JESUS A. SONODA, Appellant

v.

HAROLD W. BURNETT, Chief Justice, Trust Territory of the Pacific Islands,
EDWARD E. JOHNSTON, High Commissioner, Trust Territory of the Pacific Islands
and
TRUST TERRITORY OF THE PACIFIC ISLANDS, Appellees

Civil Appeal No. 129

Appellate Division of the High Court

Mariana Islands District

April 25, 1977

Appeal following dismissal of complaint. The Appellate Division of the High Court, per curiam, affirmed dismissal.

1. **Courts—High Court—Administrative Powers and Duties of Chief Justice**

   When disqualified from sitting in a case or participating in hearing and determining the case, the Chief Justice of the High Court continues to have administrative supervision of all courts in the territory, and he may assign a justice to hear the case, and may later reassign the case to another justice. (5 TTC §§ 201(3), 351)

2. **Courts—Judges—Appointment**

   Appellate Division of the High Court will presume that public officials act properly and that the appointment of substitute judges is regular.

Before BROWN & WILLIAMS, *Associate Justices*

BENSON, *Temporary Judge* (*Superior Court of Guam, Sitting by Designation*)

PER CURIAM

Plaintiff-appellant was appointed for a 3 year term as Associate Judge of the Mariana Islands District Court commencing August 2, 1971. He was not reappointed. He continued to serve until terminated by notice of November 7, 1974, effective November 11, 1974. Appellant sought an injunction against his removal, and damages. On motion of

defendant-appellees, the complaint was dismissed and this appeal followed.

The court has considered every assignment of error. None warrant reversal of the trial court, but one deserves discussion because of its serious nature and the care with which it has been considered by the court.

The file of the proceedings record the events.

The complaint was filed November 12, 1974. Paul J. Abbate, a temporary judge (See 5 TTC 203), on November 14, 1974 issued the prayed-for temporary restraining order and set November 25, 1974 for a hearing on a preliminary injunction. On December 2, 1974, Robert A. Hefner, Associate Justice, dissolved the temporary restraining order and denied appellant's prayer for a preliminary injunction. The appellees' motion to dismiss the complaint was heard December 6, 1974, and on December 11, 1974, Judge Hefner signed the order granting the motion and dismissing the complaint.

No assignment of judges appears in the record. In the briefs and the oral arguments both counsel have assumed as facts that Chief Justice Burnett assigned the case first to Judge Abbate and then to Judge Hefner. The record, as stated, is entirely silent on these assignments, and as to the reason for the second assignment.

The appellant contends that the action of the Chief Justice in making the second assignment violated the appellant's right to due process of law. The appellant asserts that Judge Burnett was disqualified under 5 TTC 351, which reads:

> No judge shall hear or determine or join in hearing and determining an appeal from the decision of a case or issue decided by him. No judge shall sit in any case in which he has a substantial interest, has been of counsel, is or has been a material witness, or is so related to or connected with any party or his attorney as to render it improper, in his opinion, for him to participate in the hearing and determination of the case.

Appellant then assumes that the Chief Justice acted under the authority of 5 TTC 201(3) in appointing Judge Abbate. This provision states:

> Whenever the Chief Justice is unable to perform the duties of his office or the office is vacant, his powers and duties shall devolve upon any Associate Justice designated by the Chief Justice, or in the absence of such designation, upon the senior Associate Justice in point of service until such disability is removed or another Chief Justice is appointed and takes office.

The Appellant does not contest the first assignment, but the second, since, according to his argument, the disability was not removed at that time.

The disqualification provision of the Trust Territory Code prescribes that the judge disqualified shall not "sit" on the case or "participate in the hearing and determination of the case". This provision conforms to prevailing authority:

> Disqualification of a judge to hear and decide a case suspends his powers only so far as discretionary action in the case is concerned. 46 Am.Jur.2d, Judges, § 230.

[1] Judge Burnett, as Chief Justice, continued to have administrative supervision of all the courts in the Trust Territory (5 TTC 202) and, though disqualified, could make the assignment. The appellant cites one authority in accord with this proposition:

> The disqualification of a judge generally deprives him of authority to perform any judicial act or to perform any act calling for an exercise of judicial discretion in connection with the pending cause, except to select another judge or to make a transfer of the case in accordance with the law. 48 CJS, Judges, § 97(a) (Appellant's brief, p. 6).

Thus, the disqualification of a judge *to hear and determine a cause* does not prevent him from making orders that are purely formal in character, or from performing merely ministerial duties in no way connected with the trial such as arranging the calendar or regulating the order of business. 46 Am.Jur.2d, Judges, § 230.

The emphasis has been added in the above citation because the wording parallels the disqualification provision of 5 TTC 351.

Dotson v. Burchett (1945) 301 Ky. 28, 190 S.W.2d 697, 162 A.L.R. 636, at p. 638 and cases cited in the encyclopedia support the propositions cited. Two cases involve and permit a second assignment: *Gears v. State* (1932) 203 Ind. 400, 180 N.E. 592 and *Mudge v. Hull* (1896) 56 Kan. 314, 43 P. 242.

Better practice would require written orders in this case, with a recitation of the reasons for each order. Alternatively, Judge Burnett could have included a written first assignment authority for Judge Abbate to transfer the case if necessary and to make all other appropriate orders until the case was completed.

[2] A possible inference from the second assignment is that Judge Burnett was "judge shopping". Concerning this, it must be stressed again that the record contains not a word of the assignments or the attending circumstances. We refuse to entertain this inference.* It is presumed that public officials act properly (29 Am.Jur.2d, Evidence, § 171) and that the appointment of substitute judges is regular. (48 CJS, Judges, § 106.)

The attorney for the appellant, who throughout the proceedings has acted with impressive diligence, has not assigned anything improper other than the assignment itself. This he asserts was void: He does not assign any other impropriety, such as lack of justification. Had there been impropriety, we feel confident he would have brought it into the record.

The order dismissing the complaint is affirmed.

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* In *Dotson v. Burchett*, supra, 162 A.L.R. at p. 639, the Court refused to entertain similar suspicions.

BROWN, *Associate Justice*, dissenting

The sole question before the Court is whether or not the activities of Defendant and Appellee, Harold W. Burnett, who is the Chief Justice of this Court, constituted such participation in his own case as to violate either the Canons of Judicial Ethics or the law, or both of them, so as to require reversal.

The statement of facts set forth in the majority Opinion appears to be substantially correct and is adopted for the purposes of this opinion. However, I cannot agree with the conclusion drawn from those facts.

As a starting point for analysis, we should commence with Canon 3C(1)(d)(i), Canons of Judicial Ethics, American Bar Association, which reads:

> C. DISQUALIFICATION
>
> (1.) A judge should disqualify himself in a proceeding in which his impartiality might reasonably be questioned, including but not limited to instances where:
>
> * * *
>
> (d.) he . . .
>
> (i.) is a party to the proceeding . . .
>
> * * *

From this it must be asked, from what must he disqualify himself? It is elementary that one cannot sit in judgment on his own case; the precise problem is to determine to what extent, short of actually hearing it, a Chief Justice or Chief Judge may properly participate in the disposition of a case wherein he is a party. In the case at bench, Chief Justice Burnett scrupulously avoided sitting as the judge presiding over his own case, and this was proper. Likewise, and for the purposes of this opinion, there is no suggestion of impropriety in the initial assignment of the case to Judge Paul J. Abbate, and that matter will not be discussed. It is

what followed that initial assignment that causes concern; for Judge Abbate had issued a Temporary Restraining Order and had set the matter down for hearing on an Order to Show Cause, at which point in time Chief Justice Burnett relieved Judge Abbate from further responsibility, removed the case from his jurisdiction, and reassigned it to Associate Justice Hefner for all further proceedings. Strangely, there is not a single document contained in the file that deals with the initial assignment and the reassignment. In this, the record is utterly silent and totally vacant. This is significant.

The position of the majority is that the reassignment was proper under 5 TTC Sec. 202 upon the theory that Chief Justice Burnett continued to hold administrative supervision over the case even though he was one of the defendants. Further, they intimate that the very fact that the record is completely silent as to the reassignment justifies an inference of propriety. I cannot concur.

There is no doubt that a Chief Justice can, with propriety, perform essential ministerial duties such as transferring a case to another judge. *Stringer v. United States*, 233 F.2d 947 (CA 9, 1956), *Application of Scott*, 379 F.Supp. 622 (D.C., S.D. Tex., 1974). On the surface it might appear that these authorities support the actions of Chief Justice Burnett. I do not believe that they do, for a careful reading shows that the courts emphasize and limit themselves to the purely mechanical or ministerial nature of the duties of a Chief Justice or Chief Judge in transferring or assigning cases. The facts before us here indicate something much more than a mere mechanical or ministerial assignment, and this distinction should have been kept in mind; for the Chief Justice not only assigned to Judge Abbate a case involving himself as a party but then, after Judge Abbate had assumed jurisdiction and had issued an initial order, proceeded to reassign the case to

Justice Hefner and gave no explanation whatsoever for his doing so. Once the case had been assigned to Judge Abbate, the reasons for any reassignment should have been clearly and adequately stated in the record. Without this, the further action of the Chief Justice could well be regarded as unwarranted, for a discretionary removal of a case from a competent, sitting judge scarcely comports with the idea of even-handed justice. At a very minimum, the burden should be placed upon the Chief Justice to show that his action in reassigning the case was a purely ministerial act, and no such showing was made. Instead, we are faced with a record that is oddly silent as to this important facet of the case. As counsel for Appellees stated in open court during the argument on this appeal, "I'll admit that this looks terrible", or words to that effect. That remark troubled me at the time, and it still troubles me; for it indicated to me that counsel had a serious question as to the appearance of propriety with reference to the procedures that were followed.

Next, one might, with justification, conclude that, knowingly or unknowingly, there was a degree of "judge shopping" here, and this latter practice is, of course, generally disapproved. *United States v. Bellosi*, 501 F.2d 833 (C.A., D.C., 1974).

The next question deals with whether or not Chief Justice Burnett possessed the authority to remove the case from Judge Abbate and reassign it to Justice Hefner under the conditions which then prevailed. I believe that he did not; for when a special judge has been qualified, has assumed jurisdiction, and continues to exercise that jurisdiction, the displaced judge is without authority to act further. *Dotson v. Burchett*, 190 S.W.2d 697 (Ky.), 162 A.L.R. 636.

Very similar to the case at bench is *State v. George*, 470 S.W.2d 593 (Ark.). In that jurisdiction provision had been

made for the exchange of judges between circuits under certain circumstances. Following those provisions, the presiding judge of one circuit, who had a personal interest in a case and thus was disqualified, selected the judge with whom he would exchange circuits. This was held to be error, for such selection constituted an act of discretion in a matter in which he would be personally affected, rather than a purely administrative act.

In view of all of the foregoing, it is my opinion that the actions of Chief Justice Burnett in reassigning the case from Judge Abbate to Justice Hefner with no explanation for doing so being placed in the record properly require a reversal. Hence I must respectfully dissent.