Republic of the Philippines
Supreme Court
Manila

SECOND DIVISION

NIGHTOWL WATCHMAN & SECURITY AGENCY, INC.,
Petitioner,

- versus -

NESTOR LUMAHAN,
Respondent.

G.R. No. 212096

Present:

BRION, *J., Acting Chairperson,*[*]
PERALTA,[**]
DEL CASTILLO,
MENDOZA, and
LEONEN, *JJ.*

Promulgated:

OCT 14 2015

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DECISION

BRION, *J.*:

We resolve the petition for review on certiorari under Rule 45 of the Rules of Court[1] filed by Nightowl Watchman & Security Agency, Inc. (*Nightowl*) from the September 18, 2013 decision[2] and the April 4, 2014 resolution[3] of the Court of Appeals (*CA*) in CA-G.R. SP No. 117982.

The Factual Antecedents

Sometime in December 1996, Nightowl hired Nestor P. Lumahan (*Lumahan*) as a security guard. Lumahan's last assignment was at the Steelworld Manufacturing Corporation (*Steelworld*).

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[*] Designated as Acting Chairperson, per Special Order No. 2222 dated September 29, 2015.

[**] Designated as Acting Member in lieu of Associate Justice Antonio T. Carpio, per Special Order No. 2223 dated September 29, 2015.

[1] Rollo, pp. 3-17.

[2] Id. at 18-29; penned by Associate Justice Michael P. Elbinias, and concurred in by Associate Justice Isaias P. Dicdican and Associate Justice Nina G. Antonio-Valenzuela.

[3] Id. at 30-33.

On **January 9, 2000**, Lumahan filed before the labor arbiter a complaint for illegal dismissal; underpayment of wages; nonpayment of overtime pay, premium pay for holiday and rest day, holiday pay, and service incentive leave; separation pay; damages and attorney's fees against Nightowl and/or Engr. Raymundo Lopez.

On **March 10, 2000**, he filed an amended complaint to include non-payment of 13th month pay and illegal suspension. He also corrected his date of employment and the date of his dismissal from May 1999 to June 9, 1999.

Lumahan admitted in his pleadings that he did not report for work from May 16, 1999 to June 8, 1999, but claimed in defense that he had to go to Iloilo to attend to his dying grandfather. He alleged that when he asked for permission to go on leave, Nightowl refused to give its consent. Steelworld, however, gave him permission to leave for Iloilo. When he reported back to work on June 9, 1999, Nightowl did not allow him to return to duty.

Nightowl, on the other hand, claimed that on **April 22, 1999**, Lumahan left his post at Steelworld and failed to report back to work since then. It argued that it never dismissed Lumahan and that he only resurfaced when he filed **the present complaint**.

The Labor Aribiters' Ruling

On **April 15, 2002**, Labor Arbiter Pablo C. Espiritu, Jr. (*LA Espiritu*) **dismissed the complaint** for illegal dismissal, separation pay, and damages, but ordered Nightowl and/or Engr. Raymundo Lopez to jointly and solidarily pay Lumahan wage differentials, 13th month pay differentials, service incentive leave, holiday pay, premium pay for holiday and rest day differentials, and overtime pay in the total amount of P 224,928.26 plus 10% attorney's fees.[4]

He ruled that Lumahan had **not** been dismissed to begin with; hence, he could not claim that he was illegally dismissed. He justified his ruling on the following: (1) **the security report** of SG Dominador Calibo stating that Lumahan abandoned his post, and that Nightowl appointed a replacement on April 22, 1999; and (2) the lack of evidence to support Lumahan's allegations.

Nevertheless, *LA Espiritu* ruled that Lumahan was entitled to his money claims because Nightowl failed to rebut them.

Both parties timely filed their appeal before the National Labor Relations Commission (*NLRC*).

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4 Id. at 34-39.

On September 20, 2002, the NLRC remanded the case to the labor arbiter because it believed that there were factual matters that needed to be considered further.

On **December 15, 2004**, Labor Arbiter Gaudencio P. Demaisip, Jr. (*LA Demaisip*) declared, among others, that *Lumahan had been **illegally** dismissed*, and ordered Nightowl to pay backwages and separation pay in lieu of reinstatement.[5] LA Demaisip dismissed Lumahan's other money claims for lack of merit.

LA Demaisip presumed from the payroll slips submitted by Nightowl that Lumahan worked from April 16, 1999 to April 30, 1999; to him, these slips showed that Lumahan was paid for his services covering such period. On the other hand, he was not convinced that Lumahan absented himself from May 1, 1999 to May 15, 1999 because Nightowl did not present the payroll slips for this period.

Finally, LA Demaisip held that no abandonment of work took place because Nightowl failed to establish Lumahan's intention to abandon his work. Nightowl appealed the December 15, 2004 LA Demaisip decision to the NLRC.[6]

The NLRC Decision

On **August 31, 2010**, the NLRC granted Nightowl's appeal; set aside and reversed the December 15, 2004 LA Demaisip decision; **dismissed** the complaint for illegal dismissal; deleted the award of backwages and separation pay in lieu of reinstatement; and affirmed the dismissal of the money claims.[7]

The NLRC found that there was no evidence showing that Lumahan had been dismissed, and held that what actually happened was an "informal voluntary termination of employment" on his end. It noted that Lumahan failed to sign the payroll slip for the period covering April 16, 1999 to April 30, 1999, thereby surmising that he only worked until April 22, 1999. It appreciated Lumahan's inconsistent claims on the date of his dismissal in favor of the theory that an actual dismissal **did not** take place. Finally, it maintained that Lumahan indicated his intention to sever his employment when he persisted in leaving for Iloilo despite Nightowl's refusal to give its permission.

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5 In the total amount of ₱586,549.19; id. at 40-47.

6 On August 15, 2007, the NLRC dismissed Nightowl's appeal for non-perfection because it failed to attach a certificate of non-forum shopping.

On October 31, 2007, the NLRC likewise denied Nightowl's motion for reconsideration where the required verification, certification of non-forum shopping and a secretary's certificate were attached. Subsequently, Nightowl filed a petition for certiorari with the CA.

On April 30, 2009, the CA remanded the case to the NLRC to be resolved on the substantive merits. This order became final and executory on May 22, 2009.

7 Rollo, pp. 49-59; penned by Presiding Commissioner Gerardo C. Nograles, and concurred in by Commissioner Perlita B. Velasco and Commissioner Romeo L. Go.

On November 17, 2010, the NLRC denied Lumahan's motion for reconsideration.[8] Lumahan elevated the case to the CA via a petition for certiorari.

The CA Decision

In its **September 18, 2013 Decision**, the CA granted Lumahan's certiorari petition[9] after finding grave abuse of discretion in the NLRC's August 31, 2010 Decision.

The CA ruled that Nightowl failed to discharge its burden of proving that Lumahan unjustly refused to return to work. *The fact that Lumahan did not receive any notice whatsoever sufficiently shows that Nightowl had no valid cause to terminate Lumahan's employment*; hence, Lumahan was illegally dismissed.

The CA gave more weight to the findings of LA Demaisip, reasoning that the NLRC is generally bound by the factual findings of labor arbiters who are in a better position to observe the demeanor and deportment of the witnesses.

The CA, consequently, awarded backwages reckoned from the time Lumahan was illegally dismissed on June 9, 1999, and ordered the payment of separation pay *in lieu* of reinstatement.

On **April 04, 2014**, the CA denied Nightowl's motion for reconsideration; hence, the present petition.

The Petition

Nightowl filed the present petition on the following grounds:

1. The CA erred in reversing the August 31, 2010 decision of the NLRC because Lumahan had not been actually dismissed; and

2. The CA erred in ruling that the findings of LA Demaisip must be given greater weight than that of the NLRC because findings of the labor arbiters were conflicting and because LA Demaisip's findings were not supported by substantial evidence.

Nightowl contends that the issue of whether Lumahan was illegally dismissed could not be addressed without first establishing the fact that he was dismissed. Other than the bare allegation that Lumahan was not allowed to report back to work, Nightowl argues that that there was no clear and convincing evidence showing that Lumahan had really been dismissed.

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[8] *CA* rollo, pp. 318-319.

[9] Thereby effectively setting aside the August 31, 2010 decision and November 17, 2010 resolution of the NLRC and reinstating LA Demaisip's December 15, 2004 decision.

As a result, it was not bound to prove the existence of abandonment or the legality of a dismissal that was not clearly established.

Nightowl questions the CA's reliance on the general rule that the NLRC is bound by the findings of the labor arbiter because the present case merited the NLRC's own evaluation of facts. Nightowl asserts that this case is an exception to the general rule because: (1) there were conflicting findings of different labor arbiters; and (2) LA Demaisip's findings were not supported by substantial evidence.

The Respondent's Position

Lumahan pointed out that Nightowl failed to attach as annexes the certified true copies of the parties' position papers, replies, rejoinders, and appeal memorandums filed before the NLRC, as well as the petition for certiorari, comment, and memorandum filed with the CA. Moreover, Nightowl failed to implead the CA as public respondent. Thus, he argued that Nightowl's petition for review on certiorari is fatally defective and should be dismissed outright.

Lumahan also points out that Nightowl's allegations in its petition are all rehash of its arguments in its motion for reconsideration before the CA.

On the merits, Lumahan emphasizes and reiterates that Nightowl failed to send him a report-to-work notice. He maintains that this oversight caused him to be constructively, if not actually, dismissed.

The Court's Ruling

We resolve to partly **GRANT** the petition.

I. The Threshold Objections

Nightowl's petition is not procedurally defective and does not warrant an outright dismissal.

Section 4, Rule 45 of the Rules of Court provides: "[t]he petition shall x x x be accompanied by a clearly legible duplicate original, or a certified true copy of the judgment or final order or resolution certified by the clerk of court *a quo* and the requisite number of plain copies thereof, and such material portions of the records as would support the petition; and x x x."[10] [omissions supplied]

Thus, a petition for review on certiorari does not require the attachment of all the pleadings the parties filed before the lower tribunals.

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[10] Rules of Court, Rule 45, Sec. 4(d).

Only the judgment or final order must be attached, plus supporting material records.

Additionally, Section 4, Rule 45 states: "[t]he petition shall x x x state the full name of the appealing party as the petitioner and the adverse party, as respondent, **without** impleading the lower courts or judges thereof either as petitioners or respondents x x x."[11] (emphasis and omissions supplied)

In other words, a petition for review on certiorari under Rule 45, unlike a petition for certiorari under Rule 65, does not require that the court *a quo* be impleaded. This distinction proceeds from the nature of these proceedings: a Rule 45 petition involves *an appeal* from the ruling *a quo*; a Rule 65 petition is an *original special civil action* that must implead the lower tribunal alleged to have acted in excess of its jurisdiction.

From the foregoing, Lumahan cannot rely on Section 5, Rule 45 of the Rules of Court and insist on an outright dismissal of the petition. We find that Nightowl duly complied with the requirements for filing a petition for review on certiorari.

II. The Substantive Issues

Parameters of the Court's Rule 45 review of the CA's Rule 65 decision in labor cases.

In reviewing the legal correctness of the CA decision in a labor case (pursuant to Rule 65 of the Rules of Court), we examine the CA decision in the context of the remedy the CA addressed – the petition is a determination of the presence or the absence or presence of grave abuse of discretion in the NLRC decision before it, not on the basis of whether the NLRC decision is intrinsically correct on its merits. In other words, we have to be keenly aware that the CA undertook a Rule 65 review, not a review on appeal, of the challenged NLRC decision.

Under this approach, the question that we ask is: *Did the CA correctly determine whether the NLRC committed grave abuse of discretion in ruling on the case?*[12]

Underlying this jurisdictional limitation is the general jurisdictional limitation of a Rule 45 petition that restricts the Court's inquiry to questions of law – where the doubt or controversy concerns the correct application of law or jurisprudence to a given set of facts. We do not review questions of facts (*i.e.*, where the doubt or controversy concerns the truth or falsity of

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[11] Id., Sec. 4(a).

[12] *Montoya v. Transmed Manila Corporation*, G.R. No. 183329, August 27, 2009, 597 SCRA 334, 342-343.

facts) unless necessary to determine the correctness of the CA finding that the NLRC did or did not commit grave abuse of discretion.

In resolving the present petition, therefore, we are bound by Rule 45's general factual-bars-rule, and the intrinsic limitations of the ruling under review – made based on an extraordinary remedy aimed solely at correcting errors of jurisdiction or grave abuse of discretion.

As presented by the petitioner, the issue before us involves mixed questions of fact and law, with the real issue being one of fact – whether Lumahan was dismissed from service. As a question of fact, we generally cannot address this issue.

By way of exception, the Court can address factual issues – and in the process review the factual findings of the labor tribunals and the evidence – to determine whether, as essentially ruled by the CA, the NLRC committed grave abuse of discretion by grossly misreading the facts and misappreciating the evidence.

The CA erred in finding grave abuse of discretion in the NLRC's factual conclusion that Lumahan was not dismissed from work.

In every employee dismissal case, the employer bears the burden of proving the validity of the employee's dismissal, i.e., the existence of just or authorized cause for the dismissal and the observance of the due process requirements. The employer's burden of proof, however, presupposes that the employee had in fact been dismissed, with *the burden to prove the fact of dismissal resting on the employee*. Without any dismissal action on the part of the employer, valid or otherwise, no burden to prove just or authorized cause arises.

We find that the CA erred in disregarding the NLRC's conclusion that there had been no dismissal, and in immediately proceeding to tackle Nightowl's defense that Lumahan abandoned his work.

The CA should have first considered whether there had been a dismissal in the first place. To our mind, the CA missed this crucial point as it presumed that Lumahan had actually been dismissed. The CA's failure to properly appreciate this point – which led to its erroneous conclusion – constitutes reversible error that justifies the Court's exercise of its factual review power.

We support the NLRC's approach of first evaluating whether the employee had been dismissed, and find that it committed no grave abuse of discretion in factually concluding that Lumahan had not been dismissed from work.

It should be remembered that in cases before administrative and quasi-judicial agencies like the NLRC, the degree of evidence required to be met is substantial evidence,[13] or such amount of relevant evidence that a reasonable mind might accept as adequate to justify a conclusion.[14] In a situation where the word of another party is taken against the other, as in this case, we must rely on substantial evidence because a party alleging a critical fact must duly substantiate and support its allegation.[15]

We agree with the NLRC that Lumahan stopped reporting for work on April 22, 1999, and never returned, as Nightowl sufficiently supported this position with documentary evidence.

In contrast, Lumahan failed to refute, with supporting evidence, Nightowl's contention that he did not report for work on April 22, 1999, and failed as well to prove that he continued working from such date to May 15, 1999. What we can only gather from his claim was that he did not work from May 16, 1999 to June 8, 1999; but this was after the substantially proven fact that he had already stopped working on April 22, 1999.

In addition, we find that Lumahan failed to substantiate his claim that he was constructively dismissed when Nightowl allegedly refused to accept him back when he allegedly reported for work from April 22, 1999 to June 9, 1999. In short, Lumahan did not present any evidence to prove that he had, in fact, reported back to work.

In fact, as pointed out by the NLRC, Lumahan was not even sure of the actual date of his alleged dismissal. Note the following in this respect: he initially indicated in his complaint that he was dismissed in May 1999. Then, in his amended complaint, he changed the date from May 1999 to June 1999. However, in his position paper, he claimed that he was made to wait for six (6) months until he was finally told in December 1999 to look for another job. Thus, the NLRC concluded, because of Lumahan's uncertainty, that he had not actually been dismissed.

Moreover, we gather that the payroll slips on record were not offered by Lumahan as evidence to support his position; rather, they were offered by Nightowl to prove that Lumahan was not underpaid. Thus, LA Demaisip could not simply assume that Lumahan worked from April 16, 1999 to April 30, 1999, based on the unsigned payroll slip covering this work period.

Further, we deduce that the non-submission of payroll slips dated May 1999 and onwards cannot be taken against Nightowl precisely because Lumahan never came back. Obviously, logic and common sense dictate the conclusion that Nightowl did not pay Lumahan for May 1999 because he did not work. Consistent with the "no-work-no-pay" principle under our labor

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13 Rules of Court, Rule 133, Sec. 5.

14 *Morales v. Harbour Centre Port Terminal, Inc.*, G.R. No. 174208, January 25, 2012, 664 SCRA 110, 121; citing *Salvador v. Philippine Mining Service Corporation*, 443 Phil. 878, 888-889 (2003).

15 *De Paul/King Philip Customs Tailor v. NLRC*, 364 Phil. 91, 102 (1999).

laws, Nightowl could not justifiably be expected to pay Lumahan for work which he did not render. As correctly evaluated by the NLRC: "*x x x* [Lumahan] failed to proffer copies of his pay slips for the subject period covering April 22, 1999, up to May 16, 1999, to corroborate his claim that he still worked during that period. These circumstances clearly show that [Lumahan] did not anymore render duty from April 22, 1999 onwards, and that he no longer reported to [Nightowl] thereafter, x x x."[16]

In the case before us, the CA clearly ignored certain compelling facts and misread the evidence on record by relying on LA Demaisip's erroneous appreciation of facts. Under the circumstances, the NLRC acted well within its jurisdiction in finding that Lumahan had not been dismissed. Otherwise stated, by reversing the ruling that there was no dismissal to speak of, the CA committed a reversible error in finding grave abuse of discretion on the part of the NLRC.

Grave abuse of discretion implies a capricious and whimsical exercise of judgment equivalent to lack of jurisdiction, or the exercise of power in an arbitrary or despotic manner by reason of passion or personal hostility; or in a manner so patent and gross as to amount to an evasion of positive duty enjoined or to act at all in contemplation of law.[17] It is not sufficient that a tribunal, or a quasi-judicial agency of the government, in the exercise of its power, abused its discretion; such abuse must be grave.[18]

All told, we cannot agree with the CA in finding that the NLRC committed grave abuse of discretion in evaluating the facts based on the records and in concluding therefrom that Lumahan had not been dismissed.

The CA erred when it considered "abandonment of work" generally understood in employee dismissal situations despite the fact that Nightowl never raised it as a defense.

As no dismissal was carried out in this case, any consideration of abandonment – as a defense raised by an employer in dismissal situations – was clearly misplaced. To our mind, the CA again committed a reversible error in considering that Nightowl raised abandonment as a defense.

Abandonment, as understood under our labor laws, refers to the deliberate and unjustified refusal of an employee to resume his employment.[19] It is a form of neglect of duty that constitutes just cause for the employer to **dismiss** the employee.[20]

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16 Rollo, p. 56.
17 *Machica v. Roosevelt Services Center*, G.R. No. 168664, May 4, 2006, 489 SCRA 534, 547.
18 Id., citing *Punzalan v. De la Peña,* G.R. No. 158543, July 21, 2004, 434 SCRA 601, 609.
19 See *NEECO II v. NLRC*, 499 Phil. 777, 789 (2005).
20 See Article 282 (now Article 296) of the Labor Code.

Under this construct, abandonment is a defense available against the employee who alleges a dismissal. Thus, for the employer "to successfully invoke abandonment, *whether as a ground for dismissing an employee or* ***as a defense***, the employer bears the burden of proving the employee's unjustified refusal to resume his employment."[21] This burden, of course, proceeds from the general rule that places the burden on the employer to prove the validity of the dismissal.

The CA, agreeing with LA Demaisip, concluded that Lumahan was illegally dismissed because Nightowl failed to prove the existence of an overt act showing Lumahan's intention to sever his employment. To the CA, the fact that Nightowl failed to send Lumahan notices for him to report back to work all the more showed no abandonment took place.

The critical point the CA missed, however, was the fact that Nightowl never raised abandonment as a defense. What Nightowl persistently argued was that Lumahan stopped reporting for work beginning April 22, 1999; and that it had been waiting for Lumahan to show up so that it could impose on him the necessary disciplinary action for abandoning his post at Steelwork, only to learn that Lumahan had filed an illegal dismissal complaint. Nightowl did not at all argue that Lumahan had abandoned his work, thereby warranting the termination of his employment.

Significantly, the CA construed these arguments as abandonment of work under the labor law construct. We find it clear, however, that Nightowl did not dismiss Lumahan; hence, it never raised the defense of abandonment.

Besides, Nightowl did not say that Lumahan "abandoned his work"; rather, Nightowl stated that Lumahan "abandoned his post" at Steelwork. When read together with its arguments, what this phrase simply means is that Lumahan abandoned his assignment at Steelwork; nonetheless, Nightowl still considered him as its employee whose return they had been waiting for.

Finally, failure to send notices to Lumahan to report back to work should not be taken against Nightowl despite the fact that it would have been prudent, given the circumstance, had it done so. Report-to-work notices are required, as an aspect of procedural due process, only in situations involving the dismissal, or the possibility of dismissal, of the employee.[22] Verily, report-to-work notices could not be required when dismissal, or the possibility of dismissal, of the employee does not exist.

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21 *Diamond Taxi v. Llamas*, G.R. No. 190724, March 12, 2014. See also *Samarca v. Arc-Men Industries, Inc.*, 459 Phil. 506, 515 (2003); and *Harpoon Marine Services, Inc. v. Francisco*, G.R. No. 167751, March 2, 2011, 644 SCRA 394, 405-406.

22 See Omnibus Rules Implementing the Labor Code, Rule XIV, Section 2.

Separation pay in lieu of reinstatement is the proper award in this case.

In cases where ***no dismissal took place***, the proper award is reinstatement, without backwages, not as a relief for any illegal dismissal but on equitable grounds.[23] When, however, reinstatement of the employee is rendered impossible, as when the employee had been out for a long period of time, the award of separation pay is proper.[24]

Here, considering that more than ten (10) years has already passed from the time Lumahan stopped reporting for work on April 22, 1999, up to this date, it is no longer possible and reasonable for Nightowl to reinstate Lumahan in its service. Thus, in lieu of reinstatement, we find it just and equitable to award Lumahan separation pay in an amount equivalent to one (1) month pay for every year of service, computed up to the time he stopped working, or until April 22, 1999.

WHEREFORE, we **GRANT IN PART** the petition; we **REVERSE** and **SET ASIDE** the September 18, 2013 Decision and the April 4, 2014 resolution of the Court of Appeals in CA-G.R. SP No. 117982. We REINSTATE the August 31, 2010 decision of the National Labor Relations Commission with the following **MODIFICATION**: Nightowl is ordered to pay Lumahan separation pay, *in lieu* of reinstatement, equivalent to one (1) month pay for every year of service, computed up to the time he stopped working, or until April 22, 1999.

SO ORDERED.

ARTURO D. BRION
Associate Justice

WE CONCUR:

DIOSDADO M. PERALTA
Associate Justice

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[23] See *Jordan v. Grandeur Security & Services,* G.R. No. 206716, June 18, 2014, 727 SCRA 36; *MZR Industries v. Colambot*, G.R. No. 179001, August 28, 2013, 704 SCRA 150; *Exodus International v. Biscocho*, G.R. No. 166109, February 23, 2011, 644 SCRA 76; *Ledesma v. NLRC*, G.R. No. 174585; October 19, 2007, 537 SCRA 358.

[24] See *Abaria v. NLRC*, G.R. Nos. 154113, 187778, 187861, and 196156, December 7, 2011, 661 SCRA 686, 690. See also *MZR Industries v. Colambot*, supra note 16, citing *Exodus International v. Biscocho*, supra note 16.

MARIANO C. DEL CASTILLO
Associate Justice

JOSE CATRAL MENDOZA
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.

ARTURO D. BRION
Associate Justice
Acting Chairperson, Second Division

CERTIFICATION

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

MARIA LOURDES P. A. SERENO
Chief Justice