**SUPREME COURT**
**FIRST DIVISION**

**SAVORY LUNCHEONETTE,**
***Petitioner*,**

***-versus-***

**G.R. No. L-38964**
**January 31, 1975**

**LAKAS NG MANGGAGAWANG PILIPINO, ELISEO GUZMAN, ROMEO RASCO, LUCIA VIVERO, PEDRO BASILIO, CESAR MARTINEZ, RAFAEL IBANA, RICARDO ELICO, CIRILO ENOLPE, VIRGINIA BACLOR, FEDERICO BALIBALOS, RODITO DAVA, ALEXANDER GARCES, DRISENCIO RUBIO, HONORATO OLIVERIO, ROGELIO CANUEL, PUBLIO JAPSON, SONIA BALDON, ANDY VELOSO, ANTONIO DE LA ROSA, JULIET NALZARO, PEDRO ACAL, CELEDONIO PEREZ, EDUARDO ESTRADA, ANTONIO COSTALES, BLANCAFLOR FLORES, PEDRITO DE GUZMAN, SOFRONIO JARANILLA, ARMANDO MARARAC, DOMINADOR QUINTO, GREGORIO BALBIN, and COURT OF INDUSTRIAL RELATIONS,**
***Respondents*.**

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# D E C I S I O N

**MUÑOZ PALMA, *J.*:**

Involved in this Petition for Review on Certiorari is an Order of the Court of Industrial Relations dated May 3, 1974, issued in CIR Case No. 5843-ULP entitled: "Savory Luncheonette, petitioner, vs. Lakas ng Manggagawang Pilipino, et al., respondents" which directed that the testimony of Atty, Emiliano Morabe, a witness of petitioner herein, be stricken off the record and that the witness of petitioner, Bienvenida Ting, be recalled for further cross-examination by herein private respondents.[**]

It appears from the Petition that on September 27, 1972, the Savory Luncheonette through a Court Prosecutor of the Court of Industrial Relations filed a complaint charging the private respondents to whom We shall refer at times as LAKAS PILIPINO, with unfair labor practice for having violated certain provisions of Republic Act 875 (Industrial Peace Act), to wit: declaring a strike in violation of a no-strike clause of an existing collective bargaining agreement without prior resort to the grievance procedure provided for therein and without having observed the 30-day cooling off period prescribed by law; employing illegal and unlawful means in carrying out their strike; and staging said strike to obtain recognition inspite of the fact that there was another labor union duly certified by the Court of Industrial Relations (CIR for short) as the sole and exclusive bargaining agent of the workers of the petitioner (Annex A, p. 24 rollo).

To sustain its charges, petitioner presented as its key witness, its legal counsel, Atty. Emiliano Morabe. As legal counsel, Atty. Morabe had allegedly taken charge of the labor-management problems of the petitioner and had thereby acquired first-hand knowledge of the facts of the labor dispute.

Petitioner's counsel conducted the direct examination of Atty. Morabe and concluded the same on March 2, 1973 Atty. Rodolfo Amante, counsel of LAKAS PILIPINO, was called to cross-examine Atty.

Morabe, but he moved for a postponement on the ground that he was "not in a position to cross-examine the witness." Accordingly, the cross-examination of Atty. Morabe was re-scheduled for March 7, 1973, but when such date arrived, Atty. Amante did not appear and so the cross-examination was once more transferred to March 17, 1973, with the warning from the court that "should the respondents still fail to cross-examine Atty. Morabe, the right to cross-examine him will be deemed waived."

Not heeding this warning, Atty. Amante, for the third time failed to cross-examine the witness on March 17 for the reason that he was not prepared to do so. Accordingly, the cross-examination was again re-set for March 27, 1973 with the statement that "in view of the professed unpreparedness of the representative of the respondents, the Court will give him one last chance to be ready at the next scheduled hearing."[1] This warning notwithstanding, Atty. Amante again failed and refused to conduct the cross-examination invoking the excuse that he did not have a copy of the transcript of the direct testimony. For the fifth time and again upon motion of LAKAS PILIPINO, the cross-examination was postponed to April 2, 1973 with the reservation made by the witness, Atty. Morabe, however, to challenge the ruling of the court granting another postponement of his cross-examination.

Atty. Morabe succumbed to a heart attack on March 31, 1973. On April 12, 1973, LAKAS PILIPINO filed a motion to strike out the direct testimony of Atty. Morabe from the records on the ground that since cross-examination was no longer possible, such direct testimony "could no longer be rebutted." (Annex B, p. 29, ibid) Petitioner filed an opposition to the said motion contending that by private respondents' repeated failure and refusal to cross-examine despite all the time and opportunity granted by the court, they are deemed to have waived the same. (Annex C, p. 30, ibid)

On June 14, 1973, private respondents filed another motion seeking the recall of petitioner's witness Bienvenida Ting for further cross-examination. (Annex E, p. 41, ibid) Mrs. Ting was presented as a witness by the petitioner on March 27, 1973 and was cross-examined by the private respondents on June 4, 1973. The petitioner also opposed this motion on two counts: first, that the witness was already

cross-examined on June 4, 1973 or more than two months after her direct testimony, thus giving private respondents sufficient time to go over the said testimony, and second, that the motion failed to state the points that were not taken up during the previous cross-examination thus giving rise to the conclusion that the recall of the witness was manifestly for delay and to harass and inconvenience the witness.

In an Order dated May 3, 1974, respondent court granted the two motions. (Annex F, p. 43, ibid) Thereupon, petitioner filed a motion for reconsideration of the said order but the same was denied in a resolution en banc dated July 5, 1974. (Annex G, p. 46, ibid) A copy of the resolution denying the motion for reconsideration was received by the petitioner on July 12, 1974 and on July 16, 1974, it filed its notice of appeal. (Annex H, p. 47, ibid) After an extension of time was granted to petitioner by this Court, the present Petition for Review was filed on August 6, 1974.

Petitioner now strongly asserts that respondent Court acted with grave abuse of discretion when the latter ordered that the direct testimony of its principal witness, Atty. Morabe, be stricken off the record for "To strike out the testimony of Atty. Morabe after the respondents had been given sufficient and repeated opportunities to cross-examine him, and after they have practically waived their right to cross-examine him is unjust and unfair. It is not warranted by our rules of procedure and would place a premium on respondents' repeated failure and refusal to cross-examine the witness. Respondents should not be allowed to profit and benefit from their own neglect and omission. (pp. 18-19, rollo)

Petitioner's cause merits relief.

The right of a party to confront and cross-examine opposing witnesses in a judicial litigation, be it criminal or civil in nature, or in proceedings before administrative tribunals with quasi-judicial powers, is a fundamental right which is part of due process. [1] However, the right is a personal one which may be waived expressly or impliedly by conduct amounting to a renunciation of the right of cross-examination.[3] Thus, where a party has had the opportunity to cross-examine a witness but failed to avail himself of it, he necessarily

forfeits the right to cross-examine and the testimony given on direct examination of the witness will be received or allowed to remain in the record.[4]

The conduct of a party which may be construed as an implied waiver of the right to cross-examine may take various forms. But the common basic principle underlying the application of the rule on implied waiver is that the party was given the opportunity to confront and cross-examine an opposing witness but failed to take advantage of it for reasons attributable to himself alone.

In People vs. De la Cruz, L-28110, March 27, 1974, 56 SCRA 84, 91, one of the issues raised by appellant De la Cruz who was convicted of rape was that he was not accorded the right to cross-examine the complainant. The Court discarded this contention of appellant under the following circumstances: after the direct examination of the offended party on February 22, 1966, she was cross-examined but the cross-examination was not finished; two days later or on February 24, the cross-examination was resumed at 10:00 o'clock in the morning but after a few minutes the examination was suspended; the case was then called at 10:35 that same morning for the resumption of the cross-examination, however, the counsel for the accused asked for postponement and so the hearing was transferred to March 1 reserving to the defendant the right to continue with the cross-examination; no hearing was held, however, on March 1, after which other hearings were scheduled with the offended girl duly subpoenaed to appear at those hearings; after some cancellations or transfers, the trial was resumed on June 27, 1966; on that date, June 27, counsel for the accused could have asked that he be allowed to continue the cross-examination but did not do so, and did not object when the Fiscal called his next witness, either because the counsel forgot or waived further cross-examination of the offended party. Under the foregoing circumstances, this Court ruled that:

> "It cannot be said the constitutional right of the accused to meet the witnesses face to face or the right to confrontation (Sec. 1[f], Rule 115, Rules of Court; Sec. 1[17] Art. III, Old Constitution) was impaired.

> "The fact that the cross-examination of the complainant was not formally terminated is not an irregularity that would justify a new trial. The right to confront the witnesses may be waived by the accused expressly or by implication (U.S. vs. Anastacio, 6 Phil. 413; 4 Moran's Comments on the Rules of Court, 1970 Ed., p. 201-2)."

In State of Hawaii vs. Brooks, 352 P 2d 611, the facts were: defendant was convicted in the Circuit Court, First Circuit, City and County of Honolulu, of robbery in the second degree and when the case came up to the Supreme Court of Hawaii on a writ of error, one of the issues raised by appellant was that the trial court erred in refusing to allow him to cross-examine John Torres, a prosecution witness. The record showed, however, that when the prosecution asked leave of the trial court to withdraw Torres as witness after partial direct examination, counsel for the defendant made a reservation of his right to cross-examine when the witness is recalled. The prosecution, however, subsequently rested its case without recalling the witness. When defendant called the court's attention to the fact that he had not had the opportunity to cross-examine, it was brought out that at one instance, the Court asked counsel for the defendant if he wanted to cross-examine the witness who was then in the corridors, to which question the said counsel answered "YES!" The record does not show, however, that defendant pursued this point any further. No motion, no objection, no ruling and no exception was made or taken, nor did the defendant call the witness in question for cross-examination. In overruling appellant's contention, the Supreme Court of Hawaii held that while the right to cross-examine a witness is fundamental and accepted as a basic right in the state's judicial system, however, when a party fails to avail himself of the opportunity to cross-examine, he forfeits such right, and the fact of the case conclusively showed that defendant was given an opportunity to cross-examine, and that appellant's failure to proceed must be construed as an abandonment of his earlier desire or intention to cross-examine the witness and he cannot now be heard to contend that the trial court refused to permit said cross-examination.

The case of the herein petitioner, Savory Luncheonette, easily falls within the confines of the jurisprudence given above. Private respondents through their counsel, Atty. Amante, were given not only

one but five opportunities to cross-examine the witness, Atty. Morabe, but despite the warnings and admonitions of respondent court for Atty. Amante to conduct the cross-examination or else it will be deemed waived, and despite the readiness, willingness, and insistence of the witness that he be cross-examined, said counsel by his repeated absence and/or unpreparedness failed to do so until death sealed the witness's lips forever. By such repeated absence and lack of preparation on the part of the counsel of private respondents, the latter lost their right to examine the witness, Atty. Morabe, and they alone must suffer the consequences. The mere fact that the witness died after giving his direct testimony is no ground in itself for excluding his testimony from the record so long as the adverse party was afforded an adequate opportunity for cross-examination but through fault of his own failed to cross-examine the witness.[4*]

The applicability of the rule is especially justified in proceedings before tribunals with quasi-judicial powers such as the Court of Industrial Relations. Under Section 20, Commonwealth Act No. 103, which created the Court of Industrial Relations, respondent court is authorized to disengage itself from the rigidity of the technicalities applicable to ordinary courts of justice; it is not narrowly constrained by technical rules of procedure but is enjoined to act according to justice and equity.[5]

Thus, in National City Bank of New York vs. National City Bank Employees Union, 98 Phil., 301, invoked by petitioner herein, the National City Bank of New York sought to declare illegal the strike of its employees held on June 11, 1952. After trial, the Court of Industrial Relations rendered a decision on January 6, 1953, declaring the strike illegal and ordering the dismissal of the leaders of the strike but allowing the return of 51 employees to their former positions. The Bank moved for a reconsideration of the order on the ground that it was not granted an opportunity to present any evidence or confront the witnesses; that motion was denied and a petition for certiorari was filed with this Court. Dismissing the petition, the Court held that the failure to grant petitioner bank an opportunity to cross-examine the persons from whom inquiries were made by an agent of the Court of Industrial Relations as to the reasons why said 51 employees failed to return back to work, is not a sufficient ground for the reversal of the order of the court and its findings because: (1) the Court of

Industrial Relations is not bound by strict rules of evidence in the determination of facts under Section 20, Commonwealth Act 103; and (2) there is no showing that petitioner bank ever claimed that the evidence gathered by the representative of the court was false or that it had in its possession material evidence to disprove said findings. The Court said further: "In the absence of an express allegation that a new hearing will change facts found, the new trial or cross-examination demanded would be idle ceremony; it would not serve the ends of justice at all especially so in a quasi-administrative body like the Court of Industrial Relations where the rules of confrontation and cross-examination have not been expressly granted as in a trial against an accused in a criminal case." (ibid, p. 305, emphasis Ours)

The second motion of the order of respondent court of May 3, 1974, which is assailed by petitioner directs the recall of Bienvenida Ting for further cross-examination. We believe that this order is unwarranted. As claimed by petitioner, the motion to recall the witness is intended merely to delay the proceedings and to harass and inconvenience the witness sought to be recalled. We particularly note that the direct examination of the witness was completed on March 27, 1973, and that her cross-examination was conducted on June 4, 1973, or after more than two months since the direct examination. That interval of time was long enough for private respondents' counsel to scrutinize and dissect the direct testimony of the witness and prepare himself for cross-examination. That the counsel had all the time to himself when he conducted his cross-examination on June 4, 1973, and that he concluded such cross-examination when more time was allotted for it, showed that he had asked all the questions he could possibly ask. Had the witness been cross-examined right after she gave her direct testimony, there might be reason to believe the claim that counsel unintentionally forgot to ask some material questions. But that was not so. Under those circumstances, where it was shown that a witness had been previously cross-examined extensively, it was more in consonance with justice and equity for respondent court to have denied the recall of the witness concerned.[6] More so, when the motion to recall failed to mention the matters sought to be established in the additional cross-examination.

One point raised by respondent court in its Comment to this Petition is that certiorari does not lie from the orders complained of for the

reason that they are interlocutory in nature. (p. 57, rollo) Suffice it for Us to re-state what this Court said in Manila Electric Co., et al. vs. Enriquez, et al., 110 Phil. 499:

> "While the Supreme Court would not entertain a petition for a writ of certiorari questioning the legality and validity of an interlocutory order, yet when a grave abuse of discretion is very patently committed, it devolves upon said court to exercise its supervisory authority to correct the error committed." (Emphasis supplied)

The instant Petition presents a clear case of grave abuse of discretion which justifies the Court's intervention at this stage of the proceedings in the court below.

**PREMISES CONSIDERED**, the writ of certiorari prayed for is granted and the Orders of respondent Court of May 3, 1974, and July 5, 1974, under review are hereby set aside. With costs against private respondents.

**SO ORDERED.**

**Castro, *J.*, *Chairman*, Teehankee, Makasiar and Esguerra, *JJ.*, concur.**

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[**] This Petition was filed on August 6, 1974, and in a Resolution of August 30, 1974, respondents were required to comment. Only respondent Court filed its comment to which petitioner submitted a Reply. In a Resolution dated Oct. 11, 1974, the Court resolved to consider the Petition as a special civil action and the case submitted for decision without further arguments. (p. 65, rollo)

[1] emphasis supplied.

[2] Article IV, Sec. 19, 1973 Constitution:

"In all criminal prosecutions the accused shall .. enjoy the right .. to meet the witnesses face to face."

Rule 115; Section 1, Rules of Court:

"Rights of defendant at the trial. — In all criminal prosecutions defendant shall be entitled:

x x x

(f) To be confronted at the trial by, and to cross-examine the witness against him .

x x x"

Rule 132, Sec. 8, ibid:

"Cross-examination, its purpose and extent. Leading, but not misleading, questions allowed. — Upon the termination of the direct examination, the witness may be cross-examined by the adverse party as to any matters stated in the direct examination, or connected therewith, with sufficient fullness and freedom to test his accuracy and truthfulness and freedom from interest or bias, or the reverse, and to elicit all important facts bearing upon the issue. On cross-examination, leading, but not misleading, questions, are allowed."

E. Fernando, J. The Bill of Rights, Second Edition, 1972, pp. 237-238, citing particularly Pointer vs. Texas 380 US 400 (1965).

[3] In U.S. vs. Anastacio, 1906, 6 Phil. 413, after arraignment of the accused on a charge of abusos deshonestos, the accused and his counsel in open court and with the consent of the court entered into an agreement with the prosecuting attorney to submit the case upon the evidence of record in the former charge for "attempt to commit rape" which was dismissed to give way to the new accusation, together with the exceptions and rulings of the court filed therein and upon this evidence, the accused was convicted. Accused appealed the judgment to the Supreme Court and assigned as error the action of the court in consenting to the set out agreement alleging that the right of the accused to be confronted with the witnesses was impaired thereby. This Court, holding that there was no error in the proceedings prejudicial to the right of the accused, stated:

"The right of confrontation thus guaranteed and secured to the accused is a personal privilege, and there does not seem to be any reason founded on principle or the circumstances of this particular case which prohibits its waiver.

"With full knowledge of the consequences, under the advice of counsel in open court, and for reasons sufficient to himself the accused entered into the agreement for the submission of the case on the record taken in the former trial, which was based upon the same facts though upon a complaint charging a distinct offense and in natural reason one should not complain of a thing done with his consent, except in those cases where the doctrine of the waiver of rights is limited by adverse doctrines interposing with superior force. Since the right to meet the witnesses face to face is strictly a personal privilege, there seems to be no reason based upon the above cited provisions of the law which would prohibit the waiver of such right.

"This view is sustained by the great weight of authority in the United States. In Louisiana it has been held that, as the right of being confronted with the witnesses is a personal one, the accused may waive it (State vs. Hornsby, 8 Rob., 554, 41 Am. Dec., 305); in Michigan it has been held that a conviction of murder can not be set aside for the admission of depositions in pursuance of voluntary stipulations by the parties, and that by making such a stipulation the respondent waives his constitutional right to be confronted by the witnesses (People vs. Murray, 52 Mich., 288, 17 N.W. Rep., 843); in Montana it has been held that where the defendant, to prevent a

postponement of the trial, admits that witnesses present would testify to certain facts stated in the affidavit of the prosecution for a continuance, he waives his constitutional right to be confronted with the witnesses referred to in the affidavit (United States vs. Sacramento, 2 Mont., 239, 25 Am. Rep., 742); in New York that defendant is bound by an explicit waiver of the constitutional privilege to be confronted with the witnesses against him (Wightman vs. People, 67 Barb., 44); in Texas that the prisoner may waive his constitutional right to meet adverse witnesses, by consenting to the reading of a written statement of their testimony (Hancock vs. State, 14 Tex., App. 392), and that one indicted for a crime may waive his right to be confronted with the State's witnesses (Allen vs. State, 16 Tex., App., 237); in Alabama that in a criminal case the constitutional right of the accused to be confronted by the witnesses against him may be waived, as where he agrees that a deposition taken in a civil suit between him and the prosecutor may be read in evidence without requiring the personal attendance of the witness (Rosenbaum vs. State, 33 Ala., 354); and in Iowa that the waiver by agreement of counsel of the presence of a witness for the State and reading a written statement of his testimony to the jury is not a violation of the defendant's constitutional right to be confronted with the witnesses against him (State vs. Fooks, 65 Iowa, 452, 21 N.W. Rep., 773)." (emphasis Ours).

[4] Francisco, Revised Rules of Court, Vol. on Evidence, page 853, citing People vs. Cole, 43 N.Y. 508-512 and Bradley vs. Mirick, 91 N.Y. 293; see also 29 AM. Jur. 2d 749.

[4*] See 98 C.J.S., 126-127, citing Nehring vs. Smith, 49 N.W. 2d 831; Henderson vs. Twin Falls County, 80 P. 2d 801; Citizens Bank and Trust Co. vs. Reid Motor Co., S.S.E. 2d 318; Best vs. Tavenner, 218 P. 2d 471.

[5] Ang Tibay vs. Court of Industrial Relations, 69 Phil., 635; Luzon Brokerage Co. vs. Luzon Labor Union, L-17085, January 31, 1963, 7 SCRA, 116; Associated Labor Union vs. Court of Industrial Relations, et al., L-31727, May 30, 1973, 51 SCRA 138.

[6] see State of Washington vs. Johnson, 393 P. 2d 284.