

Appeal No. 01-014-GA
IN THE SUPREME COURT
OF THE
COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS

COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS,

Plaintiff-Appellee,

v.

EUGENE B. REPEKI, JR. et. al.,

Defendant-Appellant.

Criminal Case No. 00-0162

OPINION

Cite as: *Commonwealth v. Repeki*, 2004 MP 8

Argued and submitted June 6, 2002

Decided May 27, 2004

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BEFORE: Alexandro C. Castro and John A. Manglona, Associate Justices and Pedro M. Atalig, Justice *Pro Tem*

CASTRO, Associate Justice:

CHRONOLOGY

¶1 This order contains a detailed timeline of the events, which make up the background for Appellant’s Petition. Such chronology is important as it unequivocally demonstrates that Justice Manglona’s abstaining from signing the opinion did not prejudice Appellant nor curtail his constitutional or statutory rights.

¶2 Appellant Repeki timely filed Appeal No. 01-014 on May 31, 2001. Oral arguments took place before this Court on June 6, 2002, before Chief Justice Miguel Demapan, Associate Justice Alexandro C. Castro and Associate Justice John A. Manglona. On July 7, 2002, Chief Justice Demapan recused himself from the case pursuant to 1 CMC § 3308(a), and designated Former Justice Pedro M. Atalig as Justice *Pro Tempore* for the remainder of the appeal.

¶3 Following oral arguments in early June 2002, the Court took the appeal under advisement. A full five months later, on November 15, 2002, Ramona V. Manglona, spouse of Associate Justice John A. Manglona, was sworn in as the first female Attorney General for the Commonwealth of the Northern Mariana Islands (“Commonwealth” or “CNMI”). Two months later, on January 14, 2003, this Court issued its opinion in *Commonwealth v. Repeki*, 2003 MP 1. The opinion included the signatures of Justice Castro and Justice *Pro Tem* Atalig but Justice Manglona’s signature line was blank. Footnote 20 of the opinion noted:

The issue of the potential disqualification of Justice Manglona has been raised by motion in another appeal currently pending before the Court.¹ 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.

¹ Appellee Norita filed a Motion to Disqualify Justice Manglona in *Commonwealth v. Norita*, Crim. No. 01-304.

Id. at n.20. To be sure, the opinion could have detailed the motivation for Justice Manglona's action. What is clear, however, is that Justice Manglona abstained from signing the decision after he participated in the hearing and determination of the appeal.

¶4 On January 28, 2003, Appellant Repeki filed a Petition for Rehearing. *See* Petition for Rehearing Pursuant to Com. R. App. P. 40(a). In his petition, Appellant misinterprets the CNMI Constitution and applicable Commonwealth Code sections and rests his argument on the untenable grounds that recusal is mandatory without regard for the interests of justice or the discretion of the Justice. Accordingly, his petition for a rehearing is denied.

I.

¶5 Appellant's argument that his rights under 1 CMC § 3107 were somehow violated by the signing of an opinion by two of the three Justices that comprised the panel may only survive scrutiny if the fact that Justice Manglona abstained from signing the opinion violates the CNMI Constitution or the Commonwealth Code. That contention is not supported by the fact that the Petition for Rehearing does not provide a single analogous instance in which, under even remotely similar circumstances, a Justice has recused himself or herself or has been disqualified because his or her spouse was sworn in as Attorney General during the later stages of an appeal.

¶6 Further, Appellant concludes that Justice Manglona should have recused himself without mention of a specific reason why his impartiality could reasonably be questioned pursuant to the constitution and statutory sections pertaining to recusal. We are not convinced by Appellant's argument, however in the interest of clarity and full disclosure we will delineate the circumstances surrounding Justice Manglona's abstaining from signing the opinion.

¶7 Appellant bases his petition for a rehearing on the argument that Justice Manglona improperly abstained from signing the opinion, and that such action is in direct violation of

Article IV, section 3 of the CNMI Constitution and Title 1, Section 3107 of the Commonwealth Code.

¶8 The CNMI Constitution delineates the Court's judicial powers.

The Commonwealth supreme court shall hear appeals from final judgments and orders of the Commonwealth superior court. The supreme court shall have all inherent powers, including the power to issue all writs necessary to the complete exercise of its duties and jurisdiction under this constitution and the laws of the Commonwealth. The supreme court shall consist of a chief justice and at least two associate justices.

N.M.I. Const. art. IV, § 3. Title 1, Section 3107 of the Commonwealth Code defines the statutory scope of the Supreme Court's powers:

Appeals to the Supreme Court shall be heard and determined by a panel consisting of the Chief Justice and two Associate Justices. If the Chief Justice is disqualified, he or she shall appoint a temporary Chief Justice to act in his or her stead. The concurrence of two justices shall be necessary to any decision of the Supreme Court on the merits of an appeal.

1 CMC § 3107. It is clear that the Commonwealth Constitution and statutory scheme require at least three justices to hear and determine an appeal.

¶9 Here, three justices heard and determined the appeal so there is no violation of the constitutional mandate. Further, the statutory requirement that a concurrence of two justices is necessary to establish a majority opinion is also met, as Justice Castro and Justice *Pro Tem* Atalig were in agreement. Three justices heard and determined the appeal and the opinion was signed by a concurrence of two justices, in compliance with CNMI law.

II.

¶10 The Commonwealth Code states that a judge or justice shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned. 1 CMC § 3308(a). Also, the Code states that a justice shall disqualify himself when his spouse is acting as a lawyer in the proceeding, or his spouse has an interest that could be substantially affected by the outcome of

the proceeding. 1 CMC § 3308(b)(5)(ii) and (iii). Simply put, Justice Manglona did not disqualify himself because he believed that his impartiality could not reasonably be questioned based on the fact that his spouse became Attorney General after oral arguments concluded. Further, the decision whether a judge's impartiality can "reasonably be questioned" is to be made in light of the facts as they exist, and not as they are surmised or reported to be. *See Microsoft Corp. v. United States*, 530 U.S. 1301, 1302, 121 S. Ct. 25, 26, 147 L. Ed. 2d 1048, 1049 (2000). The facts here are that Justice Manglona was a member of the panel assigned to decide this case from its onset; he sat on the full panel at oral arguments, participated in deliberations and contributed to the determination of the opinion. All of this took place before November 15, 2002, the date his spouse became Attorney General.

¶11 Once Ramona V. Manglona was sworn in as the CNMI Attorney General, she became "responsible for providing legal advice to the governor and the executive departments, representing the Commonwealth in all legal matters, and prosecuting violations of the Commonwealth law." N.M.I. Const. art. III, § 11. Further, as Attorney General she represents the Commonwealth in suits by and against the Commonwealth. *See Id.* Appellant argues that because then Attorney General Manglona is married to Justice Manglona, he should have immediately recused himself "from considering, in any capacity, all cases in which the Commonwealth is a party represented by the Attorney General's Office, including the instant case." Petition for Rehearing Pursuant to Com. R. App. P. 40(a) at 5.

¶12 What Appellant fails to note is that the rules pertaining to recusal are applied prospectively using a reasonableness standard and that Justice Manglona did not recuse himself in this instance because he both heard and determined this case as a member of the panel prior to the swearing in of Attorney General Manglona. The recusal inquiry must be "made from the

perspective of a reasonable observer who is informed of all the surrounding facts and circumstances.” *Microsoft Corp.*, 530 U.S. at 1302, 121 S. Ct. at 26, 147 L. Ed. 2d at 1049 (REHNQUIST, C.J.) (opinion respecting recusal) (*citing Liteky v. United States*, 510 U.S. 540, 548, 114 S. Ct. 1147, 1153, 127 L. Ed. 2d 474, 486 (1994)). The fact is that after submitting a brief on appeal and presenting oral arguments before the Court, the Attorney General’s Office normally takes no other action until the opinion is issued.² In this case, Justice Manglona’s spouse became Attorney General after all strategic actions and procedural decisions were made, which did not create a situation in which Justice Manglona’s impartiality could reasonably be questioned. In the interests of judicial expediency and conservation of judicial resources, Justice Manglona chose to abstain from signing the opinion to avoid the appearance of partiality while complying with Commonwealth law.

¶13 Appellant cites to 1 CMC § 3309(a), which states, “[w]henver a justice of judge of the Commonwealth believes that there are grounds for his or her disqualification, he or she shall, on his or her own initiative, recuse himself or herself and enter a written order of recusal in the record of the proceedings.” Certainly, Justice Manglona understands the Commonwealth Code and Rules pertaining to recusal when a Justice believes there are grounds for his disqualification. In fact, during former Attorney General Manglona’s term in office, Justice Manglona recused himself from cases in which his spouse, as Attorney General, had an interest in the outcome of the proceedings, including, but not limited to, *Commonwealth v. Benavente*, 03-005-GA, *Commonwealth v. Castro*, 02-309-CR, and *Commonwealth v. Himabukuro*, 02-254-GA.³ Recusal

² Occasionally, supplemental briefs or motions are filed with the Court after oral argument but none were received in this appeal.

³ Justice Manglona’s understanding of the grounds for recusal is further evidenced by his history of recusing himself from cases that his spouse signed while she was an Assistant Attorney General, including, but not limited to, *Commonwealth v. Hasan*, *Commonwealth v. Taman*, and *Commonwealth v. Borja*.

was not warranted in this instance because former Attorney General Manglona did not work on Appellant's trial in the lower court or in preparation for his appeal.

¶14 For Justice Manglona to recuse himself retroactively, as Appellant demands here, in a case that was complete but for the issuance of the written opinion, would do a disservice to the Commonwealth as the judicial resources invested in the case to that point would be lost. To be clear, a Justice should not hesitate to recuse himself or herself simply because time and effort have been expended. Rather, we hold that in a rare case such as this, when the appeal was fully briefed, oral arguments were heard and an outcome determined before the spouse of a Justice was sworn in as Attorney General, then that Justice's impartiality could not reasonably be questioned and recusal was unnecessary.

III.

¶15 Finally, Appellant argues that Justice Manglona's failure to disqualify himself from this case because his wife became Attorney General during the pendency of this appeal violated his due process rights under Article 1, Section 5 of the CNMI Constitution by denying him a fair trial. Petition for Rehearing Pursuant to Com. R. App. P. 40(a); *see generally In re Seman*, 3 N.M.I. 57 (1992). However, if Appellant truly believed Justice Manglona's impartiality could reasonably be questioned, he made no attempt to disqualify Justice Manglona through a motion before this Court in the months between the time former Attorney General Manglona was sworn in and before this Court issued its opinion.

¶16 The procedure for disqualification, set forth in both 1 CMC § 3309(b) and Commonwealth Code of Judicial Conduct, Canon 3(D)(b), provides: "[w]henever a party to any proceeding in a court of the Commonwealth believes that there are grounds for disqualification of the justice of judge before whom the matter is pending, that party may move for

disqualification of the justice or judge, stating specifically the grounds for such disqualification.”

Canon 3(D)(c) of the Commonwealth Code of Judicial Conduct further provides:

If the ground for disqualification is that the justice or judge has a personal bias or prejudice against or in favor of any party, an affidavit shall accompany the motion. Such justice or judge shall proceed no further therein, but another justice or judge shall be assigned to hear such motion.

The affidavit shall state the facts and reasons for the belief that bias or prejudice exists, and the motion and affidavit *shall be filed in sufficient time not to delay any proceedings unless the moving party can show he or she had no reason to previously question the justice's or judge's bias or prejudice or the proceeding was just recently assigned the justice or judge.*

A party may file only one such affidavit in any case. It shall be accompanied by a certificate of counsel of record stating it is made in good faith.

Com. C. Judic. Cond. Canon 3(D)(c) (emphasis added).

¶17 Petitioner’s appeal was not the only criminal case pending in which Justice Manglona was a member of the panel. In a different case pending before this Court at the time former Attorney General Manglona was sworn in, the Appellee promptly filed a Motion to Disqualify Justice Manglona. *Commonwealth v. Norita*, 02-014-CR. In response to that motion, Justice Manglona recused himself before oral arguments commenced, thereby removing even the appearance of partiality.

¶18 In the two months between former Attorney General Manglona’s swearing in and the Court’s issuance of the opinion in this case, Appellant did not file a motion to disqualify Justice Manglona. The Code of Judicial Conduct is clear that a motion to recuse should be made at a time when it would not delay any proceedings, unless it was clearly shown that the basis for disqualification was not previously known, or the proceedings were recently assigned. *Sablan v. Iginioef*, 1 N.M.I. 190, 206 (1990). Appellant had ample opportunity to move this Court to

disqualify Justice Manglona and he did not. At this point, this Court will not entertain a late motion to disqualify cloaked as a Petition for Rehearing.

¶19 Accordingly, Appellant's Petition for a Rehearing Pursuant to Com. R. App. P. 40(a) is hereby DENIED.

SO ORDERED this 27th day of May 2004.

/s/

ALEXANDRO C. CASTRO,
Associate Justice

/s/

JOHN A. MANGLONA,
Associate Justice

/s/

PEDRO M. ATALIG,
Justice *Pro Tem*