FOR PUBLICATION

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

COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS,
Plaintiff/Appellee,
v.
JOSE O. RABAULIMAN,
Defendant/Appellant.

Superior Court Criminal Case No. 98-0083
Supreme Court Appeal No. 00-019 GA

ORDER DENYING PETITION FOR REHEARING

Cite as: ***Commonwealth v. Rabauliman*****, 2004 MP 16**

Petition Submitted on July 27, 2004
Saipan, Northern Mariana Islands
Decided: September 1, 2004

Attorney for Appellant:
Victorino D. Torres, Esq.
P.O. Box 501788
Saipan, MP 96950

BEFORE: MIGUEL S. DEMAPAN, Chief Justice, Alexandro C. CASTRO, Associate Justice, and JOHN A. MANGLONA, Associate Justice.

DEMAPAN, Chief Justice:

¶ 1 Jose O. Rabauliman, Appellant in the underlying case, timely petitions this Court for rehearing of our Opinion of July 13, 2004 pursuant to Commonwealth Rule of Appellate Procedure 40.

¶ 2 Rabauliman presents three arguments to support his petition. First, he asserts that this Court misapplied the harmless error standard regarding a Fifth Amendment Constitutional violation. Secondly, Rabauliman argues the Prosecutor's statements might have contributed to the Defendant's conviction. Finally, Rabauliman asserts that as a matter of public policy, judicial integrity and the right to a fair trial, reversal is warranted.

¶ 3 The first, and perhaps most important, issue for us to consider is whether in fact we misapplied the harmless error standard. Rabauliman asserts that this Court erred when it focused on the following inquiry:

> The question we must ask ourselves is this: absent the Prosecutor's allusion to Rabauliman's failure to testify and his improper remarks about the defense counsel, is it clear beyond a reasonable doubt that the jury would have returned a verdict of guilty?

Commonwealth v. Rabauliman, 2004 MP 12 ¶56. Relying on *Chapman v. California*, 386 U.S. 18, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967), Rabauliman insists that the United States Supreme Court follows a more stringent standard, whereby reversal is almost automatic. We disagree.

¶ 4 In *Chapman*, the Court begins the opinion by stating, "[w]e are urged by petitioners to hold that all federal constitutional errors, regardless of the facts and circumstances, must always be deemed harmful. Such a holding . . . would require automatic reversal of their convictions and

make further discussion unnecessary. *We decline to adopt any such rule.*"[1] It further concluded: "there may be some constitutional errors which in the setting of the particular case are so unimportant and insignificant that they may, consistent with the Federal Constitution, be deemed harmless, *not requiring the automatic reversal* of conviction."[2] Thus, *Chapman* recognizes that an automatic reversal is not required *per se*.

¶ 5 Rabauliman contends that instead of using the standard above, the Court should have adopted the following: "[t]he question is whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction." *Fahy v. Connecticut,* 375 U.S. 85, 86-87, 84 S. Ct. 229, 230, 11 L. Ed. 2d 171, 173 (1963) *(cited in Chapman*[3]). The *Fahy* standard, however, was not adopted by the U.S. Supreme Court in *Chapman,* as Rabauliman erroneously contends. Instead, the Court cited the *Fahy* standard in a discussion of state harmless error standards and concluded,

> We, therefore, do no more than adhere to the meaning of our *Fahy* case when we hold, as we do now, that before a federal constitutional error can be held harmless, the court must also be able to declare a belief that it was harmless beyond a reasonable doubt. . . . it is a familiar standard to all courts, and we believe its adoption will provide a more workable standard, although achieving the same result aimed at in our *Fahy* case.[4]

¶ 6 Since *Chapman*, the U. S. Supreme Court has refined the harmless error standard. *See e.g. Harrington v. California,* 395 U.S. 250, 89 S. Ct. 1726, 23 L. Ed. 2d 284 (1969); *Milton v. Wainwright,* 407 U.S. 371, 92 S. Ct. 2174, 33 L. Ed. 2d 1 (1972). Most notable, and most recent, among these cases is *United States v. Hasting*, 461 U.S. 499, 103 S. Ct. 1974, 76 L. Ed. 2d 96

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[1] *Chapman v. California*, 386 U.S. 18, 21-22, 87 S. Ct. 824, 827, 17 L. Ed. 2d 705, 709 (1967) (emphasis added).

[2] *Id.*, 386 U.S. at 22, 87 S. Ct. at 827, 17 L. Ed. 2d at 709 (emphasis added).

[3] *Id.*, 386 U.S. at 23, 87 S. Ct. at 827, 17 L. Ed. 2d. at 710.

[4] *Id.,* 386 U.S. at 24, 87 S. Ct. at 828, 17 L. Ed. 2d at 710-11.

(1983). This case applied a harmless error standard to a Fifth Amendment violation under circumstances similar to those before us.[5] In that case, the Court discussed *Chapman* and found:

> In holding that the harmless-error rule governs even constitutional violations under some circumstances, the Court recognized that, given the myriad safeguards provided to assure a fair trial, and taking into account the reality of the human fallibility of the participants, there can be no such thing as an error-free, perfect trial, and that the Constitution does not guarantee such a trial. *Chapman* reflected the concern, later noted by Chief Justice Roger Traynor, of the Supreme Court of California, that when courts fashion rules whose violations mandate automatic reversals, they "retrea[t] from their responsibilities, becoming instead 'impregnable citadels of technicality.' "

Hasting, 461 U.S. at 509-10, 103 S. Ct. at 1980, 76 L. Ed. 2d at 106 (internal citations omitted).

¶ 7 In its analysis, the U.S. Supreme Court in *Hasting* pronounced: "[*t*]*he question a reviewing court must ask is this: absent the prosecutor's allusion to the failure of the defense to proffer evidence to rebut testimony of the victims, is it clear beyond a reasonable doubt that the jury would have returned a verdict of guilty?*"[6]

¶ 8 The standard we apply is identical to that used by the United States Supreme Court in *Hasting*. Hence, we cannot agree with Rabauliman's assertion that we have misapprehended the law in question. On the contrary, we have used the most recent and most applicable standard defined by the U.S. Supreme Court; as it was articulated after *Chapman*, and used in subsequent cases, we find it is the most appropriate standard to apply in our jurisdiction.

¶ 9 We turn now to the second issue raised in Rabauliman's petition. Rabauliman asserts that the Prosecutor's comments might have contributed to his conviction. It is essential to first note that this argument is based on the *Fahy* standard. If *Fahy* were controlling, then this may be an appropriate approach to the harmless error analysis; however, as discussed above, the test an

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[5] In *Hasting*, the defendants were tried by jury for kidnapping and rape and were found guilty on all counts. The challenge was for statements made by the prosecutor that referenced the defendants' exercise of their right not to testify. *United States v. Hasting*, 461 U.S. 499, 103 S. Ct. 1974, 76 L. Ed. 2d 96 (1983).

[6] *Hasting*, 461 U.S. at 510-11, 103 S. Ct. at 1981, 76 L. Ed. 2d at 106 (*citing Harrington v. California*, 395 U.S. 250, 254, 89 S. Ct. 1726, 1728, 23 L. Ed. 2d 284, 288 (1969)) (emphasis added).

appellate court applies is different. Having said that, and for reasons described below, this argument is still rendered invalid.

¶ 10 In an effort to support his theory that the improper comments might have contributed to the conviction, Rabauliman reiterates his defense. In doing so, he asks this Court to re-weigh the evidence.[7] Having reviewed the record in detail, we are not firmly convinced that a mistake was clearly committed by the jury. Instead, with the physical evidence presented by the Prosecution, the testimony of the neutral witness, and the statements made by the Defendants themselves, we found that it was reasonable for a jury to find the Defendants guilty beyond a reasonable doubt. Rabauliman relies heavily on his defense that he offered money for sex; however the record shows no evidence that the women ever received the money or consented to the act. Instead, the women were found at Suicide Cliff with their belongings scattered on the ground, crying and scared. Rabauliman himself admitted that the women were frightened when he took them and that Ms. Wang refused his request for oral sex. We cannot simply ignore the strength of the Prosecution's hard evidence, as Rabauliman suggested. Petition for Rehearing at 2.

¶ 11 In *Hasting*, the U.S. Supreme Court made clear that a reviewing court must consider the whole record before it, prior to reversing a conviction for constitutional errors that may be harmless.[8] Rabauliman argues that if the Government did not restate the evidence in its brief, then the Fifth Amendment violation requires automatic reversal. We find that it is in the record, not the brief, where the Government must put forth the evidence necessary to prove beyond a reasonable doubt that the Defendant would have been convicted, absent the violation by the

[7] Although we are able to review the record in this case in accordance with the harmless error standard, the assessment of evidence is normally a trial function, not within the province of the Supreme Court. *Manglona v. Kaipat*, 3 N.M.I. 322, 336 (1992). The Supreme Court may not reweigh evidence presented to the trial court. 1 CMC § 3103; *Commonwealth v. Delos Reyes*, 4 N.M.I. 340, 344 (1996). We shall set aside a finding of fact only when, after a review of the entire record, we are firmly convinced that a mistake was clearly committed below. *Cabrera v. Cabrera*, 3 N.M.I. 1, 7 (1992).

[8] *Hasting*, 461 U.S. at 510, 103 S. Ct. at 1981, 76 L. Ed. 2d at 107.

Prosecutor. Even if, as here, the Government does not restate the evidence in its brief, this Court clearly has the authority to review the record to make this determination.[9]

¶ 12 Finally, we address the issue of public policy. Rabauliman asserts that as a matter of public policy, judicial integrity and defendant's rights to a fair trial, reversal is most warranted. Since we found that the Prosecutor had violated a constitutional right, Rabauliman argues, our society suffers if the conviction is upheld. Rabauliman is further concerned with an alleged pattern of behavior by the Commonwealth and believes that our harsh warning was not enough to protect the citizens of the CNMI from future misconduct.

¶ 13 In making this argument, Rabauliman calls upon this Court to exercise our supervisory power. Of supervisory power, U.S. Supreme Court explained,

> Guided by considerations of justice, and in the exercise of supervisory powers, federal courts may, within limits, formulate procedural rules not specifically required by the Constitution or the Congress. The purposes underlying use of the supervisory powers are threefold: to implement a remedy for violation of recognized rights; to preserve judicial integrity by ensuring that a conviction rests on appropriate considerations validly before the jury; and finally, as a remedy designed to deter illegal conduct.

Hasting, 461 U.S. at 505, 103 S. Ct. at 1978, 76 L. Ed. 2d at 104 (internal citations and quotations omitted).

¶ 14 Again, we turn to *Hasting* for guidance on this point. In that case, the Court ruled:

> The goals that are implicated by supervisory powers are not, however, significant in the context of this case . . . as . . . the errors alleged are harmless. Supervisory power to reverse a conviction is not needed as a remedy when the error to which it is addressed is harmless since, by definition, the conviction would have been obtained notwithstanding the asserted error.[10]

¶ 15 When balancing the interests of justice in this case, we must consider not only that the error was harmless, but also the trauma these victims would experience with a new trial. To be sure,

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[9] *Id.*

[10] *Id.*, 461 U.S. at 506, 103 S. Ct. at 1979, 76 L. Ed. 2d at 104.

justice requires that the Commonwealth does not violate a criminal defendant's constitutional rights. This Court must also consider the rights of the victims[11] as well as the citizens of the CNMI to live in a safe society. A balance must be struck between the disciplining of the prosecutor on the one hand,[12] and the interest of prompt administration of justice and the interests of the victims on the other.[13]

¶ 16 While we cannot condone the behavior of the Prosecutor, we must strictly adhere to the standards of the U.S. Supreme Court. In this Petition, Rabauliman has misapprehended the harmless error analysis. The *Chapman* standard, as refined by *Hasting*, is the most recent and applicable in this case. In light of the overwhelming evidence, we are satisfied beyond a reasonable doubt that the error committed was harmless. The harmless error rule of *Chapman* and *Hasting* may not be avoided by an assertion of supervisory power, simply to justify a reversal of these criminal convictions.[14]

¶ 17 For these reasons, the Petition for Rehearing is DENIED.

Entered on this 1st day of September 2004.

/s/__________________________________
MIGUEL S. DEMAPAN
Chief Justice

/s/__________________________________
ALEXANDRO C. CASTRO
Associate Justice

/s/__________________________________
JOHN A. MANGLONA
Associate Justice

[11] *See* N. M. I. Const. art. I, § 11.

[12] We find that a strong warning is a more narrowly tailored deterrent to the objectionable conduct of James J. Benedetta, the prosecutor who handled this matter in the trial court. Along with a warning, this Court could have issued an order to show cause why he should not be disciplined; however, since Mr. Benedetto is no longer working for the Commonwealth, we feel confident that there is no danger of a continued pattern of this type of behavior from him.

[13] *Hasting*, 461 U.S. at 509, 103 S. Ct. at 1980-81, 76 L. Ed. 2d at 106.

[14] *See Id.*, 461 U.S. at 505, 103 S. Ct. at 1978, 76 L. Ed. 2d at 104.