposes his witnesses to against a callous and determined defendant who would feel no compunction about threatening and intimidating those who should dare testify against him.

There must be a hearing on the bail application and this hearing cannot be ex-parte —

When a complaint is filed in a municipal court for an offense capitally punishable, the municipal judge, after examining the papers supporting the complaint, issues the warrant of arrest as a next step. Under an amendment introduced into the Judiciary Act by Republic Act No. 3828, the municipal judge is not bound to issue

[22] People v. Montilla, (Sept., 1958) 54 O.G. 6439 C.A.-G.R. No. 18245-R & 18247-R, April 29, 1958, Martinez v. Godinez, L-12268, November 28, 1959; Maria Perez, CA 57 O.G. 1958 (Feb., 1961), cited in Aquino. Revised Penal Code (1961 ed.)

the warrant of arrest immediately: he may first question the witnesses of the complainant and satisfy himself as to the genuineness of the complaint before issuing the warrant of arrest. But this does not change the situation before the passage of Republic Act 3828, now as it was then the warrant of arrest is still issued without giving the accused an opportunity to be heard first. As the offense is capital there is no bail recommended. The person charged is taken into custody, and it is up to him to petition for bail after his arrest. This is the procedure when the complaint is filed with the municipal court. In chartered cities where the charter provides that no information may be filed by the city fiscal without first conducting a preliminary investigation, the procedure is different. The warrant of arrest is issued only after the filing of the information in the competent court. As applied to petitions for bail, one may now note the difference. When the complaint is filed in the municipal court, the warrant of arrest is issued without first conducting the preliminary investigation proper and, when a bail petition is filed, the hearing is in a court which has no jurisdiction to try the case on the merits. Its jurisdiction is limited to hearing the bail petition. This shall be more extensively discussed later.

When the complaint is filed directly with the Court of First Instance, in accordance with the decision of the Supreme Court in the case of *Albano v. Arranz*,[23] that Court must conduct a preliminary investigation (in the same manner that the Provincial Fiscal would conduct it) before issuing the warrant of arrest and remanding the case to the Provincial Fiscal for the filing of the information. Thereupon it is ready for trial and it is during this time that the accused may petition for bail.

If the accused petitions for bail, the court cannot dismiss the petition with a peremptory denial: it must first hear it before taking any action thereon. This is well settled in this jurisdiction. Mere recitals of the contents of affidavits of witnesses are not sufficient since they are considered hearsay evidence. This evidence must be submitted to the Court, because the petitioner has the right to cross-examine and to introduce his own evidence in rebuttal.[24] In one case[25] the judge refused to hear the petition for bail on the ground that there was at the time a presidential proclamation suspending the writ of habeas corpus. The Supreme Court directed him to hear the evidence of the prosecution and act accordingly, and remarked further that if in weighing the evidence

[23] G.R. No. 24403, Dec. 22, 1965.
[24] Marcos v. Cruz, 67 Phil. 82 (1939).
[25] Nava v. Gatmaitan, L-4855; Hernandez v. Montesa, L-4964; Angeles v. Abaya, L-5102, October 11, 1951; 90 Phil. 172 (1951).

introduced, the judge abuses his discretion, certiorari is available to the person detained. And the court can only determine whether there is evident proof of guilt of the petitioner through an investigation of the case with the assistance of the prosecution and the defense.[26] Where the special prosecutor during the hearing for bail merely stated that the petitioner would be charged on four counts, the most serious being the fourth count for having pointed out a person as a guerilla as a result of which that person was executed by the Japanese, and thereby read the contents of twenty seven affidavits on the basis of which the judge denied the petition for bail, the Supreme Court ruled that this was no hearing at all and ordered the judge to hold another hearing for bail for the determination of the question whether there is strong evidence of guilt.[27] In this case, however, it was found that not one of the affidavits had any relation with the fourth count. But it is submitted that even if some of the affidavits had any such relation, the situation of the prosecution could not have been improved in the face of a former ruling we have cited above,[28] that such affidavits are hearsay evidence.

The hearing in a bail petition — summary hearing v. a detailed hearing

The entire philosophy on which the right to bail has been secured to the individual by the Constitution is the sanctity of a man's liberty. If a man should be presumed innocent until found otherwise in the due course of law, there must be an ancillary right to protect this liberty in the meantime that the State is proving its case against him. Bailability, therefore, from the start, is presumed in favor of the individual and against the State. Because of the immediate urgency of the protection of this liberty, every proceedng must, to this end, be speedy. Any attempt to unduly lengthen it would render the philosophy on which it is founded self-defeating. A petitioner for bail has a right to have his application heard summarily and promptly.[29] This is the same view the Supreme Court had in mind when it said in *Teehankee v. Director of Prisons*[30] that the course of the inquiry may be left to the discretion of the court which may confine itself to receiving such evidence as has reference to substantial matters avoiding *unnecessary thoroughness in the examination and cross-examination of witnesses and reducing to a reasonable minimum the amount*

[26] Peralta v. Ramos, 71 Phil. 271 (1941).
[27] Ocampo v. Bernabe, 77 Phil. 55 (1946).
[28] Beltran v. Diaz, *supra*.
[29] Muñoz v. Rilloraza, 83 Phil. 609 (1949).
[30] 76 Phil. 82 (1946).

of corroboration particularly on details that are not essential to the purpose of hearing.

In the United States the weight of authority is that the hearing on an application for bail should be summary. The court "does not sit to try the merits or to enter into any nice inquiry as to the weight that ought to be allowed to the evidence for or against the accused, nor will it speculate on the outcome of the trial or on what further evidence may be therein offered or admitted."[31]

In practice, however, much of this underlying philosophy is lost. Many circumstances conspire to defeat it. Due to their varied legal backgrounds or training, different judges evolve their own peculiar ways in meeting their own internal and procedural problems. It is not unusual to find a judge of one branch of the same court adopting a different procedure on internal matters than the presiding judges of the other branches. In the matter of scheduling cases alone, one judge will set the arraignment on a certain date and the trial on other dates in the same notice. The advantage is obvious. The popular way is to set a day exclusively for the arraignment notify the accused and the fiscal of the dates of trial after the arraignment. One judge will prefer a formal motion for a joint trial with previous notice to the other defendants but others will entertain an oral motion before the start of the proceedings and if the other defendants are present proceed with the trial forthwith. These varied individual inclinations for or against rigid formality have their part in the consequential or inconsequential delay of proceedings whether for bail or otherwise. In bail proceedings particularly, these different trial practices of judges are reflected in several cases decided by the Supreme Court.

Before the present Revised Rules of Court became effective, bail proceedings were always considered separate from the main trial. They were perforce summary proceedings. In the period from the inception of American sovereignty to the years immediately before the Pacific War, there was a near ideal implementation of the theory regarding their brief nature.

The deluge of treason cases after liberation changed this ideal situation. Judges began to solve individual bail petition problems as dictated by the peculiarities of each case. It was because of these cases and the urgency of immediate decision to grant or not to grant bail (some treason indictees had been under the custody of American Military authorities for several months without any formal charge pending against them) that many judges were stam-

[31] Francisco, Criminal Procedure (1963 ed.), 336 citing 8 C.J.S. Bail, Sec. 36(10) (1962).

peded into improvident decisions. The case of *Ocampo v. Bernabe*,[32] already mentioned, is an example of a case where the judge denied bail without holding any real hearing at all. The point to be made is that each individual judge was free to adopt his own policy as to the length of hearings on bail in his sala. In *Muñoz v. Nillaroza*[33] the presiding judge held a joint hearing of the bail petition and the trial on the merits. When the point was raised, the Supreme Court held that a trial judge has complete discretion to hold a separate hearing or a combined hearing with the trial on the merits. It reiterated this ruling in the case of *Gerardo v. Judge*.[34] To the argument that the bail hearing should not be conducted like a regular trial because too much time is consumed, and the court's attention correspondingly directed from other business, the Supreme Court said in the same case:

> "But these objections cannot avail against constitutional command; if the Constitution requires the court to determine for itself whether or not the proof is evident or presumption great in a given case, all considerations of expediency or convenience, however potent they might be at the common law, must give way."

So that up to the inception of the regime of the present Revised Rules of Court, it depended solely on the trial judge whether to allow only a brief hearing or an extended one with an eye to its incorporation in the trial on the merits. When the Revised Rules of Court was promulgated, the Supreme Court incorporated a provision to the effect that the evidence presented during the hearing on a bail petition when such hearing is made in the Court of First Instance is automatically reproduced at the trial.[35] In practice, the effect of this provision is to wipe out the chance of a summary hearing. Because of the well-known rule that a fiscal cannot be controlled in the way he elects to present his case, he may an-

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[32] 77 Phil. 55 (1946).

[33] *Supra*, see note 29.

[34] 86 Phil. 504 (1950).

Petitioner was accused of murder in the Court of First Instance of Ilocos Norte after a preliminary investigation by the Justice of the Peace of Laoag which also fixed his bail at ₱40,000.00. In the Court of First Instance, he petitioned for the reduction of his bail to ₱20,000.00 but was opposed by the fiscal. The Judge hearing the case then directed the prosecution to present such of its witnesses as he may deem sufficient with the right of cross-examination on the part of the defense, after which the defense may present counterevidence. Four hearings on the bail petition, two on the trial on the merits, had previously been scheduled. All of them were postponed at the instance of the accused. Meanwhile, a new judge came, and impatient at the delay, set the case for trial on the merits. Before the date set, the accused filed a petition in the Supreme Court for certiorari praying that his bail be first reduced before proceeding to the trial on the merits. Held: The court is not obliged to conduct a separate hearing to determine the right of an accused to be admitted to bail. The court has the choice of method to attain this end. The hearing of an application for bail may be summary or otherwise, in the court's discretion.

nounce that he is through presenting his evidence in the bail petition only when he is done or nearly done with the people's case, as actually happened in one case.[36] There is nothing which would prevent him from doing this, aside from judicial temper, which can be used, however, only to curb manifest abuse on the part of the fiscal. Former Senator Francisco has the same view on the effect of the new provision:

> "By virtue of the new provision above-quoted, the hearing of the application for admission to bail should no longer be summary, and the discretion of the court should not be exercised so as to restrict the examination and cross-examination of the witnesses as to substantial matters only but it must permit the parties to bring out in the examination of the witnesses all the facts relevant to the guilt or innocence of the accused and also allow an exhaustive cross-examination to test and impeach the credibility of the witnesses; otherwise at the trial of the case on the merits it may happen that when the parties want to make a complete examination or exhaustive cross-examination of a particular witness who testified at the hearing of the application for admission to bail, they may find themselves unable to do so either because the witness is dead, outside the Philippines or otherwise unable to testify.[37]

While this comment is justifiable on the broader principle that society has the greater right to protection objectively, it may not satisfy the requirements of a bail proceeding because the expeditious manner which it demands to immediately extend to an accused a constitutional right is lost in the breadth and minuteness of detail which proof beyond reasonable doubt requires. And yet there is no question that the State should be protected from the antics of an accused similarly minded as the one in the *Gerardo v. Judge* case.

Order of witnesses for the prosecution in a bail hearing —

The usual and most effective way of presenting the prosecution's opposition to the bail petition is to present the strongest and most convincing evidence of guilt at once, but briefly. This way is the most effective because it would give the judge little if any choice at all. If this way is followed the natural order will invariably be the strongest witness first until the prosecution decides that it has presented enough to warant denial.

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[35] Revised Rules of Court. Rule 114, Section 7 (1964).

[36] In the case of People v. Soriano and Manolo Ferrer and People v. Rufo Gabrillo, D-1911 and D-1926, respectively, Court of First Instance of Pangasinan, the prosecution, after presenting its thirty-fifth witness, closed its opposition against bail. The prosecution introduced only one more witness to bolster its evidence on premeditation and thereupon rested its case on the merits.

[37] FRANCISCO, CRIMINAL PROCEDURE (1963 ed.) 348.

Because of the urgent nature of the hearing, and owing to the fact that up to this stage a man presumed innocent languishes in jail, the prosecution should at once strike a death blow to the claims of the accused. He has a right which is assertive and this right must not be made to wait at the pleasure of the prosecution. Justice must be given a proper start. But while this is impeccable in theory, the practical demands of the prosecution's situation will sometimes dictate a course not in pursuance of immediate justice. The prosecution in so bending to practical consideration cannot be accused of tampering with plain human rights — its action may be justified with the statement that after all the eventual consideration in every case is the ultimate triumph of justice. A concrete example will illustrate the point. In one case,[38] the evidence for the prosecution was very strong but the main evidence was built on the testimony of a lone witness who saw the shots fired by the accused. In spite of the fact that there were thirty-six witnesses presented, he was the only eyewitness to the actual shooting, the other thirty being either experts or circumstantial witnesses. But this witness was of the nervous type, prone to shock. The prosecution at once saw the danger in presenting him as its first witness in the bail hearing, which of course should have been the natural order in such a hearing. It imagined what would happen to him on cross-examination in the hands of a brilliant counsel and cross examiner like the counsel representing the principal accused. He would be torn to pieces with the first probing questions. Worse, he was not enjoying the best of health, and lengthy cross-examination would possibly wear him out to the point of physical and nervous breakdown. To gain time for him to fully recover, the prosecution reversed the natural order in the presentation of its witnesses in the bail hearing and started the hearing with the presentation of the experts first, the very ones who could least prove strong evidence of guilt. The defense vigorously objected to the manner the evidence was being presented in the bail hearing, pointing out that a bail hearing should perforce be summary. The prosecution justified its presentation with the argument that under the Revised Rules of Court[39] the testimony given during a bail hearing is automatically reproduced during the trial on the merits and this being the case the prosecution had a right to prove its case just as it would prove it if it was a trial on the merits. In any case, it added, no one could control the prosecution in the manner of its presentation of its evidence irrespective of the nature of the hearing.

[38] People v. Soriano & Ferrer, D-1911, Court of First Instance of Pangasinan (1966).

[39] Rules of Court, Rule 114, Section 7 (1964).

The Court ruled in favor of the prosecution. It took the prosecution four months to present its evidence against the bail petition. Its star witness, the thirty-second witness to be called, was presented near the end and was cross-examined for three days of morning and afternoon hearings. As the prosecution foresaw, the cross-examination was merciless but, by this time, with proper care, its star witness was ready and withstood the ordeal excellently. Had he been presented first and had suffered a nervous breakdown as a consequence, justice would have been frustrated. That it triumphed was the result more of the prudent order in the presentation of its witnesses by the prosecution.

The above is only an example of a circumstance which may dictate the prosecution to deviate from the usual way of presenting the evidence against the bail petition. There are others: say, the character and reputation of the accused. If the defendants are known to be disreputable it would do well for the prosecution to adapt it tactics accordingly. For if defendants are bailed out and allowed to enjoy temporary liberty, it may be the end of the case for the prosecution. Unless the witnesses are close members of the family of the victim, they are open to direct or indirect intimidation by such defendants. Soon there may be no more witnesses willing to testify; a series of retractions may begin. To foil the possibility of losing witnesses in this manner after bail has been granted, the prosecution should first introduce the witnesses who are the most vulnerable to intimidation irrespective of whether their testimonies are direct or indirect or whether they are necessary in the bail petition or not. There will likely be vigorous objection on the part of the defense here but the prosecution may always claim that it cannot be controlled in the order of presentation of its witnesses, although much will depend on the viewpoint of the court. After such witnesses have testified, it will have been useless for the defendants to intimidate them.

Does the fact alone that there was a confession warrant the denial of bail?

The question at first glance would seem to be unnecessary. We have accustomed ourselves to think that if the accused in a capital offense is not entitled to bail when there is a showing that the evidence of guilt is strong, necessarily he should be denied bail when he himself has supplied the evidence that he is guilty through his own confession. And unless it is shown that the basis upon which it is founded is lacking, such a reasoning is correct. Only the highest

[40] Francisco, The Revised Rules of Court in the Philippines, Criminal Procedure (1963 Ed.) 332.

considerations of truth and justice itself can be allowed to waylay it. For example, if it is shown that the confession had been extracted through fraud, force and violence, then it would in fact have no solid basis. Such a confession must be held to be insufficient to justify a denial of bail.

> "The fact that the accused stands prosecuted for murder and he has admitted his guilt in an extra-judicial sworn statement do not constitute legal reason to deny the petition of the accused that an investigation be conducted by the court for the purpose of determining whether he should be allowed to be released on bail."

In the United States the prevailing doctrine was stated in *Ex Parte Davis*,[41] where it was held that a confession made eighteen months after the death of the victim was tinged with involuntariness, the court granting bail on that finding. It was held, though, that the confession is available to aid the proof of corpus delicti, including the criminal agency of the accused. And it is not required that the confession be corroborated.[42]

The doctrine enunciated in the Davis case above was not new at the time. It was actually only a reiteration of the decision of the same court in the case of *Ex Parte Prince*.[43]

A confession by a co-accused does not justify denial of bail —

A rule of evidence that is often put forward and which the prosecution usually finds to be exasperating is that the confession of one defendant cannot be used against another. When the prosecution is presenting its evidence in a preliminary investigation, it often makes use of the confessions of a co-respondent in such investigation. When a municipal court is making an examination of sworn statements used to support a complaint antecedent to the issuance of the warrant of arrest, it will no doubt be influenced by such a confession. But during the hearing on the bail petition or the trial itself, the prosecution has no way of introducing the confession itself as evidence against a co-defendant, it being considered merely hearsay. But the real technical objection against such an introduction is the principle of *res inter alios acta* embodied in Section 25, Rule 130 of the Revised Rules of Court, to the effect

[41] 294 S.W. 2d 106, decided by the Court of Criminal Appeals of Texas, October 17, 1956.

[42] 8 C.J.S. Bail, Sec. 34(3)-35 (1962) 79.

[43] 223 S.W. 2d 241; Court of Criminal Appeals of Texas, June 22, 1949, where the court, considering the length of time the appellant was questioned and the different places to which he was taken, ruled that the alleged confession was not voluntary at all, at least substantially raised a fact sufficient to question its admissibility.

that the act or declaration of one person cannot prejudice the rights of another. The Supreme Court in very many cases has expounded on and applied the principle of *res inter alios acta.*[44] It is well to note though the several exceptions[45] to this rule when one is faced with this problem. The case of *Ex Parte Thrash* in an illustration.[46]

Would the fact alone that the evidence is circumstantial warrant the grant of bail? —

The question is asked because of the seeming indefiniteness of circumstantial evidence as compared to direct and visual evidence. There is no question, however, that circumstantial is just as good as direct evidence for purposes of conviction, when it is conclusively established.[47]

Rule 133 of the Revised Rules of Court lays down the requirments of circumstantial evidence necessary for conviction:

> "Sec. 5. *Circumstantial evidence, when sufficient.* Circumstantial evidence is sufficient for conviction if:
>
> (a) There is more than one circumstance;
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> (b) The facts from which the inferences are derived are proven; and
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> (c) The combination of all the circumstances is such as to produce a conviction beyond reasonable doubt."

But the above section speaks of the quantum of evidence for conviction. Can it be used to warrant the denial of bail if the evi-

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[44] Rosario v. Manila Railroad Co., 22 Phil. 1940 (1912); Briones v. Platon, 12 Phil. 275 (1908); Amancio v. Pardo, 20 Phil. 313 (1911); Pacia v. Santos, 46 Phil. 514 (1924); Tansioco v. Ramoso, 59 Phil. 672 (1934).

[45] Francisco, Criminal Procedure, p. 358-359, 1963 Ed.

[46] 320 S.W. 3d 357, Court of Criminal Appeals of Texas, Jan. 7, 1959, held:

"There remains then only what Fritz said that Winona Lee told him. The record before us is not complete enough to enable us to pass on whether or not what she said was admissible as an oral confession against her. But if we held that it was, it would not avail the State in this proceeding because it is the law of this State that confession of a co-indictee is not sufficient evidence to authorize a court to deny a bail. Ex Parte Suger, 149 Texas Court of appeals 133, 192 S.W. 2d. 159, which establishes such rule, was decided by this court, in 1946..."

Ex Parte Suger 192 S.W. 2d 1959, Court of Criminal Appeals of Texas, Feb. 6, 1946, held: "It should be borne in mind that although the confession of Johnnie Andrew Butler was introduced herein, he did not testify in this hearing. In an effort to show the guilt of relator as an accomplice, such extra-judicial confession was admissible only for the purpose of showing the guilt of Butler, and should be limited to such purpose. It could not be introduced for the purpose of showing the guilt of relator."

[47] "It has been held that the constitutional clause where proof is evident or presumption great indicates the same degree of certainty *whether the evidence is direct or circumstantial,* the design being to secure the right to bail in all cases unless the facts show with reasonable certainty that the accused is guilty of a capital offense." 8 C.J.S. Bail, Sec. 34(3)-35 (1962). (Italics supplied.)

dence of the State were mainly circumstantial? In other words, can circumstantial evidence be strong enough to warrant a denial of bail? When the question was brought before the Court of Appeals of Alabama in 1924, that Court ruled that circumstantial evidence may be the basis of a bail, although not without admonishing caution in its use in the case of *State v. Gilbert.*[48] But the Kansas City Court of Appeals, Missouri, in a decision promulgated on June 3, 1942, in the case of *Ex Parte Welsh*[49] answered the question in the negative, although not in a very conclusive tone.

It should be noted that in the above case of Welsh, there was a finding that facts and circumstances led to the conclusion that the accused would not flee from the officers, but would be present to answer the complaint filed against him. Would the result have been the same if there were no such finding? How good would such a finding stand against a decision of the Supreme Court of the Philippines that the mere circumstance that he had once jumped his bail is no reason why bail should be denied him in another?[50] Further, it is recalled that in the *Pareja v. Gomez* case,[51] the Supreme Court held that the reason why the quantum of circumstantial evidence required under the Rules of Court should not control in a bail proceeding is that the Court is not as yet called upon to convict but only to determine whether bail should be granted or not. On the other hand, if the evidence is merely circumstantial, is the remedy plainly not a denial but "to increase the bond to an amount as would reasonably tend to assure the presence of the defendant when it is wanted, such amount to be subject of course, to . . . the provision . . . that execssive bail shall not be required?"[52] But again how much is excessive bail to a multi-mil-

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[48] State v. Gilbert, 102 So. 155, Court of Appeals of Alabama, Nov. 11, 1924, held:

"The evidence against the petitioners are circumstantial. The circumstances may point strongly to the persons as the guilty perpetrators, and we would not weaken the force of the evidence. Justice Stone in Ex Parte Acree Ala. 234 said:

"The human provisions of the law are that a prisoner, charged with a felony, should not be convicted on circumstantial evidence, *unless it shows a full measure of proof that the defendants are guilty.* Such proof is always insufficient, unless it excludes, to a moral certainty, every other reasonable hypothesis, *but that of the guilt of the accused.*" (Underscoring supplied.)

[49] 162 S.W. 2d 358 (1942), held:

It should be said that there is no direct evidence of defendant's guilt. If the State's evidence is sufficient to warrant a conviction upon a trial, it must be founded entirely upon circumstantial evidence, unless additional facts can be presented at the preliminary hearing and now before us. It is not within our province to, and we do not, pass upon the guilt or innocence of defendants, however.

We do conclude that the evidence now before us does not meet the constitutional requirement of the proof being "evident" or the "presumption great".

lionaire who can afford any amount of bail many times over, and live in a foreign country luxuriously to the end of his natural life?

When evidence of guilt is conflicting, accused is not necessarily entitled to bail —

"When evidence of guilt is strong" is a troubling phrase in jurisprudence. How much is sufficient evidence to establish it in a specific case will probably continue to be the subject of spirited discussion between judge and lawyer in a case. However, since "it is not the purpose of the criminal law to confine a person accused of a crime before his conviction, bail in criminal cases is intended to combine the administration of justice with the liberty and convenience of the person accused. It is allowed to prevent punishment of innocent persons and to enable an accused person to prepare his defense to the charge against him.[53]

Thus when the quantum of evidence is the only issue and doubt as to its sufficiency is entertained, bail should be allowed. And as between two categories of offenses one bailable and the other not bailable, doctrinal principles incline toward bailability. Judicial temper is well expressed by the Supreme Court in the following case:

> "When the details and circumstances surrounding the commission of the crime are unknown, and there appears no evidence that may indicate the situation of the victim when he was killed or when it is not conclusively shown that the violent death of a person was attended by any of the qualifying circumstances specified in Art. 248 of the Revised Penal Code, the crime must be classified as homicide and not murder." (People v. Luwayag L-19142, March 31, 1965)

The case above is only applicable, however, as between two categories of offenses. When there is no question as to designation of the offense that was committed the problem is of course much more simplified. But what if the evidence is conflicting? A common sense approach to the question would indicate no other answer but an affirmative one. Yet in the United States it was ruled that —

> "Where the proof of his guilt of a capital offense is evident or the presumption great *accused is not entitled to bail merely because the evidence as to his guilt is conflicting, even on a vital*

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50 Guan v. Amparo, 79 Phil. 670 (1947).
51 G.R. No. L-18733, July 31, 1962.
52 *Supra*, see note 50.
53 "Bail is never required by way of punishment or denied for the purpose of punishing a person accused of crime..." (8 C.J.S. Bail, Sec. 30 (1962).

issue, or because defensive issues are raised by an accused on application for bail."[54] (Italics ours.)

In the Philippines, in the light of decisions heretofore promulgated by the Supreme Court, it would be very difficult to conceive of a case where the evidence is conflicting and yet be considered strong for bail purposes. Conceivably, conflicting evidence during the bail hearing may turn out in the end after additional evidence have been presented, to prove guilt beyond reasonable doubt, but it is difficult to understand how conflicting evidence can be the basis of denial of bail. This is as it should be since the fiscal can always recommend cancellation of bail at any time during the progress of the trial if the development of the case warrants such a step.

The question is perhaps delicate, but it is one which gives an opportunity for judicial statesmanship. As applied in particular cases, judicial pitfalls may once in a while occur. When a judge is confronted with a case where the evidence is conflicting is it better that he leans to the side of individual or to that of the state? It is submitted that if the judge must err at all he must do so on the side of the state. This is so because whatever error may be committed by him against the individual can be corrected by him while the case is in progress or in his decision of the case on the merits. On the other hand, if he commits an error against the State, he may never have a chance to correct it. For by himself, the accused knows whether he is really guilty or not. If he is guilty, and therefore doubts the strength of his defense, he may jump his bail when once he is temporarily set at liberty. And the State may have no recourse in particular cases where the accused goes to a country with which the Philippines has no extradition treaty, or even where there is such a treaty, when it is so faultily worded that he can take refuge under its vague language.

Reckless and utter disregard of human life defeats right to bail —

Embedded deep in the body of our criminal philosophy is the idea of perversity. This idea is the reason for the division of the degrees of criminal responsibility into periods. Perversity, again, is the reason behind the distinction between homicide and murder. The rule in the Revised Penal Code is that the greater perversity shown in the commission of the crime, the greater the punishment. Nowhere is this criminal maxim better exemplified than in the thread-slim difference between homicide and murder[55] and the

[54] 8 Bail, Sec. 34(3) (1962).
[55] Art. 248.

degrees of reckless imprudences,[56] and the provision regarding kidnapping and serious illegal detention,[57] to mention only a few, in the Revised Penal Code.

This philosophy is followed in the United States where the rule is well expressed in this wise:[58]

> "Bail should ordinarily be refused where the evidence adduced at the hearing shows that the killing committed by the accused was deliberate or malicious."
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> "...evidence of a design to kill someone may show such utter and reckless disregard of life in the killing of the deceased as to warrant the denial of bail without proof of motive."

In the Philippines, several malicious killings have been recorded. A man once threw a live granade into a public stage where the President of the Philippines sat with other political dignitaries. While it was principally aimed at the President, the grenade thrower knew that it would probably kill as it did kill innocent bystanders.[59] Another loaded a time bomb in a plane for the purpose of doing away with the husband of a woman with whom he was carrying-on an adulterous relation.[60] The bomb exploded as timed while the plane was in mid-air killing all its passengers. Although not yet properly denominated in our statutes, the mass killing of civilians by Japanese soldiers during the war by herding them together in one place and machine-gunning them is another example of perversity and wanton killing in the extreme.[61] Lesser only in degree but not less shocking was the killing by hungry Japanese soldiers, who had retreated into the mountain fastnesses of Mindoro, of civilians who stumbled near their hideouts, for the purpose of eating them.

Should the petitioner present his evidence to support his petition during the bail hearing? —

The question has inherent dangers. Our law provides that if the state opposes the petition it must present its evidence in support of its opposition first.

Rule 114

"SEC. 7. *Capital offense — burden of proof* — On the hearing of an application for admission to bail made by any per-

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[56] *Ibid.* Art. 365
[57] *Ibid.* Art. 267.
[58] 8 C.J.S. Bail, Sec. 34(3) (1962).
[59] People v. Guillen, 85 Phil. 307 (1950).
[60] People v. Largo, L-4913, Aug. 28, 1956.
[61] In international parlance, this is known as genocide. Genocide, however, in our experience, happens only under abnormal conditions, like war.

> son who is in custody for the commission of a capital offense, *the burden of showing that evidence of guilt is strong is on the prosecution.* The evidence presented during such hearings in the Court of First Instance shall be considered automatically reproduced at the trial, without need of retaking the same; but upon motion of either party, the court may recall any witness for additional examination unless the witness is dead, outside the Philippines or unable to testify." (Italics ours)

Again, this is in accord with the presumption that the individual should of right be entitled to bail. The accused is not called upon to support his petition because he has the presumption of entitlement in his favor. A reversed order would not square with this presumption. It would be incongruous if the State should give the individual a right and then later on require that the same individual prove the right it has given him. But to say this only hastens the question asked above, whether the petitioner should always present evidence after the state has rested its opposition to the bail petition.

The answer depends on the developments of the case itself in the hearing of the bail petition. In presentation of its evidence in support of the bail petition, there is a minimum amount of evidence that the State must lay before the Court, or otherwise it will fail in its opposition. Except when the offense is one where the law fixes only one indivisible penalty,[62] the State must first prove the circumstance that will bring the punishment within the possibility of the death penalty. Since the law always provides a range or a period for the penalty to allow judicial discretion a play in the imposition of the minimum, medium, or maximum penalty, and thus provides the way for the application of the Indeterminate Sentence Law,[63] the unalterable course of this proof will be to establish the qualifying circumstance first, and the aggravating circumstances that will catapult the penalty to the supreme pain of the death, next. This is specially true with offenses under the Revised Penal Code. In offenses punished under special laws which may also mete out the death penalty, the applicability of the accessory penalties provided in the Revised Penal Code will be stated in the law itself,[64] and, if not, the provision of article 10 of the Revised Penal Code regarding the non-subjection of such offenses to the provisions of the Revised Penal Code operates. But the presentation of proof will follow the same course whether the charge is for an offense punishable by the Revised Penal Code or by special law. In murder, it will take a course roughly like the following: The

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[62] The Indeterminate Sentence Law, Act. 4103 (1933), as amended.
[63] *Ibid.*
[64] Like the Anti-Subversion Act, [R.A. 1700 (1957)], Section 4.

qualifying circumstance that will make the offense murder must first be proved. If there are two or more qualifying circumstances, all of them must be proved with the same meticulous care that is given to any of them. This is a very important point because the proof of any one of them will firmly establish the crime committed as murder. The proof of the generic aggravating circumstances will come next.

It should be borne in mind that the information should always allege all the qualifying circumstances. It is always prudent to follow this practice. The reason is if more than one is proved, one will qualify the offense and the others also proved automatically become aggravating circumstances.[65] If only one qualifying circumstance is proved, the crime to be sure is still murder but the penalty is not automatically death, but only life imprisonment, if no mitigating circumstance is proven by the defense later on. If the penalty, from the facts proved in the bail hearing cannot be death, then the offense ceases to be capital and the accused automatically becomes entitled to bail. If, in spite of the alleged existence of more than one qualifying circumstance in the information only one is proved, the State should endeavor to prove the presence of generic mitigating circumstances to be able to maintain its position in the bail proceedings. Generic aggravating circumstances can be proven at will, they need not be alleged in the information.[66] Whether the death penalty will likely be imposed or not depends upon the presence of at least one aggravating circumstance after the qualifying circumstance has been established. This is best illustrated by the case of *Berdida*:

> "The presence of one generic aggravating circumstance, apart from the qualifying circumstance of treachery, suffices to fix the penalty for murder at the extreme punishment of death. For there is no mitigating circumstance in the present case." (G.R. No. 20183, June 30, 1966.

If the State rests its opposition to the bail petition without having succeeded in proving any aggravating circumstance, it does not mean it has lost its battle for the death penalty. *It only means it has lost its battle against the grant of bail.* The bail application must now be granted by the Court for up to this point the State has failed to show cause why bail should not be granted.

After the grant or disallowance of bail the trial on the merits begins. There may be cases where the difference between the bail proceedings and the trial proper be merely technical and exists only in name. This happens when the prosecution presents all its wit-

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[65] U.S. v. Labai, 17 Phil. 240 (1910).
[66] People v. Berbano, 76 Phil. 702 (1946).

nesses in the bail hearing. Then when bail is granted, it announces to the court that it has no more witnesses to present and rests its case. This technique is especially suited now that the evidence presented in the bail hearing is automatically reproduced in the trial proper. When the prosecution presents only such evidence as it thinks enough to show guilt, a strategy battle may develop. The defense is now faced with a problem of whether to present counter-evidence to show weakness of the state's "evidence of guilt." This is a delicate problem because if it underassesses the state's evidence, it shall have gained no advantage with bail petition. The situation would have been better if it had not filed at all. In such a case the court will of course deny the petition. But there are other reasons why the defense files a bail petition, not the least of which is its desire to probe into enemy territory. From this standpoint the bail petition is a potent weapon of offense for the defense.

When the state fails in its opposition to the grant of bail, it does not necessarily mean that the battle for the death penalty is lost. After it has made sure that a qualifying circumstance has been proven, it will next prove the generic aggravating circumstance present. To be sure, a great psychological advantage has in the meantime been gained by the accused, but this does not mean that the danger of the death penalty is already past. The state can prove any generic aggravating circumstance not only during the remaining time it has to rest its case but also during the whole time that the case may take before its final submission for decision of the court after the accused shall have presented his defense. Indeed, it may even be able to do this on cross-examination of the witnesses for the defense. And, as we have shown in the *Berdida* case, any aggravating circumstance established in addition to a qualifying circumstance is always fatal to the accused unless he can prove a mitigating circumstance to offset it.

The question asked at the outset of the discussion of this point has now answered itself. If the defense is sure that a qualifying but no aggravating circumstance has been proved, it need not present its evidence because the Court will have no basis for the denial of the bail application anyway. This is true even in offenses where the statutory penalty ranges from life imprisonment to death.[67] There is possibly only one instance when the defense has no choice but to present its evidence during the bail petition and it is when the charge is kidnapping with serious illegal detention and the

[67] Life imprisonment to death is imposed in the following offenses: kidnapping with serious illegal detention, parricide, robbery with homicide, rape with homicide, and kidnapping and failure to return a minor.

purpose is to exhort ransom,[68] because judicial discretion is not here given any leeway as to a period. Once the crime is proved the penalty will outright be either life imprisonment or death.

The advantage in the defense's not presenting its evidence during the bail hearing is that it does not thus disclose its evidence prematurely. The danger in presenting mitigating circumstances in the bail hearing is that the State may offset them with more generic aggravating circumstances not alleged in the information, and purposely kept under wraps precisely for such contingencies. When this happens, the State has a double strategic advantage: it can hold its aggravating circumstances in reserve for rebuttal either in the bail proceedings or in the remaining time it still has to rest its case. But when the charge is one punishable by the fixed indivisible penalty of death the defense risks very little in presenting its evidence during the bail hearing, and it may even develop the advantage of being given an opportunity of probing judicial temperament and sympathy. Very much depends on the correct appraisal of the situation by a state defense counsel.

It is submitted, however, that there may be an instance when the petitioner must necessarily present evidence during the bail hearing and that is when his ground is ill health. It is submitted further that this is an exception to Section 7, Rule 114 to the effect that the burden of presenting evidence first in a bail petition is on the prosecution. The wording of Section 7 seems to be limited only to cases where the petitioner's ground is that *the evidence of guilt is not strong.* When the ground is ill health, the allegation becomes an affirmative proposition which must be proven by the side alleging it.

Ill health as a ground for a petition for bail —

In the United States, a long line of decisions holds that when the custody of an accused would probably be fatal because of the nature of his ailment, he should be released on bail.[69]

"The humanity of our laws" said one case, "not less than the feelings of the court, favor liberation of a prisoner, upon bail under such circumstances. It is not necessary, in our view of the subject, that the danger which may arise from his confinement should be

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[68] Revised Penal Code, last par., Art. 267 (1930)

[69] ExParte Smith, 2 Okla. Crim. Rep. 24, 99 Pac. 893 (1909), Ex Parte Azhderian 123 Cal. 512, 56 Pac. 1130 (1899), Ex Parte Title, 37 Tex. Crim. Rep. 597, 40 S.W. 598 (1897); Ex Parte Fraley, Okla. Crim. Rep., 111 Pac. 662 (1910); Ex Parte Watson, 1 Okla. Crim. Rep. 595; 99 Pac. 161 (1909); Ex Parte Wheeler, Wis. 24 So. 261; 31 L.R.A. (N.S.) 918 (1909); Ex Parte Rivers, 131 Pac. 1197 (1913); Ex Parte Robarbs, 233 Pac. 247, 29 Okla. Crim. 86 (1928).

either immediate or certain. If, in the opinion of a skillful physician, the nature of his disorder is such that confinement, must be injurious and may be fatal, we think he ought to be bailed."[70] The District Court of Appeals of California refused to alter the rule even on a showing that the accused who had already been convicted of embezzling public funds was permitted the company of his brother at night and that during the daytime the deputy sheriff occupied quarters near his cell.[71] In the Philippines, the rule enunciated by the court in the United States seems to be favored as shown in the decision of our Supreme Court in the case of *De la Rama v. People's Court*.[72]

> "Considering that the People's Court has adopted and applied the well established doctrine in several cases, among them the cases of Pio Duran (Case No. 3324) and Benigno Aquino (Case No. 3527), where the defendants were released on bail on the ground that they were ill and their continued confinement in the New Bilibid Prisons would be injurious to their health or endanger their life, the People's Court acted with abuse of discretion in denying bail."

It should, however, be noted that in each of these cases there was always a showing that continued confinement in jail during the pendency of the case would jeopardize the life of the accused by aggravating existing serious disease from which he was suffering. If the accused is otherwise strong and healthy or if his sickness is not serious the Court would be warranted in refusing bail. In Mississipi, it was held in the case of *Ex Parte Pattison* that "bail should not be granted on the ground of bad health, unless it be rendered probable by testimony that confinement is . . . likely to produce fatal or serious results. Slight sickness is not sufficient, since there are few persons who will not be injuriously affected by imprisonment."[73] The humanity of these holdings cannot greatly be put in doubt but it poses another problem in the just administration of the laws. In the *De la Rama, Duran* and *Aquino* cases all the petitioners for bail were man of means and sound financial resources. If an accused were without these resources he would not have the means of hiring lawyers to file bail petitions, not only once but repeatedly, as in the *De la Rama* case and for this reason, prevented from raising the same question. And yet one may become "entitled" to bail simply because he could hire lawyers who could raise the question of his entitlement while another cannot, simply because he does not have the means to do so. Certainly if all persons

[70] U.S. v. Jones, 3 Wash. C.C. 224, Fed. Cas. No. 15, 495.
[71] Ex Parte Preciado, 158 Pac. 1063 (1916).
[72] 77 Phil. 461 (1946).
[73] 56 Mississippi 161 ( ).

accused of a capital offense, convicted or not, were not allowed bail, no such discrimination would be possible and the provision of the constitution regarding equal protection would consequently be promoted more.

The defense of intoxication does not entitle an accused to bail —

In the Philippines intoxication does not justify the commission of a crime nor exempt a person who has committed one. As a matter of fact our law treats it only as an alternative circumstance, that is, it may mitigate or aggravate the offense depending on whether it is habitual with the offender or was intentionally sought by him to embolden himself to commit the particular offense.[74]

Intoxication alone, so far as the bail petition is concerned, does not possess an integrity of its own to make the offense capital. In murder cases, only a qualifying circumstance can perform this function. When availed of by the prosecution, it is always as a generic aggravating circumstance for the purpose of increasing the penalty by making the offense appear more depraved or perverse. Intoxication cannot change the character or designation of the offense. When present, it is richer in possibilities for exploitation by the defense than by the prosecution. It may be a costly allegation when treachery is alleged alongside it because the authorities are divided on the question whether it negates treachery. In a case[75] decided by the Court of Appeals in 1938, it was held that one in a state of intoxication at the time of the commission of a crime cannot think properly nor realize that he was employing means and methods in the execution of an offense without any risk to himself. The same Court, however, apparently reversed this holding in the case of *People v. Wigan*[76] wherein, citing a decision of the Supreme Court of Spain on June 30, 1897,[77] it held that drunkenness is not necessarily incompatible with treachery.

It is the unstable state of the law on the point which makes it dangerous for the prosecution to allege treachery side by side with intoxication. The danger comes through the backdoor. The defense is unwittingly supplied with a two-edged weapon because it can always prove that the intoxication was not habitual nor intentional and, as a matter of fact and of law, the degree of intoxication was such that it numbed the will to do right to such an extent as to negative treachery. On the contrary, on the side of State the same weapon is always one-purposed and one-edged. If the treachery alleged by the State is the only qualifying circum-

[74] Revised Penal Code, Art. 15 (1930).
[75] People v. Abella, 38 O.G. 1449.
[76] 49 O.G. 5439.
[77] Rodriguez Navarro, Doctrina Penal del Tribunal Suprema, 836.

stance in the information, the charge of murder may be washed away by intoxication. It is costly to the prosecution because it has the potentiality of being able to obliterate a qualifying circumstance. It carries the seed of its own destruction.

There is a similarity between Philippine law and the prevailing view in the United States on intoxication as a circumstance in criminal law. The rule in the United States was early stated in the case of *Ex Parte Evers*[78] where the Court of Appeals of Texas on June 3, 1891, made the following holding construing the provision of the Bill of Rights of Texas which more or less has the same wordings as the Philippine Bill of 1902 and the Jones Law:

> *"The fact that the slayer was intoxicated does not indicate that the homicide was not done in a cool and deliberate manner.* A drunken party can commit the crime of murder with as much deliberation and in as heartless and cruel manner as the most sober man. The simple fact of intoxication has never been held to exonerate from crime, nor even to mitigate it, nor to become evidence favorable to the party accused, if the other facts show coolness and deliberation. *Intoxication, which is a wrong in and of itself, has never been held to have the effect of being an excusing cause for other and greater wrong. A party cannot be heard to plead his first wrong or crime in justification of a subsequent. offense.* No man will be heard to take advantage of his wrong. In order to have any favorable effect to the accused, the state of mind caused thereby must be such that his capacity to appreciate the enormity of his crime has been obscured, if not totally destroyed . . ." (Italics ours).

This ruling was reiterated by the Court of Criminal Appeals of the same state in the more recent case of *Ex Parte Moody* decided in 1946, which quoted the *Evers* case. The *Moody* decision is significant because the inebriation in the *Moody* case was more serious, short of temporary insanity.[79]

Power of the judge to grant or deny bail —

Whether or not a judicial officer has the power to grant or deny bail is a matter of statutory provision. The inarticulate pre-

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[78] 16 S.W. 343 (1891).

[79] Ex Parte Moody, 196 S.W. 2d 931, Court of Criminal Appeals of Texas, Oct. 23, 1946, held: The Proof is evident "that he was intoxicated at such time and believed this residence was his own is deducible from the evidence as well as from the relator's brief and argument of counsel. We can then be safe in assuming that such intoxication is the excuse for his conduct; that because of his intoxication, he was mistaken as to his house, otherwise he could not have attempted such entry. Under Art. 36, P.C. Vernon's Ann. R.C. Art. 36, intoxication, short of temporary insanity cannot be used as a defense for the commission of an offense; and as far as relator is concerned from this record, he stands as an intruder in Mr. Ballard's house."

mise of the rule is that the court over which he presides has inherent powers, the prior assumption being that the particular court has unquestionable jurisdiction. In a case in the United States,[80] it was held that —

> "The power to admit bail is not a power inherent in the court in the sense that it is necessary that a court should be possessed of such power in order that it may perform its functions and administer the laws."

Therefore a judicial officer's power to grant or deny bail begins to operate only once the situs of his court's jurisdiction has been ascertained. Till then the basis of the court's inherent powers cannot be discussed. This is the rule followed in the Philippines as held in very many cases.[81]

In the United States, a distinction is made between inferior officers and judicial officers vested with higher jurisdictions. There it has been held —

> "that inferior officers vested only with the power to commit, without express legislative enactment, take bail in capital cases, for the determination of the sufficiency of the evidence in such cases, in order to entitle the accused to bail is a matter of greatest importance both to the accused and to the state and is the appropriate province of the court entrusted with the trial of such causes (Vanderford v. Brand 126 Ga 67, 54 SE 822, 9 Ann. Cas 617); Frequently the power of such inferior officers has been further limited and they have been confined in the taking of bail to misdemeanors and the less serious felonies, the trial courts being vested with power in the case of all offenses of a higher degree." (39 LRA NS 758).

Inferior officers are purely administrative officers. Their functions are ministerial and they have no inherent power to allow bail in the absence of statutory authorization. In the United States, clerks of courts, sheriffs and police officers are ministerial officers although some statutes there allow them to grant bail in misdemeanors.[82] The Philippines has inferior courts called the municipal courts[83] but no inferior officers. The equivalent of these inferior offficers, also called by the same designations as in the United States, are not considered judicial officers. Philippine law seems to be a combination of the variety of laws in the United States because, as previously discussed, Section 87 of the Judiciary

[80] U.S. ex rel Garapa v. Curren, 297, F. 946, 36 ALR 877 (1924).
[81] Among them are Manila Railroad v. Attorney General, 20 Phil. 523 (1911); U.S. v. de la Santa, 9 Phil. 22 (1907); U.S. v. Narvas, 14 Phil. 410 (1909).
[82] 6 AM Jur 2d, Bail, Sec. 19-24 (1950).
[83] Rep. Act 296, Section 67 (1948).

Act of 1948 (as amended) as construed by the Supreme Court in the case of *Manigbas v. Luna*[84] empowers the municipal court (inferior court) to grant bail even in capital offenses which definitely they have no jurisdiction to try. But once the power has lodged, how much discretion is left for the judge to exercise?

The trend in this respect is to leave as little as possible to judicial discretion.[85] Yet, even that little is big as shall be presently shown. This is so because of the hearing that must always precede its final denial.

If the judge's denial of bail is not unreasonable, it must be upheld —

The scales of justice are sensitive. They take a temporary or final dip upon the slightest touch. Nowhere is this true than in petitions for bail. Here the commodity being weighed is human right and the ultimate goal is human justice. Because they have no exact pecuniary equivalence any slight mistake becomes grievous.

When the judge denies bail to an individual he denies liberty to that individual even before he is finally adjudged guilty. But let the judge commit a mistake in giving bail to an undeserving respondent and his victim becomes, in turn, society. These are the consideration upon which the scales take a dip or rise. To be just, a judge must be scrupulously fair to both.

The same case of *Pareja v. Gomez* cited in the beginning of this article is authority for the statement that if the judge's resolution in denying bail is reasonable, it should not be disturbed on certiorari. Said the court in that case:

> "The facts and circumstances obtaining in this case are such that reasonable men may honestly disagree on the question whether petitioner should be released or not on bail. As a consequence, it cannot be said that respondent judge had abused his discretion, much less gravely in issuing the orders complained of."

The orders complained of to which the decision refers are the ones denying bail. The Supreme Court will usually sustain the finding of the lower court granting or denying bail provided the court had jurisdiction to grant it even if it had exercised bad judgment in so doing,[86] provided, of course, that there is no abuse. After all, the order of denial if given during the early stages of the case is not final as to the court issuing it. It may set

[84] 98 Phil. 466 (1956).
[85] 6 Am Jur, 2d, Bail, Sec. 11-13 (1950).
[86] Navarro, Criminal Procedure, 240, (2d ed. 1960).

it aside any time during the trial if it becomes convinced that the death penalty may no longer be meted out to the accused. In an actual case,[87] after the court had denied a petition to grant bail, a motion for reconsideration was immediately filed. The judge did not rule on the motion for reconsideration but set the continuation of the trial on the merits. After the defense had introduced all its witnesses for one of the accused who was denied bail, it requested the court to rule on its motion for reconsideration, but the court announced that it would rule on the motion at the same time with the decision it would render on the case after its submittal.

The decisions of the Supreme Court of the Philippines upholding the decision of the lower court in denying or granting bail are paralleled by decisions in the United States. Typical of such a case is the case of *Ex Parte Zinnanti*.[88]

On motion for a rehearing the argument was raised that the arrest was illegal because it was unconstitutional to seize a car used for the unlawful transportation of intoxicating liquor without warrant. The Court found, however, that the law of the State authorized a peace officer to arrest within his view. And it squarely met the issued raised by quoting the words of Judge Hurt in the case of *Miller v. State*:[89]

> "*A* is expecting an attempt will be made to arrest him illegally. He deliberately prepares his arm for immediate use, calmly and deliberately determined to kill the person who attempts the arrest. *B* appears with intention of making the arrest. *A* immediately shoots and kills *B*. *A* would be guilty of murder upon express malice, though the intended arrest was illegal. To hold *A* guilty of murder upon express *malice would not only be the law, but common sense and justice*". (Italics ours)

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[87] People v. Rudy Soriano and Manolo Ferrer and People v. Rufo Garbillo (D-1911 and D-1926) which were jointly tried.

[88] 75 S.W. 2d 45, Court of Criminal Appeals of Texas, Oct. 17, 1934, held: On appeal from an order denying bail, the decision of the trial court upon the facts, while not conclusive, is accorded great weight (Ex Parte Hanks 97 Texas Cr. R. 387, 261 S.W. 1027). The mere fact that there is in evidence mitigating facts coming from the testimony of the accused will not in every case suffice to overturn the decision of the trial judge. Ex parte Hanks, *supra*, and authorities cited. Applying the rules mentioned to the evidence before us, we reached the conclusion that this court would not be warranted in reversing the judgment of the trial court denying bail. See Ex Parte Rothschild 2 Tex. App. 500.

The case of Ex Parte Hanks cited in the above decision follows: (97 Texas Cr. R. 387, 261 S.W. 1027) held: Trial Court's Denying bail, while not conclusive, is entitled to weight, and existence of mitigating facts will not in every case suffice to overturn trial court's decision. Ex Parte Smith, 23 Texas App. 100, 5 S.W. 99; Ex Parte Jones, 31 Texas Cr. R. 422, 20 S.W. 983; Ex Parte Good, 74 Texas Cr. R. 326, 251 S.W. 233; Ex Parte Ross, 94 Texas Cr. R. 313, 251 S.W. 235.

[89] 32 Texas Cr. R. 319, 20 S.W. 1103 (1893).

May the municipal judge grant bail to persons accused of capital offenses?

The Supreme Court in the case of *Manigbas v. Luna*,[90] decided the question in the affirmative but admitted that the law was not very clear on the point. Said the Supreme Court:

> *"Our answer must of necessity be in the affirmative not only because there is no such limitation in our Constitution but because the Judiciary Reorganization Act of* 1948 *seems to expressly ,confer this power upon them.* We refer to Sections 87 and 91 of said act relative to the power of justices of the peace to conduct preliminary investigations and the incidental powers they may exercise in relation thereto. The first section provides that the justice of the peace may conduct preliminary investigations 'for any offense alleged to have been committed within their respective municipalities . . . without regard to the limits of punishment, *and may release, or commit or bind over any person charged with such offense to secure his appearance before the proper court.'* And section 91 provides that the same justice of the peace may require of any person arrested a bond for good behaviour or to keep the peace, or for the further appearance of such person before a court of competent jurisdiction. The only limitation to this power is that the bond must be approved by that court. *These provisions are broad enough to confer upon justices of the peace the authority to grant bail to persons accused even of capital offenses* for such is the only meaning that we can give to the phrase 'bind over any person charged with such offense to secure his appearance before the proper court. This is the meaning of bail as defined in Section 1 of Rule 110.'" (Italics ours).

The pertinent provision of the 1948 statute referred to by the Supreme Court are as follows:

> "Section 87. . . . Said justices of the peace of municipal courts may also conduct preliminary investigation for any offense alleged to have been committed within their respective municipalities and cities, which are cognizable by the Courts of First Instance and the information filed with their courts without regard to the limits of punishment, and may release, or commit *and bind over any persons charged with such offense to secure his appearance before the proper court".* (Italics ours).

> "Section 91. *Incidental power of justices of the peace and municipal courts.* — The justices of the peace and the municipal courts shall have power to administer oath and to give certificate thereof; to issue summonses, writs, warrants, executions and all others processes necessary to enforce, their order and judgments; to compel the attendance of witnesses to punish contempts of courts by fine or imprisonment, or both within the limitation imposed by Rules of Court *and to require of any per-*

[90] *Supra*, at p. 471.

> *son arrested a bond for good behavior or to keep the peace, or for further appearance of such person before a court of competent jurisdiction.* But no such bond shall be accepted unless it be executed by the person in whose behalf it is made, with sufficient surety or sureties, to be approved by the said court". (Italics ours).

Is this still the law? This decision of the Supreme Court in the above case has not yet been modified, repealed nor abrogated since its promulgation on February 27, 1956. On January 1, 1964, it promulgated the Revised Rules of Court and added a second sentence to Section 7, Rule 114, to the effect that the evidence taken in the hearing on the application for bail in the Court of First Instance shall be automatically reproduced as a part of the trial on the merits. As it stands this particular section now reads as follows:

> Section 7. *Capital offense — burden of proof.* — On the hearing of an application for admission to bail made by any person who is in custody for the commission of a capital offense, the burden of showing that evidence of guilt is strong is on the prosecution. The evidence presented during such hearings in the Court of First Instance shall be considered automatically reproduced at the trial without need for retaking the same; but upon motion of either party, the court may recall any witness for additional examination unless the witness is dead, outside the Philippines or otherwise unable to testify."

It is to be noted that the added portion says that it is "the evidence presented during such hearings in the Court of First Instance" which is automatically reproduced. The wording alone would seem to indicate that a hearing in an inferior court is allowed but that it is not reproduced because, not being, a court of record, there is nothing to reproduce. But the question may be added: Does this not only prove that a hearing in the inferior court is not contemplated because it has no jurisdiction over the case? We are back where we started.

The dissenting opinion of Justice Montemayor in the same case explains the other side of the question. After making mention of that part of the majority opinion admitting that the law is not explicit on the point he said:

> "Let us start with the fact that a Justice of the Peace Court is not a court of record. There is no stenographer to take down the evidence submitted before it. So, if said court acting upon a petition for bail in a capital offense case grants bail on the ground that the evidence for the prosecution is not strong or, on the other hand, denies bail on the ground that said evidence for the prosecution is strong, it would be difficult, if not impossible, to appeal from said order or to correct it thru cer-

> tiorari proceedings on the ground of abuse of discretion, for the simple reason that the appellate court where the appeal is taken or where the extraordinary legal remedy is sought, cannot review the evidence received by the Justice of the Peace Court to determine whether or not it abused its discretion, because there is no record of such evidence."

Aside from what Justice Montemayor has stated above, we might say that the addition in Section 7, Rule 114, of the Revised Rules of Court, contemplated a hearing in the Court of First Instance only because it is at once obvious that as a municipal court is not of record, there is nothing to reproduce if the hearing is conducted there. After a bail hearing, the next step in the municipal court is the preliminary investigation proper. If the judge is convinced that there is a prima facie case, he remands the records to the Court of First Instance for further proceedings there.[91] When it is tried here, it is not de novo trial because there is a de novo trial only with regard to a case originally tried by the municipal court but appealed to the Court of First Instance.[92] When a trial de novo is conducted by the Court of Instance it disregards proceedings on the merits in the municipal court. But when a case is remanded to the Court of First Instance after a preliminary investigation by the municipal court it does not disregard the records in the municipal court because whatever action it takes consequent to its receipt is merely a continuation of the proceedings heretofore taken in the lower court. But as has been said elsewhere, there are no records of the bail proceedings in the municipal court because they are not supposed to take a record of the bail proceedings there. Is this not a clear indication that a bail hearing on the case was not contemplated in the municipal court in the first place?

And yet there are serious considerations that militate in favor of the decision of the Supreme Court. For one thing, the same argument of Justice Montemayor about the fiscal being made to travel to remote municipalities and being forced to leave his office for several days to attend to incidents committant to the bail hearing can be said just as well of an accused indigent, who will thereupon be forced to travel to the provincial capital with his witnesses and seek his lawyer there if the bail hearing were required to be conducted always in the Court of First Instance. The cost of such a hearing is prohibitively enormous to a poor man. As between the government and the individual, the choice as to who should bear the expenses of the proceedings should not be difficult to make. The protection of the individual is one of the reasons for the government's organization. Again, there are those who believe that

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[91] Revised Rules of Court (1964), Rule 113, Section 12.
[92] Revised Rules of Court (1964), Rule 123, Section 7.

the granting or denial of any bail application is only committantly an extension of the power to issue the warrant of arrest. Considering this, the court which issued the warrant of arrest should also be the one to decide whether to grant bail or not. While this view flies into the teeth of some American precedents,[93] there is some advantage in it with particular reference to municipal courts. By requirement of law,[94] the judge must first examine the witnesses by means of searching questions before issuing the warrant of arrest. He has therefore already a foreknowledge of the case before the hearing on the bail application begins.

But the most serious objection to the hearing of the bail petition in the Court of First Instance on a warrant of arrest issued by an inferior court is its technical legal difficulty. It should be remembered that up to his time the defendant has not yet been arraigned as no information has as yet been filed against him. The information is the document that formally informs the accused of the nature and cause of the accusation against him within the meaning of the constitutional provision laying down such a requirement. If the hearing is conducted in the Court of First Instance, necessarily it must be one prior to the filing of the information. When the trial on the merits begins, the defense counsel may object to the automatic reproduction of the evidence presented during the bail hearing on the legal ground that the hearing was conducted without the accused having been previously informed of the nature and cause of accusation against him. After the receipt of the records of a case preliminarily investigated by a municipal court, the case is referred to the provincial fiscal and it is only then that the latter files the information, should he decide that course of action. This was the procedure outlined in the case of *Biron v. Cea*,[95] where the Supreme Court said:

> ". . . The purpose of compelling the justice of the peace to transmit the record of the preliminary investigation to the Clerk of First Instance . . . is to provide the fiscal with a basis for whatever action he may desire to take in the premises, either to prepare the corresponding complaint or information, or if the accused has been discharged, to seek his re-arrest upon a new complaint if he believes the order of the Justice of the Peace to be erroneous."

The accused is then arraigned in the Court of First Instance. The municipal court cannot arraign the accused because it has no jurisdiction to try the case. Even in cases originally tried by the municipal court but subsequently appealed to the Court of First

[93] 6 Am Jur, 2d, Bail, Sec. 19-24 (1950).
[94] Judiciary Act of 1948, Section 87, as amended by Rep. Act 3828.
[95] Biron v. Cea, 73 Phil. 673 (1942).

Instance, there must still be a rearraignment as was held in the case of *People v. Malayao.*[96] This case was originally tried by the Justice of the Peace. Upon conviction he appealed to the Court of First Instance. A new information was filed in the Court of First Instance but was dismissed without the accused having been arraigned there. The provincial fiscal appealed the dismissal on certiorari. In the Supreme Court, the accused pleaded double jeopardy but the court held:

> Inasmuch as the judgment of the Justice of the Peace was vacated upon appeal to the Court of First Instance in accordance with Section 28, Rule 119 of the Rules of Court[97] a new arraignment is necessary because the case stands as if it were a case originally instituted in that Court and as this was not done the reopening of the case connot place the accused in double jeopardy.

These two cases strengthen the contention that a technical difficulty exists when a bail hearing is conducted by the Court of First Instance on a warrant of arrest issued by the municipal court. It is not claimed that the Court of First Instance is without authority to hear such an application. This is not the point. The point is that when the trial of the case on its merits comes, the records of the bail hearing cannot be reproduced because any hearing before the accused has been informed of the nature and cause of the accusation against him carries a congenital constitutional vice. If the bail hearing in the Court of First Instance is subsequently declared a nullity on this ground. the result is a clear merry-go-round.

The answer, therefore, to the question whether a municipal judge can grant bail to a person accused of a capital offense or not is that he can, provided that he conducts a separate hearing on the bail application. A distinction should be made between this hearing and requirement of Republic Act No. 3828[98] that before a municipal judge issues the warrant of arrest he should first examine the witnesses through the question and answer method. He must do this even without any request from any party because it is a duty imposed on him by law. The judge cannot combine this proceeding and the bail proceedings in one simply because the examination required by Republic Act 3828 is one before the warrant is issued and is always ex parte. On the other hand, the hearing on the bail petition is necessarily one pursuant to an application by one who is under detention and this hearing is conducted with all the ceremonies of a formal trial. Neither is the hearing on the bail

[96] G.R. No. 12103, Feb. 28, 1961.
[97] Substantially reproduced as Section ", Rule 123 of the Revised Rules of Court. (1964).
[98] Section 6.

petition a part of the preliminary investigation proper (second stage) that is conducted by the municipal judge because the preliminary investigation proper only takes place after the bail petition has been terminated. The two have again different purposes. The purpose of the bail proceedings is for the Court to decide whether it should release the respondent pending the filing of the information and consequent trial and decision while in a preliminary investigation the purpose is to determine whether it should further proceed against the respondent by the elevation of the records to the Court of First Instance and the consequent filing of the information by the provincial fiscal.

Bail under the Anti-Subversion Act —

Under the Anti-Subversion Act the death penalty may be meted out to "an officer or a ranking leader of the Communist Party of the Philippines or of any subversive association" or to a "member who takes up arms against the Government".[99] But the same law provides that the proper Court of First Instance must conduct the preliminary investigation. We quote the pertinent portion of the provision.

> "Section 5. . . . Provided, that the preliminary investigation of any offense defined and penalized herein by prison mayor to death shall be conducted by the proper Court of First Instance".

The provision has been reproduced in *toto* in Section 16, Revised Rules of Court. As a consequence, the application for bail with regard to violations of the Anti-Subversion Act when the penalty is from prison mayor to death should always be filed in the Court of First Instance.

The provision of both the Constitution and the Rules of Court that all persons are bailable except those accused of a capital offense when the evidence of guilt is strong refers to the stage of the proceedings before trial and conviction. When the case is submitted for decision and the trial court metes out a lesser penalty than death the protection given by the constitutional provision can no longer be availed of. Another provision of the Revised Rules of Court automatically operates, that is, Section 4 of Rule 114, which reads as follows:

> "Section 4. *Non-capital offenses after conviction by the Court of First Instance.* — After conviction of the Court of First Instance, defendant may upon application, be bailed out at the discretion of the Court".

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[99] Republic Act No. 1700, Section 4 (1957).

Judicial discretion is now given a wide play. In the words of former Senator Francisco:

> "When a person accused of a capital offense is convicted but the penalty imposed is not death, he may be granted bail in the exercise of the discretion of the court and under special circumstances. The special circumstances are those which the courts have consistently considered as legal grounds for granting bail to the accused, prior to his conviction, against whom there is strong evidence of guilt. Some of the special circumstances are old age, sickly condition, and the improbability that he will try to frustrate the course of justice".

There is no need to delve into the wisdom or unwisdom of Section 4 of Rule 114 of the Revised Rules of Court. But the following question is posed for purposes of academic discussion: Would it not have been better if bail were denied to a person already convicted of life imprisonment as well? Because of the nature and length of the penalty involved, it is believed that no amount of money is big enough to deter such a person from jumping his bail. The experience in the case of Ernest Berg[100] is too recent to be lost to us. A convicted man is not the same as a man who is still fighting his battle for acquittal. Statistics will prove that the number of affirmed convictions are far greater than the number of those reversed. The mere thought of the fact that one is already convicted after trial dampens one's zeal and erodes his belief in the success of his appeal. Combined with a hundred other factors, these may conspire towards a cowardly resolution to take flight rather than face the final judgment of a court.

[100] Ernest Berg of German descent, who became a naturalized Filipino, amassed a fortune during the war. Accused of treason, he jumped his bail.