FOR PUBLICATION

Appeal No. 01-014

IN THE SUPREME COURT
OF THE
COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS

COMMONWEALTH OF THE NORTHERN
MARIANA ISLANDS,
Plaintiff-Appellee,

v.

EUGENE REPEKI, JR. et al.,
Defendant-Appellant.

OPINION

Cite as: *Commonwealth v. Repeki*, 2003 MP 1

Hearing held June 6, 2002
Decided January 14, 2003

For Plaintiff-Appellee:
Kevin A. Lynch, Esq.
Assistant Attorney General
Civic Center Complex
Susupe, Saipan, MP 96950

For Defendant-Appellant:
Danilo T. Aguilar, Esq.
PMB 886
Box 10001
Saipan, MP 96950

BEFORE: Alexandro C. CASTRO, Associate Justice, John A. MANGLONA, Associate Justice, Pedro M. Atalig, Justice *Pro Tempore*[1]

CASTRO, Associate Justice:

¶1 Appellant Eugene Repeki, Jr. [hereinafter Defendant or Repeki] appeals a Sentence Order of the Superior Court, entered on July 19, 2001. We have jurisdiction pursuant to Article IV, Section 3 of the Commonwealth Constitution and 1 CMC § 3102(a). We affirm.

ISSUES PRESENTED AND STANDARD OF REVIEW

¶2 This case presents two issues for our consideration:

I. Whether this appeal is moot because the same complaining party will not be subject to the same action again.

II. Whether the trial court erred in closing the courtroom to all spectators, except for the victim's spouse and the witness' grandmother, for the testimony of one witness during the trial, and violated the Sixth Amendment of the U.S. Constitution and Article 1, Section 4(d) of the Commonwealth Constitution.

¶3 The first issue was raised by the Government in its Response Brief. The mootness doctrine implicates this Court's jurisdiction to hear the main issue on appeal. *Govendo v. Micronesian Garment Mfg., Inc.*, 2 N.M.I. 270, 281 (1991) (Courts lack jurisdiction to decide moot cases.). As such, it will be discussed first. The second issue is reviewed *de novo*. *United States v. Raffoul*, 826 F.2d 218, 222 (3rd Cir. 1987) ("The decision to close a portion of a trial is a discretionary one. However, the adequacy of the procedures employed by the district court is a question of law over which we have plenary review.") (citation omitted); *Commonwealth v. Bergonia*, 3 N.M.I. 22, 35 (1992)

[1] The Honorable Pedro M. Atalig is sitting by designation. On July 2, 2002, Chief Justice Miguel S. Demapan recused himself pursuant to 1 CMC § 3308.

("A question involving the application of the U.S. or NMI Constitution is reviewed *de novo*.")

FACTUAL AND PROCEDURAL BACKGROUND[2]

¶4 On or about May 4, 1999, Cesar Valerio [hereinafter Valerio] was found partially conscious at the second floor of the Courtney's Plaza building in Chalan Kanoa, Saipan. It appeared that he had been assaulted by one or more individuals. Valerio died on May 12, 1999; the treating physicians concluded that Valerio's death was caused by complications from an epidural hematoma located above his left eyebrow.[3]

¶5 On or about March 13, 2000, Repeki and co-defendants Thomas Basa and Anthony Magofna were charged with Murder in the Second Degree,[4] Voluntary Manslaughter[5] and Aggravated Assault and Battery.[6] All the defendants pled not guilty to all the charges. The trial court severed the trials for Repeki and the two co-defendants.

¶6 Prior to the commencement of Repeki's trial, the Government disclosed it would call co-defendants Basa and Magofna as witnesses and that if they were called, the Government would request immunity under 6 CMC § 6502 to permit their testimony.[7]

---

[2] The facts were provided in the Appellant's Brief.

[3] No autopsy was performed.

[4] *See* 6 CMC § 1101(b).

[5] *See* 6 CMC § 1102(a).

[6] *See* 6 CMC § 1203(a).

[7] Section 6502(b) of Title 6 of the Commonwealth Code reads:

> Whenever a witness refuses, on the basis of the privilege against self-incrimination, to testify or provide other information in a proceeding before or ancillary to a court of the Commonwealth and the judge presiding over the proceeding communicates to the witness an order issued under this section, the witness may not refuse to comply with the order on the basis of the privilege against self-incrimination; but no testimony or other information compelled under the order (or any information directly or indirectly derived from the testimony or other information) may be used against the witness in any criminal case, except a prosecution for perjury, giving a false statement, or otherwise failing to comply with the order.

Counsel for Basa requested that if Basa was called as a witness, the courtroom would be sealed to ensure that none of his statements would be heard by the public. At that time, Repeki's counsel noted his non-opposition, however Government counsel noted the problem of preserving Repeki's right to a public trial.[8]

¶7 On the third day of Repeki's trial, the Government called Basa to the stand to testify under immunity. Prior to Basa actually taking the stand, Repeki's counsel asserted Repeki's right to a public trial and to have Basa's testimony heard by the public. The trial court denied Repeki's request to keep the courtroom open and reasoned that Repeki had waived his right to a public trial from the earlier ruling on Basa's request to close the courtroom. The court asked the members of the gallery to leave the courtroom. However, the Government requested to allow the victim's wife to remain, and Basa's attorney requested to have Basa's mother to remain as well.[9]

---

[8] Neither the exact exchange nor the trial court's decision/order (either written or a transcript if done orally) was provided to this Court in the Appellant's Excerpts of Record.

[9] This exchange was provided in the Appellant's Excerpts of Record. It went as follows:

MR. THOMPSON:	Your Honor, is this a sealed courtroom?
COURT:	No, I didn't think it was. So that means you want to exclude everyone, that is not a witness? Or interested party?
MR. THOMPSON:	Yes, Your Honor.
COURT:	Okay. So that means, everyone who's not affiliated with this case, or who's not going to testify, and I guess [unintelligible] you're going to testify, [unintelligible] your witness, everyone needs to be excluded. Please step outside and we'll call you when the proceedings are reopened.
MR. LEMONS:	Your Honor, Judge, there's one person that asked not to be excluded because I don't think that individual would cause a problem, what counsel fears. And that's the victim's wife is here. She's here, she doesn't live here, she's not going to poison the community with anything. She [unintelligible] she's going back to the Philippines.
COURT:	Mr. Thompson?
MR. THOMPSON:	Your Honor, I would not object to the - as long as she is ordered by this court not to reveal the specific testimony of Mr. Basa to anyone outside –
COURT:	Is she here? Is that her?
MR. THOMPSON:	-- of this courtroom here today.
COURT:	Okay. Did you understand what was said Ma'am?
A:	[no audible response]

COURT:	If you stay, if you remain in the proceeding, then you're not allowed to disclose anything that you hear on this part of the trial. Do you understand?
MR. LEMONS:	Judge, she has a very poor understanding of the English language.
COURT:	Oh, well- then it's not going to do a whole lot of good, it's not going to be translated anyway, so –
MR. THOMPSON:	This is Mr. Basa's mother and I ask that she stay as well.
COURT:	Okay. How about the other lady?
MR. THOMPSON:	That's Mr. Basa's mother.
COURT:	All right – I can't see. Mr. Aguilar, can you move a minute? Oh, that's the mother. I thought it was the older lady with the white hair.
MR. AGUILAR:	Your Honor.
COURT:	I was thinking of his grandmother, right? That's his grandmother? Yes, okay.
MR. AGUILAR:	Your Honor, earlier, we basically stated our non-opposition, but Mr. Repeki didn't realize that's what was going to be done. He wants to assert his right to a public trial at this point. I just asked him now and that's what we- that's what he wants to do.
COURT:	Well. I don't know. I don't think that's a complicated concept. He asked and he waived it. And I don't think – what's the prejudice of Mr. Repeki having this portion of the proceeding sealed? I think the – I'm asking you, Mr. Aguilar. Because I think that the bottom line is – the whole purpose of the splitting up the trials in order to afford him this trial without the other two defendants, is to assert him a fair trial and to avoid any implications from their confessions. That was the whole purpose of the *Bruton* issue. And now, to allow this information to get public and then to taint the trial of the other two defendants, I don't know. You want to be heard on this, Mr. Lemons?
MR. LEMONS:	Judge, I objected to the opposing proceeding, so… I'm willing to abide by the court's ruling, whatever it is, I have no response.
MR. THOMPSON:	I'm sorry Your Honor. I didn't hear that.
COURT:	Mr. Repeki is now saying that he is objecting to the closing of the proceedings – for purposes of this – does he understand it's only for purposes of Mr. Basa's testimony?
MR. AGUILAR:	Yes, Your Honor
COURT:	Okay. So…
MR. AGUILAR:	Well, I don't know what else to say, Your Honor. I make my arguments for the closed proceedings based on my client's fair trial right.
COURT:	Uhumm.
MR. AGUILAR:	And the Judge – Your Honor already ruled on that, so ….
COURT:	Yes, I think I did. And like I said, he did it and I think he waived it at that point. And I'm not – I don't think that based on the fact that everyone's relied on that and the matter's been set up at this time, I'm not going to reverse it and you can take it up on appeal.
MR. AGUILAR:	Thank you, Your Honor.

Appellant's Excerpts of Record [hereinafter E.R.] at 7-9.

¶8 Basa testified to the jury in a courtroom that was closed to the general public. At the close of Government's case-in-chief, Repeki moved for a judgment of acquittal. The court, after oral arguments, denied that motion. Repeki did not present a defense to the jury. The jury convicted Repeki of murder in the second degree.

¶9 Repeki filed a renewed motion for a judgment of acquittal. The court heard this motion and issued a written decision denying the same. The trial court held a sentencing hearing on May 2, 2001. After considering the arguments of counsel, the court sentenced Repeki to 30 years incarceration.[10] On May 31, 2001, Defendant filed this timely appeal.

ANALYSIS

I. This case is not moot because an actual controversy that can be remedied by this Court exists.

¶10 The thrust of the Government's argument is that this Court should decline appellate review because Repeki will not be subject to the same action again. The Government cites *Weinstein v. Bradford*, 423 U.S. 147, 96 S. Ct. 347, 46 L. Ed. 2d 350 (1975)(per curium) for the following proposition:

> To avoid a finding of mootness, two separate elements must be shown. First, the challenged action must have been too short in duration to be fully litigated prior to its cessation or expiration; and second, there must be a reasonable expectation that the same complaining party will be subjected to the same action again.

Appellee's Response Br. at 1.

¶11 The Government acknowledges that the Commonwealth will continue holding court proceedings in criminal cases, but argues there is no "'demonstrated probability' that Repeki will again be the subject of those proceedings." *Id.* at 2.[11]

---

[10] Repeki is currently incarcerated and is projected to be released from custody on or before March 13, 2030.

[11] Appellant did not file a Reply Brief; as such, he did not argue against the applicability of the mootness doctrine.

¶12 *Weinstein* is easily distinguishable from the case at bar. In *Weinstein*, Bradford sued members of the North Carolina Board of Parole, claiming they failed "to accord him certain procedural rights in considering his eligibility for parole." 423 U.S. at 147, 96 S. Ct. at 348, 46 L. Ed. 2d at 351. He was released from custody and supervision before his appeal was finally decided. *Id.* at 148, 96 S. Ct. at 348, 46 L. Ed. 2d at 352.[12] The United States Supreme Court held that the exception to the mootness doctrine outlined in *Sosna v. Iowa*, 419 U.S. 393, 95 S. Ct. 553, 42 L. Ed. 2d 532 (1975),[13] did not apply. *Id.* at 149, 96 S. Ct. at 349, 46 L. Ed. 2d at 353.[14]

¶13 In the case currently before us, it is indeed likely that the Commonwealth will continue to have court proceedings in criminal cases, and it is also true that there is no demonstrated probability that Repeki will be subject to those proceedings. However, the Government's position fails to account for the fact that Repeki is currently incarcerated and most likely will be until the year 2030.[15]

¶14 The nonexistence of an exception to the mootness doctrine does not, *ipso facto*, mean that the case is moot. A case is moot if it cannot be said that there is an actual

---

[12] "It is undisputed that respondent was temporarily paroled on December 18, 1974, and that this status ripened into a complete release from supervision on March 25, 1975. From that date forward it is plain that respondent can have no interest whatever in the procedures followed by petitioners in granting parole." *Weinstein v. Bradford*, 423 U.S. 147, 148, 96 S. Ct. 347, 348, 46 L. Ed. 2d 350, 352 (1975) (per curium).

[13] In *Weinstein,* the Supreme Court explained the holding of *Sosna* thusly:

> Sosna decided that in the absence of a class action, the "capable of repetition, yet evading review" doctrine was limited to the situation where two elements combined: (1) the challenged action was in its duration too short to be fully litigated prior to its cessation or expiration, and (2) there was a reasonable expectation that the same complaining party would be subjected to the same action again.

Id. at 149, 96 S. Ct. at 349, 46 L. Ed. 2d at 353.

[14] "While petitioners will continue to administer the North Carolina parole system with respect to those who at any given moment are subject to their jurisdiction, there is no demonstrated probability that respondent will again be among that number." *Id.*

[15] *See, supra*, n.10.

controversy currently before the court that can be remedied "by a judgment which can be carried into effect." *Govendo v. Micronesian Garment Mfg., Inc.*, 2 N.M.I. 270, 281 (1991) (*quoting Wong v. Board of Regents, University of Hawaii*, 616 P.2d 201, 204 (Haw. 1980)).

¶15 Here, an actual controversy is presently before us: Repeki claims he is presently incarcerated as a result of a trial wherein certain of his rights were denied. Further, should Repeki prevail, this Court could, among other things, provide Repeki with a new trial as a remedy. Therefore, this case is not moot.

II. We are unable to adequately review the actions of the trial court and, consequently, can find no error.

¶16 The Sixth Amendment of the U.S. Constitution and Article I, Section 4(d) of the Commonwealth Constitution guarantee that a criminal defendant has a right to a public trial. "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial…" U.S. CONST. amend. VI. The Commonwealth Constitution plainly states that a criminal defendant has a fundamental right to a public trial. The pertinent language reads: "Section 4: Criminal Prosecutions. In all criminal prosecutions certain fundamental rights shall obtain. . . . d) There shall be a speedy and public trial." N.M.I. Const. art. I, § 4(d).

¶17 Repeki admits that the right to a public trial is not absolute, and posits that a trial court may close a hearing to the public only after applying a four-pronged test established by the U.S. Supreme Court, citing *Waller v. Georgia*, 467 U.S. 39, 104 S. Ct. 2210, 81 L. Ed. 2d 31 (1984).[16] He contends that the trial court did not follow the

[16] The test outlined in *Waller v. Georgia*, 467 U.S. 39, 48, 104 S. Ct. 2210, 2216, 81 L. Ed. 2d 31, 39 (1984), has four prongs:

> [T]he party seeking to close the hearing must advance an overriding interest that is likely to be prejudiced, the closure must be no broader than necessary to protect that interest, the trial court must consider reasonable alternatives to closing the proceeding, and it must make

required test and asserts that his conviction should be vacated and that he is entitled to a new trial. Appellant's Br. at 10.

¶18 We are not able to reach the merits of his claim because Repeki failed to provide us with a sufficient record to review. The Rules of Appellate Procedure place the burden of assembling a proper record on the Appellant. *See* Com. R. App. P. 10(b)(2) ("If the appellant intends to urge on appeal that a finding or conclusion is unsupported by the evidence or is contrary to the evidence, the appellant shall include in the record a transcript of all evidence relevant to such finding or conclusion."); Com. R. App. P. 11(a) ("Duty of Appellant. After filing the notice of appeal, . . . each appellant shall comply with the provisions of Rule 10(b) and shall take any other action necessary to enable the clerk to assemble the record."); Com. R. App. P. 30(b)(3) ("[The excerpts of record shall include] any other orders or rulings (whether written or delivered orally) sought to be reviewed").

¶19 The portion of the transcripts Repeki did provide demonstrates that the trial court decided to close the proceedings for Basa's testimony at some earlier time, and the closure of the courtroom on the third day of trial was based on that earlier ruling.[17] No transcript of that hearing was provided to this Court. *See, supra*, n.8.

¶20 Without this transcript, we have no way of reviewing the trial court's decision. *See Sablan v. Blake*, 1998 MP 9 ¶6, 5 N.M.I. 167, 168. *See also Syncom Capital Corp. v.*

---

findings adequate to support the closure.

[17] The relevant portion of the transcript reads:

MR. AGUILAR: Well, I don't know what else to say, Your Honor. I make my arguments for the closed proceedings based on my client's fair trial right.
COURT: Uhumm.
MR. AGUILAR: *And the Judge – Your Honor already ruled on that, so ….*

E.R. at 9 (emphasis added).

Wade, 924 F.2d 167, 169 (9th Cir. 1991) ("[W]e still lack the trial transcript that Wade was responsible for furnishing. Without a trial transcript, the majority of Wade's contentions are unreviewable."). Other than the facts that Repeki did not object to the closure of the proceedings when it was first brought before the trial court and that the Government did object to the closure, we do not know what information was presented to the trial court justifying the closure solely for Basa's testimony.[18] Further, we do not know what alternatives to closing the courtroom solely for Basa's testimony, if any, were presented to and considered by the trial court. Finally, we do not know what findings, if any, the trial court made.[19]

¶21 When we are unable, from the record provided us, to adequately examine the actions of the trial court, we are unable to find error. *Sablan v. Blake*, 1998 MP 9 ¶6, 5 N.M.I. 167, 168. Finding no error, the judgment of the trial court must stand.

CONCLUSION

¶22 For the foregoing reasons, the judgment of the trial court is AFFIRMED.

---

[18] There are two instances where Repeki mentions this earlier proceeding in his Brief. First, in his Statement of the Case, he says:

> [Prior to the commencement of trial, counsel for Basa] requested that if [Basa] was called as a witness, the courtroom would be sealed to ensure that none of his statements would be heard by the public. At that time, Repeki's counsel noted his non-opposition, however Government counsel noted the problem of preserving Repeki's right to a public trial.

Appellant's Br. at 6. In his Argument, he states: "The trial court did not believe that Repeki would be prejudiced by the closure of the courtroom only for the testimony of Mr. Basa and found that Repeki had waived his right to a public trial based upon counsel's earlier agreement to the closure during pretrial proceedings." Appellant's B. at 15-16.

[19] Also curiously absent from the record is proof that anyone was actually excluded from the proceedings. Repeki, in his Statement of the Case, states: "[a]ll other persons were told to leave the courtroom, including [Repeki's] mother and sister. (ER 7)." Appellant's Br. at 7. This statement was omitted from Repeki's Statement of the Facts. *See* Appellant's Br. at 7-9. Our review of the portion of the record cited by Repeki (as well as the entire record provided by Repeki) reveals that, while it is evident that the court asked that everyone "not affiliated with this case . . . [p]lease step outside," E.R. at 7, and decided that certain people could stay, E.R. at 8, 10, it is also equally evident that nobody bothered to state on the record who, if anyone, actually left.

SO ORDERED THIS 14TH DAY OF JANUARY 2003.

/s/
ALEXANDRO C. CASTRO, ASSOCIATE JUSTICE

JOHN A. MANGLONA, ASSOCIATE JUSTICE[20]

/s/
PEDRO M. ATALIG, JUSTICE *PRO TEMPORE*

[20] The Court heard oral arguments in this appeal on June 6, 2002. On November 15, 2002, Justice Manglona's spouse, Ramona V. Manglona, was sworn as the Commonwealth's Attorney General. The issue of the potential disqualification of Justice Manglona has been raised by motion in another appeal currently pending before the Court. In the interests of justice, and making no comment as to the merits of the aforementioned motion, Justice Manglona abstains from participating in this decision to expedite the resolution of this appeal.