REPUBLIC OF THE PHILIPPINES
SUPREME COURT
Manila

SECOND DIVISION

NOTICE

Sirs/Mesdames:

Please take notice that the Court, Second Division, issued a Resolution dated **June 27, 2022** *which reads as follows*:

"G.R. No. 238355 (*Vivian Tiongkiao y Tanyag v. Mark Sherrah*). – This Court resolves the Petition for Review on *Certiorari*[1] challenging the Decision[2] dated July 19, 2017 and the Resolution[3] dated March 20, 2018 of the Court of Appeals (*CA*) in CA-G.R. CR No. 35725, which nullified and set aside the Order[4] dated December 13, 2010 of the Regional Trial Court, Branch 166, Pasig City (*RTC*) in Criminal Case Nos. 142548-54 and reinstated the criminal informations for estafa against petitioner Vivian Tiongkiao *y* Tanyag (*Vivian*).

Sometime in April 2007, Vivian and respondent Mark Sherrah (*Mark*) became intimate with each other through an internet dating service.[5] On May 22, 2007, Mark went to the Philippines to visit Vivian.[6] He stayed in her condominium unit at Unit 203, Pearl Plaza Condominium, Pearl Drive, Ortigas Center, Pasig City.[7] Subsequently, he agreed to refurbish said condominium unit and thus, while he was abroad, he sent money on seven different occasions totaling ₱1,051,931.00 to be used for the renovation.[8]

Unfortunately, the parties' relationship turned sour when the expenses for renovation increased and seriously strained Mark's finances.[9] Mark then demanded an accounting of said expenses, but Vivian failed to account and present official receipts of the expenses for renovation.[10] Thus, Mark filed a

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1 *Rollo*, pp. 10-29.
2 Penned by Associate Justice Zenaida T. Galapate-Laguilles, with Associate Justices Japar B. Dimaampao (now a member of this Court) and Franchito N. Diamante, concurring; *id.* at 37-46.
3 *Id.* at 47-48.
4 Penned by Presiding Judge Rowena de Juan Quinagoran; *id.* at 83-87.
5 *Id.* at 37.
6 *Id.* at 38.
7 *Id.*
8 *Id.*
9 *Id.*
10 *Id.*

Complaint[11] with the Office of the City Prosecutor of Pasig City against Vivian for the crime of estafa under paragraph 1(b), Article 315 of the Revised Penal Code (*RPC*).[12] Eventually, the prosecution caused the filing of the information in court.

On March 25, 2010, Vivian filed a Motion for the Determination of Probable Cause (Reinvestigation) and Motion for the Deferment of the Issuance of Warrant of Arrest, which the RTC denied in an Order dated June 18, 2010 for failure to comply with Section 5, Rule 15 of the Rules of Court on notices of hearing.[13] Undaunted, Vivian filed a 2nd Motion for the Determination of Probable Cause and Deferment of the Issuance of Warrant of Arrest[14] dated August 7, 2010, arguing that she and Mark cohabited in the condominium unit as husband and wife from May 2007 until the end of July 2008, hence, she should be exempt from criminal liability pursuant to Article 332 of the RPC.[15] Further, she insisted that the amount of money subject of Mark's Complaint was adequately supported by receipts, contracts, and acknowledgment of payments by contractors and suppliers of services and materials.[16]

The prosecution opposed Vivian's second motion, contending that Vivian was simply Mark's girlfriend and not his common-law wife.[17] Moreover, the prosecution asserted that bare allegations are not equivalent to proof.[18] Also, no witness has identified or authenticated the purported e-mails, documents, and affidavits.[19]

On December 13, 2010, the RTC issued an Order[20] granting the second motion. It found that there was no probable cause to indict Vivian for estafa because of the absence of the second and third elements of the crime as charged.[21] In ruling that there was no misappropriation or conversion of money or property, the RTC gave credence to Vivian's explanation about how she utilized the money entrusted to her by Mark for the renovation of their condominium.[22] Finally, the RTC pronounced that Vivian cannot be charged with estafa because she is Mark's common-law spouse – a relationship Vivian had established through a series of e-mail communications where she and Mark expressed their affection.[23]

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11 *Id.* at 66-69.
12 *Id.* at 15.
13 *Id.* at 38.
14 *Id.* at 73-82.
15 *Id.* at 38.
16 *Id.*
17 *Id.* at 39.
18 *Id.*
19 *Id.*
20 *Id.* at 83-87.
21 *Id.* at 85.
22 *Id.*
23 *Id.* at 86.

Aggrieved, the People filed an appeal.[24] It posited that the RTC erred when it appreciated as evidence the e-mails, documents, and affidavits, which were neither part of the records during the preliminary investigation nor presented and duly admitted in court in accordance with the rules on evidence.[25] On the other hand, Vivian insisted that the RTC personally and independently determined that there was no probable cause for the issuance of a warrant of arrest.[26] She claimed that along with the other pieces of evidence, the RTC evaluated the vital documents, affidavits, and the prosecutor's report of the contending parties submitted during the preliminary investigation and judicial determination of probable cause.[27]

In a Decision dated July 19, 2017, the CA granted the appeal, finding the RTC's immediate dismissal of the case as precipitate and in disregard of the standard of clear lack of probable cause.[28] It reiterated the prevailing legal norm concerning dismissal of cases for lack of probable cause – "dismissal only in clear-cut cases."[29] The CA ruled that the diametrically opposed contentions of the parties were evidentiary matters needing further calibration, which can only be resolved by the court and the litigants through exhaustive trial.

Vivian filed a Motion for Reconsideration,[30] which the CA denied in a Resolution[31] dated March 20, 2018.

Hence, this petition.

The sole issue before this Court is whether the CA erred in reinstating the criminal informations for estafa against petitioner.

We deny the petition.

Petitioner insists that the RTC judge made an independent assessment of the evidence on record and, in doing so, correctly found that the evidence so far presented did not meet the appropriate standard of probable cause.[32]

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24 *Id.* at 40.
25 *Id.*
26 *Id.*
27 *Id.*
28 *Id.* at 42.
29 *Id.* at 43.
30 *Id.* at 49-60.
31 *Id.* at 47-48.
32 *Id.* at 22.

It is well settled that the determination of probable cause may either be executive or judicial.[33] In *De Los Santos-Dio v. Court of Appeals*[34] (*De Los Santos-Dio*), this Court explained the distinction between an executive and judicial determination of probable cause:

> x x x The first is made by the public prosecutor, during a preliminary investigation, where he is given broad discretion to determine whether probable cause exists for the purpose of filing a criminal information in court. Whether or not that function has been correctly discharged by the public prosecutor, *i.e.*, whether or not he has made a correct ascertainment of the existence of probable cause in a case, is a matter that the trial court itself does not and may not be compelled to pass upon.
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> The second is one made by the judge to ascertain whether a warrant of arrest should be issued against the accused. In this respect, the judge must satisfy himself that, on the basis of the evidence submitted, there is a necessity for placing the accused under custody in order not to frustrate the ends of justice. If the judge, therefore, finds no probable cause, the judge cannot be forced to issue the arrest warrant. Notably, since the judge is already duty-bound to determine the existence or non-existence of probable cause for the arrest of the accused immediately upon the filing of the information, the filing of a motion for judicial determination of probable cause becomes a mere superfluity, if not a deliberate attempt to cut short the process by asking the judge to weigh in on the evidence without a full-blown trial.
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> In the case of *Co v. Republic*, the Court emphasized the settled distinction between an executive and a judicial determination of probable cause, *viz.*:
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> > We reiterate that preliminary investigation should be distinguished as to whether it is an investigation for the determination of a sufficient ground for the filing of the information or it is an investigation for the determination of a probable cause for the issuance of a warrant of arrest. The first kind of preliminary investigation is executive in nature. It is part of the prosecution's job. The second kind of preliminary investigation which is more properly called preliminary examination is judicial in nature and is lodged with the judge.
>
> On this score, it bears to stress that a judge is not bound by the resolution of the public prosecutor who conducted the preliminary investigation and must himself ascertain from the latter's findings and supporting documents whether probable cause exists for the purpose of issuing a warrant of arrest. This prerogative is granted by no less than the Constitution which provides that "no warrant of arrest shall issue except upon probable cause to be determined personally by the judge after examination under oath or affirmation of the complainant and the witnesses he may produce."[35]

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33 *De Los Santos-Dio v. Court of Appeals*, 712 Phil. 288, 305 (2013).
34 *Supra.*
35 *Id.* at 305-307. (Citations omitted)

Vote

Section 6(a), Rule 112 of the Revised Rules of Criminal Procedure provides that the judge shall personally evaluate the resolution of the prosecutor and its supporting evidence within 10 days from the filing of the complaint or information. If the evidence on record clearly fails to establish probable cause, the same rule allows the judge to immediately dismiss the case. Conversely, should the judge find probable cause, the judge shall issue a warrant of arrest. Thus:

> Sec. 6. *When warrant of arrest may issue.* — (a) *By the Regional Trial Court.* — Within ten (10) days from the filing of the complaint or information, the judge shall personally evaluate the resolution of the prosecutor and its supporting evidence. He may immediately dismiss the case if the evidence on record clearly fails to establish probable cause. If he finds probable cause, he shall issue a warrant of arrest, or a commitment order if the accused has already been arrested pursuant to a warrant issued by the judge who conducted the preliminary investigation or when the complaint or information was filed pursuant to section 7 of this Rule. In case of doubt on the existence of probable cause, the judge may order the prosecutor to present additional evidence within five (5) days from notice and the issue must be resolved by the court within thirty (30) days from the filing of the complaint of information.

In other words, after the information is filed with the court and the judge proceeds with the primordial task of evaluating the evidence on record, the judge may or may not find probable cause or doubt that probable cause exists. In which case, the judge has three options: "(a) issue a warrant of arrest, if [the judge] finds probable cause; (b) immediately dismiss the case, if the evidence on record clearly fails to establish probable cause; and (c) order the prosecutor to submit additional evidence, in case [the judge] doubts the existence of probable cause."[36]

De Los Santos-Dio warns, however, that the judge's dismissal of a case "must be done only in clear-cut cases when the evidence on record plainly fails to establish probable cause."[37] Hence:

> In this regard, so as not to transgress the public prosecutor's authority, **it must be stressed that the judge's dismissal of a case must be done only in clear-cut cases when the evidence on record plainly fails to establish probable cause — that is when the records readily show uncontroverted, and thus, established facts which unmistakably negate the existence of the elements of the crime charged.** On the contrary, if the evidence on record shows that, more likely than not, the crime charged has been committed and that respondent is probably guilty of the same, the judge should not dismiss the case and thereon, order the parties to proceed to trial. In doubtful cases, however, the appropriate course of action would be to order the presentation of additional evidence.[38] (Emphasis supplied)

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36 *Id.* at 308.
37 *Id.*
38 *Id.* at 307-308.

Indeed, the judge's determination of probable cause for the issuance of a warrant of arrest does not mean that the judge becomes an appellate court for purposes of assailing the prosecutor's determination of probable cause.[39] If a party wishes to assail the prosecutor's exercise of executive determination of probable cause, the party's proper remedy is to question the prosecutor's resolution *via* an appeal to the secretary of justice.[40] In *People v. Alcantara, et al.*,[41] this Court elucidated:

> The determination of the judge of the probable cause for the purpose of issuing a warrant of arrest does not mean, however, that the trial court judge becomes an appellate court for purposes of assailing the determination of probable cause of the prosecutor. The proper remedy to question the resolution of the prosecutor as to his finding of probable cause is to appeal the same to the Secretary of Justice. If the Information is valid on its face and the prosecutor made no manifest error or his finding of probable cause was not attended with grave abuse of discretion, such findings should be given weight and respect by the courts. The settled policy of non-interference in the prosecutor's exercise of discretion requires the courts to leave to the prosecutor the determination of what constitutes sufficient evidence to establish probable cause for the purpose of filing an information to the court. Courts can neither override their determination nor substitute their own judgment for that of the latter; they cannot likewise order the prosecution of the accused when the prosecutor has not found a *prima facie* case.[42]

Taking off from the clear-cut standard in the dismissal of cases for lack of probable cause, this Court finds that the RTC's immediate dismissal of the criminal cases was improper. As correctly observed by the CA, the RTC failed to observe the standard of clear lack of probable cause. The CA ratiocinated:

> Applying these principles, We view the court *a quo*'s immediate dismissal of the case as precipitate and in disregard of the standard of clear lack of probable cause. The prevailing legal norm concerning dismissal of cases for lack of probable cause is "dismissal only in clear-cut cases."
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> Here, the diametrically opposed contentions of the parties are matters that are obviously evidentiary and hence needing further calibration, a process that can only be utilized by the court and the litigants through the crucible of an exhaustive trial. While Tiongkiao appears to have documentary evidence in her favor such as receipts and e-mail communications, We hold the same needs an in-depth identification and elucidation not only by the presentor thereof but also by the opposing side (Sherrah) who from the inception of the case has been vehemently assailing their genuineness and belated presentation. As has been emphasized, the factual and evidentiary issues can be best passed upon and threshed out

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39 *People v. Alcantara, et al.*, 835 Phil. 635 (2018).
40 *Id.* at 644.
41 *Supra* note 39.
42 *Id.* at 646. (Citations omitted)

during a full-blown court trial since it is the court's task to determine guilt beyond reasonable doubt based on the evidence presented by the parties at a trial on the merits.

Tiongkiao's cardinal submission is the alleged lack of the elements of the crime imputed against her, to which the trial court unfortunately concurred. We hold otherwise. In the same case of *De Chavez v. Office of the Ombudsman*, it was highly underscored that the presence or absence of the elements of the crime is evidentiary in nature and is a matter of defense. This is the same situation obtaining in the instant case. As correctly submitted by Sherrah, the receipts presented by Tiongkiao do not prove, at least in the preliminary investigation stage, payments.

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We also cannot ignore the argument of the People that the belated presentation of documents comprising of e-mails, Commonwealth of Australia Application for Certificate of No Impediment to Marriage, Seabird Exploration Pension Scheme, Nomination of Beneficiary Form, Affidavits, photos and other relevant papers attached as Annexes 1-20 cannot yet be admitted as evidence. Aside from the fact that their belated presentation is violative of the People's right to due process, they were also unidentified hence have not been authenticated.

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Just like the other exculpatory submissions of Tiongkiao, the foregoing documents essentially delve on matters that are best passed upon in a full-blown trial. The issues upon which the charges are built pertain to factual matters that cannot be threshed out and conclusively determined during the preliminary stage of the case.[43] (Citations omitted)

This Court, not being a trier of facts, sees no reason to overturn the CA's foregoing findings.

In *De Los Santos-Dio*, this Court set aside the RTC's order of dismissal and reinstated the criminal informations for estafa against the respondents because certain essential facts remained controverted. Thus, the RTC could not have concluded with certainty whether the elements of estafa were indeed absent.

Similarly, certain facts in this case remain controverted, such as: (a) whether Vivian paid the expenses for the condominium unit's renovation; (b) the nature of Mark and Vivian's relationship; and (c) whether such relationship is sufficient to come within the purview of relationships exempt from criminal liability. These facts can be best established through a full-blown trial on the merits during which the RTC can reasonably make a conclusion on the absence or presence of the elements of estafa under paragraph 1(b), Article 315 of the RPC. Petitioner's defense – that the amount of money sent by respondent for the renovation of the unit was adequately

43 *Rollo*, pp. 42-45.

supported by receipts, contracts, and acknowledgment of payments by contractors and suppliers of services and materials – are all matters of evidence that she should thresh out during the trial proper. Pending a full-blown trial, any such conclusion on the elements of the offense is precipitate and premature.

Petitioner takes issue with respondent's failure to deny the e-mails she attached to her Second Motion for Determination of Probable Cause, which purportedly showed how respondent treated petitioner as his wife.[44] Again, these are evidentiary matters better ventilated during the trial of the case. The defense that respondent referred to petitioner as his "wife"[45] is different from their actual cohabitation as husband and wife, which necessitates the presentation of proof. Mere allegation is not evidence and is not equivalent to proof.[46] Needless to say, the standard for which the RTC can dismiss criminal cases during its judicial determination of probable cause is no less than unmistakable and clear-cut absence of probable cause.[47] Here, the existence of controverted facts upholds, rather than negates, probable cause.

This Court agrees with the CA when it held that respondent's right to due process had been violated.[48] While the RTC considered petitioner's attachments to her motions for judicial determination of probable cause, it did not order the prosecution to present additional evidence. Yet, the Rules mandate that, should the judge doubt the existence of probable cause, he or she should, at the very least, grant the prosecution an opportunity to submit additional evidence. This is because the prosecution's finding of probable cause, in the absence of a showing that the finding was done in a capricious and whimsical manner, should not be interfered with by the courts.[49] Between the executive and judicial functions of probable cause, there is a delineation that neither the prosecution nor judge can cross. Certainly, the clear-cut standard prevents the judge from transgressing the prosecutor's authority.[50]

In sum, Criminal Case Nos. 142548-54 should be adjudged under the crucible of a full-blown trial on the merits, where the parties could be given an opportunity to thresh out their claims and defenses. To be sure, "the presence or absence of the elements of the crime is evidentiary in nature and is a matter of defense that may be best passed upon after a full-blown trial on the merits."[51]

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44 *Rollo*, p. 22.
45 *Id.* at 75-77.
46 *Morales, Jr. v. Ombudsman Carpio-Morales, et al.*, 791 Phil. 539, 555 (2016), citing *Agdeppa v. Office of the Ombudsman*, 734 Phil. 1, 39 (2014).
47 *Young, et al. v. People*, 780 Phil. 439, 450 (2016).
48 *Rollo*, p. 44.
49 *People v. Alcantara, et al., supra* note 39, at 647.
50 *De Los Santos-Dio v. Court of Appeals, supra* note 33, at 307-308.
51 *People v. Alcantara, et al., supra* note 39, at 648.

FOR THESE REASONS, the petition is **DENIED**. The Decision dated July 19, 2017 and the Resolution dated March 20, 2018 of the Court of Appeals in CA-G.R. CR No. 35725 are **AFFIRMED**. The criminal informations for estafa against petitioner Vivian Tiongkiao *y* Tanyag in Criminal Case Nos. 142548-54 are hereby **REINSTATED**. The Regional Trial Court, Branch 166, Pasig City, is **DIRECTED** to **PROCEED** with the arraignment of petitioner and the trial of the case with dispatch.

SO ORDERED."

By authority of the Court:

TERESITA AQUINO TUAZON
Division Clerk of Court
04 OCT 2022

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