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SJC-12840

COMMONWEALTH vs. JOSEPH COUSIN.

May 14, 2020.

Practice, Criminal, Postconviction relief, Disqualification of judge. Supreme Judicial Court, Superintendence of inferior courts.

The defendant, Joseph Cousin, appeals from a judgment of a single justice of this court granting the Commonwealth's petition under G. L. c. 211, § 3, and ordering that a certain judge of the Superior Court be recused from acting on Cousin's postjudgment motion to dismiss the indictments against him or for a new trial in his underlying criminal case. We affirm.

Background. A grand jury indicted Cousin in 2002 on several charges including murder in the first degree. He and a codefendant were tried together; his codefendant was acquitted and a mistrial was declared as to Cousin. After this court concluded that double jeopardy did not bar retrial, see Commonwealth v. Cousin, 449 Mass. 809 (2007), the Commonwealth retried him, and a jury convicted him of murder in the second degree. See Commonwealth v. Cousin, 478 Mass. 608, 609 (2018). In 2013, Cousin moved for a new trial on the basis that his trial counsel was ineffective because he "was burdened by an actual conflict of interest." A judge in the Superior Court allowed the motion. Id. On the Commonwealth's appeal, we vacated the decision allowing the motion for a new trial but remanded the case to the Superior Court for consideration whether Cousin "was prejudiced by potential conflicts of interest." Id. at 629.

Subsequent proceedings then took place in the trial court, including Cousin's attempts to expand the record and his claim

that the Commonwealth had withheld discovery. More specifically, he claimed, apparently for the first time, that the trial prosecutor had failed to disclose certain exculpatory evidence before trial.¹ On that basis, Cousin moved to dismiss the indictments against him or for a new trial (the so-called "Brady motion"). At a hearing on the motion, the motion judge raised the question whether she could be impartial because the prosecutor had since been appointed as a judge of the Superior Court and was now her judicial colleague.² She noted that "it seems . . . that there is a key factual question here which is whether [the prosecutor] turned over certain evidence to the defense," and that the issues involved in Cousin's motion "would essentially require [her] to pass on [the prosecutor's] credibility."

The judge initially expressed strong reservations as to whether she could be impartial in the circumstances. She noted that the prosecutor "is . . . my colleague. I am not friends with [him], I am friendly with [him]. . . . I have a conflict of interest here that no matter how much I might try to be objective and fair and impartial, there is this thing, this reality out there, which is that [he] is my colleague" She further stated, on the issue whether she could make an independent judgment and remain impartial, that

"I would hope that I could, but I'll tell you I just feel like there is too much pull internally that -- that I wouldn't -- no matter how much I might try, I would still have the [] possibility that I would be influenced by the fact that this is a colleague of mine. . . . [I]t just seems not only is there the [] danger that it would not be fair and impartial, but there would be the danger that it would not appear to be a fair and impartial decision if for example I were to determine that [he] was credible, you know, how would that appear?"

The judge took the matter under advisement, and the Commonwealth subsequently filed a motion in support of recusal.

¹ The same prosecutor handled both the first and second trials.

² The motion judge had allowed the motion for a new trial that the court vacated in Commonwealth v. Cousin, 478 Mass. 608 (2018), and that preceded the current motions in the trial court, but she did not preside over either of the defendant's two trials.

At a second hearing on the matter, the judge indicated that she was reconsidering her decision to recuse herself. She indicated that there was not, as she had previously thought, an inherent conflict that disqualified her per se, and that she therefore needed to consider whether, subjectively, she could be fair and impartial. She noted that,

"before the [previous] hearing there was certainly no reason for anybody to question my ability to be fair and impartial. . . . I went into the hearing on the last date with a key assumption on which my decision was then based. I was of the belief that there was an inherent conflict of interest for a Superior Court judge to be a finder of fact at an evidentiary hearing where an important witness was another Superior Court judge, and that the only way to eliminate that conflict was to have a judge assigned to the case that did not sit in the Superior Court. . . . I was wrong. First of all, that is not -- there is no inherent conflict; that is not the policy or protocol. . . . What I did not do, because I had that erroneous assumption, is I did not then inquire whether I could, quite apart, in light of that reality that this was a colleague, could I search in my own heart [and] still be fair and impartial."

At the final, and full, hearing on the issue, the judge reiterated that her initial thinking that she should recuse herself was based on the presumption "that there would be an inherent conflict of interest for a Superior Court judge to be the finder of fact at an evidentiary hearing where an important witness was a colleague and the credibility of that testimony was going to be important." She stated that, thereafter, she

"started to think. Well, the fact is, we, as judges, are regularly called upon to make credibility determinations regarding people we know. Police officers testify regularly in court. I know these people, at least in passing. Defense lawyers are witnesses at evidentiary hearings. . . . So that I know the witness or even though I work in the same Trial Court Department as a witness, cannot be the end of the inquiry. Rather, the question is whether having searched my heart and conscience that I believe that I could be fair."

Ultimately, she concluded that she believed she could be fair and impartial. She noted that her contact with the prosecutor since he had been appointed to the bench was limited and that

none of her contact with him would cause her to have any "preconceived notions" about him.

The judge then finally addressed the question whether, even if she thought she could be fair and impartial, there would be an appearance of partiality. On that point, she stated that if the circumstances like those presented in this case constituted an appearance of partiality that required recusal, then judges would routinely be required to recuse from hearings and cases, and that whatever appearance existed here was not such that the public could not be confident that she would be fair and impartial.

After the judge denied the Commonwealth's motion for recusal, the Commonwealth filed its G. L. c. 211, § 3, petition seeking review of the judge's ruling. In particular, the Commonwealth asked the court to order the trial court judge to recuse "at a minimum" from deciding the entirety of the Brady motion. After a hearing, a single justice allowed the Commonwealth's petition.^{3, 4}

Discussion. Cousin first argues that the Commonwealth's petition did not warrant the single justice's use of the court's extraordinary superintendence power pursuant to G. L. c. 211, § 3, and that the single justice therefore abused her discretion in considering the substantive merits of the petition. He correctly notes, as we have said more than once, that "[t]he

³ At the time the Commonwealth filed its petition pursuant to G. L. c. 211, § 3, it also sought and received, from the single justice, an order staying further proceedings in the trial court while the petition was pending. The single justice subsequently vacated the stay when she allowed the Commonwealth's petition. It does not appear that any further proceedings have taken place in the trial court during the pendency of this appeal.

⁴ In its appeal to this court, the Commonwealth argues that we should affirm the single justice's judgment and order that the Superior Court judge be recused "from further proceedings in this case." In other words, the Commonwealth appears to be seeking a broader result (recusal from the entirety of the case) than it had originally sought in its petition (recusal from the Brady motion). The single justice, in her decision, focused essentially on the Brady motion, and, as we explain in the text, we hold that recusal is only required with respect to that motion.

fact that the Commonwealth has no other remedy does not make [G. L.] c. 211, § 3, review automatic." Commonwealth v. Cook, 380 Mass. 314, 319 (1980). See Commonwealth v. Fontanez, 482 Mass. 22, 25 (2019), and cases cited. That said, we have also held that a single justice has considerable discretion when determining whether a petition presents the type of subject matter and factual circumstances that warrant an exercise of the court's extraordinary power of general superintendence. Id. at 24-26. We do not reverse a single justice's decision not to reach the substantive merits of a challenged trial court order unless the single justice has abused his or her discretion in making that decision, id., and likewise we do not reverse a single justice's decision to reach the substantive merits, as the single justice in this case did, unless there has been an abuse of discretion in doing so, Commonwealth v. Narea, 454 Mass. 1003, 1004 n.1 (2009). The single justice was within her discretion to reach the merits in this case.

Cousin's second argument, then, is that the single justice "further abused her discretion" in allowing the Commonwealth's petition. The single justice carefully considered what occurred in the trial court relevant to the motion judge's decision not to recuse herself. As the motion judge understood, determining whether a judge can act fairly and impartially requires a two-step inquiry that has both subjective and objective components.

"Faced, then, with a question of [her] capacity to rule fairly, the judge was to consult first [her] own emotions and conscience." Lena v. Commonwealth, 369 Mass. 571, 575 (1976). That is the subjective evaluation a judge must make -- does she believe that she can be impartial in the circumstances? "If [she] passed the internal test of freedom from disabling prejudice, [she] must next attempt an objective appraisal of whether this was a proceeding in which [her] impartiality might reasonably be questioned" (quotation and citation omitted). Id. That is the objective evaluation to be made -- would a disinterested observer, informed of all the circumstances, reasonably believe that the judge's impartiality may have been compromised? "[A]ctual impartiality alone is not enough In order to preserve and protect the integrity of the judiciary and the judicial process, and the necessary public confidence in both, even the appearance of partiality must be avoided." Commonwealth v. Morgan RV Resorts, LLC, 84 Mass. App. Ct. 1, 9 (2013), and cases cited. See also S.J.C. Rule 3.09, Canon 2, Rule 2.11 (2016) ("A judge shall disqualify himself or herself in any proceeding in which the judge cannot be impartial or the judge's impartiality might reasonably be questioned . . .").

The single justice reasonably accepted (as do we) the judge's subjective determination that she could act impartially on Cousin's Brady motion, even though it called into question the propriety of the prosecutor's (her current colleague's) conduct. The concern arises, however, as the single justice noted, with the second step -- that is, whether there is an objective appearance of partiality. In the circumstances, given the judge's various observations and strong statements from the bench made while considering the recusal issue, there is a legitimate question whether her continued presiding over the defendant's Brady motion objectively gives the appearance of partiality.

We recognize that, by the judge's own account, when she initially indicated that she thought she should recuse herself, she did so on the basis of a mistaken belief of an inherent conflict. After she determined that there was not an inherent conflict, she changed her mind. Nonetheless, and assuming without deciding that she is correct that there is no inherent conflict, and that her first impression of the issue was therefore incorrect, her statements to the effect that she might be influenced by the fact that the prosecutor is now a judicial colleague cannot be overlooked. Notwithstanding Cousin's suggestion to the contrary, her statements were not "fleeting." They were strong, repeated, and, at the time they were made, of real concern to the judge. In the circumstances, we agree with the single justice that those statements cannot now be dismissed or disregarded, and that an objective appearance of partiality (more precisely, an appearance of the lack of impartiality) cannot be avoided if the judge were to continue to preside over the Brady motion that was before her. We therefore agree with the single justice that the prudent and legally correct result in these circumstances is for the judge to recuse herself from ruling on that motion.⁵

Conclusion. The single justice did not err or abuse her discretion in allowing the Commonwealth's petition seeking recusal.

Judgment affirmed.

⁵ Our decision does not extend beyond the Brady motion. The judge shall recuse herself from ruling on that motion, but she may otherwise continue to preside over the case as it proceeds in the trial court.

The case was submitted on briefs.
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Commonwealth.