



Republic of the Philippines
Supreme Court
 Manila

SECOND DIVISION

ARLENE HOMOL y G.R. No. 191039
ROMOROSA,
 Petitioner, Present:

- versus -

LEONEN, J., *Chairperson,*
 LAZARO-JAVIER,
 LOPEZ, M.,
 LOPEZ, J., and
 KHO, JR., *JJ.*

PEOPLE OF THE Promulgated:
PHILIPPINES,
 Respondent. **AUG 22 2022**

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D E C I S I O N

M. LOPEZ, J.:

Grave abuse of confidence aggravates and qualifies the crime of theft. When the gravity of exploitation of trust is not proven, the crime is only simple theft and the abuse of confidence shall be treated as a generic aggravating circumstance. The Court applies this rule in resolving this Petition for Review on *Certiorari*¹ assailing the Court of Appeals-Cebu City's Decision² dated June 26, 2008 and Resolution³ dated December 16, 2009 in CA-G.R. CEB CR No. 00080.

¹ *Rollo*, pp. 33-41.

² *Id.* at 11-22. Penned by Associate Justice Franchito N. Diamante with the Concurrence of Associate Justices Priscilla Baltazar-Padilla (now a retired Member of the Court) and Florito S. Macalino.

³ *Id.* at 28-29. Penned by Executive Justice Franchito N. Diamante (Chairperson) with the concurrence of Associate Justices Florito S. Macalino and Edgardo L. Delos Santos (retired Associate Justice of the Court).

ANTECEDENTS

Dr. Jelpha Robillos y Jimenez (Dr. Robillos) hired Arlene Homol y Romorosa (Arlene) as a clinic secretary. Also, Dr. Robillos tasked Arlene to collect and remit installment payments from customers who purchased jewelry. On March 2 and 8, 2002, Arlene received a total of ₱1,000.00 from Elena Quilangtang (Elena) for the gold bracelet that she bought. However, Arlene did not give the money to Dr. Robillos. On March 14, 2002, Arlene resigned from work. The following day, Dr. Robillos reminded Elena of her unpaid installments. Elena replied that she already paid to Arlene. Aggrieved, Dr. Robillos filed a criminal complaint against Arlene. Finding probable cause, the public prosecutor charged Arlene with qualified theft before the Regional Trial Court (RTC) docketed as Criminal Case No. 11513,⁴ to wit:

The undersigned, City Prosecutor I, City of Tagbilaran, Philippines, hereby accuses ARLENE R. HOMOL of the crime of Qualified Theft, committed as follows:

That, on or about March 2, to March 8, 2002, in the City of Tagbilaran, Philippines, and within the jurisdiction of this Honorable Court, the above-named accused, who is a secretary/collector of Dra. Jelpha Robillos, **with intent of gain and with grave abuse of confidence** which facilitated the commission of the offense and **without the consent** of said Dr. Jelpha Robillos, the owner thereof and also her employer, did then and there **willfully, unlawfully and feloniously take, steal and carry away ONE THOUSAND PESOS ([₱]1,000.00)**, Philippine Currency, as partial payment from a customer **which she ought to remit** to the said owner/employer being a collector, **to the damage and prejudice** of said Dra. Jelpha Robillos, in the amount to be proved during the trial of the case.

Acts committed contrary to the provisions of Article[s] 308 and 310 of the Revised Penal Code.⁵ (Emphases supplied)

Arlene pleaded not guilty. At the trial, Arlene did not deny receipt of ₱1,000.00 but insisted that she remitted it to Dr. Robillos.⁶ On July 26, 2004, the RTC convicted Arlene of *estafa* involving unfaithfulness or abuse of confidence under Article 315 paragraph 1(b) of the Revised Penal Code (RPC). The RTC held that Arlene misappropriated the payment and violated the trust of Dr. Robillos and Elena,⁷ thus:

WHEREFORE, premises considered, the Court finds accused Arlene Homol y Romorosa guilty beyond reasonable doubt of the crime of Estafa under subdivision No. 1, paragraph (b) of Article 315 of the [RPC] and penalized under the 3rd paragraph of the same article and, applying the Indeterminate Sentence Law, the Court hereby sentences the said accused to suffer the penalty of imprisonment ranging from Three (3) Months and Eleven (11) Days, as the minimum, to One (1) Year and (1) Day, as the maximum, and to indemnify [Dr.] Jelpha J. Robillos the sum of ₱1,000.00,

⁴ *Id.* at 12; and Records, pp. 8–10.

⁵ Records, p. 122.

⁶ *Id.* at 122–123.

⁷ *Id.* at 129.

the amount misappropriated by the accused.

SO ORDERED.⁸ (Emphases supplied)

Arlene elevated the case to the CA docketed as CA-G.R. CEB CR No. 00080. Arlene argued that the RTC erroneously convicted her of *estafa* when the charge was for qualified theft. Moreover, the Information is fatally defective for failure to allege juridical possession which is an element of *estafa*.⁹ On June 26, 2008, the CA affirmed the RTC's findings that all the elements of *estafa* involving unfaithfulness or abuse of confidence were alleged and proven. The CA ruled that Arlene was guilty of *estafa* because she was in possession of the money when she misappropriated it. The CA explained that what distinguishes theft from *estafa* is the possession of the thing. In theft, it is presumed that the personal property is in the possession of another, unlike in *estafa*, where the possession of the thing is already in the hands of the offender.¹⁰

Arlene sought reconsideration but was denied.¹¹

Hence, this recourse. Arlene did not dispute the facts but maintains that her right to be informed of the nature and cause of the accusation was violated. The charge was for qualified theft which translates only to material possession. The Information did not allege juridical possession necessary for *estafa*. At any rate, a mere employee does not have juridical possession over the amount supposedly misappropriated and cannot be held liable for *estafa*.¹²

RULING

The Petition is partly meritorious.

It is fundamental that every element of the crime must be set out in the Information¹³ to avoid surprise on the part of the accused and to afford [them] the opportunity to suitably prepare [their] defense.¹⁴ No matter how conclusive and convincing the evidence of guilt may be, an accused cannot be convicted of any offense unless it is charged in the Information on which [they are] tried or is necessarily included therein.¹⁵ More importantly, “[the allegations of facts constituting the offense charged are substantial matters and an accused’s right to question [their] conviction based on facts not alleged in the Information cannot be waived.”¹⁶ Here, the charge against Arlene is designated in the Information as qualified theft. Yet, the CA and the RTC convicted Arlene of *estafa* involving unfaithfulness or abuse of confidence.

⁸ *Id.* at 129.

⁹ *Rollo*, pp. 20–21.

¹⁰ *Id.* at 11–22.

¹¹ *Id.* at 28–29.

¹² *Id.* at 33–41.

¹³ Rules of Court, Rule 110, Section 8.

¹⁴ *Pielago v. People*, 706 Phil. 460, 469 (2013) [Per *J. Reyes*, First Division].

¹⁵ Rules of Court, Rule 120, Section 4.

¹⁶ *Andaya v. People*, 526 Phil. 480, 497 (2006) [Per *J. Ynarez-Santiago*, First Division].

Thus, the Court deems it necessary to discuss first the distinctions between these two crimes.

Theft is distinguished from estafa by the manner in which the offender in each case acquires possession of the property.

“Theft is committed by any person who, with intent to gain but without violence against[,] or intimidation of persons nor force upon things, shall take personal property of another without the latter’s consent.”¹⁷ If committed with grave abuse of confidence, the crime of theft becomes qualified.¹⁸ The crime of qualified theft under Article 308 in relation to Article 310 of the RPC requires the confluence of the following elements, to wit:

1. There was a taking of personal property;
2. The said property belongs to another;
3. The taking was done without the consent of the owner;
4. The taking was done with intent to gain;
5. The taking was accomplished without violence or intimidation against person, or force upon things; and
6. The taking was done under any of the circumstances enumerated in Article 310 of the RPC, *i.e.*, with grave abuse of confidence.¹⁹

On the other hand, the requirements to prove *estafa* involving unfaithfulness or abuse of confidence under Article 315, paragraph 1(b) of the RPC are the following:

- (a) that money, goods or other personal property is received by the offender in trust, or on commission, or for administration, or under any other obligation involving the duty to make delivery of, or to return the same;
- (b) that there be misappropriation or conversion of such money or property by the offender or denial on his part of such receipt;
- (c) that such misappropriation or conversion or denial is to the prejudice of another; and

¹⁷ REVISED PENAL CODE, Article 308, paragraph 1.

¹⁸ *Id.*, Article 310.

¹⁹ *People v. Bago*, 386 Phil. 310, 334–335 (2000) [Per J. Puno, First Division].

- (d) that there is a demand made by the offended party on the offender.²⁰
(Citation omitted)

Theft should not be confused with *estafa*. In general, the two crimes are distinguished by the manner in which the offender in each case acquires possession of the property. The thief takes the item without the owner's consent. The *estafador* receives the thing and converts it to their own use or benefit. "However, there may be theft even if the accused has possession of the property."²¹ The misappropriation constitutes theft if the accused was entrusted only with the material or physical (natural) or *de facto* possession of the thing. Whereas, the conversion constitutes embezzlement or *estafa* if the accused has the juridical possession of the thing.²² The next question now is whether the Information for qualified theft alleges sufficient facts to sustain a conviction for *estafa*.

The prosecution failed to recite in the Information facts constitutive of estafa.

It is an essential element of the crime of *estafa* that the money or goods misappropriated or converted by the accused to the prejudice of another was received by him "in trust, or on commission, or for administration, or under any other obligation involving the duty to deliver, or to return, the same."²³ The phrase contemplates receipt of the thing by virtue of a fiduciary relationship between the parties,²⁴ or transactions where juridical possession of the item is transferred to the accused.²⁵ Mere receipt of the property does not satisfy this element,²⁶ wherein the accused is entrusted only with material possession of the thing.²⁷

In this case, the CA and the RTC both held that the prosecution alleged and proved all the elements of *estafa* under Article 315, paragraph 1(b) of the RPC. However, the Information is silent whether Arlene received the money in a fiduciary capacity, or under an obligation to return the same.²⁸ The phrase in the Information that Arlene "ought to remit"²⁹ the money is insufficient absent the allegation that this duty is rooted in transactions where she acquired juridical possession of the thing. In contrast, the Information alleged that Arlene received the money as a mere collector.³⁰ As such, the money merely

²⁰ *Diaz v. People*, 585 Phil. 318, 332 (2008) [Per J. Chiao-Nazario, Third Division]; *Ceniza-Manantan v. People*, 558 Phil. 104, 118 (2007) [Per J. Chico-Nazario, Third Division]; and *Chua-Burce v. Court of Appeals*, 387 Phil. 15, 25–26 (2000) [Per J. Quisumbing, Second Division].

²¹ *Santos v. People*, 260 Phil. 519, 526 (1990) [Per J. Cruz, First Division].

²² *Id.* at 525–526.

²³ *Pamintuan v. People*, 635 Phil. 514, 522 (2010) [Per J. Brion, Third Division].

²⁴ *Id.* at 523.

²⁵ *Murao v. People*, 501 Phil. 53, 64–65 (2005) [Per J. Chico-Nazario, Second Division], citing *Manahan, Jr. v. Court of Appeals*, 325 Phil. 484, 497–498 (1996) [Per J. Vitug, First Division].

²⁶ *Legaspi v. People*, 842 Phil. 72, 81 (2018) [Per J. Tijam, First Division].

²⁷ *Fideli v. People*, 568 Phil. 793, 806–807 (2008) [Per J. Reyes, R.T., Third Division].

²⁸ *Guzman v. Court of Appeals*, 99 Phil. 703, 707–708 (1956) [Per J. Reyes, J.B.L., *En Banc*].

²⁹ Records, p. 122.

³⁰ *Id.*

passes into Arlene's hands and her custody is only until the amount is remitted to Dr. Robillos. Arlene acquires only physical or material possession over the unremitted funds. Verily, an employee who receives money or property in behalf of the employer is not vested with juridical possession but only physical or material possession.³¹ An employee cannot be considered as an agent if the duty to collect is imposed by reason of his employment,³² thus:

It bears to stress that a sum of money received by an employee on behalf of an employer is considered to be only in the material possession of the employee. The material possession of an employee is adjunct, by reason of his employment, to a recognition of the juridical possession of the employer. So long as the juridical possession of the thing appropriated did not pass to the employee-perpetrator, the offense committed remains to be theft, qualified or otherwise. Hence, conversion of personal property in the case of an employee having mere material possession of the said property constitutes theft, whereas in the case of an agent to whom both material and juridical possession have been transferred, misappropriation of the same property constitutes Estafa.³³ (Emphases supplied and citations omitted)

Corollarily, Arlene cannot be convicted of a crime not embraced within the Information. Nevertheless, the Court finds that the allegations sufficiently charged Arlene with qualified theft.

The Information alleged all the constitutive elements of qualified theft. However, the prosecution proved only simple theft absent evidence that the abuse of confidence is grave.

There is no ambiguity in the Information. The designation of the offense and the recital of facts sufficiently constitute the crime of qualified theft. Arlene was not denied of her constitutional right to be fully apprised of the charge against her, and to suitably prepare a defense. The Information alleged that Arlene, with intent to gain, took ₱1,000.00 belonging to her employer, Dr. Robillos, without the latter's consent, thereby gravely abusing the confidence reposed on her as a collector. Apparently, the charge is for the crime of theft "[s]ince there is no allegation that the taking was accomplished with violence or intimidation against person or force upon things." The allegation that the taking is with grave abuse of confidence categorizes the theft as qualified rather than a simple one.³⁴ It is settled "that the Information need not use the exact language of the statute in alleging the acts or omissions complained of as constituting the offense. The test is whether it enables a person of common

³¹ *San Diego v. People*, 757 Phil. 599, 608–609 (2015) [Per J. Peralta, Third Division]; and *Balerta v. People*, 748 Phil. 806, 819 (2014) [Per J. Reyes, Third Division], citing *Chua-Burce v. Court of Appeals*, 387 Phil. 15 (2000) [Per J. Quisumbing, Second Division].

³² *People v. Mirto*, 675 Phil. 895, 913 (2011) [Per J. Velasco, Jr., Third Division].

³³ *Benabaye v. People*, 755 Phil. 144, 154–155 (2015) [Per J. Perlas-Bernabe, First Division].

³⁴ *Avecilla v. People*, 285 Phil. 11, 20 (1992) [Per J. Romero, Third Division].

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understanding to know the charge against him, and the court to render judgment properly.”³⁵ Again, Arlene could not have been bewildered as to the nature of the accusation against her.

However, the Court finds that the prosecution established only simple theft.³⁶ *First*, Arlene received ₱1,000.00 from Elena but failed to remit the amount to Dr. Robillos. *Second*, the money belongs to Dr. Robillos as it comprised installment payments from customers who purchased jewelry. *Third*, the absence of consent was shown in Dr. Robillos attempt to recover the unpaid installments from Elena. *Fourth*, the furtive taking of the money, raised the reasonable presumption of intent to gain. *Fifth*, Arlene got hold of the money in the performance of her duty as a collector without force, violence or intimidation. Yet, the prosecution failed to establish the element of grave abuse of confidence.

The Court has explained that grave abuse of trust is a “circumstance which aggravates and qualifies the commission of the crime of theft; hence, the imposition of a higher penalty is necessary.”³⁷ In qualified theft, the taking must be the result of a relation by reason of dependence, guardianship, or vigilance, between the accused and the offended party that has created a high degree of confidence between them.³⁸ Thus, grave abuse of confidence by a thieving employee should be contextualized not only by the relationship between the employer and employee, but also by the purpose for which the employee was given the employer's trust.³⁹ In *People v. Sabado*,⁴⁰ the accused is guilty of qualified theft when he gravely exploited the trust of his employer. The Court considered the accused's exclusive management of the shop and access to the vault, to wit:

Theft here became qualified because it was committed with grave abuse of confidence. Grave abuse of confidence, as an element of theft, must be the result of the relation by reason of dependence, guardianship, or vigilance, between the accused-appellant and the offended party that might create a high degree of confidence between them which the accused-appellant abused. Accused-appellant, as established by the prosecution, is an employee of the Pawnshop. **Accused-appellant could not have committed the crime had he not been holding the position of the trusted employee which gave him not only sole access to the Pawnshop's vault but also control of the premises.** The relevant portion of the RTC's disquisition reads:

³⁵ *People v. Puig*, 585 Phil. 555, 562 (2008) [Per J. Chico-Nazario, Third Division].

³⁶ *People v. Euraba*, G.R. No. 220762 [Notice], April 18, 2018.

³⁷ *People v. Mejares*, 823 Phil. 459, 470 (2018) [Per J. Leonen, Third Division].

³⁸ *People v. Cahilig*, 740 Phil. 200, 209–210 (2014) [Per J. Carpio, Second Division]. *See also People v. Koc Song*, 63 Phil. 369, 371 (1936) [Per C.J. Avanceña, *En Banc*].

³⁹ *Tejolan v. People*, G.R. No. 218972 [Notice], June 30, 2021.

⁴⁰ 813 Phil. 221 (2017) [Per J. Tijam, Third Division]. *See also People v. Koc Song*, *supra* note 37.

Based on the extant records[,] it appears that accused Luther Sabado was a trusted employee of Diamond Pawnshop. **In fact, the following circumstances show the trust and confidence reposed on him by the shop owners, to wit: he manages the shop alone; he has the keys to the locks of the shop; and he has access to the vault and knows the combination of the same. x x x.**

The management of Diamond Pawnshop clearly had reposed its trust and confidence in the accused-appellant, **and it was this trust and confidence which he exploited to enrich himself to the damage and prejudice of his employer.**⁴¹ (Emphases supplied and citations omitted)

In *Viray v. People*,⁴² however, a house caretaker was convicted only of simple theft for breaking into his employer's home to steal several valuables. The Court found that the employer denied the accused access to the house which refutes the degree of trust and confidence between them, thus:

This Court is inclined to agree with the CA that the taking committed by petitioner cannot be qualified by the breaking of the door, as it was not alleged in the Information. However, we disagree from its finding that the same breaking of the door constitutes the qualifying element of grave abuse of confidence to sentence petitioner Viray to suffer the penalty for qualified theft. **Instead, [w]e are one with the RTC that private complainant did not repose on Viray[']s "confidence" that the latter could have abused to commit qualified theft.**

The very fact that petitioner "forced open" the main door and screen because he was denied access to private complainant's house negates the presence of such confidence in him by private complainant. Without ready access to the interior of the house and the properties that were the subject of the taking, **it cannot be said that private complaint had a "firm trust" on petitioner or that she "relied on his discretion" and that the same trust reposed on him facilitated Viray's taking of the personal properties justifying his conviction of qualified theft.**

To warrant the conviction and, hence, imposition of the penalty for qualified theft, there must be an allegation in the [I]nformation and proof that there existed between the offended party and the accused such high degree of confidence or that the stolen goods have been entrusted to the custody or vigilance of the accused. In other words, where the accused had never been vested physical access to, or material possession of, the stolen goods, it may not be said that he or she exploited such access or material possession thereby committing such grave abuse of confidence in taking the property[.]⁴³ (Emphases supplied and citations omitted)

Similarly, the Court in *People v. Maglaya*,⁴⁴ refused to impose the penalty prescribed for qualified theft when the accused was not given material possession or access to the property. The Court determined that the accused did not act with grave abuse of confidence despite his duties involving the handling and receiving of money from his employer's customers, viz.:

⁴¹ *Id.* at 228–229.

⁴² 720 Phil. 841 (2013) [Per J. Velasco, Jr., Third Division].

⁴³ *Id.* at 852–853.

⁴⁴ 141 Phil. 278 (1969) [Per C.J. Conception, First Division].

Although appellant had taken advantage of his position in committing the crime aforementioned, [w]e do not believe he had acted with grave abuse of confidence and can be convicted of qualified theft, because his employer had never given him the possession of the machines involved in the present case or allowed him to take hold of them, and it does not appear that the former had any especial confidence in him. Indeed, the delivery of the machines to the prospective customers was entrusted, not to appellant, but to another employee.⁴⁵ (Emphasis supplied)

Here, it was not proven that Dr. Robillos had special trust, or high degree of confidence in Arlene. The allegation in the Information that Arlene is a “*secretary/collector*” of Dr. Robillos does not by itself, without more, create the relation of confidence and intimacy required in qualified theft. More telling are the minuscule amounts involved and the fact that Dr. Robillos allowed Arlene to resign without any question, discount the existence of a high degree of confidence between them. The prosecution, likewise, failed to substantiate the gravity how Arlene betrayed Dr. Robillos’ supposed special trust to qualify, or facilitate the taking of the money. Dr. Robillos principally hired Arlene as a clinic secretary while her task as a collector is foreign to her usual duties. The circumstances do not show that Arlene’s job was instrumental in facilitating the taking of the money. There is no evidence that Arlene could not have committed the crime had she not been holding the position of a secretary or collector. To reiterate, abuse of confidence must be grave. On this point, the Court is convinced that Arlene took advantage of her position in committing the crime but not on the level of grave abuse of confidence. Thus, Arlene is guilty only of simple theft.

At most, the abuse of confidence shall be considered as a generic aggravating circumstance since the gravity of exploitation of trust was not proven.⁴⁶ Indeed, abuse of confidence is inherent in qualified theft but not in simple theft since the circumstance is not included in the definition of the crime.⁴⁷ Under Article 14 of the RPC, abuse of confidence exists only when the offended party has trusted the offender who later abuses such trust by committing the crime. The abuse of confidence must be a means of facilitating the commission of the crime, the culprit taking advantage of the offended party’s belief that the former would not abuse said confidence. The confidence between the offender and the offended party must be immediate and personal.⁴⁸ As discussed above, Arlene took advantage of her position as a secretary or collector in committing theft but the gravity of exploitation of trust was not proven.

⁴⁵ *Id.* at 285.

⁴⁶ REVISED PENAL CODE, Article 14, paragraph 4.

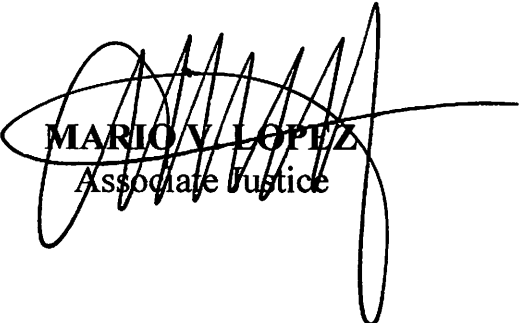
⁴⁷ REVISED PENAL CODE, Article 62.

⁴⁸ Luis B. Reyes, *The REVISED PENAL CODE*, Fourteenth Edition, Revised 1998, pp. 342-344, citing *United States v. Torrida*, 23 Phil. 189, 192 (1912) [Per J. Trent, *En Banc*].

Under Republic Act No. 10951,⁴⁹ the penalty for simple theft is *arresto mayor* to its full extent if the value of the property stolen is over ₱500.00 but does not exceed ₱5,000.00.⁵⁰ As this penalty does not exceed one (1) year, the Indeterminate Sentence Law becomes inapplicable. With the presence of the generic aggravating circumstance of abuse of confidence, the imposable penalty must be within the maximum period of the prescribed penalty which ranges from four (4) months and one (1) day to six (6) months. Accordingly, this Court imposes upon Arlene the penalty of four (4) months and one (1) day. Applying the prevailing jurisprudence, the actual damages due to Dr. Robillos amounting to ₱1,000.00 shall earn interest at the rate of 6% *per annum* from the date of the RTC's Decision on July 26, 2004 until full payment.⁵¹

ACCORDINGLY, the Petition is **DENIED**. The Court of Appeals' Decision dated June 26, 2008 and Resolution dated December 16, 2009 in CA-G.R. CEB CR No. 00080 are **AFFIRMED** with **MODIFICATIONS** in that Arlene Homol y Romorosa is found guilty of simple theft and is sentenced to suffer the penalty of imprisonment of four (4) months and one (1) day. The award of actual damages to private complainant Dr. Jelpha Robillos y Jimenez in the amount of ₱1,000.00 shall earn interest at the rate of 6% *per annum* from the date of the Regional Trial Court's Decision dated July 26, 2004 until full payment.

SO ORDERED.


MARIO V. LOPEZ
Associate Justice

⁴⁹ An Act Adjusting the Amount or the Value of Property and Damage on Which a Penalty is Based, and the Fines Imposed Under the Revised Penal Code, Amending for the Purpose Act No. 3815, Otherwise Known as "The Revised Penal Code," as Amended. Approved: August 29, 2017.

⁵⁰ Republic Act No. 10951, Section 81, paragraph 5.

⁵¹ *Nacar v. Gallery Frames*, 716 Phil. 267 (2013) [Per J. Peralta, *En Banc*].

WE CONCUR:



MARVIC M.V.F. LEONEN
Senior Associate Justice
Chairperson



AMY C. LAZARO-JAVIER
Associate Justice



JHOSEF V. LOPEZ
Associate Justice



ANTONIO T. KHO, JR.
Associate Justice

ATTESTATION

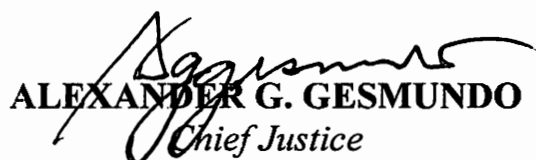
I attest that the conclusions in the above Decision has been reached in consultation before the case was assigned to the writer of the opinion of the Court's Division.



MARVIC M.V.F. LEONEN
Senior Associate Justice
Chairperson

CERTIFICATION

Pursuant to Section 13, Article VIII of the Constitution and the 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.



ALEXANDER G. GESMUNDO
Chief Justice