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IN THE SUPREME COURT OF GUAM

CEZAR B. DIZON,)
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Petitioner,)
)
vs.)
)
SUPERIOR COURT OF GUAM,)
)
Respondent,)
)
vs.)
)
THE PEOPLE OF GUAM,)
)
Real Party In Interest.)

Supreme Court Case No.: WRP98-001
Superior Court Case No.: CF0380-95

OPINION

Filed: May 13, 1998
Cite as: 1998 Guam 3

Petition for Writ of Prohibition

Argued and Submitted on May 8, 1998
Hågatña, Guam

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BEFORE: PETER C. SIGUENZA, Chief Justice, JOAQUIN C. ARRIOLA¹, and JOSE I. LEON GUERRERO², Associate Justices.

SIGUENZA, C.J.:

[1] The petitioner, Cezar B. Dizon, petitions this Court for a writ of prohibition restraining the Superior Court from scheduling any further action or proceeding in Criminal Case Number CF0380-95 before Presiding Judge Alberto C. Lamorena, III. The respondent court made no response to this petition. However, the People of Guam, the real party in interest, oppose the petition.

[2] Upon consideration of the applicable standards for recusal and for writ relief, the Court issued an oral ruling recusing Judge Lamorena from CF0380-95. The Court now issues this written opinion in support of its ruling. Furthermore, the Court sets out the proper procedure for the reassignment of this case and future cases where the Presiding Judge is recused or is otherwise disqualified from performing his or her duties as the Presiding Judge.

FACTUAL AND PROCEDURAL BACKGROUND

[3] The Petitioner is the defendant in Superior Court of Guam Criminal Case Number CF0380-95. The case had been assigned by Judge Lamorena to himself and recusal was sought by the Petitioner after learning of the correspondence between Senior United States Circuit Judge for the Ninth Circuit, Alfred T. Goodwin and Judge Lamorena. The letter from Judge Goodwin was typewritten on Ninth Circuit Court of Appeals stationery and the content described Judge Goodwin's concern for quick resolution of the case and asked for Judge Lamorena's efforts to ensure that same end. The letter was sent by facsimile to Judge Lamorena on February 24, 1998 and then subsequently received by United States mail on

¹Part-time Associate Justice.

²Part-time Associate Justice.

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3 March 9, 1998. Judge Lamorena returned from an off-island trip on March 7, 1998 but claimed below
4 that he did not read or even see the letter until March 12, 1998. A pre-trial conference was scheduled for
5 March 5, 1998; however, Judge Lamorena was off-island and could not preside over that hearing. In
6 keeping with Judge Lamorena's instructions, Judge Maraman ordered the prosecution to file a written
7 request for a continuance that would be heard after Judge Lamorena's return on Monday, March 9, 1998.
8 The trial date had previously been set for March 10, 1998. The motion was argued before Judge
9 Lamorena on the basis that expert witnesses would not then be available and the prosecutor trying the case
10 would be in another murder trial. The Petitioner did not object to a continuance. However, Judge
11 Lamorena denied the request for a renewed pre-trial conference for March 23, 1998, but he put the trial
12 over for an additional week, until March 17, 1998, and stated that no further continuances would be
13 granted.

14 [4] There is some confusion as to how the existence of the letter was brought to the attention of the
15 parties. The Petitioner asserts that it was the People who disclosed to his counsel Judge Lamorena's
16 receipt of the letter. Judge Lamorena, in his answer to the recusal motion, stated that he did not
17 communicate the existence of the letter to the People. Judge Lamorena indicated that it was Attorney
18 Thomas J. Lannen, the victim's ex-husband, who was responsible. At any rate, it was not Judge Lamorena
19 who initially disclosed the existence of the letter to the Petitioner. Instead, the Petitioner made a request
20 for that information to the Judge. The court informed the parties that there was a letter, but that it was
21 "innocuous." The Petitioner further claims that Judge Lamorena failed to timely produce this letter after
22 being requested to do so.

23 [5] The Petitioner then proceeded to file a Motion for Change of Venue; Objection to Presiding Judge
24 Alberto C. Lamorena, III, Acting as Judge Herein. Judge Lamorena filed an answer and the People filed
25 an opposition to that motion. The motion was heard before, Judge Joaquin V. E. Manibusan, Jr. who
26 denied the recusal of Judge Lamorena although in a Decision and Order, the court acknowledged that the
27 situation could have been handled better. Judge Manibusan noted that
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Judge Lamorena could have been more forthcoming by being the one to have disclosed the existence and receipt of the letter from Judge Goodwin. The Petitioner timely filed its Petition for Alternative Writ of Prohibition.

DISCUSSION

I.

[6] The Court has jurisdiction over original proceedings for prohibition pursuant to 7 GCA § 3107(b). The People argue that a writ should not issue because there is no extraordinary circumstance warranting such action. *Topasna v. Superior Court of Guam*, 1996 Guam 5, ¶5. The statute provides that a writ may issue when “there is not a plain, speedy, adequate remedy in the ordinary course of law.” 7 GCA § 31302. This Court has previously addressed the issue of whether a writ of prohibition is the proper channel for reviewing the qualifications of a judge to preside over a trial court case. *Topasna* at ¶5. Although a writ is a drastic remedy, in *Topasna* the Court found that there was no plain, speedy, adequate remedy for the petitioner even though a denial of the disqualification of Judge Demapan in that case was an appealable order after trial. *Id.* The same is true in this case. For the Defendant to have to wait for the completion of a trial and possible conviction before being able to appeal the case on this same issue leaves him without a plain, speedy, adequate remedy.

[7] The People attempt to distinguish *Topasna* because it is factually different and because the basis for the disqualification of Judge Demapan was different. However, in that Judge Demapan’s disqualification was pursuant to the Presiding Judge’s lack of authority to appoint Judges Pro Tempore, which created an issue of the supervisory authority of this Court, and there are conceptually similarities to the case at bar. Certainly no two cases will be factually the same nor will

the basis for a judge’s disqualification be identical. It is, therefore, within this Court’s appellate jurisdiction to exercise its inherent supervisory authority over the lower court.

II.

[8] The recusal statute provides that a judge must disqualify himself when his “impartiality might reasonably be questioned.” 7 GCA § 6105(a). Both parties agree that the standard for recusal is the appearance of impropriety and that no actual showing of bias is necessary for recusal to lie. The United States Supreme Court has addressed this same issue, via a similar federal statute, and held that it is the appearance of bias or prejudice which is of concern to the court. *Liteky v. United States*, 510 U.S. 540, 548, 114 S.Ct. 1147, 1154 (1994) (“[W]hat matters is not the reality of bias or prejudice but its appearance. . . .”). The basis for the recusal is the letter received from Judge Goodwin which is considered to be an extrajudicial source. As an extrajudicial source, a reasonable person standard must be applied to determine whether recusal is necessary. *Id.*

[9] The Petitioner cites the case of *Nichols v. Alley*, 71 F.3d 347 (10th Cir. 1995), where recusal of a judge was sought in the Oklahoma bombing case because some court employees had been injured in the bombing. The court held that a reasonable person could doubt the judge’s impartiality although the judge himself had acted properly and professionally throughout the proceedings. *Id.* If there is a question as to the propriety of a judge remaining on a case, it is better to err on the side of caution and in favor of recusal.

If it would appear to a reasonable person that a judge has knowledge of facts that would give him an interest in the litigation then an appearance of partiality is created even though no actual partiality exists because the judge does not recall the facts, because the judge actually has no interest in the case or because the judge is pure in heart and incorruptible . . . the judge’s actual state of mind, purity of heart, incorruptibility, or lack of partiality are not the issue.

Id. at 351. On the other hand, the recusal statutes should not be so broadly construed so as to

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4 become presumptive or to allow for judge shopping. *Id.*

5 [10] This Court finds that the trial court’s analysis of the recusal statute and the standard created
6 by case law is flawed and, thus, we proceed with our own analysis of Judge Lamorena’s recusal.³

7 [11] We first note that Judge Lamorena had no apparent part in the creation of the letter at issue. The
8 Petitioner finds support for his motion for recusal in the fact that Judge Lamorena not only received this
9 letter, but that he failed to disclose its receipt or even be forthcoming when it was requested. It is not clear
10 whether Judge Lamorena would have ever disclosed its receipt, or its existence, had an outside source not
11 made the parties aware of it. The receipt of ex parte communications is a well visited issue. In *Guenther*
12 *v. Commissioner of Internal Revenue*, 939 F.2d 758 (9th Cir. 1991) an ex parte memorandum was
13 submitted to the tax court by the government. The court ruled that the defendant was entitled to a new trial
14 with a judge who had not been exposed to that ex parte communication. *Id.* at 762. In the case of *United*
15 *States v. Van Griffin*, 874 F.2d 634 (9th Cir. 1989), the court held that a magistrate should have

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17 ³Although the trial court applied the proper standard, it failed in its analysis to focus on the concept of the
18 appearance of bias. *Dizon v. Superior Court*, No. CF0380-95 (Guam Super. Ct. April 21, 1998). Instead, the trial court
19 took great care in demonstrating the absence of any actual prejudice resulting from the letter through examples of Judge
20 Lamorena’s allegedly consistent desire to quickly bring the case to trial from the beginning. *Id.* The court concluded
21 that “the letter received from Judge Goodwin does not serve as a source of bias in this matter, and that he [Judge
22 Lamorena] has given no consideration or weight to the suggestions set forth herein.” *Id.* at 11. The trial court also
23 stated that “[t]here has been no display of bias from his [Judge Lamorena’s] actions” *Id.* at 12. These are precise
24 demonstrations of the trial court’s focus on actual bias, rather than the appearance of impropriety or that the judge’s
25 impartiality might reasonably be questioned, which is the actual standard. The court focused on the fact that Judge
26 Lamorena claims he did not read the letter until well after his return and after it had been made clear, via Judge Maraman,
27 that the case would be immediately going forward to trial. *Id.* at 5-6. The trial court noted that the letter “would not
28 necessarily lead a reasonable person” to believe that Judge Lamorena was now biased. *Id.* at 10. That example clearly
points out that the court was failing to properly apply the test in that (1) the test does not require a showing that a
reasonable person “necessarily” question a judge’s impartiality, but instead merely that one “might reasonably” question
the impartiality; and (2) that it is also not necessary that a reasonable person believe that actual bias or impartiality had
resulted, i.e., in this case that any decision subsequently made by Judge Lamorena would be made as a direct result of
the receipt of the letter when instead all that is required is that impartiality be reasonably questioned. Additionally, the
trial court asserts that based on the totality of the circumstances, a reasonable person would not question Judge
Lamorena’s impartiality. *Id.* However, this Court finds that the trial court did not give proper weight to the influence of
Judge Goodwin as an Appellate Court judge and the weight of his position and influence through the use of the Ninth
Circuit Court stationery, as will be discussed more fully within this opinion. The trial court also found that Judge
Lamorena acted appropriately upon receipt of the letter. *Id.* To the extent that Judge Lamorena did not respond or in any
other way contact Judge Goodwin, the Court agrees with the trial court; however, the fact that Judge Lamorena did not
immediately disclose either the receipt or the content of the letter to the parties, and the fact that the trial court had no
problem with this omission, is of great concern to this Court.

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3 disqualified himself after being in possession of a ranger's report of a driving while under the influence
4 incident because a reasonable

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6 person could have doubted his impartiality, even though the magistrate did not read the report.

7 [12] The People argue that the cases discussed above are distinguishable because the information
8 received by the courts was information which they did not already possess, and, in this case, Judge
9 Lamorena was not advised of anything which he did not already know. While it may be true that no
10 substantive information may have been contained in the Goodwin letter, that is not to say that it did not
11 contain any information on the merits of the case of which Judge Lamorena was not already aware. The
12 fact that Judge Goodwin had such strong feelings and a seemingly emotional stake in the outcome and
13 speedy resolution of this case could be viewed as information which Judge Lamorena did not already
14 possess. When viewed in conjunction with the two judges' friendship a reasonable question as to
15 impartiality and bias in the mind of a reasonable person is created. We must also bear in mind that this
16 correspondence was disclosed only after the Petitioner had made two separate requests.

17 [13] Clearly, inappropriate behavior is attributable to Judge Goodwin. However, the belated disclosure
18 of the letter is directly relevant to whether Judge Lamorena should remain on the case. The belated
19 disclosure of the letter is highly compelling evidence of the appearance of impropriety. Judge Goodwin
20 himself has admitted that his letter was inappropriate, that he shouldn't have done it and that it was one of
21 those foolish things that people sometimes do. Susan McRae, *Foreign Affairs A 9th Circuit Judge's*
22 *personal Plea Has Raised a Ruckus in Guam*, L.A. Daily Journal, April 10, 1998. Judge Goodwin has
23 also been quoted as stating as justification that he, as a 9th Circuit Court Judge, no longer has direct
24 jurisdiction over Guam Superior Court cases; however, in the same breath he demonstrates his belief that
25 he could "get it [the case] moving." *Id.* Further damaging is the fact that Judge Goodwin points out that
26 in his forty (40) years as a judge he has never attempted to interject himself into another judge's business,
27 which only demonstrates his knowledge of the implications that such interjection carries. Additionally,
28 although claiming he was not attempting to place any pressure on Judge Lamorena, he certainly believed

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3 that he did so when stating “apparently it worked,” in response to the situation. Clarissa J. Walker, *Judge*
4 *says he might have*

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7 *erred, Defense wants him under oath*, Pacific Daily News, April 22, 1998 at 1.

8 [14] The Petitioner argues that the tone of the letter coupled with Judge Lamorena’s
9 characterization of the letter as being innocuous heightens the appearance of impropriety. This letter
10 is more than merely a letter from a “friend of the victim,” as the People would wish this Court to believe.
11 As previously mentioned, the letter was written on Ninth Circuit Court stationery rather than personal
12 stationery. There is a message conveyed by that distinction. In *Cabot v. Kobayashi*, No. CV0064-95
13 (Guam Super. Ct. June 10, 1996), the court issued sanctions against a real estate broker who used his
14 influence as an attorney by drafting a letter on attorney letterhead to secure a commission in a real estate
15 deal. The court opined that by using the attorney letterhead it was reasonable to assume that an ordinary
16 person would view his legal opinion in higher regard. *Id.* at 6-7. Similarly in this case, a letter from a Ninth
17 Circuit Court of Appeals judge carries a great deal of weight on a lower court judge. The People, and
18 Judge Goodwin himself, have conceded the impropriety of the letter and the possibility that such
19 correspondence may be a breach of the Code of Judicial Ethics.

20 [15] Furthermore, the fact that Judge Lamorena received and read the letter, did not disclose it to any
21 of the parties and then, when confronted, deemed it innocuous and delayed production of the letter until
22 after two requests had been made, is troubling. Essentially, Judge Lamorena subjectively determined the
23 letter’s effect and concluded there was no need for disclosure. In doing so, he failed to provide the parties
24 with an opportunity to raise objections or waive any claims of bias. In his answer Judge Lamorena claims
25 that he was off-island when the letter arrived and that he did not read it until several days after his return,
26 at which time he had already decided that the case was going to trial immediately and no further
27 continuances would issue. Judge Lamorena supports his position by stating that he has a very busy trial
28 calendar and did not want to continue the proceedings for that reason. Whether all of this is convincing

evidence is unclear, at best.⁴ However, his actual feelings, thoughts and actions are not the issue. The standard is whether a reasonable person could doubt his ability to be impartial. That standard is met under these circumstances. Presiding Judge Alberto C. Lamorena, III, is ordered recused from the matter.

III.

[16] Having determined that Judge Lamorena is recused from this case, this Court addresses the issue of the case’s reassignment. The Petitioner argues that it is within the Court’s authority to exercise its inherent power over the trial court and reassign a case to a different judge. *United States v. Sears, Roebuck & Co., Inc.*, 785 F.2d 777, 779 (9th Cir. 1986). The Court has previously exercised its supervisory authority, not only in *Topasna*, but also in *Guam Publications, Inc. v. Superior Court of Guam*, 1996 Guam 6, where the Court issued a writ of mandamus ordering the Superior Court to cease the practice of closing proceedings without substantive findings to support such closure. The Petitioner asks this Court to prescribe a manner in which the trial court should handle ex parte communications and to ensure that the case is assigned to a fair and impartial judge and not one hand-picked by Judge Lamorena.

[17] By statute, the powers of a Presiding Judge of the Superior Court have been set forth as follows:

Section 4103. Powers of the Presiding Judge. The Presiding Judge of the Superior Court shall prescribe the order of business and assign the cases to the judges, referees and hearing officers of the Court. The Presiding Judge may preside at any session of the Court which he or she attends. During the Presiding Judge’s temporary absence or temporary disability, the Presiding Judge’s duties shall be performed by his or her designated appointee. Appointment shall be on a rotating basis among all judges of the Superior Court.

7 GCA § 4103 (as amended by P.L. 24-139). Given this Court’s recusal of Judge Lamorena from the

⁴We do not pass on the credibility of Judge Lamorena’s claim that he did not review immediately upon his return the copy of the letter that had been faxed to him by a federal judge. The facts agreed to by the parties provide a sufficient basis for our determination.

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3 underlying criminal case, CF0380-95, the Court deems the Presiding Judge to be temporarily disabled
4 under the statute. Furthermore, the Court finds that due to that temporary disability and the

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7 fact that no procedure exists to fairly designate an Acting Presiding Judge or for the assignment of cases,
8 the Presiding Judge is without the power to appoint or designate a judge to act as his replacement for the
9 purpose of reassigning CF0380-95.

10 **[18]** Because the statute is silent as to what procedure must be followed to designate a judge to perform
11 the duties of assigning cases in a situation such as this, the Court hereby invokes its inherent
12 power in so designating a judge.

13 Undoubtedly, courts of justice possess powers which were not given by legislation and
14 which no legislation can take away. These are 'inherent powers' resident in all courts of
15 superior jurisdiction. These powers spring not from legislation but from the nature and
16 constitution of the tribunals themselves. . . . The 'inherent powers' of a court are such as
17 result from the very nature of its organization and are essential to its existence and
protection and to the due administration of justice. It is fundamental that every court has
inherent power to do all things that are reasonably necessary for the administration of
justice within the scope of its jurisdiction.

18 *State v. Superior Court of Maricopa County*, 275 P.2d 887, 889 (Ariz. 1954). Further support for the
19 invocation of the inherent powers doctrine lies in the case of *Cruz v. Abbate*, 812 F.2d 571 (9th Cir.
20 1987). The issue involved in *Cruz* was the Presiding Judge's practice of assigning cases in an arbitrary and
21 unfair manner to the judge of his choice. The Ninth Circuit remanded the case for more specific details to
22 support the allegations made by the petitioner. *Id.* at 574. However, the court did recognize the
23 supervisory power of the appellate court to correct the matter should it determine, on remand, whether an
24 abuse of discretion was occurring. *Id.* The interest of justice requires ensuring that there is no abuse of
25 discretion in the assignment of cases. Although case assignment is largely an administrative function, when
26 abused it can become a substantively judicial function which may have direct bearing upon a party's,
27 particularly a criminal defendant's, constitutional rights. Therefore, similarly, this Court invokes the same
28 power.

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[19] The Court hereby assigns the next most-senior judge to hear the case. In this case the next senior judge is Judge Maraman. However, given that Judge Maraman and Judge Frances Tydingco-Gatewood, the next senior judge to Judge Maraman, have disqualified themselves from sitting on CF0380-95, the assignment of the case will fall on Judge Manibusan as the next in line. In the event that this judge is unavailable due to illness, absence, disqualification, conflict or recusal, the assignment shall then proceed to the next senior judge to him and so on and so forth as necessary.

JOAQUIN C. ARRIOLA, Associate Justice JOSE I. LEON GUERRERO, Associate Justice

PETER C. SIGUENZA, Chief Justice