

Republic of the Philippines
National Capital Judicial Region
REGIONAL TRIAL COURT
Branch CXXXIX (139)
Makati City

PEOPLE OF THE PHILIPPINES,

CRIMINAL CASE NO. 95-1643

-versus-

VIC DEL FIERRO,

Accused.

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DECISION

For allegedly defaming the good name of Pepsi Co., Inc. ("private complainant") in his broadcasts aired over radio station DWAD-AM on 17 July, 24 July, 31 July and 7 August 1994, Vicente ("Vic") T. Del Fierro ("accused") was charged with the commission of the crime of Libel in the Information dated 20 April 1995 filed by the Makati City Prosecution Office before this Court on 19 July 1995. This case was first assigned on 21 July 1995 to Branch 148 of this Court, presided by Hon. Oscar B. Pimentel, which issued a warrant for the arrest of the accused, pursuant to its order dated 24 July 1995.

The accused posted his cash bond on 10 November 1995 under O.R. No. 039256 issued by the Treasurer's Office of Parañaque duly approved by Hon. Judge Zosimo V. Escaño of RTC, Branch 259, Parañaque. On 04 December 1995, the accused filed his Motion to Quash Arrest Warrant and for Reinvestigation. In its order dated 05 December 1995, RTC, Branch 148 set his arraignment and the pre-trial on 15 January 1996. On 05 January 1996, the prosecution filed its Opposition to the accused's Motion to Quash Arrest Warrant and for Reinvestigation. On 08 January 1996, the accused filed his Motion to Expunge Sham Pleading. In its order dated 11 January 1996, RTC, Branch 148, denied the accused's Motion to Expunge Sham Pleadings.

On 12 January 1996, the accused filed his Motion to Quash. On 15 January 1996, RTC, Branch 148 suspended the arraignment of the accused scheduled on that date, i.e., 15 January 1996, until it has resolved his Motion to Quash. On 30 January 1996, the prosecution submitted its Opposition to the accused's Motion to Quash. On 09 February 1996, the accused filed his Motion for Leave to Plead Additional Grounds for the Quashal of the Information. The

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said motion for leave was considered submitted for resolution on 15 February 1996 (see *Minutes of the Hearing dated 15 February 1996*).

On 01 March 1996, the prosecution submitted its Opposition/Comment (Re: Motion for Leave to Plead Additional Grounds for the Quashal of the Information). In its Order dated 25 April 1996, RTC, Branch 148 denied for lack of merit the accused's Motion to Quash and Motion for Leave to Plead Additional Grounds for the Quashal of Information after finding that the grounds relied upon by him are purely, if not mostly, evidenciary in nature. Thereafter, the arraignment of the accused was set on 27 May 1996 under the Notice of Hearing dated 25 April 1996 issued by RTC, Branch 148.

In the meantime, or on 15 May 1996, RTC, Branch 148, received a copy of the accused's Petition for Certiorari with Application for Temporary Restraining Order filed by him with the Court of Appeals docketed as CA-G.R. SP No. 40634. On the same date, 15 May 1996, the accused filed his Manifestation and Motion to Defer Arraignment. During the hearing of the accused's manifestation and motion on 21 May 1996, RTC, Branch 148, under its order of even date, noted the said manifestation, granted the motion, and deferred the arraignment to 24 June 1996, if no action was taken by the Court of Appeals on the accused's application for issuance of temporary restraining order. During the arraignment and pre-trial scheduled on 24 June 1996, RTC, Branch 148 directed the accused, who failed to appear thereat despite notice and absence of a temporary restraining order or injunction against the said court to further proceed with this case, to show cause why his bond should not be forfeited and his arrest directed under its order of even date. In the same order, RTC, Branch 148 reset the arraignment of the accused and pre-trial to 16 July 1996.

On 05 July 1996, RTC, Branch 148 received a copy of the Manifestation and Motion to Issue Preliminary Injunction filed by the accused before the Court of Appeals. The arraignment and pre-trial scheduled on 16 July 1996 was reset to 12 August 1996 considering that Hon. Oscar B. Pimentel, Presiding Judge of RTC, Branch 148, has a very urgent matter to attend to under its Order dated 16 July 1996. On 06 August 1996, the accused filed his Compliance to the order dated 24 June 1996 of RTC, Branch 148 requiring him to show cause why he failed to appear on the last mentioned date. The said Compliance was noted by RTC, Branch 148 in its order dated 08 August 1996.

The arraignment of the accused and pre-trial scheduled on 12 August 1996 was reset by RTC, Branch 148 to 19 September 1996, on motion of the accused. In the meantime, RTC, Branch 148 was

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dated 30 January and 13 February 1997 of RTC, Branch 148). On 25 February 1997, the private complainant filed its Motion to Reset Hearing. In view thereof and due to the absence of the accused, the trial scheduled on 27 February 1997 was reset to 03 and 07 April 1997 under the order dated 27 February 1997 of RTC, Branch 148 (see also *Minutes of Hearing dated 27 February 1997*).

Prosecution witness Quintin J. Gomez, Jr. testified partly on further cross-examination on 03 April 1997 but the continuation thereof was reset to 15 and 28 May 1997 while the 07 April 1997 previously set trial was cancelled, on motion of the counsel for the accused, under the order dated 03 April 1997 of RTC, Branch 148 (see also *Minutes of Hearing dated 03 April 1997*). In another order dated 03 April 1997, considering that Hon. Oscar B. Pimentel, Jr., the presiding judge of RTC, Branch 148 had to attend to the cases at RTC, Branch 147, its pairing court, the continuation of the presentation of prosecution's evidence was reset on 28 May and 2 and 9 July 1997. Quintin J. Gomez, Jr. testified partly on further cross-examination on 15 May 1997 but due to lack of material time, the continuation thereof was reset to 28 May and 2 and 9 July 1997, as previously scheduled (see *Minutes of Hearing dated 15 May 1997*). On 28 May 1997, Quintin J. Gomez, Jr. testified partly on further cross-examination but the continuation thereof was reset to 02 July 1997, as previously scheduled, there being other important cases RTC, Branch 148 had to hear, under its order dated 28 May 1997. The testimony of Quintin J. Gomez, Jr. on further cross-examination was taken on 02 July 1997 but due to the predicament of the counsel for the accused, the continuation thereof was reset to 09 July 1997, as previously scheduled, under RTC, Branch 148's order dated 02 July 1997.

Quintin J. Gomez, Jr. further testified on cross-examination on 09 July 1997 and after the completion thereof, his re-direct examination was reset to 06 and 14 August 1997, on motion of the prosecution, under the order dated 09 July 1997 of RTC, Branch 148. The testimony on re-direct examination of Quintin J. Gomez, Jr. was completed on 06 August 1997 and, thereafter, his re-cross examination was reset to 14 August 1997, as previously scheduled, on motion of the counsel for the accused, under the order dated 06 August 1997 of RTC, Branch 148. Quintin J. Gomez, Jr. testified on re-cross examination on 14 August 1997 and after the completion thereof, the continuation of the presentation of prosecution's evidence was reset to 03, 10 and 25 September and 01 October 1997 under the order of RTC, Branch 148 dated 14 August 1997.

During the trial scheduled on 03 September 1997, RTC, Branch 148 reset the continuation of trial on 01 and 07 October 1997.

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furnished on 05 September 1996 with a copy of the Urgent Motion for the Issuance of Temporary Restraining Order filed before the Court of Appeals by the accused (petitioner therein). During the arraignment scheduled on 19 September 1996, the accused, after reading the Information against him, refused to enter his plea and thus, a plea of not guilty was entered in his favor by RTC, Branch 148 under its order of even date (see also the *Minutes of Hearing and Certificate of Arraignment both dated 19 September 1996*). In the same order, the pre-trial and trial of this case was set on 18, 21 and 25 November 1996.

Thereafter, RTC, Branch 148 received from the Court of Appeals on 19 September 1996 a copy of the latter's Notice of Resolution dated 13 September 1996 in CA-G.R. SP No. 40634 which denied the accused's (petitioner therein) Urgent Motion for the Issuance of Temporary Restraining Order. Subsequently, RTC, Branch 148 received from the Court of Appeals the latter's Notice of Judgment and Resolution dated 30 September 1996 together with a copy of its Decision of even date in CA-G.R. SP No. 40634 which dismissed the accused's (petitioner therein) petition for certiorari after finding no grave abuse of discretion committed by public respondent, Hon. Oscar B. Pimentel.

During the pre-trial and trial scheduled on 18 November 1996, RTC, Branch 148, after the accused waived the pre-trial, reset the trial, on motion of the prosecution, to 2, 5 and 16 December 1996 and cancelled the trial previously scheduled on 21 and 25 November 1996 upon request of the accused under its order dated 18 November 1996. Thereafter, the trial ensued. During the trial on the merits scheduled on 02 December 1996, the prosecution presented **Quintin J. Gomez, Jr.** as its first witness. His cross-examination was reset to 05 and 16 December 1996 (see *Minutes of Hearing dated 2 December 1996*). The cross-examination of Quintin J. Gomez, Jr. scheduled on 05 December 1996 was cancelled and reset by RTC, Branch 148 to 16 December 1996, as previously scheduled, under its order dated 05 December 1996 (see also *Minutes of Hearing dated 05 December 1996*).

Quintin J. Gomez, Jr. was partly cross-examined on 16 December 1996 and, thereafter, the continuation of his cross-examination was reset to 30 January and 13 and 27 February 1997 considering that RTC, Branch 148 had to hear another case of equal importance under its order dated 16 December 1996 (see *Minutes of Hearing dated 16 December 1996*). In view of the absence of prosecution witness Quintin J. Gomez, Jr., the continuation of his cross-examination set on 30 January 1997 and on 13 February 1997 was reset to 27 February 1997, as previously scheduled (see *Orders*

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under its order dated 03 September 1997 (see also the *Minutes of Hearing dated 03 September 1997*). Upon agreement of the parties during the trial scheduled on 10 September 1997, considering that the next prosecution witness is not around, the trial of this case was reset to 01 and 09 October 1997. The prosecution presented the testimony of **Atty. Enrique Cube** as its second witness on 01 October 1997 and after the completion thereof, the continuation of the presentation of the evidence for the prosecution was reset to 08 October, 26 November and 03 December 1997 while the previous setting on 09 October 1997 was cancelled by agreement of the parties under the order of RTC, Branch 148 dated 01 October 1997 (see also *Minutes of Hearing dated 01 October 1997*). For its third witness the prosecution presented the testimony of **Evangeline Cruz** on 08 October 1997 and after the completion thereof, the continuation of trial was reset to 26 November and 03 December 1997 under RTC, Branch 148's order dated 08 October 1997 (see also the *Minutes of Hearing dated 08 October 1997*).

On motion of the prosecution, considering that their next witness is not available, the trial scheduled on 26 November 1997 was cancelled and reset to 03 December 1997, as previously scheduled, under the order dated 26 November 1997 of RTC, Branch 148. After the completion of the testimony fourth witness of **Eugenio Munoz Guren, Jr.** on 03 December 1997, the prosecution asked for and was given a period of time within which to file its formal offer of evidence while the defense was also given time within which to submit its comment or objection thereto and, thereafter, the said offer was considered submitted for resolution under the order of even date of RTC, Branch 148. In the same order, the reception of the evidence for the accused was set on 04 and 11 February 1998.

The counsel for the accused filed on 08 January 1997 his Manifestation stating therein, among others, that he has not yet received the copy of the prosecution's formal offer of evidence. On 19 January 1998, the prosecution filed its Offer of Documentary Evidence. On 16 January 1998, the accused, through counsel, submitted his Motion to Deny Acceptance of the Offer of Evidence and Motion for Extension of Time to Submit Objection to and Comments on the Offered Documentary Evidence. On 29 January 1997, the accused submitted his Objections to and/or Comments on Prosecution's Offer of Documentary Evidence. On the same date, the accused also filed his Motion to Reset Hearing and Motion for Leave to File Demurrer to Evidence.

Considering that there is still a pending incident and that the prosecution intends to file reply to the accused's Objections to and/or Comments on the Prosecution's Offer of Documentary Evidence, the

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trial scheduled on 04 February and on 11 February 1997 were both cancelled and reset to 01 and 22 April 1998 under the order dated 04 February 1997 of RTC, Branch 148. On 16 March 1998, the prosecution submitted its Reply to accused's Objections to and/or Comments on the Prosecution's Offer of Documentary Evidence. On 24 March 1998, the accused filed his Demurrer to Evidence. During the trial scheduled on 01 April 1998, the prosecution asked for and was given a period of time within which to submit its Opposition or Comment on the accused's Demurrer to Evidence while the defense asked for and was also given time to file his reply and, thereafter, the said demurrer to evidence was considered submitted for resolution under the order dated 01 April 1998 of RTC, Branch 148. In the same order, the trial scheduled on 22 April 1998 was retained.

Since RTC, Branch 148 has to rule first on the prosecution's Offer of Documentary Evidence before it can act on the accused's Demurrer to Evidence and considering further the intention of the prosecution to reopen the proceedings, the trial in this case was suspended under the order of the said court dated 22 April 1998. On 13 May 1998, the prosecution submitted its Opposition to Motion to Dismiss By Way of Demurrer to Evidence. On 01 June 1998, the accused filed his Rejoinder to Opposition to Motion to Dismiss By Way of Demurrer to Evidence. In its order dated 08 April 1999, RTC, Branch 148, after going through the pleadings regarding the subject incident and considering the demurrer to evidence as having been filed after the prosecution had rested its evidence, denied the accused's Demurrer to Evidence and directs the defense to continue with the presentation of its evidence on 20, 26 and 27 May 1999.

On 10 May 1999, the accused filed his Motion for Consolidation/Joint Trial asking therein that this case be consolidated or jointly tried with Criminal Case Nos. 95-841 and 95-842 both of which are pending trial before RTC, Branch 133. In its order dated 10 May 1999, RTC, Branch 148 directed the prosecution to submit its comment on the accused's Motion for Consolidation/Joint Trial and, after which, the said motion was considered submitted for resolution. On 20 May 1999, the prosecution's request for additional time to file its comment on the accused's motion for consolidation, etc. was granted by RTC, Branch 148 under its order of even date (see also *the Minutes of Hearing dated 20 May 1999*). On 21 May 1998, the prosecution submitted its Comment on Motion for Consolidation/Joint Trial. The accused filed his Reply to the prosecution's Comment on 03 June 1999. The prosecution submitted its Rejoinder to accused's Reply on 14 June 1999. On 15 July 1999, the accused filed his Sur-Rejoinder.

In its order dated 25 September 2000, RTC Branch 148 denied

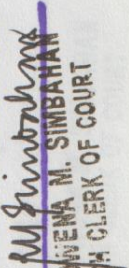
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the accused's Motion for Consolidation/Joint Trial and directed the accused to present his evidence on 26 October 2000. The accused filed on 23 October 2000 his Motion for Reconsideration. During the hearing of the accused's Motion for Reconsideration on 26 October 2000, the prosecution (Criminal Case No. 95-1643; Criminal Cases Nos. 95-841 and 95-842) asked for and was given a period of time within which to submit their comment or opposition to the Motion for Reconsideration filed by the accused and the prosecution was also given time within which to file its reply and, thereafter, the said motion was considered submitted for resolution under the order of RTC, Branch 148 of even date. The prosecution in Criminal Case Nos. 95-841 and 95-842 submitted its Comment to the accused's Motion for Reconsideration on 09 November 2000.

On the other hand, the prosecution in this case, Criminal Case No. 95-1643, filed its Motion asking for additional time within which to submit its own opposition to the said motion for reconsideration and it was granted by RTC, Branch 148 under its order dated 21 November 2000. On 01 December 2000, the prosecution in the present case, Criminal Case No. 95-1643, submitted its Opposition to accused's Motion for Reconsideration. In its order dated 15 August 2001, RTC, Branch 148 denied the accused's Motion for Consolidation/Joint Trial (should be Motion for Reconsideration) and considered his Demurrer to Evidence submitted for resolution. On 21 September 2001, the prosecution filed its Motion to Set Case for Trial. In its order dated 27 September 2001, RTC, Branch 148, gave due course to the prosecution's Motion to Set Case for Trial it appearing that accused's Demurrer to Evidence had been denied by it under its order dated 08 April 1999 and that there being no other pending incidents remaining unresolved and directed the resumption of trial on 23 and 30 October 2001.

During the trial scheduled on 23 October 2001 RTC, Branch 148 reset the reception of the evidence for the accused on 11 and 18 December 2001 and cancelled the trial previously scheduled on 30 October 2001. Subsequently, RTC, Branch 148 received a copy of the accused's Motion for Reconsideration of the Court of Appeals' Order dated 20 November 2001 in CA-G.R. No. 676453 (sic), which dismissed his petition for certiorari and mandamus with application for issuance of injunction and/or temporary restraining order against Hon. Oscar B. Pimentel, Jr., presiding judge of the said Branch. Later, RTC, Branch 148 also received a copy of the accused's Supplemental Motion for Reconsideration filed by him with the Court of Appeals. In its order dated 20 November 2001, RTC, Branch 148 directed the records of Criminal Cases Nos. 95-841 and 95-842, which it previously received from RTC, Branch 145, to which said cases were re-assigned after Hon. Napoleon Inoturan, then presiding

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judge of RTC, Branch 133 inhibited from trying the said cases, to be transmitted back to RTC, Branch 145 pursuant to RTC, Branch 148's order dated 25 September 2000 and 15 August 2001.

The accused filed his Motion to Defer Presentation of Defense Evidence on 10 December 2001 and asked the same to be heard on 18 December 2001. In the said motion, the accused attached the Resolution of the Court of Appeals in CA-G.R. SP No. 67653 dated 07 December 2001 setting aside its Resolution dated 20 November 2001 and reinstating the accused's petition for certiorari and mandamus, etc. During the trial scheduled on 11 December 2001, the accused moved for the deferment of the presentation of defense evidence pending the resolution of his petition for certiorari and mandamus, etc. before the Court of Appeals and the said motion was granted by RTC, Branch 148 on the condition that if no temporary restraining order would be secured by the said accused within a specified period of time, the defense would present its evidence under its order of even date. In the same order, the reception of the evidence for the accused was set on 3, 12 and 19 February 2002.

On 26 November 2001, RTC, Branch 148 received a copy of the Court of Appeals' Notice of Resolution in CA-G.R. SP No. 67653 together with the appellate court's Resolution both dated 20 November 2001 dismissing the accused's petition for certiorari and mandamus. On 08 January 2002, RTC, Branch 148 received a copy of the Motion to Amend Petition for the Purpose of Including as Public Respondent Judge Cesar D. Santamaria in His Capacity as the Newly-Appointed Presiding Judge of Branch 145 of the Makati Regional Trial Court filed by the petitioner, accused herein, before the Court of Appeals. On 04 February 2002, the accused filed his Motion to Cancel the Hearings Scheduled on 5, 12 and 19 February 2002, etc. The trial scheduled on 05 February 2002 and those scheduled on 12 and 19 February 2002 were cancelled in view of the Motion for Postponement filed by the defense and the same was reset to 7 and 14 March 2002 under the order dated 05 February 2002 of RTC, Branch 148 (see *Minutes of Hearing dated 05 February 2002*).

During the trial scheduled on 07 March 2002, RTC, Branch 148, cancelled the hearing previously set on 7 and 14 March 2002 and re-scheduled the reception of the evidence for the accused on 3 and 10 May 2002 under RTC, Branch 148's order dated 07 March 2002 (see *Minutes of the Hearing dated 07 March 2002*). On 12 April 2002, RTC, Branch 148 received copies of the Notice and Resolution of the Court of Appeals in CA-G.R. SP No. 67653 both dated 2 April 2002 denying the accused's (petitioner therein) Motion to Amend Petition, etc. and Application for the Issuance of Temporary Restraining Order and Writ of Preliminary Injunction. By agreement

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of the parties, the trial scheduled on 03 May 2002 was cancelled and reset to 10 May, 11 and 25 June, and 16 July 2002 under the order dated 03 May 2002 of RTC, Branch 148. In view of the absence of the public prosecutor, the trial scheduled on 10 May 2002 was cancelled and reset to 11 and 25 June and 16 July 2002 under the order of RTC, Branch 148 dated 10 May 2002 (see *Minutes of Hearing dated 10 May 2002*).

On 14 May 2002, the private complainant filed its Motion to Authorize Private Prosecutors to actively prosecute this case even in the absence of the public prosecutor with the conformity of Assistant Chief State Prosecutor Leonardo Guiyab and asked the same to be heard on 17 May 2002. In its order dated 17 May 2002, RTC, Branch 148 granted the private complainant's Motion to Authorize Private Prosecutors to actively prosecute this case even in the absence of the public prosecutor, the same being with the conformity of Assistant Chief State Prosecutor Guiyab. Considering that Hon. Oscar B. Pimentel, Jr., presiding judge of RTC, Branch 148 was on sick leave, the trial scheduled on 11 June 2002 was cancelled and reset to 25 June, 16 July and 22 August 2002 (see *Minutes of Hearing dated 11 June 2002*). In a *Constancia* issued by RTC, Branch 148, the trial of this case scheduled on 11 June 2002 was cancelled and reset to 25 June, 16 July and 22 August 2002 considering that Hon. Oscar B. Pimentel, Jr., its presiding judge, was on sick leave.

For failure of the public and private prosecutors to appear, the trial set on 25 June 2002 was cancelled and reset to 16 July and 22 August 2002, as previously scheduled under RTC, Branch 148's order dated 25 June 2002. The 16 July 2002 trial was cancelled after the prosecution has admitted the existence of People's Tonight and Manila Standard's newspaper clippings and reset it to 22 August, 12 September, 1 and 24 October 2002 under RTC, Branch 148's order dated 16 July 2002 (see *Minutes of Hearing dated 16 July 2002*). The defense presented the testimony of **Jose G. Burgos, Jr.** as its first witness on 22 August 2002 and after the completion thereof, the continuation of the presentation of the evidence for the accused was reset to 12 September and 24 October and 14 November 2002 while the 01 October 2002 previous setting was cancelled by agreement of the parties' counsels under the order dated 22 August 2002 of RTC, Branch 148. For its second witness, the defense presented the testimony of **Feliciano Maragay** on 12 September 2002 and after the completion thereof, the continuation of trial was reset to 24 October and 14 November 2002 under the order dated 12 September 2002 of RTC, Branch 148.

During the trial scheduled on 24 October 2002, the defense merely marked its Exhibits "2" to "12" and, thereafter, the continuation

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of the presentation of defense evidence was reset to 14, 29 November and 18 December 2002 under the order dated 24 October 2002 of RTC, Branch 148. Accused **Vicente "Vic" del Fierro, Jr.** testified as the third witness for the defense on 14 November 2002 and after his partial direct-examination, the continuation of his testimony was reset to 29 November and 18 December 2002 under the order of RTC, Branch 148 dated 14 November 2002. Vic del Fierro, Jr. further testified on direct-examination on 29 November 2002 but the continuation thereof was reset on motion of the defense to 18 December 2002 under the order dated 29 November 2002 of RTC, Branch 148. Considering that the court employees of Makati City were then holding their Christmas party, the trial scheduled on 18 December 2002 was cancelled and reset to 18 February, 6 and 25 March 2003 under the order dated 18 December 2002 of RTC, Branch 148. In view of the fact that there is a need to transcribe the Video Cassette Discs (VCDs) containing certain programs and commercials in order for RTC, Branch 148 to determine whether or not they may be admitted in evidence, the trial scheduled on 18 February 2003 was cancelled and reset to 25 March 2003 while the previous setting on 06 March 2003 was likewise cancelled under the order dated 18 February 2003.

On motion of the defense counsel, the continuation of the testimony of accused Vic del Fierro, Jr. scheduled on 25 March 2003 was again cancelled and reset to 15 April 2003. On 15 April 2003, accused Vic del Fierro, Jr. testified further on direct-examination and after the completion thereof his cross-examination was reset to 20 and 26 May 2003 under RTC Branch 148's order dated 15 April 2003. Considering that Hon. Oscar B. Pimentel, presiding judge of RTC, Branch 148 was attending a seminar, the cross-examination of the accused scheduled on 20 May 2003 was cancelled and reset to 26 May 2003. The accused was cross-examined on 26 May 2003 but due to his health conditions the continuation thereof was reset to 10, 17 June and 8 July 2003 under RTC, Branch 148's order dated 26 May 2003. On 10 June 2003, accused Vic del Fierro, Jr. further testified on cross-examination but due to his health conditions, the continuation thereof was reset to 17 June 2003 while the previous setting on 8 July 2003 was cancelled under the order of RTC, Branch 148 dated 10 June 2003.

After partial cross-examination conducted on the accused on 17 June 2003, the continuation thereof was reset to 16 and 23 July 2003 due to his health conditions under the order dated 17 June 2003 of RTC, Branch 148. However, accused Vic del Fierro, Jr. filed on 02 July 2003 his Motion for Voluntary Inhibition of Hon. Oscar B. Pimentel. During the trial scheduled on 16 July 2003, the prosecution verbally moved for RTC, Branch 148 to strike out from the records the

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accused's Motion for Voluntary Inhibition and, after hearing the parties' arguments, the said motion of the prosecution was considered submitted for resolution under the order dated 16 July 2003 of RTC, Branch 148. In its order dated 26 February 2004, RTC, Branch 148 denied the prosecution's verbal motion to strike out from the records accused's Motion for Voluntary Inhibition and Hon. Oscar B. Pimentel decided to voluntarily inhibit himself from trying this case. In the meantime, RTC, Branch 148 received copies of the Notice and Decision of the Court of Appeals in CA-G.R. SP No. 67653 both dated 26 March 2004 denying the accused's (petitioner therein) petition for certiorari and mandamus and affirming the orders dated 25 September 2000 and 15 August 2001 of Hon. Oscar B. Pimentel.

Pursuant to RTC, Branch 148's order dated 26 February 2004, the records of this case, then in five (5) volumes consisting of 1,174 pages, exclusive of the transcript of stenographic notes, were transmitted to the Office of the Clerk of Court, RTC, Makati City on 07 May 2004 for re-raffle. Notices of Re-Raffle of this case on 17 May 2004 were sent to the parties and their respective counsels by the Office of the Clerk of Court on 11 May 2004. On 17 May 2004, this case was re-raffled and the records thereof were transmitted to this Branch (RTC Branch 139), on the same date. On 22 July 2004, this Court/Branch set the continuation of trial in this case on 26 August 2004 and subpoenas and notices of hearing dated 22 July 2004 were sent to the accused, his counsel, private complainant and the private prosecutors by registered mail on 23 July 2004.

In the meantime, this Court received on 27 July 2004 copies of the Notice and Resolution of the Court of Appeals in CA-G.R. SP No. 67653 denying the accused's (petitioner therein) Motion for Reconsideration of its Decision dated 26 March 2004. On 30 July 2004, this Court received a copy of the Motion for Extension of Time to File Petition for Review on Certiorari filed by the accused before the Supreme Court. Thereafter, the accused filed his Motion to Reset Scheduled Hearing on August 26, 2004. In its order dated 9 August 2004, this Court granted the accused's Motion to Reset, etc., cancelled the setting on 26 August 2004 and reset the continuation of the presentation of defense evidence to 07 October 2004. On 18 August 2004, this Court received a copy of the Petition for Review with Urgent Application for Temporary Restraining Order and/or Writ of Preliminary Injunction, which was docketed as G.R. No. 164158, filed by the accused before the Supreme Court.

On 04 October 2004, this Court received a copy of the Motion for Reconsideration, which seeks to set aside the Resolution of the Supreme Court in G.R. No. 164158 dated 25 August 2004 denying

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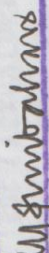
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accused's (petitioner therein) petition for review, filed by him before the SC. On 07 October 2004, the accused filed his Manifestation and Urgent Motion to Cancel Hearing. During the trial scheduled on 07 October 2004, this Court, due to the absence of the defense counsel and taking into consideration the said urgent motion to cancel hearing, reset the cross-examination of accused Vic del Fierro to 25 November and 2 December 2004 under its order dated 07 October 2004. Considering that the presiding judge and the branch clerk of this court were required to attend the Regional Judicial Career Enhancement Program from 24-26 November 2004, the previous settings on 25 November and 02 December 2004 were cancelled and reset to 01 February 2005 under this court's order dated 17 November 2004. The trial scheduled on 01 February 2005 was likewise cancelled and reset to 22 March 2005 since the presiding judge of this court was not feeling well at that time (see *Minutes of Session dated 01 February 2005*).

On 21 March 2005, the accused filed his Motion to Cancel Hearing. During the hearing scheduled on 22 March 2005, this Court granted the accused's Motion to Cancel Hearing and reset the continuation of his cross-examination to 26 April, 3 and 17 May 2005 under its order dated 22 March 2005. Accused Vic del Fierro further testified on cross-examination on 26 April 2005 and after the completion thereof, his re-direct examination was reset to 26 May and 12 July 2005 under the order of this Court dated 26 April 2005. For failure of the parties and their respective counsels to appear, the trial scheduled on 17 May 2005 was cancelled and reset anew to 26 May and 12 July 2005, as previously scheduled, under its order dated 17 May 2005. On motion of the defense counsel, the re-direct examination of the accused scheduled on 26 May 2005 was cancelled anew and reset to 12 July 2005, as previously scheduled, under its order dated 26 May 2005.

On 29 April 2005, the accused filed his Urgent Motion to Cancel Hearing. Another Motion to Cancel Hearing was filed by the accused on 27 June 2005. In its order dated 05 July 2005, this court granted the accused's motion to cancel hearing, cancelled the setting on 12 July 2005 and reset the re-direct examination of the accused on 01 September 2005. During the trial scheduled on 01 September 2005, the defense counsel manifested that he will no longer conduct re-direct examination on the accused and that they have no other witness to present and thus, on motion of the defense, they were given a period of time within which to file their formal offer of evidence while the prosecution was given the same period of time from receipt of the copy of the said formal offer within which to submit their comment/opposition thereto and, after which, the said offer of evidence was considered submitted for resolution under the order of

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this court dated 01 September 2005. In the same order, considering the manifestation of the private prosecutor, this Court set the presentation of rebuttal evidence on 01 December 2005.

During the trial scheduled on 01 December 2005, the defense counsel asked for and was given an additional period of time within which to file their formal offer of evidence while the prosecution was likewise given the same period of time from receipt of the copy of the said formal offer within which to submit their comment or opposition thereto and, thereafter, the said formal offer was considered submitted for resolution under the order of this Court of even date. In the same order, the initial presentation of rebuttal evidence was reset to 23 February 2006. On 28 December 2005, the defense filed its Urgent Motion for Time to File Formal Offer of Exhibits. The said motion was granted by this Court in its order dated 02 January 2006 and gave the defense an extension of time to file their formal offer of documentary exhibits.

On 06 January 2006, the accused filed his Formal Offer of Documentary Exhibits. On 20 January 2006, the prosecution submitted its Objections and Comments on the accused's Formal Offer of Documentary Exhibits. In its order dated 23 January 2006, this court granted the said Formal Offer of Exhibits and admitted defense Exhibits "1" to "61", "63", "64" and "66" as part of the testimonies of the witnesses who testified thereon while the offer for admission of its Exhibit "62" was not acted upon considering that it was not the one marked during the proceedings in this case. On motion of the defense, considering the unavailability of the accused's counsel on record, the presentation of prosecution's rebuttal evidence scheduled on 23 February 2006 was cancelled and reset to 27 April 2006. The accused, on 12 April 2006 filed his Motion to Reset Hearing. In its order dated 18 April 2006, this court granted the said motion and reset the presentation of rebuttal evidence to 04 May 2006.

The prosecution presented the testimony of **Director Antonia P. Barros** of the Records and Archives Section, Senate of the Philippines, as its first rebuttal witness on 04 May 2006 and after the completion of her direct testimony, her cross-examination was reset to 06 July 2006 under the order of this court dated 04 May 2006. Considering that this court had to conduct an inventory of its cases from 01 to 15 July 2006, the cross-examination of Director Barros previously scheduled on 06 July 2006 was cancelled and reset to 17 August 2006 (see *Notice of Hearing dated 23 June 2006*). Director Antonia P. Barros testified on cross-examination on 17 August 2006 and after the completion of her testimony, the continuation of the presentation of rebuttal evidence was reset to 05 October 2006, on

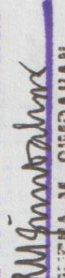
motion of the prosecution, under the order of this court dated 17 August 2006. For its second rebuttal witness, the prosecution presented on 05 October 2006 the testimony of **Atty. Allan Tablizo** of the Office of the Senate Secretary and after some clarificatory questions from this Court in the middle of his cross-examination by the defense counsel, the continuation thereof was reset to 14 November 2006, on motion of the defense counsel, considering that he needs time to study R.A. 1827 on which said witness testified under the order of this court dated 05 October 2006. Considering that the trial prosecutor was on leave of absence, the trial scheduled on 14 November 2006 was cancelled and reset to 23 January 2007 (see *Minutes of Session dated 14 November 2006*).

On the basis of the letter of Atty. Tablizo addressed to this Court and for his failure to appear at the trial scheduled on 23 January 2007, the continuation of the cross-examination of the said rebuttal witness was reset to 19 April 2007 under this court's order dated 23 January 2007. By agreement of the parties and their respective counsels, the trial scheduled on 23 January 2007 was cancelled and reset anew to 21 June 2007 (see *Minutes of Session dated 19 April 2007*). Atty. Allan Tablizo further testified on cross-examination on 21 June 2007 and after the completion of his testimony, the prosecution manifested that they have no other rebuttal witness to present and thus, they asked for and was given a period of time within which to file their formal offer of exhibits on rebuttal while the defense was give a like period of time from receipt of the copy of the said formal offer within which to submit their comment or opposition thereto and, after which, the said offer was considered submitted for resolution under the order of this court of even date. In the same order, this Court gave the prosecution and the defense a period of thirty (30) days from receipt of the copy of its order relative to the prosecution's formal offer of rebuttal evidence within which to simultaneously submit their respective memoranda.

On 02 July 2007, the prosecution filed its Formal Offer of Rebuttal Evidence. On 24 August 2007, the accused submitted his Comment to prosecution's Formal Offer of Rebuttal Evidence. In its order dated 28 August 2007, this court granted the said offer and admitted prosecution's Exhibits "T" to "X" and its sub-markings as part of the testimonies of the witnesses who testified thereon. On 19 October 2007, the prosecution filed its Motion for Extension of Time to File Memorandum and the same was granted by this court in its order dated 22 October 2007. On 08 November 2007, the prosecution submitted its Memorandum. The accused, on the other hand, filed his Memorandum on 13 November 2007.

In its Notice dated 09 February 2009, this Court set the promul-

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gation of judgment in this case on 05 March 2009. Considering that there are still some procedural problems that this Court had to act on or to resolve, after finding out from the records that Branch 148 of this Court from which this case originated have not expressly admitted the prosecution's documentary exhibits previously offered for admission in support of its case in chief, among others, the promulgation of judgment set on the same date was cancelled and reset tentatively on 15 April 2009 and relative thereto the complainant, the private prosecutor, the accused, his counsel and 4th Assistant City Prosecutor Benjamin Vermug, Jr. were directed to appear before this Court on 10 March 2009 under its order dated 05 March 2009. The accused filed his Urgent Motion to Dismiss on 09 March 2009. In a letter dated 10 March 2009, this Court, through its Branch Clerk of Court, asked the Criminal Case-In-Charge of RTC, Branch 148, who failed to transmit the audio tapes to this Branch on or before the promulgation previously set on 05 March 2009, to transmit the subject audio tapes the soonest possible time. During the conference held on 10 March 2009, the prosecution and the defense were given a period of one (1) week from said date within which to locate their respective copies of the four (4) pieces of tape recordings of the alleged broadcasts made by the accused and to submit the same before this Court in order for it to rule on the formal offer of evidence of the prosecution (see *Minutes of the Session dated 10 March 2009*).

On March 10, 2009, this Court received the letter of the Criminal Case-In-Charge of RTC, Branch 148 of even date transmitting therewith the four (4) pieces of the original audio cassette tapes marked as prosecution's Exhibits "G", "H", "I" and "J". Thus, in its order dated 12 March 2009, this Court acted on the prosecution's formal offer of evidence by admitting prosecution's Exhibits "A" to "S", inclusive, and its sub-markings as part of the testimonies of its witnesses who testified thereon. On 18 March 2009, the prosecution, through the private prosecutor submitted its Manifestation with Comment on Urgent Motion to Dismiss.

Hence, this Decision.

The undisputed facts of this case are as follows:

Pepsi Company, Inc. [Phils.]/Pepsi Cola International ("Pepsi", for brevity) ran in the Philippines from February to June 1992 the "under the crown (consumer) promotion" called the "Number Fever". In the said promotion, Pepsi distributed marked crowns with three-digit numbers. One of the three-digit numbers was the number "349". (TSN, 2 December 1996, pp. 1-67)

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Pepsi has three (3) main businesses around the world and these are: (a) sale of concentrates from which soft-drinks are made, (b) sale of snack foods around the world through its Food Division called "Frito Lay" and (c) operation of chain of restaurants, like Pizza Hut, Kentucky Fried Chicken and Taco Bell, through its Restaurant Division. Pepsi is registered in the State of Delaware, USA, with headquarters in New York, and does business over 140 countries around the world including the Philippines. Pepsi is duly licensed to do business in the Philippines. These soft-drinks are sold under the brand names: Pepsi Cola, 7 Up, Mountain Dew and Mirinda, which are the more popular brands, and Slice and Mug Root Beer, all of which are available in the Philippines and in the United States and are also sold in several countries all over the world. Pepsi had been engaged in this business since the early 1900 the year it was established. The Pepsi Cola beverage as a soft-drink was invented and developed in the late 1800. (TSN, 2 December 1996, pp. 1-67)

Pepsi Co., Inc. has a branch in the Philippines and licensed to do business in the country. Pepsi Co., Inc. in the Philippines is not a different entity from Pepsi Co., Inc. in Delaware. There are three (3) Pepsi Cola corporations in the Philippines and these are: Pepsi Company (International) or Pepsi Co., Inc., Pepsi Cola Far East and Pepsi Cola Philippines, Inc. (a joint venture company). These three (3) corporations are engaged purely in the marketing of the products of Pepsi Cola. (TSN, 16 December 1996, pp. 1-57)

Pepsi markets its products in various ways, the most visible of which is through media advertising (television, radio or print), trade relation activities, public relations activity and joint venture partners around the world. In the Philippines alone, Pepsi spend an average of 100 Million Pesos for media advertising not to mention promotional activities and other forms of advertising. Pepsi has more than 100 Million Pesos marketing budget annually. Pepsi comes out with the Annual Statements such as those for 1994 and 1995 (*Exhibits "C" & "D"*) which include financial statements like balance sheets and profitability statements that are circulated to all its field offices around the world. (TSN, 2 December 1996, pp. 1-67)

An incident occurred in the said promotion. In the course of the various investigations conducted by different government agencies in connection with the "349" controversy, Quintin Gomez, Jr., the Marketing Services Manager of Pepsi, met Vic Del Fierro, the herein accused. These investigations or inquiries where Quintin Gomez, Jr. met Vic Del Fierro were held in various places such as the Senate, the Congress and the Department of Trade and Industry. Vic del Fierro was representing at that time a group of claimants against Pepsi called "Coalition 349". During those meetings, Vic Del Fierro

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on several occasions made representations on the claims of his constituents/group members in the form of speeches and audio-visual presentations. (TSN, 2 December 1996, pp. 1-67)

Quintin Gomez, Jr. had met Vic del Fierro several times and one of such occasion was when Pepsi Cola was under investigation by the Department of Trade (and Industry). He was present in some but not all the time that the investigation was being conducted. It had to do with the "349" issue, which was related to the promotion that they ran at that time. DTI penalized Pepsi Cola, Inc. with the compromised penalty in the amount of about P150,000.00 under a DTI Resolution. There was a Senate Trade and Commerce Committee Report No. 190 (*Exhibits "2", "2-A" & "2-B"*). (TSN, 3 May 1997, pp. 1-46)

Due to this so called "349" fiasco, there were groups of holders of "349" caps who filed estafa cases against the Directors of Pepsi Cola Products (Phils.), Inc. Quintin Gomez, Jr. and his companions learned from the office of Frederick "Fred" Dael, the Area Vice President of Pepsi, that Vic del Fierro will air a broadcast in DWAD. The time the broadcasts on different dates were made was 3:00 o'clock in the afternoon and he personally listened to it. He heard the radio broadcast at about 3:00 o'clock in the afternoon and the voice he heard sounded like the voice of Vic del Fierro but he did not see him in the radio booth. He listened to the first broadcast made on 13 (sic) July 1994 and it lasted for about one or two hours. He imagined that the radio broadcast on 24 July 1994 lasted the same time as the first. The broadcast of 31 July 1994 was handled in the same manner but Quintin Gomez, Jr. does not know how many hours it lasted although he listened to it by himself. The 7 August 1994 broadcast probably lasted the same amount of time and he listened to all of these. (TSN, 16 December 1996, pp. 1-57)

Quintin Gomez, Jr. was alerted by their media or advertising department to wait for a certain hour and for a certain day for the broadcast that they expect Vic del Fierro will make. They have a prior knowledge of Vic del Fierro's broadcasting activities because he is a media person who utilizes the media quite extensively during those days. As to the nature of the broadcast that he will make, they have no prior knowledge thereof. It was anticipated that the broadcast could be regarding the "349" issue. He thought that the information that Vic del Fierro will make such a broadcast on a particular day came from the advertising agency but it is not uncommon for them to get reports of such nature. (TSN, 3 May 1997, pp. 1-46)

According to Quintin Gomez, Jr., they have a lot of interest on

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what Vic del Fierro said, wrote or had published on or about the time the "349" issue came about because anything he did or said or wrote or had published in the newspaper are also of interest to their company. It was not unreasonable to expect that the broadcast of Vic del Fierro would be uncomplimentary to Pepsi Co., Inc. in that point in time. They were anticipating that he would say things that would be prejudicial to their company. On several occasions in front of the Senate, Congress and media and on many occasions there were letters coming from Vic del Fierro to bankers effectively discriminating against Pepsi Co., Inc. and Pepsi Cola, Inc.. For those reasons they paid particular attention to what Vic del Fierro will say because he had been actively crusading for the interests of thousands of people who had these "349" crowns. The said letters were written also as a reaction to the promotion of the so called "Number Fever". (TSN, 15 May 1997, pp. 1-59)

According to Quintin Gomez, Jr., it is a common knowledge that Vic del Fierro is active in the media, he writes, broadcast, he has TV appearances, public speeches, he has regular columns in tabloid newspapers, and advertisements all over media. When Quintin Gomez, Jr. heard that Vic del Fierro was going to make broadcast on a particular day, he asked their advertising agency to tape the broadcast. The said advertising agency in turn requested the services of a company called Philippine Monitoring Service whose function is to monitor commercials over the radio. The original broadcasts were taped on their behalf by a company called Philippine Monitoring Service. (TSN, 3 May 1997, pp. 1-46)

Previous to the day of broadcast, Quintin Gomez, Jr. was alerted by their people that Vic del Fierro will make a broadcast. Accordingly, he responded to the alert given to him and he prepared to listen to the broadcast. He listened to the broadcast but did not personally tape recorded it. He was at his office when he heard the broadcast, for the most part he was alone but there were other colleagues of his who would come in and listen for a few minutes. It was just another or the second episode or second broadcast that the officials of Pepsi Cola, including himself, are monitoring. (TSN, 15 May 1997, pp. 1-59)

Quintin Gomez, Jr. does not think he was at his office to listen to the broadcast of 24 July 1994. Probably he listened to it in the confines of his room in his house. He started listening at the beginning of the broadcast of Vic del Fierro on 24 July 1994 on or about 3:00 p.m. He was listening while the taping was made in another place. He had the broadcast taped through their advertising agency who in turn commissioned the Philippine Monitoring Service.

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The taping was done at the office of the Philippine Monitoring Service on four (4) separate days. (TSN, 15 May 1997, pp. 1-59)

They have been informed that Vic Del Fierro was going to make some radio broadcast on or about 17, 24 and 31 July and 24 August 1994 over radio station DWAD-AM. They had taken the initiative of taping those radio broadcast during the program of Vic Del Fierro through an advertising agency O'Gilvy & Mather, upon his instructions on 13 July 1994 (*Exhibits "G" & "G-1"*), 24 July 1994 (*Exhibits "H" & "H-1"*), 31 July 1994 (*Exhibits "I" & "I-1"*) and on 7 August 1994 (*Exhibits "J" & "J-1"*). Quintin Gomez was the one who filed the Complaint-Affidavit for libel against accused Vic Del Fierro (*Exhibits "E" to "E-2"*) and the Reply-Affidavit (*Exhibits "F" & "F-1"*) in behalf of Pepsi. (TSN, 2 December 1996, pp. 1-67)

Quintin Gomez, Jr.'s authority to file this complaint (*Exhibits "A" & "B"*) was granted by (Eugenio) Muñoz Gurren and Fred Dael, the representatives of Pepsi Co., Inc. in the Philippines. He does not have the authority from the Board of Directors to sue and be sued in behalf of Pepsi Co., Inc. Mr. Muñoz Gurren is the Director of Human Resources of Pepsi Co., Inc. in the Philippines. As such Director, Muñoz Gurren has the authority to look after the welfare of all the employees of Pepsi Co., Inc. and to deal with third party agencies with regards to the affairs of the said employees. Fred Dael is the one in-charge of looking after the volume and share and financial commitments, the welfare of the employees and to insure the company's growth in the market. He does not know whether there is an authority from the Board of Directors of Pepsi Co., Inc. for him to file the present complaint.

Quintin Gomez, Jr. did not include radio station DWAD in his complaint as one of the respondents because as such station, it is difficult for them to screen everything that is said over it, if it is a live program; that they (radio stations) have no control over the radio broadcasters as to what is said. The complaint is only against Vic del Fierro. He did not include the management of the radio station DWAD in his complaint/charge because they believe that the said management acted in good faith and if the management sold radio air time to Vic Del Fierro it is a normal transaction of businessmen engaged in radio broadcast; that these are live broadcast and one has no way of controlling what is in the mind of the person broadcasting. (TSN, 16 December 1996, pp. 1-57)

Perhaps his involvement in this "349" promotion and the fact that Vic del Fierro is also a party to this libel case are the reasons why he was selected to be the one to sign ~~all~~ the complaints of Pepsi Co., Inc. of Delaware/Pepsi Co., Inc. (Phils.) when they started the "349"

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cases that came out of that promotion. He was chosen to represent Pepsi Co., Inc. not directly by the said corporation but through locally organized corporation Pepsi Co., Inc. (Phils.), a subsidiary of Pepsi Co., Inc. in New York. (Frederick) "Fred" Dael and (Eugenio) Muñoz Gurren are employees of Pepsi Co., Inc. whose mother company is in Delaware and they were assigned to be part of the management team of Pepsi Cola Products (Phils.), Inc. He does not know if there was direct authority from the Board of Directors of Pepsi Co., Inc. in Delaware authorizing (Eugenio) Muñoz Gurren and Fred Dael to authorize him to file the various complaints he filed in the Philippines. (TSN, 3 May 1997, pp. 1-46)

Prior to June 1997, Eugenio Muñoz Guren was employed by Pepsi Cola International as Director for Personnel. He has been the Director for Personnel of Pepsi Cola International since 1980. As such director, he was in charge of the implementation and development of compensation and benefits, of recruitment, selection and orientation of employees, of the training and development of employees' functions and of the implementation of the human resource plan. Aside from being such director, Eugenio Muñoz Gurren is also an officer of the company as Director of Employee Relations and was the one representing both Pepsi Cola International and Pepsi Cola Far East. Quintin Gomez as Marketing Services Manager was responsible for developing and implementing media plans and he was also responsible for implementing broad media plans for brand strategies and he coordinates with outside contractors for different types of special events and promotions.

Eugenio Muñoz Gurren is the one who prepared and executed the Certification dated 2 February 1995 (*Exhibits "A" & "A-1"*). Frederick Dael, the Area Vice President for Pepsi Cola International for Philippine operation, signed the Certification dated 2 February 1995 (*Exhibits "B" & "B-1"*). Frederick Dael was responsible for the Philippine operation, i.e., on all matters regarding sales, volume, finance, human resources and technical services. Eugenio Muñoz Guren made the said certification because there was a case filed by Pepsi Cola International (Phils.) against Vic del Fierro and he was requested by Frederick Dael to give the authority to Quintin Gomez regarding the filing of a case. The said certification refers to the authority of Quintin Gomez.

The company referred to in the Certification is Pepsi Cola International (Phils.). Pepsi Cola International (Phils.) is operating in the Philippines through the Pepsi Cola International. As officers of the company, they (Muñoz Gurren and Dael) gave the authority and delegate responsibilities to their employees. Quintin Gomez as Marketing Services Manager has the authority to represent their com-

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pany, Pepsi Cola International (Phils.). The actual corporate name of Pepsi Cola International is Pepsi Cola International (Phils.). Pepsi Cola International (Phils.) is not a local corporation but a branch of Pepsi Co., Inc. of Delaware, the mother corporation.

Eugenio Muñoz Gurren claimed that they have several corporations under Pepsi Co., Inc. Pepsi Cola International is the Soft-Drinks Division of Pepsi Co., Inc. that represents the latter in the international business/market. He is not sure if Pepsi Cola International (Phils.) is a Philippine corporation. Eugenio Muñoz Guren's appointment came from the authorities of the Pepsi Cola International (Phils.). He was appointed as Director for Personnel by Cosme de Aboitiz, the then President of Pepsi Cola International (Phils.). Since 1995, the head of the corporation is the Area Vice President of the Philippine operation, i.e., Pepsi Cola International (Phils.).

Frederick Dael was appointed by Pepsi Cola International, which represents/or part of Pepsi Co., Inc. Eugenio Muñoz Guren does not know if there was authority from the Board of Directors of Pepsi Co., Inc. of Delaware. Pepsi Cola International (Phils.) reports to Pepsi Cola International which has an office in Hongkong. Pepsi Cola International has offices around the world and the Philippine branch reports to the Hongkong office. Pepsi Cola International (Phils.) never makes a report directly to Pepsi Co., Inc. of Delaware which is the main corporation. (TSN, 3 December 1997, pp. 1-46)

Evangeline Cruz, an executive legal secretary of Castillo Laman Tan Pantaleon and San Jose law offices since it started in 1981, knows that their law offices handle Pepsi "349 cases" because said cases goes to her first before it goes through Atty. Felipe Cuison, the Head of their Litigation Department. Pepsi is one of the biggest clients of Castillo Laman Tan Pantaleon and San Jose since 1982. The late Atty. Gregorio Castillo, the founder of Castillo Laman Law Offices, is the account partner for Pepsi. She knows a person by the name of Vic del Fierro because he mentioned his name in the tapes she was then transcribing. In the tapes, Vic del Fierro mentioned that he is such person and they heard from the radio that he has a 349 Coalition-Pepsi of which she thinks he is the President.

Evangeline Cruz and three (3) other secretaries, whose help she requested, transcribed the tapes of Vic del Fierro. The said secretaries include Tita Macaraeg, who is no longer connected with the law firm now, Libi Tantay, who is the Unites States now, and Tess Pascual Florendo, who is on maternity leave. She was the one supervising this team of secretaries being the most senior. This team of secretaries was formed in July 1994 when they started transcribing

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the tapes. The task of this team of secretaries was to transcribe the tapes during nighttime after their regular office hours. These tapes include the ones marked in evidence as Exhibits "G" & "G-1" (Del Fierro DWAD-AM July 13 [should read 17] 1994), Exhibits "H" & "H-1" (Del Fierro DWAD-AM July 24, 1994), Exhibits "I" & "I-1" (349 DWAD-AM July 30, 1994 Del Fierro) and Exhibits "J" & "J-1" (349 DWAD-AM August 7, 1994 Del Fierro).

This team of four (4) secretaries in fact transcribed the said tapes. Evangeline Cruz transcribed part of those tapes and then the three (3) secretaries transcribed also the said tapes. She supervised the said secretaries and after the transcriptions were finished, she reviewed the transcriptions. During the transcription, she saw to it that all of them were transcribing, that they have all the things they need by preparing them, such as food, tapes and cassettes. They transcribe the tapes only when they having nothing else to do. These transcriptions were made sometime during office hours, if they do not have anything else to do such as rush motions, but most of it were transcribed usually at night as an overtime.

According to Evangeline Cruz, they have all the three (3) secretaries doing overtime work transcribing the tapes. She remembers that it took them two to three weeks to complete the transcription of these four (4) tapes because they were long and they did the transcription on a part time basis, i.e., they did not transcribe them for the whole office hours. When the secretaries finished the transcriptions, they gave all of it to her and then she replayed the tapes and read the transcription at the same time to determine if the transcriptions were correct and in accordance with the tapes. She read the transcriptions as the tapes were being played. The transcriptions consisting of 26 pages with the heading DWAD-AM Vic del Fierro Interview July 17, 1994 3:00 p.m. Sunday Coalition 349 (Exhibit "K"), transcriptions consisting of 61 pages with the heading DWAD-AM 349 July 24, 1994 Sunday 3:00 p.m. Vic del Fierro Coalition 349 (Exhibit "L"), transcriptions consisting of 19 pages with the heading 349 DWAD-AM July 31, 1994 Vic Del Fierro (Exhibit "M"), and transcriptions consisting of 23 pages with the heading Side A August 7, 1994 Vic Del Fierro DWAD (Radio Station) "349" Coalition Oras 3:00 Announcer Mr. Vic Del Fierro (Exhibit "N") are the transcriptions made by them.

Evangeline Cruz further claimed that they have copies of the said transcriptions in their office files. After reviewing the transcriptions, she found them complete and correct. After she had completed reviewing the transcriptions she gave them to Atty. Alexander Poblador, the one in-charge of the PepsiCo 349 cases. The transcriptions were in turn given by Atty. Poblador to the other

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lawyers to determine if the transcriptions are correct with the tapes. The tapes were given to them by Atty. Poblador who was in charge of the Pepsi Coalition for transcription and she does not know where Atty. Poblador obtained those tapes.

According to her, the tapes were given to them one at a time. She thinks that their team took three weeks to transcribe the four (4) tapes. They did not finish transcribing the four (4) tapes at the same time. It took them a month to completely transcribe all the four (4) tapes because they were not given to them at the same time. It took their team four (4) weeks to transcribe the four (4) tapes from the first tape to the last tape. In other words, each tape took their team about one (1) week to transcribe. After the four (4) alleged tapes of the broadcast have been completely transcribed, she checked the transcriptions by listening to the broadcast.

When the tapes were given to her, the markings "Del Fierro DWAD-AM 349", "Del Fierro July 31 DWAD-AM 349" are not yet there. She does not know who placed those markings in the tapes. When the tapes were given to her, there were no identification whatsoever and she came to know that they are supposedly the broadcast made by Vic del Fierro because she heard his name mentioned. (TSN, 8 October 1997, pp. 1-49)

According to Atty. Enrique A. Cube, one of the commentators of radio station DWAD and who has an authority (Exhibit "S") from the Station Manager to represent the latter in court, the address of the said station is at 304 Shaw Boulevard, Mandaluyong City. He was told by the said station manager that at present the station has no record whatsoever of the requested tape recordings of 17 July 1994, Sunday, 3:00 p.m.; 24 July 1994, Sunday, 3:00 p.m.; 31 July 1994, Sunday, 3:00 p.m. and 7 August 1994, Sunday, 3:00 p.m. broadcasts. The said tapes have already been there for more than four (4) years from 1994 and usually DWAD keep records only for one (1) year and, afterwards, the tapes are erased and used for some other slots. Engr. Pestaño made a search for the said tapes. (TSN, 01 October 1997, pp. 1-24)

Atty. Cube was not given any documents relative to the broadcast of accused Vic del Fierro over DWAD referred to in the subpoena *duces tecum* dated 15 September 1997. He was told by the said manager that they have no more copies of the tapes. Usually the radio station does not answer for whatever the commentators would say. When it comes to those commentators who pay for their time slot, the radio station would not answer for whatever has been stated by the buyer of the slot. (TSN, 01 October 1997, pp. 1-24)

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According to **Jose G. Burgos, Jr.**, he know accused Vic Del Fierro because he was his classmate during their college days in the **UST Faculty of Philosophy and Letters** and they have had also dealings with him because he used to write articles with them and at present they are helping to set-up an organization of alumni of the Faculty of Philosophy and Letters Foundation. He has known Vic del Fierro for over 30 years ago. For 30 years he has been associated with or have known accused Vic del Fierro. He knew Vic del Fierro to be a writer, an advertising and PR practitioner and lately, an advocate.

Joe G. Burgos, Jr. further testified that the latest activity where Vic Del Fierro was involved in is the advocacy on the Pepsi (Number) Fever. To his knowledge, advocacy means espousing one's cause or several causes in the interest of the people and the welfare of the people is very much involved. When he said "interest of the people" it could mean a group of people, it could mean the entire nation, it could mean a community, and it could also mean one individual person (at this juncture, the prosecution and the defense entered into stipulation that "the problem, which arose out of the Number Fever Promo is a matter of public interest and it has generated public interest and these facts were taken judicial notice of by RTC, Branch 148). (TSN, 22 August 2002, pp. 1-26)

According to Feliciano Maragay, the matters stated in his report/article/news item he wrote for Manila Standard on 11 (or 14) July 1993 (*Exhibit "1"*) were learned by him from the interviews he conducted on the people involved in the investigation of the case and from the reports those people made such as the report of the Senate Committee on Trade and Industry which used to be chaired by then Senator (Gloria) Macapagal-Arroyo. He based his report only from two persons, i.e., the statement of then Senator Arroyo and then Senator Nikki Coseteng plus some information from other senators. The article he wrote faithfully reflected what was contained in the Senate Report of the Senate Committee on Trade and Industry. This report was only one of the reports that he made on the Senate Committee Report. The report itself of then Senator Macapagal-Arroyo is more complete and accurate since the newspaper article he wrote which appeared in the Manila Standard issue of 14 July 1993 was only a subsequent newspaper report and the bigger story was the one he wrote upon the submission of the Senate Committee Report.

Feliciano Maragay further testified that he know personally accused Vic del Fierro because the latter used to be the public relations man of then Senator Teodoro Guingoran, Jr.. He has known him since about 1991 or maybe even earlier. He has known Vic del

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Fierro for more than ten (10) years and he considers the latter as his friend although not a close one. The "bigger story" which he referred to earlier was the one that appeared (in the newspaper) after then Senator Arroyo gave a press conference to brief the members of Senate Press Committee on the findings and recommendation of her Committee on the "349 scandal." (TSN, 12 September 2002, pp. 1-17)

According to accused Vicente "Vic" del Fierro, Jr., as a lobbyist, he acts as de facto member of Congress and his opinions are primarily entered into the book of both chambers of Congress and Senate so he could represent various interest groups and sectors in whatever laws or deliberations to uplift the position of his clients, sector or industry. He is a licensed/registered lobbyist. There is a law, the Lobbyist Law, authored by then Senator Alberto Romulo which accredits and registers lobbyists. Not everyone can qualify to be a lobbyist; that to be accredited as lobbyist one must have a good moral character and pass stringent tests and guidelines and endorsements from several people who knew him personally as well experience in legislation as well as on laws. The Senate issues license to accredited lobbyist. He has a license as a lobbyist which was issued on 19 September 1989 in Manila, Philippines (Exhibit "13").

As lobbyist, he conceptualized legislation, he represent interest groups in public hearings in both houses of Congress and Senate and interpellate the same so that there will be an enlightened legislation that will inform further legislative members of Congress. He has been a free lance journalist since 1965 and he had worked as public relations marketing and advertising consultant in multinational advertising agencies. As a journalist he had written for almost all the major newspapers and magazines before, during and after Martial Law and even up to the present. At present, he is writing as a columnist in some newspapers. Right now he is writing for Manila Standard. As samples of his writings, he has recent contemporary columns that he has written and one of these is Consumer Exchange (Exhibit "14"). Recently, he has written "Consumerism in RP" for Manila Standard (Exhibit "14-A"), "Getting Sick Need Not Be Expensive" on 3 November 2002 (Exhibit "14-B") and "Profit with Honor versus Profit at All Cost" on 9 November 2002 (Exhibit "14-C").

In all his nearly forty (40) years as a freelance journalist, he had never been accused of libel, never in the history of his career as a freelance journalist until now when he took the cudgel for the pro-consumers. Aside from writing as a freelance journalist, he practices his profession as a Public Relations Consultant and Marketing and Advertising Practitioner as well to keep his body and soul together.

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He has a modest advertising company which sustains him and his advocacy as well. He has hundred several public interest cases and have written about it since the time he started writing to expose incompetence and corruption in the government bureaucracy. During his stint in the Senate, he had been interested in the NFA Rice as a member of the staff in the Blue Ribbon Committee. When he was under Senator Heherson Alvarez, he handled the prosecution of illegal logging which is depriving the country its resources. He also stood against jueteng at all costs because gambling, whether legal or illegal, is bad;

He has been involved in anti-legal gambling advocacies and the most notable of these was the Pepsi Cola "Number Fever" which he perceived to be similar to jueteng. Any public game that is similar to gambling is something that he really abhor as an individual and as prayer (lay) leader of a Christian community and that is why when Pepsi Cola and Pepsi Product (Phils.) launched the Pepsi "Number Fever" in February 18, 1992, knowing the mechanics of the contest, he was of the opinion that it is counter-productive to the country's youth because it cultivates a culture of dependence on chance, especially the fact that soft-drinks are geared for the youth market and it offered a lot of very, very attractive prizes and he took note of it. Later on, he decided to write his letter to the editor to condemn the promotion and not Pepsi Cola per se, but the promotion which in his view as an individual and as a prayer leader, is counter productive. He has written a letter as part of his plan to really check-out counter productive promotions.

On 29 February 1994 (sic), less than ten (10) days after the promotion was launched, his letter to the Editor of People's Tonight (Exhibit "15") appeared in the People's Tonight newspaper. In essence, he denounced the promotion as breeding the culture of gambling because of the mechanics, which is similar to jueteng. To him, for a company to be doing this promotion geared towards the youth, is something he would really stand up against because it is counter-productive, the people will be lazy, people will be depending their future to chance. In pursuit of his advocacy, he decided to closely monitor the promotion including the TV commercials and he personally obtained posters and closely studied the promotion and collected newspaper clippings that he had everyday in the house, the first one of which is a column of Ding Marcelo of Manila Bulletin which quoted the former President and Chairman Luis Lorenzo of Pepsi Cola (Phils.) as saying, "it is so simple, the people have to buy a soft-drink, (in) crown or cap, and you have to wait for the winning crown." There is something wrong with the "Number Fever" Promo Scheme of Pepsi Cola Company as shown by the posters (Exhibits "16", et seq.) that he had gathered.

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According to his perception as a veteran advertising and promotion and marketing practitioner, the rules of the contest was made so simple that the only factor in winning is the 3-digit number and this, plus the opinion of the then President (of Pepsi Cola) who says it is matter of winning the three-digit number only. He perceived it as so simple that winning in the Pepsi Number Fever Promotion was very easy, i.e., you have to wait for the 3-digit number and if that 3-digit number is announced, you win the price placed or indicated in the cap. There was an extension of the promo period and there was a *different* announcement. Rodolfo Salazar, President of the Pepsi Cola Products (Phils.), Inc., was *trying to quell the brewing crisis* reported in the newspaper and other columns. He was able to get hold of the said poster during the period from March to May 1992 on account of his continuing advocacy.

There was a brewing crisis because no less than *the tenor of the announcement recognizes that there is a crisis in the interpretation of the promotion rule*. In the newspaper clippings that he collected, there were really claimants who were not paid after the "349" winning number was announced. Even before that, there were claimants whose winning number were not paid but he has no knowledge of the other winning number, he *just read* from the said newspaper clippings that there was really *a problem* in the promotion. (TSN, 14 November 2002, pp. 1-53)

There were winning combinations that came about as a result of the Pepsi Cola promo. He has a compilation of the announcement/advertisement of Pepsi Cola Products (Phils.), Inc. regarding the Pepsi Number Fever dated 28 November 02 (sic) (Exhibit "17") signed by Rodolfo ("Rod") Salazar (Exhibit "17-A") explaining the numbers which were the winning number combinations and one of them is "349" (Exhibit "17-B"). He *really does not know* whether the claims on those several winning number combinations were paid but they know that winning number combination "349" is *contested*. He monitored the Pepsi Cola Number Scheme through the advertisements, the newspaper clippings and TV commercials because those would be the *basis whether there is something wrong* with the promotion and the announcement from the company. They have copies of the clippings he collected/ monitored.

His letters to the editor of the newspaper were published and one of which is the letter published in People's Tonight's newspaper article entitled "All Numbers Game Nurtures Jueteng Culture" dated 29 February 1992 (Exhibits "18" & "18-A"). His letter to the Manila Times was published in the Manila Times newspaper article entitled "Pepsi Promo Encourages Jueteng" dated 03 March 1992 (Exhibits "19" & "19-A"). The newspaper clipping taken from the Manila Times

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column of Froilan Antonio entitled "Pepsi PR Problem", which is a conclusion of two parts series commentary on the problem of the winning combination *not being paid* (Exhibit "20"). Aside from these clippings, he was able to collate several other newspaper clippings (Exhibits "21", "24" to "61").

When he monitored the promotion he also monitored all the advertising campaign from Pepsi Cola some of which includes the posters presented earlier and the TV commercials of "359" promo (Exhibit "62") (at this juncture the said TV commercials recorded in VHS/Video cassette format were played using a television set provided by the defense who, thereafter, stated for the record that in the said TV commercials there was *never mentioned* whatsoever of *any supposed security code as required* to be presented). The said TV commercials were later transcribed by the court's stenographer as agreed upon between the parties and the court (Exhibit "63"). Other than these TV commercials, they have the radio commercials which are basically the same as the TV commercials. (TSN, 29 November 2002, pp. 1-35; TSN, 25 March 2003, pp. 1-10)

Accused Vic del Fierro, Jr. further testified that he has other video tape presentations with the respect to the Pepsi Promo Number Scheme. Among these tapes are TV clips of the RPN News of RPN TV9 when it brought up the Number Fever, "349" was announced as the winning number. They have also the initial reaction of public officials on TV, the public affairs forum discussions in "Business Class" hosted by Atty. Rodolfo Romero wherein the Chairman of the Senate Committee on Trade, then Senator Gloria Macapagal-Arroyo, was special guest together with the City Fiscal of Manila who investigated one of the first cases of the 30 "Number Fever" scandal and him (accused Vic del Fierro), who took the side of the consumers. The said public affairs forum discussions were later transcribed by the court stenographer as agreed upon between the parties and the court (Exhibit "64"). (TSN, 18 February 2003, pp. 1-25; TSN, 25 March 2003, pp. 1-10)

Insofar as the TV commercials, he personally feel that it would be very difficult to understand the "reception" made therein because the commercials focused only the three winning numbers, there was *no mention or hint or implication whatever about the need for security codes*, which is a hidden rule in the promotion; *that first*, if we just look at the transcript, it would seem to be harmless commercials but if one would read through the commercials there is a strong emphasis to focus on the winning number combination, which is supposed to be the key to winning the cash prizes up to millions of pesos in the Number Fever Promotion; *that second*, the transcription made by the staff of this court, if one is basing it only on the sound/audio without

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looking at the transcription, it would look conscientious to say "prices" but it should be "prizes" (see p. 1 of the transcript); that he noticed that the President, then Senator, Gloria Macapagal Arroyo was misquoted and this is very, very critical because the transcription says "the status of the heart," when it should be "the status of the facts" since the facts of the case were never controverted according to the President, according to GMA, who was the one who quoted this thing, the fact that Pepsi changed the rules (see p. 11 of the transcript).

When he filed the case against Pepsi for US\$400 Million in Brooklyn, exactly *two days after*, he received a call from his wife telling him that cases against him were filed by Pepsi sometime in November 1994. Prior to the libel case, he filed a US\$400 million suit against PepsiCo before the Brooklyn Court of the United States of America; that a year after he filed the said case, there was a decision by Judge Nickerson declaring it for (*forum?*) "*non-convenience*" but there was an order for Pepsi Cola to submit to the jurisdiction of the court of the Philippines. Since the case was filed in the US, there were other cases filed here in the Philippines because there were thousands of victims and one of the winning cases was the case of Joel Roque in Bulacan wherein Pepsi Cola was ordered to pay the winner in the contest (Roque) his cash prizes but the same was appealed later.

He is the head of the group called "Coalition 349". He organized it two (2) days after he went to Pepsi Cola Plant in Aurora Boulevard. There were so many people there but he felt that the people there do not know what to do, they were aimless and so he took it upon himself, as a Christian, to share his little expertise in Marketing and Advertising to get them organized and that was the start of "Coalition 349". This Coalition "349" is duly registered with the Securities and Exchange Commission. As stated in their SEC records, "Coalition 349" is a consumer vigilance movement to uphold consumer flags (plights) in the country.

According to Vic del Fierro, they have several thousands of members all over the country including those in the Visayas and Mindanao, Muslims and Christians alike who were *victims* of the Pepsi controversy. Of the 40,000 consumers that he represented before, there were still 2,000 more or less who survived the 11 years protracted war between Pepsi and the consumers. At present these 2,000 more or less remaining members are still with the Coalition and they were giving them monthly monitoring reports on what is happening with the cases and some would meet with them monthly and they are being kept abreast of every development including the cases that are being heard.

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The first government agency that took notice of this was the Department of Trade and Industry, because it has the mandate to protect the consumers. The DTI thereafter organized a task force to investigate the *controversy*, for the protection of the consumers. The DTI Task Force came out with its findings (*Exhibit "6-C"*) that there was no clearance for the *change of the rules* of the promotion and that there was a *violation* of Ministry Order No. 33, which requires that all rules of the promotion should be cleared before the DTI. In the case of the changing of the rules particularly on the security code, which is meant only to determine whether the client is willing (winning?) or not, it was never mentioned that it was the basis for winning the cash prizes and not the 3-digit numbers, which was hyped in the commercials. There was another government agency which conducted investigation of this promo and, as a matter of fact, then Senator Gloria Macapagal-Arroyo, now the President of the country, investigated this thoroughly through the invitation of the Senate. The Senate Committee on Trade, following the Resolution of Senator Ernesto Maceda, who was then the Chairman of the Senate Blue Ribbon Committee, investigated this promo lengthily and their report/conclusion was that they *faulted* Pepsi for *gross negligence*.

As head of Coalition 349, he asked the Philippine Congress' (lower house) Committee on Trade to investigate the matter and Congresswoman Sandra Ocampo filed a Resolution asking that the Committee on Trade headed by Congressman Albertito Lopez to conduct an investigation; that an investigation was conducted by the Philippine Congress and they have it recorded in a video format; that unfortunately, when he went to the United States, no less than then Senator Gloria Macapagal Arroyo told him that Pepsi Cola Company had a *lobby to stop the preparation of the Congressional Report* and thus, there was no official report that came out and so what they can only present are public documents of the proceedings relative to the start of the investigation but not its conclusion.

After the Senate Report was submitted by Senator Gloria Macapagal Arroyo, he went to the U.S. *not to file a case* but to get to the top brass; that they (Coalition 349) came up with a public information campaign to try to establish the relevance of the issue to the national concern (consciousness) about the poverty's intention (alleviation) (?) since it is not just about the "tansan"; that they have to flesh out the real meaning of the *Pepsi scandal* in the national perspective of poverty; that he had occasion to meet with their members in Mindanao; that as a matter of fact, after coming back from his trip to the U.S. in 1993, he went to Mindanao to tell said members of the status of the case, the wherefores and the chances of winning and what he did in the U.S.; that on his first trip to Mindanao, he went to Davao and on his second trip, he went to Iligan

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and Cagayan de Oro and after that he was supposed to go to Zamboanga and Tabacco, General Santos but in Cagayan de Oro he was stopped by the NBI; that he has stopped by the NBI in Cagayan de Oro because a so-called concerned citizen has asked the NBI-Cagayan de Oro to apprehend him, to invite him for questioning; that this so-called concerned citizen happened to be the lawyer of Pepsi Cola, Atty. Ray Lago Salcedo; that was the first time he was arrested for doing something for the *public good*; that he and his son were threatened that they (NBI) will be pulling them bodily from the hotel to the headquarters if they refuse to come with them since they were outnumbered; that even the other "349" sympathizers could not console him, they (Muslim 349 claimant in Cagayan de Oro) were warned to interfere; that he and his son were taken to the NBI Headquarters for series of questioning, which unfortunately focused only on Pepsi, i.e., why did he went to the U.S.?; that they thought they will never get there alive, they just have to be quiet, they had to be like lambs; that after the said incident, he had to be rushed to the Manila hospital because of his first heart attack due to the intense feeling made by the NBI purely on questions about my Pepsi's concern; that when he got back in Manila, after resting for a while, he filed a case and then the NBI-Cagayan de Oro presented to him a Memorandum to DTI in Cagayan de Oro (*Exhibit "65"*) about his activities signed by Atty. Alexander Poblador, who happened to be the counsel of Pepsi Cola in the Philippines; that he has a copy of the said memorandum; that there are many "349" groups; that it is true that there were bombings but he never resorted to violence; that he cannot say that it (bombings) were all done by "349" cap holders; that as a matter of fact, in Davao, they would send black coffins to the manager of Pepsi Cola just to intimidate them, the people were restless; that Pepsi Cola complained with the NBI; that some people were given help already and their findings were that these goons happened to be security guards of Pepsi Cola; and that he knew who in particular the NBI Agent who conducted the investigation and he even interviewed him and he happened to be Atty. Artemio Sacaguing, the Head of the NBI Anti-Organized Crime, who was tasked to investigate this and he came up with a sworn statement (*Exhibits "66" to "66-C"*) before the City Fiscal of Manila attesting to the fact that his investigation revealed that the test (?) bombing was done by Pepsi hired goons.

While he is being charged in court for libel allegedly committed by him relative to his utterances made in a radio broadcast, the so-called radio commentary was never presented here and so he cannot comment on that; that honestly speaking, he read about this sugar importation made by Pepsi Cola subsidiary Macondray Company and there was a big howling protest made by the sugar planters; that these affected him since they were his co-recorded (?)

team, and that he has no malice against Pepsi in the first place but the fact that he was not heard or even presented here in court nor the station manager ever presented to authenticate, he cannot affirm with them but based on his observation, based on the transcript they made, this was based on the sugar importation made by Pepsi Cola. (TSN, 15 April 2003, pp. 1-47)

He is aware that he is charged in this case for the crime of libel; that he is very much aware that the charge of libel was embodied in the criminal information filed by the City Prosecutor of Makati dated 20 April 1995; that the said information was read to him; that he agrees that the Information was filed on the basis of a complaint filed by private complainant through its representative, Quintin Gomez; that prior to the filing of the criminal information in this case, a preliminary investigation was conducted by the Office of the City Prosecutor of Makati; that he is aware that it was Quintin Gomez who filed the complaint but he did not know in what capacity he was doing it, for or in behalf of Pepsi Cola; that when the complaint was filed by Quintin Gomez, he had an opportunity to read the same or to go over the said complaint and did not agree with it; that he does not agree that the allegations contained in the affidavit of Quintin Gomez correspond to the allegations mentioned in the Information; that the allegations in the Information in this case and the allegations in the complaint-affidavit of Quintin Gomez with respect to the defamatory statement allegedly made by him are exactly the same; that the complaint-affidavit was based on the transcript of the tape submitted by Pepsi, which was the only document he had seen, but Pepsi claimed that they submitted the tapes which, according to them, they have recorded; that as required by law, he filed a counter-affidavit to the complaint-affidavit of Quintin Gomez of Pepsi Cola; that his counter-affidavit dealt heavily about the authority of Quintin Gomez to file the present case in behalf of Pepsi Cola, he being a mere employee; that the transcript quoted in the Information was based on the alleged tape presented by Pepsi, according to Pepsi that was the tape made by them; that based on his knowledge of sugar dumping is that it deprives Government of its income, the country's sugar industry will suffer; that Victoria's Milling Company handles one of the biggest sugar industry before; that he knows that all the soft-drink company are getting other sugar supply in other countries, but if they will prefer foreign sugar over the country's local produce, then the country's sugar industry will suffer and because of this practice, this may have implications on the lives of thousands, even millions of Filipinos; that based on the said transcript made by Pepsi, he never accused Pepsi of sugar dumping, but he thinks they have *taken advantage* of cheaper sugar of Malaysia; that what he said was Macondray and never mentioned "Pepsi and what he meant by "dampot" was "import" and he was misquoted; that he learned about

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this from regular broadcast and from the newspaper; that it was already published repeatedly in the Inquirer, in the Bulletin and every newspaper; that if he is prohibited from commenting on it, that would be preposterous; that referring to the transcript made by Pepsi Cola, the so-called "panloloko" which was allegedly broadcast over the radio station, he can only comment on this; that the "panloloko" refers to the non-compliance of its corporate obligation that they will pay the people who have these winning caps but they (did) not; that the said statements refer to the Pepsi "Number Fever"; that he is aware that in connection with the said "Number Fever", several complaints for estafa were filed against the responsible officers of PepsiCo and Pepsi Cola (Phils.); that he is aware of the lengthy effort done by Pepsi Cola as they went up to the Supreme Court in regard with these cases; that based on published reports in the newspapers, Pepsi has not been honoring its obligation with other numbers and not only on "349" but other winning caps and this is the root of his comment "*marami ng tinatanggihan mga numerong ina-announce in public*", there were winning number combinations which were not being paid; and that he does not know any criminal, civil or administrative cases filed against Pepsi in connection with other winning numbers other than "349" but there were published report of people who got winning numbers and not being paid by Pepsi Cola. (TSN, 26 May 2003, pp. 1-58)

He is the founder and the president of Coalition 349; that Coalition 349 was originally an association of people who were victimized by the infamous Pepsi Number Fever; the coalition was formed for the quest of justice in behalf of the thousands victimized by the infamous Pepsi Number Fever scandal of 1992; that he has nothing against Pepsi but *only against the promotion itself*; that he has been a freelance journalist since 1963; that he was written for the pre-martial law Manila Times, Philippine Free Press, Manila Chronicle, Philippines Herald and a lot of other magazines long, long before Pepsi "349" case; that he considers himself a veteran freelance journalist because he does not belong to any newspaper company; that he has extensive experience in writing since his UST days; that their Code of Ethics extend on the truth, nothing but the truth and they should never be caught/cowed (?) by any threat of libel or anything; that Code of Ethics requires them to report or comment on the truth and nothing but the truth and for them to do this, as a journalist, they give all parties to a certain issue a *chance to explain themselves if they give their sides*, they would also come but if they remain silent, they cannot do anything about it; that as a journalist, his conviction was to serve what is good for the public and he is not supposed to believe on the mouthpiece of any commercial entity or private interest; that if the private interest would rather prefer to keep their mouth shut, then they cannot do anything, they get the public's

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side/right; that he believes in the truth; that in order to arrive at that truth, he *needs to get all available and accessible sources of information* regarding a certain issue; that in any controversy, there are at least always two (2) sides, provided both sides give their sides; that he is the president and founder of Coalition 349 representing the consumers who were victimized by the Number Fever scandal; that his engagement as a journalist is *different* from his advocacy as a consumer; that the complaint of Pepsi against him for libel underwent a preliminary investigation and he admitted having filed a counter-affidavit; that he confirms the annexes (newspaper clippings) attached to his counter-affidavit because those were all the facts about the controversy and the sugar importation made by Pepsi; that he made the statements appearing in paragraph 1A, page 2 of Quintin Gomez's Complaint-Affidavit *based on those newspaper clippings that were his*; that he is contesting the taped broadcast made by the secretary of the Pepsi Cola lawyer since it was never validated and even the statement itself; and that what they (Pepsi Cola lawyer) put there, he had never heard; that he is not worried that he might be convicted since he stands and always fight for the truth. (TSN, 10 June 2003, pp. 1-55)

Annex "B" refers to the photocopy of the newspaper clipping which reports that certain sugar mill workers began boycotting versus Pepsi mentioned in paragraph 5 of his Counter-Affidavit; that the photocopy of a newspaper report entitled "Temporary Restraining Order versus Imported Malaysian Sugar" is the Annex "C" of his Counter-Affidavit; that he cannot recall if the photocopy of the newspaper article entitled "Sugar Supply Inadequate for Users" is the Annex "D" referred to in his Counter-Affidavit; that his Counter-Affidavit was prepared by his counsel; that the Fiscal told him to fill his Counter-Affidavit up but he was not really able to define the stratum of that reply; that the stories in the attached documents (newspaper clippings) *identified Pepsi* and so, how can he refer to that it being printed in the newspaper; that based on the photocopy of the said newspaper report, which he attached as Annex "C" of his Counter-Affidavit, there was a suit filed by sugar planters to prevent the importation in large quantities of sugar; that as a journalist, he is familiar with press releases, i.e., a party makes press release to further his cause; that he was not the one who wrote that newspaper report and so he cannot testify on whether or not the said article was simply a simple press release which was published at the instance of the groups supporting these sugar planters; that the newspaper clippings speaks for itself and it speaks about the temporary restraining order filed against the imported Malaysian sugar; that the sugar importation is being challenged because it will hurt the sugar industry and poor people and thousands of families who will be affected by the foreign sugar; that *he was under the sugar industry*

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many years back before the cases of Pepsi Number Fever and so he was exposed to the plight of the sugar planters in Victoria's Milling Company, one of the biggest sugar mills in the country; that he has not heard that the sugar planters were complaining because they were claiming that the Filipino sugar planters are producing sugar in sufficient quantities; that he is not in a position to competently answer that question regarding an oversupply of sugar; and that the fact that there is sugar being passed on, being imported by shield (?) price (as reported) in some of the of the clippings, completely validate that there was really an entry of an attorney by Pepsi's subsidiary, sister company, Macondray (TSN, 17 June 2003, pp. 1-34).

He recalls having been asked the question, "Based on the newspaper report attached as Annex "C" to your counter-affidavit, there was a suit filed by the sugar planters to prevent the importation of large quantity of sugar?" and he said he agreed with the small farmers. He feels that there was a violation committed by Pepsi Cola which would affect the life of poor and small farmers and this is the violation of the Magna Carta which says that no importation will be allowed which will introduce (?) adequately by these farmers and the sugar being well the most one, most voluminously products in large quantities. There was no need with the small farmers and there was no need to import sugar when there is no sugar available locally. He sided with the planters. He is a journalist, among others. As a journalist, he can only gain the truth if the other party cooperates in providing their side. In some cases, like the Pepsi Cola case, they have never wanted to reveal their side but the other side wanted to. As a journalist, he obligated himself to fight for the truth and if there are two sides in the question, they wanted to give them the opportunity but the other side refused to avail of their opportunity. He just read it on the newspaper article (Exhibit "U"). It so happened that he was in Bacolod at the time and there were "349" caps holder there and his presence in the local media was noted and there were sugar planters later on meeting on that day and one of them is Danding Cojuangco. He was invited by the planters association of the city to join their meeting and so, he was able to listen to their petition about this importation of Pepsi which would hurt the plight of the thousands of families of the sugar planters. The sugar importers never asked him anything and he was not behind them. These things were published not only in the Negros newspaper, it was published in the Business Day and it was publicized for one week and so, he guessed they (the sugar importers) would know it by that time. If the owners of Pepsi were vigilant enough, they should have called his attention. They should have asked him if he would not make the statement on the radio whether that is correct or not. As a journalist, they are open to all parties, they have to call their attention. It is voluntary on their (parties) part to air out their own position. He was just reporting what

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has been published in all the major national dailies. Because of the said publication he expected them (the parties/sugar importers) to call his attention. The most logical thing (that should have been done) by Pepsi Cola was to come up with its clarificatory statement. Despite the said publication, Pepsi did not come up with any statement. His being the president of Coalition 349 and a veteran journalist as well gave him the capacity and competence to better object (?). (TSN, 26 April 2005, pp. 1-57)

The accused raised the following issues in his Memorandum:

1. Assuming the acts constituted a crime of libel were it not for the fact that *the person of the alleged victim was outside of the Philippine jurisdiction* when the alleged acts were committed, whether the court has jurisdiction under the **theory of territoriality**;
2. Granting the **theory of territoriality** grants jurisdiction to the court, whether Mr. Quintin Gomez, Jr. had the authority to prosecute this particular case on behalf of complainant Pepsi Cola International;
3. Assuming *arguendo* he had authority, whether the crime of libel was committed, as laid down under the following sub-issues:
 - i. Whether there was publication of the alleged defamation;
 - ii. Assuming *arguendo* there was publication, whether there was identification of the person allegedly defamed;
 - iii. Assuming *arguendo* there were publication and identification, whether the alleged broadcasts are defamatory; and
 - iv. Assuming all the aforementioned three elements of libel were present, whether there was malice in the alleged broadcasts.

Whether the court has jurisdiction under the theory of territoriality

In the present case, the accused claims that *the person of the alleged victim was outside of the Philippine jurisdiction* when the alleged acts were committed.

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From the evidence presented, it was established by **Quintin Gomez** in his testimony that Pepsi Company, Inc. [Phils.]/Pepsi Cola International ("Pepsi, for brevity) is registered in the State of Delaware, USA, with headquarters in New York, and does business over 140 countries around the world including the Philippines; that Pepsi is duly licensed to do business in the Philippines; Pepsi Co., Inc. which has a branch in the Philippines and licensed to do business in the country; a foreign corporation doing business in the Philippines; that Pepsi Co., Inc. in the Philippines is not a different entity from Pepsi Co., Inc. in Delaware; that there are three (3) Pepsi Cola Corporation in the Philippines and these are: Pepsi Company (International) or Pepsi Co., Inc., Pepsi Cola Far East and Pepsi Cola Philippines, Inc. (a joint venture company); that these three (3) corporations are engaged purely in the marketing of the products of Pepsi Cola; Pepsi Co., Inc. (Phils.), a subsidiary of Pepsi Co., Inc. in New York; that Pepsi Co., Inc. of Delaware is licensed to do business in the Philippines while Pepsi Cola Products (Phils.) is a locally organized corporation;

Eugenio Muñoz Guren testified that the actual corporate name of Pepsi Cola International is Pepsi Cola International (Phils.); that Pepsi Cola International (Phils.) is not a local corporation but a branch of Pepsi Co., Inc. of Delaware, the mother corporation; that they have several corporations under Pepsi Co., Inc.; that Pepsi Cola International is the Soft-Drinks Division of Pepsi Co., Inc. that represents the latter in the international business/market; that he is not sure if Pepsi Cola International (Phils.) is a Philippine corporation; that Pepsi Cola International (Phils.) is operating in the Philippines through the Pepsi Cola International; ; that Pepsi Cola International (Phils.) reports to Pepsi Cola International which has an office in Hongkong; that Pepsi Cola International has offices around the world and the Philippine branch reports to the Hongkong office; and that Pepsi Cola International (Phils.) never makes a report directly to Pepsi Co., Inc. of Delaware, which is the main corporation.

In his *Philippine Conflict of Laws* (Fifth Edition, 1979, Rex Book Store, pp. 409-412), Associate Justice Edgardo L. Paras says that there are at least six (6) different theories as to what tribunal or legal system has jurisdiction to take cognizance of criminal cases, or the so-called **theories of extra-territorial competence**, and these are: (1) the territorial theory; (2) the nationality or personal theory; (3) the protective theory; (4) the real theory; (5) the cosmopolitan or universality theory; and (6) the **passive personality theory** (see *Harvard Research in International Law*, 29 A.J.I.L., Supplement 1935).

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The "Territorial Theory"

Under the **territorial theory**, the state where the crime was committed has jurisdiction to try the case. The **penal code** that will be applied by the said state will be its own and the penalties to be meted out will also depend on its laws. It is based on the rationale that crimes affect directly and particularly the dignity, authority, and sovereignty of the state where the crime was committed. The aggrieved state is duty bound to prosecute and punish the offender if only to restore public order and trust. **In general, it is the theory that is adhered to in the Philippines.** (Ibid., p. 484)

The "Passive Personality Doctrine"

Under the **passive personality theory**, also called **passive nationality theory**, the state of which the victim is a citizen or subject has jurisdiction. The reason seems to be this—a wrong having been inflicted on its citizen or subject, a state is duty bound to seek justice by criminally prosecuting the offender. This theory has been widely criticized (Harvard Research, *supra*), principally because a national of one country may by one act subject himself to the penalties given by several foreign penal codes (see Instructions of November 1, 1887, U.S. Foreign Relations, p. 75).

As earlier stated, for allegedly defaming the good name of Pepsi Co., Inc. ("private complainant") in his broadcasts aired over radio station DWAD-AM on 17 July, 24 July, 31 July and 7 August 1994, Vicente ("Vic") T. Del Fierro ("accused") was charged with the commission of the crime of Libel in the Information dated 20 April 1995 filed by the Makati City Prosecution Office before this Court on 19 July 1995. The said Information avers:

"That sometime and on several occasions in July to August, 1994, in the City of Makati, Philippines and within the jurisdiction of this Honorable Court, the above-named accused, with malicious intent of injuring the good name of PEPSICO, INC. herein represented by its Marketing Services Manager, Mr. Quintin J. Gomez, Jr. and exposing willfully, unlawfully and feloniously broadcast and air and/or accused (caused) to be broadcasted and aired over the radio station DWAD-AM, the following:

"The July 17, 1994, Broadcast:

x x x

x x x

x x x

"The July 24, 1994 Broadcast:

x x x

~~x x x~~ x

x x x

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"The July 31, 1994 Broadcast:

x x x

x x x

x x x

"The August 7, 1994 Broadcast:

x x x

x x x

x x x

wherein the said accused falsely, maliciously and without justifiable motives(,) imputed to the said complainant the commission of a crime(,) of a vice or defect, or any act, condition, status or circumstances tending to cause dishonor, discredit or contempt of **(?) the said amount or amount as may be awarded to him under the Provision of the New Civil Code of the Philippines (?)**."

"CONTRARY TO LAW.

"City of Makati.

"April 20, 1995."

The said felony is defined in Article 353 of the Revised Penal Code, as Amended. It provides that:

"Art. 353. *Definition of libel*.—A libel is a public and malicious imputation of a crime, or of a vice or defect, real or imaginary, or any act, omission, condition, status or circumstance tending to cause the dishonor, discredit, or contempt of a natural or juridical person, or to blacken the memory of one who is dead."

Libel may be committed by several means and these are enumerated in Article 355 of the same Code, which states that:

"ART. 355. *Libel by means of writings or similar means*.—A libel committed by means of writing, printing, lithography, engraving, radio, phonograph, painting, theatrical exhibition, cinematographic exhibition, or any similar means x x x."

Section 15, paragraph (a), Rule 110 (Prosecution of Offenses) of the Revised Rules of Criminal Procedure provides:

"(a) *Subject to existing laws*, the criminal action shall be *instituted and tried* in the court of the municipality or territory where the offense was committed or where any of its essential ingredients occurred."

On this point, the Court of Appeals held in the case of *Hilarion M. Henares, Jr. vs. Hon. Fortunato L. Madrona, etc., et al.*, CA-G.R. SP. Proc. No. 87968, March 12, 2008, penned by Justice Jose C. Reyes, Jr. that:

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"x x x. Art. 355 of the Revised Penal Code defines libel as to its manifestations, and 'writing' and 'radio' are therein enumerated side by side as among the overt acts. x x x a **radio broadcast** being libel, the filing for (sic) a case of libel in that regard should follow the **general rule** re instituting a criminal action as provided under **Sec. 15, Rule 110 of the Revised Rules of Criminal Procedure.**"

Thus, it is clear that pursuant to Section 15, Rule 110 of the Revised Rules of Criminal Procedure, the herein accused should be tried in the Regional Trial Court of Makati City, "*the court of the municipality or territory where the offense was committed or where any of its essential ingredients occurred*" as averred in the Information filed against him. Under the territorial theory, the proper Philippine Regional Trial Courts have jurisdiction over the crime of libel with which the herein accused is charged.

Our **criminal law in the Philippines** has three main **characteristics**, namely: (1) general, (2) territorial, and (3) prospective.

It is **general** in character in that criminal law is *binding on all persons who live or sojourn in Philippine territory* (Article 14, New Civil Code). However, there are cases where our Criminal Law does not apply even if the crime is committed *by a person residing or sojourning in the Philippines* and they constitute the **exceptions** to the **principle of generality**. These exceptions are "those mentioned under **Article 2, Revised Penal Code, as Amended**, which include: (a) those provided in the *treaties*; and (b) *laws of preferential application* or those mentioned under Article 14 of the New Civil Code which include: (a) those subject to the *principles of public international law*; and (b) to *treaty stipulations*."

Article 14 of R.A. No. 386, otherwise known as the Civil Code of the Philippines, as Amended, provides:

"ARTICLE 14. Penal laws and those of public security and safety shall be obligatory upon all who live or sojourn in the Philippine territory, subject to the principles of public international law and to treaty stipulations (7a).

It is **territorial** in character in that our criminal laws undertake to punish *crimes committed within Philippine territory*. The **principle of territoriality** means that as a rule, penal laws of the Philippines are enforceable only within its territory. However, the provisions of our criminal laws shall be enforced outside of the jurisdiction of the Philippines against those persons who commit the crimes mentioned

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and in the place and manner stated in Article 2 of the Revised Penal Code, as Amended.

Article 2 of R.A. 3815, as Amended, otherwise known as the Revised Penal Code, as Amended, provides:

"ARTICLE 2. *Application of its provisions.*—Except as provided in the **treaties** and **laws of preferential application**, the provisions of this Code shall be enforced not only within the Philippine Archipelago, including its atmosphere, its interior waters and maritime zone, but also outside of its jurisdiction, against those who:

1. Should commit an offense while on a Philippine ship or airship;
2. Should forge or counterfeit any coin or currency note of the Philippine Islands or obligations and securities issued by the Government of the Philippine Islands;
3. Should be liable for acts connected with the introduction into these islands of the obligations and securities mentioned in the preceding number;
4. While being public officers or employees, should commit an offense in the exercise of their functions; or
5. Should commit any of the crimes against **national security** and **the law of nations**, defined in Title One of Book Two of this Code (such as treason, conspiracy and proposal to commit treason, misprision of treason, espionage, inciting to war or giving motives for reprisals, violation of neutrality, correspondence with hostile country, flight to enemy's country, piracy and mutiny on the high seas or in Philippine waters, qualified piracy)."

In the present case, the accused does not fall within any of the exceptions to the principles of generality and territoriality.

Whether Mr. Quintin Gomez, Jr. had the authority to prosecute this particular case on behalf of complainant Pepsi Cola International

The private complainant in the present case is a corporation. A corporation is an artificial person, created by operation of law, having the right of succession, and the powers, attributes and properties expressly authorized by law or incident to its existence (Sec. 2, *Batas Pambansa Blg. 68, otherwise known as the Corporation Code of the Philippines*). Private corporations are those formed for some private purpose, benefit, aim or end (Sec. 3, Act No. 1459, *otherwise known as the Corporation Law, as Amended*).

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Associate Justice Edgardo L. Paras, in his *Philippine Conflict of Laws* (Fifth Edition, 1979, Rex Book Store, pp. 427-432), states that there are at least three (3) **theories on the personal or governing law of a private corporation** and these are: (1) the theory that the personal law is *the law of the place of incorporation*; (2) the theory that said personal law is *the law of the place or center of management*, also known as the **central office principle**; and (3) the theory that insists on *the law of the place of exploitation* as the personal law. (see Wolff, *Private International Law*, pp. 304-305)

The first theory (*the law of the place of incorporation*) is premised on the idea: (a) that the corporation is merely a creation of the law under which it was organized; (b) that without such law granting its existence, it would be a non-entity, devoid of any rights; and (c) that, therefore, wherever it may be, said law should govern its very actuation (see Wolff, *Ibid.*, p. 203). Unfortunately, such a doctrine, *if adhered to literally*, would make possible evasion of many responsibilities by the simple expedient of a company organizing in one state and performing its corporate functions in another. *This theory is followed by England, the United States, Soviet Russia, many German jurists, and in a modified way by the Philippines.*

In the Philippines, the personal law of a corporation (as well as its nationality) is generally subjected to the "incorporation test." On this point, Section 69, Philippine Corporation Law, Act No. 1459, provides that:

*"No **foreign corporation** or corporation formed, organized, or existing under any laws other than those of the Philippines shall be permitted to transact business in the Philippines or maintain by itself or assignee any suit for the recovery of any debt, claim, or demand whatever, unless it shall have the license prescribed . . ."*

It would seem from this section that if the corporation was organized in the Philippines, it is a local or domestic corporation (see Section 19, Corporation Code, as Amended); if incorporated elsewhere, it is a **foreign corporation** (Section 123, Corporation Code, as Amended). It is logical therefore to conclude that **as a rule, we follow the theory of incorporation**. The **exceptions** to this rule are: (a) **for constitutional purposes**, even if the corporation was incorporated in the Philippines, it is not deemed a Philippine corporation for the purpose of the exploitation of our natural resources and operate public utilities unless 60% of the capital of which is Filipino owned (Section 10, Art. XII [National Economy and Patrimony], 1987 Constitution); and (b) **for wartime purposes**, we pierce the veil of corporate identity and go into the *nationality of the controlling stockholders* to determine if a corporation is an enemy corporation or not under the "control test", as distinguished from the

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"incorporation test." (*Filipinas Insurance Co. vs. Christern Huenefeld & Co.*, L-2294, May 25, 1951; *Doris Winship vs. Phil. Trust Co.*, L-3869, Jan. 31, 1962)

Section 129 of the Corporation Code of the Philippines provides that:

"SECTION 129. *Law applicable.*—Any **foreign corporation lawfully doing business in the Philippines** shall be bound by all laws, rules and regulations applicable to domestic corporation of the same class, except such only as provide for the creation, formation, organization or dissolution of corporations or those which fix the relations, liabilities, responsibilities, or duties of stockholders, members, or officers of corporations to each other or to the corporation (73a)."

From the foregoing, it is clear that a foreign corporation doing business in the Philippines "shall be bound by all laws, rules and regulations applicable to domestic corporations of the same class." In the present case, while complainant PepsiCo was incorporated in the United States, the said foreign corporation is doing business in this Philippines and thus, it is bound by laws, rules and regulations applicable to domestic corporations.

Section 23 of the Corporation Code of the Philippines provides that:

"SECTION 23. *The board of directors and trustees.*—Unless otherwise provided in this Code, the corporate powers of all corporations formed under this Code shall be exercised, all business conducted and all property of such corporations controlled and held by the board of directors or trustees to be elected from among the holders of stocks, or where there is no stock, from among the members of the corporation, who shall hold office for one (1) year until their successors are elected and qualified. (28a)"

Section 123 of the Corporation Code of the Philippines, *supra*, further provides as follows:

"SECTION 123. *Definition and rights of foreign corporation.*—x x x a **foreign corporation** x x x shall have the right to transact business in the Philippines after it shall have obtained a license to transact business in this country in accordance with this Code and a certificate of authority from the appropriate government agency. (n)

In the present case, the prosecution failed to show that Quintin Gomez, Jr. was authorized by the board of directors of private complainant PepsiCo to file the criminal case for libel with which the herein accused is charged.

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Whether the crime of libel was committed

Article 353 of the Revised Penal Code, as Amended, provides:

"Art. 353. *Definition of libel.*—A **libel** is a public and malicious imputation of a crime, or of a vice or defect, real or imaginary, or any act, omission, condition, status, or circumstance tending to cause dishonor, discredit, or contempt of a natural or juridical person, or to blacken the memory of one who is dead."

Libel is a defamation committed by means of writing, printing, lithography, engraving, radio, phonograph, painting or theatrical or cinematographic exhibition, or any similar means (Art. 355, RPC).

Defamation, which includes libel and slander, means the offense of *injuring* a person's *character, fame or reputation* through *false and malicious* statements. It is that which *tends to injure* reputation or *to diminish* the esteem, respect, good will or confidence in the plaintiff or to excite derogatory feelings or opinions about the plaintiff. It is the *publication* of anything which is *injurious* to the good name or reputation of another or *tends to bring him into disrepute*. **Defamation** is an *invasion of a relational interest* since it involves the *opinion which others in the community may have, or tend to have, of the plaintiff*. (MVRs Publication, Inc. vs. Islamic Da'wah Council of the Philippines, Inc., G.R. No. 135306, 444 SCRA 230, 241 [2003]).

The enjoyment of a private reputation is as much a constitutional right as the possession of life, liberty or property. It is one of those rights necessary to human society that underlie the whole scheme of civilization. The law recognizes the value of such reputation and imposes upon him who attacks it, by slanderous words or libelous publication, the liability to make full compensation for the damage done. (Worcester vs. Ocampo, 29 Phil. 42)

The elements of defamation are:

1. That *there must be an imputation* of a crime, or of a vice or defect, real or imaginary, or any act, omission, status or circumstance.
2. That the imputation *must be made publicly*.
3. That it *must be malicious*.
4. That the imputation *must be directed to a natural or juridical person, or one who is dead*.
5. That the imputation *must tend to cause dishonor*,

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discredit or contempt of the person defamed.

Whether the alleged broadcasts are defamatory

The **defamatory imputation** may cover: (a) *crime allegedly committed* by the offended party; (b) *vice or defect, real or imaginary, of the offended party*; or (c) *any act, omission, condition, status of, or circumstance relating to the offended party*. In determining whether a **statement is defamatory**, the words used are construed in their entirety and taken in their plain, natural and ordinary meaning as they would naturally be understood by persons reading them, unless it appears that they were used and understood in another sense (Novicio vs. Aggabao, 463 SCRA 510, 516 [2003]). Words calculated to induce suspicion are sometimes more effective to destroy reputation than false charges directly made. *Ironical and metaphorical language* is a favored vehicle for slander. A charge is sufficient if the words are calculated to induce the hearers to suppose and understand that the person against whom they were uttered was guilty of certain offenses, or are sufficient to impeach the honesty, virtue or reputation, or to hold him up to public ridicule. (U.S. vs. O'Connell, 37 Phil. 767)

In applying these rules to the language of an alleged libel, the court will disregard any subtle or ingenious explanation offered by the publisher on being called to account. The whole question being the effect the publication held upon the minds of the readers, and they not having been assisted by the offered explanation in reading the article, it comes too later to have the effect of removing the sting, if any there be, from the word used in the publication. (U.S. vs. Sotto, 38 Phil. 666). When the comments are *insincere and intended to ridicule* rather than to praise the plaintiff, the publication is libelous. *Praise undeserved is slander in disguise*. (Jimenez vs. Reyes, 27 Phil. 52)

In the present case, **Quintin Gomez** also testified that it was only in the course of Vic Del Fierro's radio broadcast in the portion thereof where the accused became very livid and antagonistic against Pepsi that struck him; that from the words used by Vic Del Fierro in the context of what he was trying to profound at that time, it shows that obviously he had a grudge against Pepsi which began from the "349" controversy; and that during Vic del Fierro's radio broadcast it was obvious to him (Gomez) that the words used in the context which those words were said or uttered were antagonistic towards Pepsi; that those words or utterances of Vic Del Fierro were expressed in his (Gomez) Complaint-Affidavit (Exhibit "E", supra).

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Quintin Gomez further testified that the broadcast made by the accused on 17, 24 and 31 July and 7 August 1994 damaged the reputation and goodwill of Pepsi on a very great extent to which it is still trying to recover from; that it caused Pepsi ill-repute with its customers in the trade and it has caused a great deal of damage with the consumers that it sells its products; that he heard the said broadcasts and when heard the same he felt abused, that they were wronged to a great extent, that it was very one-sided and biased and blatantly ensued (?) because of the nature of his (Del Fierro) allegations, their (Pepsi's) side was not heard, and it (broadcasts) was not in the proper forum where both sides will be heard; that he (Gomez) had mixed reactions, he felt angry and sad because of the words said about their company (Pepsi), he felt ridiculed that they (Pepsi) were being tried unjustly over the radio.

Further, **Quintin Gomez** that he is not sure of the subject of the 17 July 1994 broadcast since he does not listen to the tape day in and day out, that it is not one of his better listening habit but if he will be confronted with the transcript or with the written document of the broadcast, he will be able to answer the question more intelligibly; that after having been informed by the defense counsel, he can now recall a little bit that the subject of the 17 July 1994 was the sugar industry; that he cannot recall that in the broadcast of 17 July 1994, Vic del Fierro called on thousands of his members to support the boycott of Pepsi Cola products initiated by the leaders of the sugar industry;

The broadcasts made by the accused, as alleged in the Information, are quoted below in *verbatim*:

"The July 17, 1994, Broadcast:

"A. "I was in Negros for 4 days at and Coalition 349 is supporting this move and we have announce (sic) it our (sic) sa media doon sa Negros dahil meron pong qinawang katiwalian ang Pepsi. Ano po ang katiwalian na ito? Sila, sa pamamagitan ng kanilang sister company Macondray, sila ay nagdampot ng asukal sa Malaysia. From Malaysia iyon ay nakita ito po ay kung papayagan, kung papayagang makapasok dito sa Pilipinas at makalanding na nga ay bubuksan at maaring ito sa gawing paraan ng ibat-ibang industriya upang makadampot ng asukal at babagsak na naman ang sugar industriya which involved 5 million people. Hindi lang po sa Negros iyan; and majority niyan ay sa "Negros."

"B. "Ngayon po ito and latest one, at iyon po ay kasama ang Coalition 349 diyan sa laban na iyan na Nationwide boycott na tinawag ng sugar industriya at iyon po ay sinusuportahan ng

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Mayor's league ng buong Negros at sinabi ko ang na kung pupuwede na ipaabot din iyan ang kawalanghiyaan na iyan ay maisumpa rin ng mga other Mayor's league of the Philippines hindi lang sa Negros kung sa ganoon din all cities of the Philippines para sa ganoon ay maipalaganap and Nationwide boycott na iyan."

"C. "Sa mga taga sugar industry, we are going to help them in this campaign against Pepsi Cola Products. Lahat po iyan(.) nakita po ninyo pati industry ng asukal ay sisirain nila industry ng Pilipinas. Tay-tayo lahat ho kung pupuwede huwag na po tayong bibili ng Pepsi. Isumpa ho natin iyan(.) isumpa ang pangalang iyan; Pepsi katumbas ng pangluluko. Pangluluko sa mga Pilipino ngayon pati sugar industry ibabagsak nila kaya po sumali na ang 349 doon."

"D. "Sa totoo lang malaking kabalastugan itong ginawa; kalapastanganan itong ginawa ng Pepsi. Walang sinabing security code. Ang sinasabi nila ang batayan nila ng panalo ay three digit numbers announced daily. Wala namang sinasabing tatlong digit numbers iyan inaannounce pero kailangan tama ang security code numbers, alam natin dahil may tape ako ng mga announcement nila Martin Nievera eh at saka mga posters eh wala naman doon iyan at iniikot ikot ko nga yong posters eh wala naman akong makitang kailangan talaga ang security code kundi three digit numbers lang kaya po ang ating tinatayuan sa labanang ito."

"E. "Ang katotohanan ay . . . pinagsasamantalahan nila. May panloloko diyan sa promotion na iyan na nagmula sa New York. Nandoon ang panloloko, bakit? Hindi pa lumalabas iyung ang 349 marami ng tinatangqihang mga numerong ina-announce na panalo. Eh anong labas niyan eh panloloko, lokohan na nagkarma lang dahil sa kapabayaan ng local Pepsi. Lumabas na iyong numero, nakalimutan nila. Tuwang-tuwa sila sa palakpakan at napabalitaan nga na iyang isang Presidente ng Pepsi na magbibigay sana ng lecture sa Johnson and Johnson tungkol sa 349 bigla na lang hinimatay. Hindi papayagan ng Panginoong Diyos na kayo ay maghimagsik (sic) pa ng kasinungalingan, tandaan ninyo."

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"F. "Bakit iyon ay paraang idiin na talagang iyon ay kasuklam-suklam(.) karumal-dumal(.) kaya't itong ginagawa ng Pepsi ay karumal-dumal iyan ay isang paghamon na sa ating Panginoon(.) sa ating Diyos."

"G. "Ang katotohanan ay itong promotion ng Number Fever promotion ng Pepsi sa mula't-mula pa sa una pa lang ay tinago na iyong security code. Kunwari ay ayaw nilang banggitin sa TV, sa poster at pagkatapos bigla nilang ilalabas na nagkaroon ng aberya as sa totoo lamang marami ng Marso pa lamang ay marami ng nanalong numero na hindi

been a freelance journalist since 1963. He has written for the pre-martial law Manila Times, Philippine Free Press, Manila Chronicle, Philippines' Herald and a lot of other magazines long, long before Pepsi "349" case. He considers himself a veteran freelance journalist because he does not belong to any newspaper company. He has extensive experience in writing since his UST days. Their Code of Ethics extend on the truth, nothing but the truth and they should never be cowed by any threat of libel or anything. That Code of Ethics requires them to report or comment on the truth and nothing but the truth and for them to do this, as a journalist, they give all parties to a certain issue a chance to explain themselves. If they give their sides, they would also come but if they remain silent, they cannot do anything about it. As a journalist, his conviction was to serve what is good for the public and he is not supposed to believe on the mouthpiece of any commercial entity or private interest. If the private interest would rather prefer to keep their mouth shut, then they cannot do anything, they get the public's side/right. He believes in the truth. In order to arrive at that truth, he needs to get all available and accessible sources of information regarding a certain issue. In any controversy, there are at least always two (2) sides, provided both sides give their sides. He is the president and founder of Coalition 349 representing the consumers who were victimized by the Number Fever scandal. His engagement as a journalist is different from his advocacy as a consumer.

The complaint of Pepsi against him for libel underwent a preliminary investigation and he admitted having filed a counter-affidavit. He confirms the annexes (**newspaper clippings**) attached to his counter-affidavit because those were all the facts about the controversy and the sugar importation made by Pepsi. He made the statements appearing in paragraph 1A, page 2 of Quintin Gomez's Complaint-Affidavit based on those newspaper clippings that were his. He is contesting the taped broadcast made by the secretary of the Pepsi Cola lawyer since it was never validated and even the statement itself. What they (Pepsi Cola lawyer) put there, he had never heard. He is not worried that he might be convicted since he stands and always fight for the truth. (TSN, 10 June 2003, pp. 1-55)

Whether there was identification of the person allegedly defamed

Identification of the offended party is required. It is not sufficient that the offended party recognized himself as the person attacked or defamed; it must be shown that at least a third person could identify him as the object of the libelous publication (Kunkle vs. Cablenews-American, 42 Phil. 757).

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In the present case, Quintin Gomez likewise testified that the broadcast of 17 July 1994 was discussed in their office with Fred Dael, who was then the Head of Pepsi Co., Inc. in the Philippines but beyond that, he is not sure if he referred the same to other Pepsi Co., Inc. offices in the region or in New York; that he cannot be certain if this particular broadcast was referred to Pepsi Co., Inc. in Delaware before he filed this libel complaint;

More importantly, the prosecution failed to present a third person that identified the complainant as the object of the libelous broadcasts allegedly made by the accused. Quintin Gomez, Jr. and Evangeline Cruz are not third persons as they are respectively the employee of the private complainant and the employee of the law firm representing the said complainant.

Thus, it is clear that the prosecution failed to prove all the essential elements of the crime of libel.

Admissibility of Evidence

The accused additionally testified on direct-examination that while he is being charged in court for libel allegedly committed by him relative to his utterances made in a radio broadcast, the so-called radio commentary was never presented here and so he cannot comment on that; that he is contesting the taped broadcast made by the secretary of the Pepsi Cola lawyer since it was never validated and even the statement itself; and that what they (Pepsi Cola lawyer) put there, he had never heard.

Quintin Gomez likewise testified that they have been informed that Vic Del Fierro was going to make some radio broadcast on or about 17, 24 and 31 July and 24 August 1994 over radio station DWAD-AM; that they had taken the initiative of taping those radio broadcast during the program of Vic Del Fierro; that he heard and taped the said broadcasts, through an advertising agency O'Gilvy & Mather, upon his instructions, as shown by the tape recordings on 13 July 1994 (Exhibits "G" & "G-1"), 24 July 1994 (Exhibits "H" & "H-1"), 31 July 1994 (Exhibits "I" & "I-1") and on 7 August 1994 (Exhibits "J" & "J-1"); that they have transcriptions of the contents of the tape recordings on 17 July 1994 (Exhibit "K"), 24 July 1994 (Exhibit "L"), 31 July 1994 (Exhibit "M") and on 7 August 1994 (Exhibit "N").

They taped the broadcast and he personally listened to it but when the taping was being done he was not present; that he has no particular participation in the taking of the tape recordings under the four (4) tapes he brought to court because he did not have the needed facilities for that purpose; that he heard the radio broadcast at

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about 3:00 o'clock in the afternoon and the voice he heard sounded like the voice of Vic del Fierro but he did not see him in the radio booth.

The quoted portion of the broadcast in the Information were also taken out of the entirety of the transcription; that the tapes were given to the agency and the transcriptions were made based on the tapes and he randomly checked the transcripts together with the tapes; that he had nothing to do on the typing of the transcripts by the secretary; that he checked portions of it and the same were accurate;

The original broadcast were taped on their behalf by a company called Philippine Monitoring Service; that when he heard that Vic del Fierro was going to make broadcast on a particular day, he asked their advertising agency to tape the broadcast; that the said advertising agency in turn requested the services of a company called Philippine Monitoring Service whose function is to monitor commercials over the radio; that he did not say that he personally taped the broadcast but rather he merely listened to it; that they had taken the initial steps in taping through other means, through other sources; and that he does not remember if Tape No. 1 (first broadcast made on 17 July 1994) is about the sugar industry in Negros.

On further cross-examination, **Quintin Gomez** testified that previous to the day of broadcast, he was alerted by their people that Vic del Fierro will make a broadcast; that accordingly he responded to the alert given to him and he prepared to listen to the broadcast; that he also prepared to tape the broadcast; that he listened to the broadcast but did not personally taped it; that he had the broadcast taped through their advertising agency who in turn commissioned the Philippine Monitoring Service; that he was listening while the taping was made in another place; that he was certain that the broadcast happened on that particular time after he reviewed the tape and having heard what was said on the tape; that he was certain that the broadcast was made on that particular day, on that particular time and over that particular radio station; that the taping was done at the office of the Philippine Monitoring Service on four (4) separate days; that he was at his office when he heard the broadcast, for the most part he was alone but there were other colleagues of his who would come in and listen for a few minutes; that there were other listeners because it was a working day; that he was not aware that 17 July 1994 was a Sunday; that he cannot recall if there were any introductory remarks made by the radio station; that he cannot recall if there was any disclaimer by the radio station on what the broadcast might be;

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Further, **Quintin Gomez** testified that he is not sure of the subject of the 17 July 1994 broadcast since he does not listen to the tape day in and day out, that it is not one of his better listening habit but if he will be confronted with the transcript or with the written document of the broadcast, he will be able to answer the question more intelligibly; that after having been informed by the defense counsel, he can now recall a little bit that the subject of the 17 July 1994 was the sugar industry; that he cannot recall that in the broadcast of 17 July 1994, Vic del Fierro called on thousands of his members to support the boycott of Pepsi Cola products initiated by the leaders of the sugar industry;

Quintin Gomez additionally testified that he does not know how long it took to have the alleged taped broadcast to be transcribed from the day of the broadcast on 17 July 1994; that he read the alleged transcription as soon as the transcripts were ready but he does not remember exactly when; that maybe it took a week; that he does not know who exactly made the transcription; that the transcription was done in the office of their lawyer upon their request; that the transcription was made not in his presence; that he believes that the transcription was made verbatim based on the tape recording of the broadcast; that he did not personally transcribe it but it was done for them by their legal counsel; that he does not know who picked out or selected the phrases in the transcription that were embodied in his complaint-affidavit which eventually were embodied in the Information; that he supposed it was part of the job of the law office who handled the case; that he reviewed the transcripts before filing the complaint; that he believes that there were excerpts of the transcript which to his mind are libelous and defamatory and will be able to point them out from the transcript; that he did not compare the selected phrases of the transcription with the publication in the Philippine Daily Inquirer; that he made no verification whatsoever whether the broadcast that Vic del Fierro made is the same subject matter that has been published in or commented on in the Philippine Daily Inquirer; that

Enrique A. Cube testified that the station manager wanted him to appear in the former's behalf, to represent him and his broadcasting system pursuant to the subpoena *duces tecum ad testificandum* issued by the Court and delivered by the private prosecutor's office; that he discussed the said subpoena with the station manager of DWAD and the latter told him to inform the Court that at present the station has no record whatsoever of the requested tape, to testify and to bring tape recordings of 17 July 1994, Sunday, 3:00 p.m.; 24 July 1994, Sunday, 3:00 p.m.; 31 July 1994, Sunday, 3:00 p.m. and 7 August 1994, Sunday, 3:00 p.m. broadcasts; that according to the station manager of DWAD-AM told him that the said

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tapes have already been there for more than four (4) years from 1994 and usually they keep records only for one (1) year and, afterwards, the tapes are erased and used for some other slots; that Engr. Pestaño made a search for the said tapes.

According to Enrique Cube, he was not given any documents relative to the broadcast of accused Vic del Fierro over DWAD referred to in the subpoena *duces tecum* dated 15 September 1997; that the station manager did not make any reference to the said documents during the time he was briefed except the fact that he was told by the former that they have no more copies of the tapes;

On clarificatory questioning of the court, **Enrique Cube** testified that he appeared in this case as a representative of the Station Manager of radio station DWAD; that the Station Manager asked him to testify before the court for and in the former's behalf that DWAD has no more records of the tapes that is being asked by the court; that he has an authority (*Exhibit "S"*) from the Station Manager to represent the latter in court; that the only matter that he is supposed to testify to are those which the Station Manager told him to testify to in accordance with the subpoena *duces tecum*; and that the testimony that he has given before this Court were the matters that the Station Manager told him to testify on. (*TSN, 01 October 1997, pp. 1-24*)

In the case of *Torralba vs. People*, G.R. No. 153699, August 22, 2005, it was held that:

"It is **generally held** that sound recording is not inadmissible because of its form (29 *Am. Jur. 2d*, p. 583) where a proper foundation has been laid to guarantee the genuineness of the recording (*VII The Revised Rules of Courts in the Philippines, Ricardo J. Francisco, p. 121, 1997 edition*). In our jurisdiction, it is a rudimentary rule of evidence that before a tape recording is admissible in evidence and given probative value, the following requisites must first be established, to wit:

- (1) a showing that the recording device was capable of taking testimony;
- (2) a showing that the operator of the device was competent;
- (3) establishment of the authenticity and correctness of the recording;
- (4) a showing that changes, additions, or deletions have not been made;
- (5) a showing of the manner of the preservation of the recording;
- (6) identification of the speakers; and
- (7) a showing that the testimony elicited was voluntarily made without any kind of inducement (*Ibid, citing*

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20 Am. Jur. 1961 Supplement 43; People vs. Orpilla, CA-G.R. No. L-06591, 22 July 1971, XXXVI L.J. 284).

In one case, it was held that the testimony of the operator of the recording device as regards its operation, his method of operating it, the accuracy of the recordings, and the identities of the persons speaking laid a sufficient foundation for the admission of the recordings (58 A.L.R. 2d, p. 4, citing *Monroe vs. United States*, 98 App. DC 228, 234 F 2d 49). Likewise, a witness' declaration that the sound recording represents a true portrayal of the voices contained therein satisfies the requirement of authentication (*Ibid*, citing *Commonwealth vs. Roller*, 100 Pa Super 125). The party seeking the introduction in evidence of a tape recording bears the burden of going forth with sufficient evidence to show that the recording is an accurate reproduction of the conversation recorded (29 A Am. Jur. 2d. p1233).

These requisites were laid down precisely to address the criticism of susceptibility to tampering of tape recordings. Thus, it was held that the establishment of a proper foundation for the admission of a recording provided adequate assurance that the proper safeguards were observed for the preservation of the recording and for its protection against tampering (58 ALR 2d, 1034, citing *State vs. Alleman*, 218 La 821, 51 So 2d 83).

In the case at bar, one can easily discern that the proper foundation for the admissibility of the tape recording was not adhered to. It bears stressing that Lim categorically admitted in the witness stand that he was not familiar at all with the process of tape recording and that he had to instruct his adopted daughter to record petitioner Torralba's radio broadcasts, thus:

X X X

X X X

X X X

Clearly, Shirley Lim, the person who actually recorded petitioner Torralba's radio show on 11 April 1994, should have been presented by the prosecution in order to lay the proper foundation for the admission of the purported tape recording for said date. Without the requisite authentication, there was no basis for the trial court to admit the tape recording—Exhibit "D"—in evidence.

In view of our disallowance of the 11 April 1994 tape recording, we are constrained to examine the records of this case in order to determine the sufficiency of evidence stacked against petitioner Torralba, bearing in mind that in criminal cases, the guilt of the accused can only be sustained upon proof beyond reasonable doubt.

In his comprehensive book on evidence, our former colleague, Justice Ricardo Francisco, wrote that "[e]vidence of a message or a speech by means of radio broadcast is admissible as evidence when the identity of the speaker is established either by the testimony of a witness who saw him broadcast his message or speech, or by the witness' recognition of the voice of the speaker" (*Evidence*, Ricardo J. Francisco, p. 13, 1996 edition).

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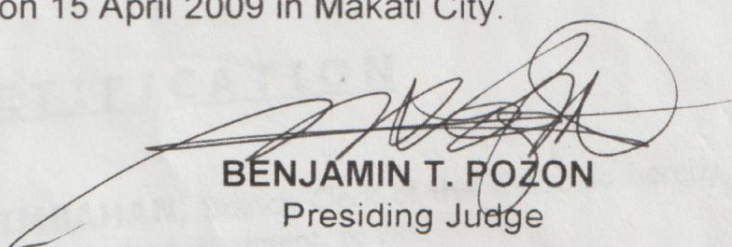
In the present case, the prosecution failed to present the person who actually recorded the broadcasts allegedly made by the accused. In other words, the prosecution failed to comply with the requisites for the admissibility of a tape recording. Hence, the tape recordings of the said broadcasts and the transcriptions of the said recordings are inadmissible in evidence.

WHEREFORE, premises considered, accused VICENTE ("VIC") DEL FIERRO, JR. is hereby **ACQUITTED** of the crime of libel charged against him under the Information filed by the prosecution for insufficiency of evidence.

No pronouncement as to costs.

SO ORDERED.

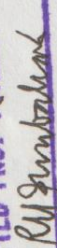
Given in open court on 15 April 2009 in Makati City.



BENJAMIN T. POZON
Presiding Judge

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