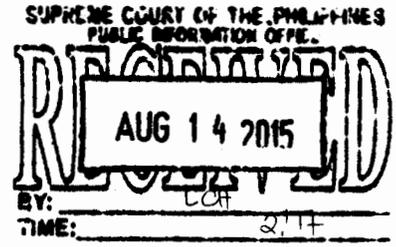




Republic of the Philippines
Supreme Court
 Manila



FIRST DIVISION

NELSON LAI y BILBAO,
 Petitioner,

G.R. No. 175999

Present:

- versus -

SERENO, C.J.,
 LEONARDO-DE CASTRO,
 BERSAMIN,
 PEREZ, and
 PERLAS-BERNABE, JJ.

Promulgated:

PEOPLE OF THE PHILIPPINES,
 Respondent.

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DECISION

BERSAMIN, J.:

The accused assails the affirmance of his conviction for homicide through the assailed decision promulgated on May 27, 2005 by the Court of Appeals (CA).¹ The conviction had been handed down by Judge Fernando R. Elumba of the Regional Trial Court, Branch 42, in Bacolod City (RTC) in Criminal Case No. 17446 entitled *People of the Philippines v. Nelson Lai y Bilbao*.²

Antecedents

The Prosecution's version was summarized by the RTC as follows:

On December 16, 1995, at around 9 o'clock in the evening, the victim Enrico Villanueva, Jr. together with his friends Burnie Fuentebella (a prosecution witness), Butsoy Arenas, Raffy Gustilo, Nonoy Martinez, and Mark Anthony Merre, were seated inside the passenger jeepney owned by the accused, Nelson Lai y Bilbao, which was parked at the back of Pala-pala, Brgy. 6, corner North Capitol Road – San Juan Streets,

¹ *Rollo*, pp. 359-369; penned by Associate Justice Ramon M. Bato, Jr. and concurred in by Associate Justice Mercedes Gozo-Dadole (retired) and Associate Justice Pampio A. Abarintos (retired).

² *Id.* at 107-122.

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Bacolod City, where they were waiting for a female friend of theirs who was supposed to arrive at 9:30 o'clock of the same evening per their agreement. While they were waiting for their friend to arrive, the accused Nelson Lai y Bilbao suddenly approached the vehicle and ordered all the persons who were seated inside (including the deceased Enrico Villanueva, Jr.) to alight therefrom. After all of them have alighted from the jeepney, the accused instantaneously grabbed the victim by the latter's left arm and accused him (the deceased) of having stolen the antenna of his (Lai's) vehicle. Denying that he was responsible for the theft of the antenna, the victim was able to free himself from the hold of the accused and ran away towards the direction of the house of Christopher Padigos located at Purok Narra Bukid North, Brgy. 8, Bacolod City, across the Pala-pala. Upon arriving at the house of Christopher Padigos, the victim ran all the way to the second floor room he shared with Jemuel V. Gepaya (a prosecution witness). Finding his roommate inside the room, the victim confided to the former that Nelson Lai had just accused him of stealing his (Lai's) car antenna and that he (the deceased) was grabbed and hit by the accused at the neck but that he (the victim) was able to retaliate by kicking the accused. There the victim remained until about 11:00 o'clock of the same evening when he left the house of Christopher Padigos to go to the dancehall located at nearby Purok Azucena, Barangay 6, Bacolod City where a benefit dance was being held.

At around 11:00 o'clock of the same evening, both the accused and the victim were inside the dancehall, the latter being seated on a bench together with his friends while the former was dancing to the tune of the cha-cha. After dancing the accused stood immediately in front at about one and a half arms length (sic.) from where the victim was seated. Thereafter, the accused stepped towards where the victim was seated. As the accused was about to approach the victim, a brownout suddenly occurred. Immediately after the lights went out, a spark was seen and a gunshot rang out right in front where the victim was seated. Suddenly, the victim fell down bloodied. Immediately thereafter, the victim was rushed to the provincial hospital by his friends led by Burnie Fuentebella, a prosecution witness, for treatment. Similarly, Jemuel V. Gepaya, a cousin of the victim, also followed to the hospital after hearing the news that the victim was shot.

Inside the Emergency Room of the Provincial Hospital, while the victim lay (sic) bleeding from a gunshot wound in the neck and awaiting medical attention, he was able to tell Burnie Fuentebella and Jemuel Gepaya, both prosecution witnesses, that the accused Nelson Lai was the one who shot him. Moreover, the victim likewise shouted the name "Nelson Lai" when he was asked by PO3 Homer Vargas who shot him. Likewise, when Enrico Villanueva, Sr., the father of the victim, arrived at the Emergency Room and asked the victim who shot him, the latter replied that it was "Nelson Lai". (parenthetical citations omitted)³

In contrast, the CA summed up the Defense's own version in its assailed decision, to wit:

³ Id. at 108-110.

Appellant Nelson Lai drives his own passenger jeep plying the Banago-Libertad route. At around 8:30 o'clock in the evening of December 16, 1995, appellant parked his jeepney at the back of his house located at Purok Azucena, Barangay 6, Bacolod City. After resting for a while, he went to the house of their Purok President, Ramero Jarabelo, where he drank three bottles of beer. Thereafter, he went home at around 9:00 o'clock, passing by the dancehall where (sic.) a benefit dance was being held as a thanksgiving party for the Sangguniang Kabataan. There, he was invited by Merlyn Rojo, who acted as emcee of the program, to open the first dance. Appellant acceded and danced the first dance with Merlyn Rojo. After their dance, appellant went home as he still had to work early the next morning.

When appellant arrived home, he noticed that eight (8) persons, including the victim, were seated inside his jeepney. He approached them and requested them not to stay inside his jeepney. Thereafter, all of them went away without any untoward incident. When the accused and his wife were about to have their late dinner at around 11:00 o'clock, a brownout occurred. About two seconds after the lights went out; he heard a gunshot which he initially thought was merely a firecracker. Later, when he overheard that someone was shot at the dancehall which was only 40 meters away from his house, he went out to look for his two sons. Along the way, he met Daisy Panes, who, together with her husband, were also on their way to the dancehall.

At the dancehall, someone told appellant that his son, Windel, was the one who carried the victim to the hospital. So appellant went home and proceeded to eat his dinner. At around 11:45 o'clock of the same evening, while appellant was already resting, three policemen came to his house and told him that the victim mentioned his name as the one who shot him. Believing that he has done nothing wrong, appellant volunteered to go with the policemen. Appellant claims that when they arrived at the police station, he even asked that a paraffin test be conducted on him, the result of which was negative.⁴

Judgment of the RTC

In its judgment dated August 22, 2001,⁵ the RTC, through Judge Elumba, disposed as follows:

WHEREFORE, premises considered, this Court finds the accused NELSON LAI y BILBAO guilty beyond reasonable doubt of the crime of Homicide defined and penalized under Article 249 of the Revised Penal Code of the Philippines, as amended, and, in the absence of neither mitigating nor aggravating circumstances which may be considered in the imposition of the penalty thereof, this Court hereby sentences the said accused to suffer the indeterminate penalty of imprisonment of eight (8) years and one (1) day of prision mayor as minimum to fourteen (14) years, 8 months and one (1) day of reclusion temporal as maximum and orders the accused to indemnify the heirs of the victim Enrico Villanueva, Jr. in

⁴ Id. at 361-362.

⁵ Id. at 107-122.

the amount of Fifty thousand (P50,000.00) Pesos only without subsidiary imprisonment in case of insolvency as well as to suffer the accessory penalty provided for by law and to pay the costs.

SO ORDERED.⁶

Decision of the CA

On appeal, the petitioner raised the following errors, to wit:

[T]hat the lower court:

1. ERRED in giving full credence to the alleged dying declaration of Enrico Villanueva, Jr.;
2. ERRED in considering the alleged earlier untoward incident between accused and the group of Enrico Villanueva, Jr. as sufficient to motivate the former to kill the latter;
3. ERRED in discarding *en (sic) toto* the defense of alibi and the negative result of the paraffin test conducted on the accused;
4. ERRED in failing to see that the entire evidence presented by both the prosecution and defense engender a reasonable doubt which should be resolved in favor of the accused;
5. **ERRED as accused was deprived of due process when this case was decided by the honorable presiding judge who acted as the public prosecutor in this case before he was appointed to the bench;**
6. ERRED when it completely disregarded appellant's motion for reconsideration below with nary a look into any issue raised therein; and
7. ERRED when it denied appellant's motion for new trial.⁷

On May 27, 2005, the CA promulgated its decision,⁸ disposing:

WHEREFORE, the assailed Decision of the Regional Trial Court of Bacolod City, Branch 42, in Criminal Case No. 17446 is hereby **AFFIRMED** *in toto*.

SO ORDERED.⁹

⁶ Id. at 122.

⁷ Id. at 364 (bold underscoring is supplied for emphasis).

⁸ Supra, note 1.

⁹ *Rollo*, p. 369.

Ruling of the Court

In this appeal, the petitioner continues to assail the conviction, but the Court has immediately noted that the right to due process of the petitioner had been denied to him by Judge Elumba, the trial judge, by not disqualifying himself from sitting on and trying Criminal Case No. 17446 despite having participated in the trial as the public prosecutor. Thus, it is necessary for the Court to first determine if the non-disqualification of Judge Elumba prejudiced the petitioner's right to a fair and impartial trial.

As the records indicate, Judge Elumba had been assigned on March 23, 1998 as the public prosecutor in Branch 42 of the RTC in Negros Occidental to replace the previous public prosecutor,¹⁰ but became the Presiding Judge of Branch 42 on April 27, 2000.¹¹ Branch 42 was the trial court hearing and ultimately deciding Criminal Case No. 17446 against the petitioner. As such, Judge Elumba should have disqualified himself from having anything to do with the case once he became the trial judge because he was compulsorily disqualified. The petitioner pointed to the need for Judge Elumba's disqualification in his *Motion for Reconsideration*,¹² but the latter ignored his concerns upon the excuse that he had appeared in Criminal Case No. 17446 only after the Prosecution had rested its case. Judge Elumba argued that he did not personally prosecute the case, and that, at any rate, the petitioner should have sought his disqualification prior to the rendition of the judgment of conviction.¹³

On appeal, the petitioner focused the CA's attention to the denial of due process to him by the non-disqualification of Judge Elumba, but the CA upheld Judge Elumba's justifications, stating:

As to the fifth assigned error, appellant claims that he was denied due process because the judge who rendered the assailed decision was also, at one time, the public prosecutor of the instant case. *First*, the record of this case shows that when the judge, who was then a public prosecutor, entered his appearance, the prosecution had already long rested its case, more specifically, he appeared therein only when the last witness for the defense was presented, not to mention the fact that it was a private prosecutor who cross-examined the last witness, Merlyn Rojo. Thus, it cannot be said that the presiding judge personally prosecuted the instant case, nor supervised the prosecution thereof when the same was still pending. *Second*, settled is the rule that a petition to disqualify a judge must be filed before rendition of judgment by the judge. Having failed to

¹⁰ Records, p. 141.

¹¹ Id. at 187.

¹² Id. at 224-269, 264-266.

¹³ Id. at 307.

move for the disqualification of the judge, appellant cannot thereafter, upon a judgment unfavorable to his cause, take a total turn about (sic.) and say that he was denied due process. 'One surely cannot have his cake and eat it too.'¹⁴

It is not disputed that the constitutional right to due process of law cannot be denied to any accused. The Constitution has expressly ordained that "no person shall be deprived of life, liberty or property without due process of law."¹⁵ An essential part of the right is to be afforded a just and fair trial before his conviction for any crime. Any violation of the right cannot be condoned, for the impartiality of the judge who sits on and hears a case, and decides it is an indispensable requisite of procedural due process.¹⁶ The Court has said:

This Court has repeatedly and consistently demanded 'the cold neutrality of an impartial judge' as the indispensable imperative of due process. To bolster that requirement, we have held that the judge must not only be impartial but must also appear to be impartial as an added assurance to the parties that his decision will be just. The litigants are entitled to no less than that. They should be sure that when their rights are violated they can go to a judge who shall give them justice. They must trust the judge, otherwise they will not go to him at all. They must believe in his sense of fairness, otherwise they will not seek his judgment. Without such confidence, there would be no point in invoking his action for the justice they expect.

Due process is intended to insure that confidence by requiring compliance with what Justice Frankfurter calls the rudiments of fair play. Fair play calls for equal justice. There cannot be equal justice where a suitor approaches a court already committed to the other party and with a judgment already made and waiting only to be formalized after the litigants shall have undergone the charade of a formal hearing. Judicial (and also extra-judicial) proceedings are not orchestrated plays in which the parties are supposed to make the motions and reach the denouement according to a prepared script. There is no writer to foreordain the ending. The judge will reach his conclusions only after all the evidence is in and all the arguments are filed, on the basis of the established facts and the pertinent law.¹⁷

The adoption of rules governing the disqualification of the judges from hearing and deciding cases should there be any cause that diminishes or negates their impartiality is a firm means of ensuring their impartiality as judges. In particular, Section 1, Rule 137 of the *Rules of Court* embodies the rule on self-disqualification by a sitting judge, viz.:

¹⁴ *Rollo*, p. 368.

¹⁵ CONSTITUTION, Article III, Sec. 1.

¹⁶ *Mateo, Jr. v. Villaluz*, G.R. Nos. L-34756-59, March 31, 1973, 50 SCRA 18, 23.

¹⁷ *Javier v. Commission on Election*, G.R. Nos. L-68379-81, September 22, 1986, 144 SCRA 194, 206-207.

Section 1. *Disqualification of judges.* – No judge or judicial officer shall sit in any case in which he, or his wife or child, is pecuniarily interested as heir, legatee, creditor or otherwise, or in which he is related to either party within the sixth degree of consanguinity or affinity, or to counsel within the fourth degree, computed according to the rules of the civil law, or in which he has been executor, administrator, guardian, trustee or counsel, or in which he has presided in any inferior court when his ruling or decision is the subject of review, without the written consent of all parties in interest, signed by them and entered upon the record.

A judge may, in the exercise of his sound discretion, disqualify himself from sitting in a case, for just or valid reasons other than those mentioned above.

Section 1 of Rule 137, *supra*, contemplates two kinds of self-disqualification. The first paragraph enumerates the instances when the judge is prohibited and disqualified from sitting on and deciding a case.¹⁸ The prohibition is compulsory simply because the judge is conclusively presumed to be incapable of impartiality.¹⁹ The second paragraph speaks of voluntary inhibition; whether or not the judge can sit in and try the case is left to his discretion, depending on the existence of just and valid reasons not included in the first paragraph, but in exercising the discretion, he must rely only on his conscience.²⁰

Reprising Section 1 of Rule 137 is Section 5, Canon 3 of the *New Code of Judicial Conduct for the Philippine Judiciary*,²¹ which pertinently demands the disqualification of a judge who has previously served as a lawyer of any of the parties, to wit:

Section 5. Judges shall disqualify themselves from participating in any proceedings in which they are unable to decide the matter impartially or in which it may appear to a reasonable observer that they are unable to decide the matter impartially. Such proceedings include, but are not limited to instances where:

x x x x

(d) The judge served as executor, administrator, guardian, trustee or lawyer in the case or matter in controversy, or a former associate of the judge served as counsel during their association, or the judge or lawyer was a material witness therein; x x x.

Given the foregoing, the CA's justifications directly contravened the letter and spirit of Section 1 of Rule 137, *supra*, and Section 5 of Canon 3 of the *New Code of Judicial Conduct for the Philippine Judiciary*, *supra*. The

¹⁸ *Pagoda Philippines, Inc. v. Universal Canning, Inc.*, G.R. No. 160966, October 11, 2005, 472 SCRA 355, 360-361.

¹⁹ *Garcia v. De la Peña*, A.M. No. MTJ-92-687, February 09, 1994, 229 SCRA 766, 774.

²⁰ *Pagoda Philippines, Inc. v. Universal Canning, Inc.*, *supra* note 18, at 361.

²¹ Effective June 1, 2004.

words *counsel* in the first paragraph of Section 1 of Rule 137, *supra*, and *lawyer* in Section 5 of Canon 3, *supra*, are understood in their general acceptation because their usage by the rules has not been made subject of any qualifications or distinctions. As such, the mere appearance of his name as the public prosecutor in the records of Criminal Case No. 17446 sufficed to disqualify Judge Elumba from sitting on and deciding the case. Having represented the State in the prosecution of the petitioner, he could not sincerely claim neutrality or impartiality as the trial judge who would continue to hear the case. Hence, he should have removed himself from being the trial judge in Criminal Case No. 17446.

To be clear, that Judge Elumba's prior participation as the public prosecutor was passive, or that he entered his appearance as the public prosecutor long after the Prosecution had rested its case against the petitioner did not really matter. The evil sought to be prevented by the rules on disqualification had no relation whatsoever with the judge's degree of participation in the case before becoming the judge. He must be reminded that the same compulsory disqualification that applied to him could similarly be demanded of the private prosecutor or the defense lawyer, if either of them should be appointed as the trial judge hearing the case. The purpose of this stricture is to ensure that the proceedings in court that would affect the life, liberty and property of the petitioner as the accused should be conducted and determined by a judge who was wholly free, disinterested, impartial and independent. As the Court has amplified in *Garcia v. De la Peña*:²²

The rule on compulsory disqualification of a judge to hear a case where, as in the instant case, the respondent judge is related to either party within the sixth degree of consanguinity or affinity rests on the salutary principle that no judge should preside in a case in which he is not wholly free, disinterested, impartial and independent. **A judge has both the duty of rendering a just decision and the duty of doing it in a manner completely free from suspicion as to its fairness and as to his integrity. The law conclusively presumes that a judge cannot objectively or impartially sit in such a case and, for that reason, prohibits him and strikes at his authority to hear and decide it, in the absence of written consent of all parties concerned.** The purpose is to preserve the people's faith and confidence in the courts of justice.²³ (Emphasis supplied)

Moreover, to say that Judge Elumba did not personally prosecute or supervise the prosecution of Criminal Case No. 17446 is to ignore that all criminal actions were prosecuted under the direction and control of the public prosecutor. That a private prosecutor had appeared in the case was of no consequence, for such private prosecutor still came under the direct control and supervision of the public prosecutor. In this connection, we note that it was only on May 1, 2002, or two years after Judge Elumba's

²² *Supra* note 19.

²³ *Id.* at 773-774.

appointment in the Judiciary, when Section 5,²⁴ Rule 110 of the *Rules of Court*, was amended by A.M. No. 02-2-07-SC in order to expressly authorize the intervention of the private prosecutor to prosecute a criminal case in case of heavy work load or lack of the public prosecutor, provided that the private prosecutor was authorized in writing for the purpose by the Chief of the Prosecution Office or the Regional State Prosecutor. Even so, the records do not indicate that the private prosecutor who appeared in Criminal Case No. 17446 had been duly authorized in writing by the Chief of the Prosecution Office or the Regional State Prosecutor to prosecute the case by himself.

We have also observed that the CA appeared too eager to sustain the refusal of Judge Elumba to disqualify himself as the trial judge. Such overeagerness was uncharacteristic of the CA as an appellate court in a criminal case whose unmistakable duty was to thoroughly sift and scrutinize the records of the trial court to search for errors that would reverse or modify the judgment in favor of the accused. Had it done its duty, it would have quickly noticed a hard indication existing in the trial records of Criminal Case No. 17446 exposing Judge Elumba to have actually taken an active participation in the trial. The indication was in the form of the *Motion to Present Rebuttal Evidence* that then Public Prosecutor Elumba had filed on January 25, 2000, the text of which is reproduced herein:

MOTION TO PRESENT REBUTTAL EVIDENCE

x x x x

That the records of the above-entitled case would show that the accused rested his case on October 29, 1999;

That, however, **after going over the records of the case, the prosecution feels that there is a need to present rebuttal evidence.**
(Emphasis supplied)

WHEREFORE, PREMISES CONSIDERED, it is most respectfully prayed of this Honorable Court that the prosecution be allowed to present rebuttal evidence to refute the evidence presented by the accused.

(Sgd.)
FERNANDO R. ELUMBA
Trial Prosecutor²⁵

²⁴ Section 5. *Who must prosecute criminal action.* - All criminal actions either commenced by complaint or by information shall be prosecuted under the direction and control of a public prosecutor. In case of heavy work schedule of the public prosecutor or in the event of lack of public prosecutors, the private prosecutor may be authorized in writing by the Chief of the Prosecution Office or the Regional State Prosecutor to prosecute the case subject to the approval of the court. Once so authorized to prosecute the criminal action, the private prosecutor shall continue to prosecute the case up to end of the trial even in the absence of a public prosecutor, unless the authority is revoked or otherwise withdrawn.

²⁵ Records, p. 185.

The text of the motion disclosed that then Public Prosecutor Elumba had come to the conclusion that “there is a need to present rebuttal evidence” after his having gone over the records of the case. Clearly, he had formed an opinion that was absolutely adverse to the interest of the petitioner.

The CA’s reliance on *Lao v. Court of Appeals*²⁶ was inappropriate. In *Lao*, the Court opined and declared that the petition to disqualify the trial judge must be filed prior to the rendition of judgment.²⁷ But the supposed disqualification of the judge in *Lao* was premised on bias as *perceived* by a party.²⁸ We should point out that perceived bias was a ground covered by the second paragraph of Section 1 of Rule 37, *supra*, and would justify only the *voluntary inhibition* of the judge. In contrast, Judge Elumba’s situation rested on a ground for *mandatory disqualification* because it emanated from the conclusive presumption of his bias.²⁹ Such a ground should have been forthwith acknowledged upon Judge Elumba’s assumption of the judgeship in Branch 42, or, at the latest, upon the ground being raised to his attention, regardless of the stage of the case.

Under the circumstances, Judge Elumba, despite his protestations to the contrary, could not be expected to render impartial, independent and objective judgment on the criminal case of the petitioner. His non-disqualification resulted in the denial of the petitioner’s right to due process as the accused. To restore the right to the petitioner, the proceedings held against him before Judge Elumba and his ensuing conviction have to be nullified and set aside, and Criminal Case No. 17446 should be remanded to the RTC for a partial new trial to remove any of the prejudicial consequences of the violation of the right to due process. The case shall be raffled to a Judge who is not otherwise disqualified like Judge Elumba under Section 1, Rule 137 of the *Rules of Court*. For, as we said in *Pimentel v. Salanga*:³⁰

This is not to say that all avenues of relief are closed to a party properly aggrieved. If a litigant is denied a fair and impartial trial, induced by the judge’s bias or prejudice, we will not hesitate to order a new trial, if necessary, in the interest of justice. Such was the view taken by this Court in *Dais vs. Torres*, 57 Phil. 897, 902-904. In that case, we found that the filing of charges by a party against a judge generated ‘resentment’ or the judge’s part that led to his “bias or prejudice, which is reflected in the decision.” We there discoursed on the ‘principle of impartiality, disinterestedness, and fairness on the part of the judge’ which ‘is as old as the history of courts.’ We followed this with the pronouncement that, upon the circumstances obtaining, we did not feel assured that the trial judge’s

²⁶ G.R. No. 109205, April 18, 1997, 271 SCRA 477.

²⁷ *Id.* at 487.

²⁸ *Id.* at 486.

²⁹ *Garcia v. De la Peña*, *supra* note 19.

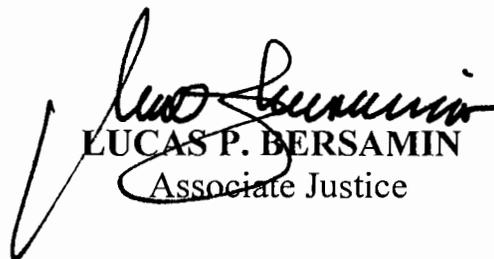
³⁰ G.R. No. L-27934, September 18, 1967, 21 SCRA 160.

finding were not influenced by bias or prejudice. Accordingly, we set aside the judgment and directed a new trial.³¹

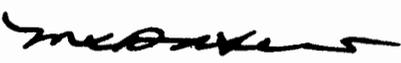
WHEREFORE, the Court **ANNULS** and **SETS ASIDE** the decision promulgated on May 27, 2005 by the Court of Appeals and the judgment rendered on August 22, 2001 by the Regional Trial Court; **REMANDS** Criminal Case No. 17446 entitled *People of the Philippines v. Nelson Lai y Bilbao* to the Regional Trial Court in Bacolod City with instructions to the Executive Judge of the Regional Trial Court to assign it to any Regional Trial Judge not disqualified under Section 1 of Rule 137 of the *Rules of Court*; and **INSTRUCTS** the new trial judge to resume the trial in Criminal Case No. 17446 starting from the stage just prior to the assumption of Judge Fernando R. Elumba as the trial judge, and to hear and decide Criminal Case No. 17446 with reasonable dispatch.

No pronouncement on costs of suit.

SO ORDERED.


LUCAS P. BERSAMIN
Associate Justice

WE CONCUR:


MARIA LOURDES P. A. SERENO
Chief Justice


TERESITA J. LEONARDO-DE CASTRO
Associate Justice


JOSE PORTUGAL PEREZ
Associate Justice


ESTELA M. PERLAS-BERNABE
Associate Justice

³¹ Id. at 166.

CERTIFICATION

Pursuant to Section 13, Article VIII of the Constitution, I certify that the conclusions in the above Decision had been reached in consultation before the case was assigned to the writer of the opinion of the Court's Division.



MARIA LOURDES P. A. SERENO
Chief Justice