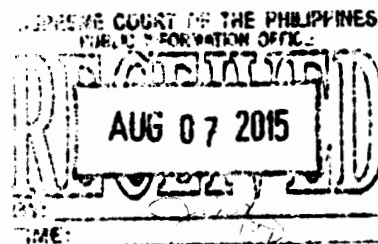




Republic of the Philippines  
Supreme Court  
Manila



FIRST DIVISION

ALVIN COMERCIANTE y G.R. No. 205926  
GONZALES,

Petitioner, Present:

- versus -

PERALTA, \* J.  
BERSAMIN, J., Acting Chairperson, \*\*  
PEREZ  
PERLAS-BERNABE, and  
LEONEN, \*\*\* JJ.

PEOPLE OF THE  
PHILIPPINES,

Respondent. Promulgated:

JUL 22 2015

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DECISION

PERLAS-BERNABE, J.:

Assailed in this petition for review on *certiorari*<sup>1</sup> are the Decision<sup>2</sup> dated October 20, 2011 and the Resolution<sup>3</sup> dated February 19, 2013 of the Court of Appeals (CA) in CA-G.R. CR No. 32813, which affirmed *in toto* the Judgment<sup>4</sup> dated July 28, 2009 of the Regional Trial Court of Mandaluyong City, Branch 213 (RTC) in Crim. Case No. MC-03-7242-D convicting petitioner Alvin Comerciante y Gonzales (Comerciante) of the crime of illegal Possession of Dangerous Drugs defined and penalized under Section 11, Article II of Republic Act No. (RA) 9165,<sup>5</sup> otherwise known as the Comprehensive Dangerous Drugs Act of 2002.

\* Designated Acting Member per Special Order No. 2103 dated July 13, 2015.

\*\* Per Special Order No. 2102 dated July 13, 2015.

\*\*\* Designated Acting Member per Special Order No. 2108 dated July 13, 2015.

<sup>1</sup> *Rollo*, pp. 9-30.

<sup>2</sup> *Id.* at 34-49. Penned by Associate Justice Noel G. Tijam with Associate Justices Ricardo R. Rosario and Leoncia R. Dimagiba concurring.

<sup>3</sup> *Id.* at 69-72.

<sup>4</sup> Promulgated on September 4, 2009 and penned by Judge Carlos A. Valenzuela; *id.* at 81-94.

<sup>5</sup> Entitled "AN ACT INSTITUTING THE COMPREHENSIVE DANGEROUS DRUGS ACT OF 2002, REPEALING REPUBLIC ACT NO. 6425, OTHERWISE KNOWN AS THE DANGEROUS DRUGS ACT OF 1972, AS AMENDED, PROVIDING FUNDS THEREFOR, AND FOR OTHER PURPOSES" (approved June 7, 2002).

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### The Facts

On July 31, 2003, an Information was filed before the RTC charging Comerciante of violation of Section 11, Article II of RA 9165, to wit:

That on or about the 30<sup>th</sup> day of July 2003, in the City of Mandaluyong, Philippines, a place within the jurisdiction of this Honorable Court, the above-named accused, not having been lawfully authorized to possess any dangerous drugs, did then and there willfully, unlawfully and feloniously and knowingly have in his possession, custody and control Two (2) heat-sealed transparent plastic sachet (*sic*) each containing 0.15 gram (*sic*) and 0.28 gram (*sic*) of white crystalline substance with a total of 0.43 grams which was found positive to the test for Methamphetamine Hydrochloride commonly known as “shabu”, a dangerous drug.

CONTRARY TO LAW.<sup>6</sup>

According to the prosecution, at around 10 o'clock in the evening of July 30, 2003, Agent Eduardo Radan (Agent Radan) of the NARCOTICS group and PO3 Bienvy Calag II (PO3 Calag) were aboard a motorcycle, patrolling the area while on their way to visit a friend at Private Road, Barangay Hulo, Mandaluyong City. Cruising at a speed of 30 kilometers per hour along Private Road, they spotted, at a distance of about 10 meters, two (2) men – later identified as Comerciante and a certain Erick Dasilla<sup>7</sup> (Dasilla) – standing and showing “improper and unpleasant movements,” with one of them handing plastic sachets to the other. Thinking that the sachets may contain *shabu*, they immediately stopped and approached Comerciante and Dasilla. At a distance of around five (5) meters, PO3 Calag introduced himself as a police officer, arrested Comerciante and Dasilla, and confiscated two (2) plastic sachets containing white crystalline substance from them. A laboratory examination later confirmed that said sachets contained methamphetamine hydrochloride or *shabu*.<sup>8</sup>

After the prosecution rested its case, Dasilla filed a demurrer to evidence, which was granted by the RTC, thus his acquittal. However, due to Comerciante's failure to file his own demurrer to evidence, the RTC considered his right to do so waived and ordered him to present his evidence.<sup>9</sup>

In his defense, Comerciante averred that PO3 Calag was looking for a certain “Barok”, who was a notorious drug pusher in the area, when suddenly, he and Dasilla, who were just standing in front of a jeepney along

<sup>6</sup> *Rollo*, p. 78.

<sup>7</sup> Varies throughout the records. The variations are “Erick Dasillo” and “Erick Dacillo.” See *rollo*, pp. 13, 84, 85, 86, 129, and 130.

<sup>8</sup> *Id.* at 36-37.

<sup>9</sup> *Id.* at 37.

Private Road, were arrested and taken to a police station. There, the police officers claimed to have confiscated illegal drugs from them and were asked money in exchange for their release. When they failed to accede to the demand, they were brought to another police station to undergo inquest proceedings, and thereafter, were charged with illegal possession of dangerous drugs.<sup>10</sup>

### The RTC Ruling

In a Judgment<sup>11</sup> dated July 28, 2009, the RTC found Comerciante guilty beyond reasonable doubt of violation of Section 11, Article II of RA 9165, and accordingly, sentenced him to suffer the penalty of imprisonment for twelve (12) years and one (1) day to twenty (20) years, and ordered him to pay a fine in the amount of ₱300,000.00.<sup>12</sup>

The RTC found that PO3 Calag conducted a valid warrantless arrest on Comerciante, which yielded two (2) plastic sachets containing *shabu*. In this relation, the RTC opined that there was probable cause to justify the warrantless arrest, considering that PO3 Calag saw, in plain view, that Comerciante was carrying the said sachets when he decided to approach and apprehend the latter. Further, the RTC found that absent any proof of intent that PO3 Calag was impelled by any malicious motive, he must be presumed to have properly performed his duty when he arrested Comerciante.<sup>13</sup>

Aggrieved, Comerciante appealed to the CA.

### The CA Ruling

In a Decision<sup>14</sup> dated October 20, 2011 the CA affirmed Comerciante's conviction. It held that PO3 Calag had probable cause to effect the warrantless arrest of Comerciante, given that the latter was committing a crime *in flagrante delicto*; and that he personally saw the latter exchanging plastic sachets with Dasilla. According to the CA, this was enough to draw a reasonable suspicion that those sachets might be *shabu*, and thus, PO3 Calag had every reason to inquire on the matter right then and there.<sup>15</sup>

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<sup>10</sup> Id. at 38. See also id. at 85-87.

<sup>11</sup> Id. at 81-94.

<sup>12</sup> Id. at 93.

<sup>13</sup> Id. at 87-93.

<sup>14</sup> Id. at 34-49.

<sup>15</sup> Id. at 40-48.

Dissatisfied, Comerciante moved for reconsideration<sup>16</sup> which was, however, denied in a Resolution<sup>17</sup> dated February 19, 2013. Hence, this petition.<sup>18</sup>

### The Issue Before the Court

The core issue for the Court's resolution is whether or not the CA correctly affirmed Comerciante's conviction for violation of Section 11, Article II of RA 9165.

In his petition, Comerciante essentially contends that PO3 Carag did not effect a valid warrantless arrest on him. Consequently, the evidence gathered as a result of such illegal warrantless arrest, *i.e.*, the plastic sachets containing *shabu* should be rendered inadmissible, necessarily resulting in his acquittal.<sup>19</sup>

On the other hand, the Office of the Solicitor General, on behalf of respondent People of the Philippines, maintains that Comerciante's warrantless arrest was validly made pursuant to the "stop and frisk" rule, especially considering that he was caught *in flagrante delicto* in possession of illegal drugs.<sup>20</sup>

### The Court's Ruling

The petition is meritorious.

Section 2, Article III<sup>21</sup> of the Constitution mandates that a search and seizure must be carried out through or on the strength of a judicial warrant predicated upon the existence of probable cause; in the absence of such warrant, such search and seizure becomes, as a general rule, "unreasonable" within the meaning of said constitutional provision. To protect people from unreasonable searches and seizures, Section 3 (2), Article III<sup>22</sup> of the

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<sup>16</sup> See Urgent Motion for Reconsideration dated November 10, 2011; *id.* at 50-67.

<sup>17</sup> *Id.* at 69-72.

<sup>18</sup> *Id.* at 9-32.

<sup>19</sup> See Petition; *id.* at 16-29.

<sup>20</sup> See Comment; *id.* at 133-137.

<sup>21</sup> Section 2, Article III of the Constitution states:

Section 2. The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures of whatever nature and for any purpose shall be inviolable, and no search warrant or 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, and particularly describing the place to be searched and the persons or things to be seized.

<sup>22</sup> Section 3 (2), Article III of the Constitution states:

Section 3. x x x x

Constitution provides an exclusionary rule which instructs that evidence obtained and confiscated on the occasion of such unreasonable searches and seizures are deemed tainted and should be excluded for being the proverbial fruit of a poisonous tree. In other words, evidence obtained from unreasonable searches and seizures shall be inadmissible in evidence for any purpose in any proceeding.<sup>23</sup>

The exclusionary rule is not, however, an absolute and rigid proscription. One of the recognized exceptions established by jurisprudence is a search incident to a lawful arrest.<sup>24</sup> In this instance, the law requires that there first be a lawful arrest before a search can be made – the process cannot be reversed.<sup>25</sup> Section 5, Rule 113 of the Revised Rules on Criminal Procedure lays down the rules on lawful warrantless arrests, as follows:

SEC. 5. *Arrest without warrant; when lawful.* – A peace officer or a private person may, without a warrant, arrest a person:

(a) When, in his presence, the person to be arrested has committed, is actually committing, or is attempting to commit an offense;

(b) When an offense has just been committed and he has probable cause to believe based on personal knowledge of facts or circumstances that the person to be arrested has committed it; and

(c) When the person to be arrested is a prisoner who has escaped from a penal establishment or place where he is serving final judgment or is temporarily confined while his case is pending, or has escaped while being transferred from one confinement to another.

In cases falling under paragraphs (a) and (b) above, the person arrested without a warrant shall be forthwith delivered to the nearest police station or jail and shall be proceeded against in accordance with Section 7 of Rule 112.

The aforementioned provision provides three (3) instances when a warrantless arrest may be lawfully effected: (a) arrest of a suspect *in flagrante delicto*; (b) arrest of a suspect where, based on personal knowledge of the arresting officer, there is probable cause that said suspect was the perpetrator of a crime which had just been committed; (c) arrest of a prisoner who has escaped from custody serving final judgment or temporarily confined during the pendency of his case or has escaped while being transferred from one confinement to another.<sup>26</sup>

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(2) Any evidence obtained in violation of this or the preceding section shall be inadmissible for any purpose in any proceeding.

<sup>23</sup> See *Ambre v. People*, 692 Phil. 681, 693 (2012).

<sup>24</sup> *Id.*, citing *People v. Delos Reyes*, 672 Phil. 77, 108-109 (2011).

<sup>25</sup> *Malacat v. CA*, 347 Phil. 462, 480 (1997); citations omitted.

<sup>26</sup> See *id.* at 479.

For a warrantless arrest under Section 5 (a) to operate, two (2) elements must concur, namely: (a) the person to be arrested must execute an overt act indicating that he has just committed, is actually committing, or is attempting to commit a crime; and (b) such overt act is done in the presence or within the view of the arresting officer.<sup>27</sup> On the other hand, Section 5 (b) requires for its application that at the time of the arrest, an offense had in fact just been committed and the arresting officer had personal knowledge of facts indicating that the accused had committed it.<sup>28</sup>

In both instances, the officer's personal knowledge of the fact of the commission of an offense is absolutely required. Under Section 5 (a), the officer himself witnesses the crime; while in Section 5 (b), he knows for a fact that a crime has just been committed.<sup>29</sup>

A judicious review of the factual milieu of the instant case reveals that there could have been no lawful warrantless arrest made on Comerciante. PO3 Calag himself admitted that he was aboard a motorcycle cruising at a speed of around 30 kilometers per hour when he saw Comerciante and Dasilla standing around and showing "improper and unpleasant movements," with one of them handing plastic sachets to the other. On the basis of the foregoing, he decided to effect an arrest. PO3 Calag's testimony on direct examination is revelatory:

Pros. Silao:

Q: Now on July 30, 2003 around 10:00 o'clock in the evening, kindly tell the court where were you?

A: We were then conducting our patrol on a motorbike ma'am.

x x x x

Q: And who were with you while you were patrolling?

A: Eduardo Radan, Ma'am.

Q: And who is this Eduardo Radan?

A: He is an agent of the Narcotics Group, ma'am.

Q: While you were along Private Road, Hulo, Mandaluyong City, what unusual incident that happened if any?

A: We spotted somebody who was then as if handing a plastic sachet to someone.

x x x x

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<sup>27</sup> *People v. Villareal*, G.R. No. 201363, March 18, 2013, 693 SCRA 549, 556, citing *Valdez v. People*, 563 Phil. 934, 947 (2007).

<sup>28</sup> *Id.* at 556, citing *People v. Cuizon*, 326 Phil. 345 (1996).

<sup>29</sup> *Id.* at 557.

**Q: Now how far were you when you saw this incident from these two male persons you already identified?**

**A: About ten (10) meters away ma'am.**

Q: What were their positions in relation to you when you saw them in that particular act?

A: They were quite facing me then.

**Q: What was the speed of your motorcycle when you were traversing this Private Road, Hulo, Mandaluyong City?**

**A: About thirty (30) kilometers per hour, ma'am.**

Q: And who was driving the motorcycle?

A: Eduardo Radan, ma'am.

Q: When you spotted them as if handing something to each other, what did you do?

A: We stopped ma'am.

Q: And how far were you from them when you stopped, more or less?

A: We passed by them for a short distance before we stopped ma'am.

Q: And after you passed by them and you said you stopped, what was the reaction of these two male persons?

A: They were surprised, ma'am.

x x x x

**Q: And what was their reaction when you said you introduced yourself as police officer?**

**A: They were surprised.**

**Q: When you say "nabigla" what was their reaction that made you say that they were surprised?**

**A: They were stunned.**

**Q: After they were stunned, what did you do next, police officer?**

**A: I arrested them, ma'am. I invited them.**

Q: What did you say to them? How did you invite them? In short, *napakasimple lang ng tanong ko sa yo eh*. Did you say anything?

Court:

Mr. Witness, stop making unnecessary movements, just listen.

Pros. Silao:

Are you fit to testify? *May sakit ka ba o wala?*

Witness:

*Wala po.*

Pros. Silao:

*Eh, bakit di ka makapagsalita?*

Court:

You keep touching your eyes. Just relax. Answer the question, *ano sinabi mo sa kanila?*

Pros. Silao:

Are you fit to testify? *Wala ka bang sakit?*

Witness:

*Wala po.*

x x x x

Q: From what portion of his body, I am referring to Alvin Comerciante did you recover the plastic sachet?

A: From his hand ma'am.

Q: Left or right hand?

**Pros. Silao:**

**You cannot recall? *Hindi mo matandaan. Sabihin mo kung hindi mo matandaan, no problem. Kaliwa, kanan or you cannot recall?***<sup>30</sup> (Emphases and underscoring supplied)

On the basis of such testimony, the Court finds it highly implausible that PO3 Calag, even assuming that he has perfect vision, would be able to identify with reasonable accuracy – especially from a distance of around 10 meters, and while aboard a motorcycle cruising at a speed of 30 kilometers per hour – miniscule amounts of white crystalline substance inside two (2) very small plastic sachets held by Comerciante. The Court also notes that no other overt act could be properly attributed to Comerciante as to rouse suspicion in the mind of PO3 Calag that the former had just committed, was committing, or was about to commit a crime. Verily, the acts of standing around with a companion and handing over something to the latter cannot in any way be considered criminal acts. In fact, even if Comerciante and his companion were showing “improper and unpleasant movements” as put by

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<sup>30</sup> *Rollo*, pp. 17-20.

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PO3 Calag, the same would not have been sufficient in order to effect a lawful warrantless arrest under Section 5 (a), Rule 113 of the Revised Rules on Criminal Procedure.<sup>31</sup> That his reasonable suspicion bolstered by (a) the fact that he had seen his fellow officers arrest persons in possession of *shabu*; and (b) his trainings and seminars on illegal drugs when he was still assigned in the province are insufficient to create a conclusion that what he purportedly saw in Comerciante was indeed *shabu*.<sup>32</sup>

Neither has the prosecution established that the rigorous conditions set forth in Section 5 (b), Rule 113, have been complied with, *i.e.*, that an offense had in fact just been committed and the arresting officer had personal knowledge of facts indicating that the accused had committed it. As already discussed, the factual backdrop of the instant case failed to show that PO3 Calag had personal knowledge that a crime had been indisputably committed by Comerciante. Verily, it is not enough that the arresting officer had reasonable ground to believe that the accused had just committed a crime; a crime must, in fact, have been committed first, which does not obtain in this case.<sup>33</sup>

In this relation, the Court finds respondent's assertion that there was a valid "stop and frisk" search made on Comerciante untenable. In *People v. Cogaed*,<sup>34</sup> the Court had an opportunity to exhaustively explain "stop and frisk" searches:

"Stop and frisk" searches (sometimes referred to as *Terry* searches) are necessary for law enforcement. That is, law enforcers should be given the legal arsenal to prevent the commission of offenses. However, this should be balanced with the need to protect the privacy of citizens in accordance with Article III, Section 2 of the Constitution.

**The balance lies in the concept of "suspiciousness" present where the police officer finds himself or herself in.** This may be undoubtedly based on the experience of the police officer. Experienced police officers have personal experience dealing with criminals and criminal behavior. Hence, they should have the ability to discern – based on facts that they themselves observe – whether an individual is acting in a suspicious manner. **Clearly, a basic criterion would be that the police officer, with his or her personal knowledge, must observe the facts leading to the suspicion of an illicit act.**

x x x x

Normally, "stop and frisk" searches do not give the law enforcer an opportunity to confer with a judge to determine probable cause. In *Posadas v. Court of Appeals*, one of the earliest cases adopting the "stop

<sup>31</sup> See *People v. Villareal*, supra note, 27. See also *Malacat v. CA*, supra note, 25, where the Court invalidated a warrantless arrest made to the accused who, according to police officers, "were acting suspiciously with '[t]heir eyes . . . moving very fast.'"

<sup>32</sup> See *id.*

<sup>33</sup> See *id.* at 558-559.

<sup>34</sup> See G.R. No. 200334, July 30, 2014.

and frisk” doctrine in Philippine jurisprudence, this court *approximated* the suspicious circumstances as probable cause:

The *probable cause* is that when the petitioner acted suspiciously and attempted to flee with the buri bag there was a probable cause that he was concealing something illegal in the bag and it was the right and duty of the police officers to inspect the same.

For warrantless searches, probable cause was defined as “a reasonable ground of suspicion supported by circumstances sufficiently strong in themselves to warrant a cautious man to believe that the person accused is guilty of the offense with which he is charged.

*Malacat v. Court of Appeals* clarifies the requirement further. **It does not have to be probable cause, but it cannot be mere suspicion. It has to be a genuine reason to serve the purposes of the “stop and frisk” exception:**

**Other notable points of *Terry* are that while probable cause is not required to conduct a “stop and frisk,” it nevertheless holds that mere suspicion or a hunch will not validate a “stop and frisk.” A genuine reason must exist, in light of the police officer’s experience and surrounding conditions, to warrant the belief that the person detained has weapons concealed about him.**

In his dissent for *Esquillo v. People*, Justice Bersamin reminds us that **police officers must not rely on a single suspicious circumstance. There should be “presence of more than one seemingly innocent activity, which, taken together, warranted a reasonable inference of criminal activity.”** The Constitution prohibits “unreasonable searches and seizures.” Certainly, reliance on only one suspicious circumstance or none at all will not result in a reasonable search.<sup>35</sup> (Emphases and underscoring supplied)

In this case, the Court reiterates that Comerciante’s acts of standing around with a companion and handing over something to the latter do not constitute criminal acts. These circumstances are not enough to create a reasonable inference of criminal activity which would constitute a “genuine reason” for PO3 Calag to conduct a “stop and frisk” search on the former. In this light, the “stop and frisk” search made on Comerciante should be deemed unlawful.

In sum, there was neither a valid warrantless arrest nor a valid “stop and frisk” search made on Comerciante. As such, the *shabu* purportedly seized from him is rendered inadmissible in evidence for being the proverbial fruit of the poisonous tree. Since the confiscated *shabu* is the very *corpus delicti* of the crime charged, Comerciante must necessarily be acquitted and exonerated from all criminal liability.


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<sup>35</sup> See *id.*; citations omitted.

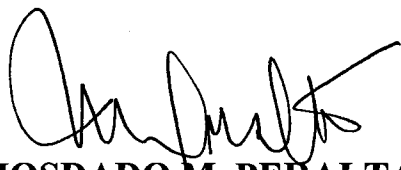
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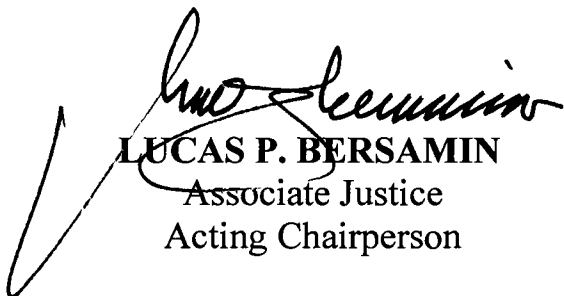
**WHEREFORE**, the petition is **GRANTED**. Accordingly, the Decision dated October 20, 2011 and the Resolution dated February 19, 2013 of the Court of Appeals in CA-G.R. CR No. 32813 are hereby **REVERSED** and **SET ASIDE**. Accordingly, petitioner Alvin Comerciante y Gonzales is hereby **ACQUITTED** of the crime of violating Section 11, Article II of Republic Act No. 9165. The Director of the Bureau of Corrections is ordered to cause his immediate release, unless he is being lawfully held for any other reason.

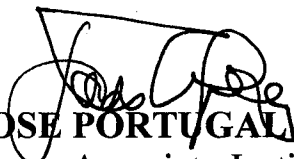
**SO ORDERED.**

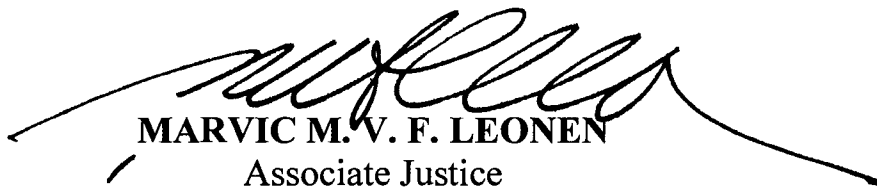
  
**ESTELA M. PERLAS-BERNABE**  
 Associate Justice

**WE CONCUR:**

  
**DIOSDADO M. PERALTA**  
 Associate Justice

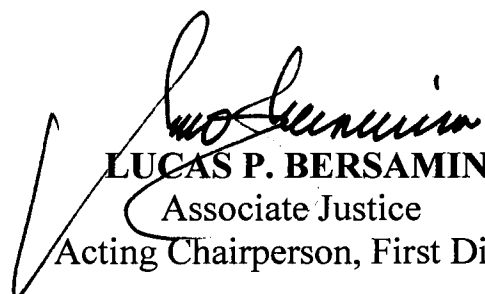
  
**LUCAS P. BERSAMIN**  
 Associate Justice  
 Acting Chairperson

  
**JOSE PORTUGAL PEREZ**  
 Associate Justice

  
**MARVIC M. V. F. LEONEN**  
 Associate Justice

**ATTESTATION**

I attest 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.

  
**LUCAS P. BERSAMIN**  
 Associate Justice  
 Acting Chairperson, First Division

**CERTIFICATION**

Pursuant to Section 13, Article VIII of the Constitution, and the Acting Division Chairperson's Attestation, 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.



**ANTONIO T. CARPIO**  
Acting Chief Justice