NO. SCWC-30371

IN THE SUPREME COURT OF THE STATE OF HAWAIʻI

STATE OF HAWAIʻI, Respondent/Plaintiff-Appellee,

vs.

LITO A. MATEO, Petitioner/Defendant-Appellant.

CERTIORARI TO THE INTERMEDIATE COURT OF APPEALS
(ICA NO. 30371; CR. NO. 07-1-0107)

DISSENT BY ACOBA, J., WITH WHOM
CIRCUIT JUDGE POLLACK, JOINS

Respectfully, I would accept the application for writ of certiorari filed by Petitioner/Defendant-Appellant Lito A. Mateo inasmuch as this case plainly deserves further review, HRS § 602-59 (noting that this court may consider errors or inconsistencies "dictating the need for further appeal" in deciding whether to accept certiorari), for the reasons that follow.

(1) In a general sense, although each case is based on particular facts, this case falls within the classic category in the law traditionally recognized and punishable as manslaughter, not murder. See Commentary to Model Penal Code § 210.3 (noting that the law frequently recognized

"witnessing adultery as provocation for intentional homicide of either the unfaithful spouse or the paramour"). The facts in this case, however, are far more egregious than the code example.

Petitioner was described by several individuals, including co-workers and his children, as a hard-working, quiet, shy, humble, and respectful individual, who was never violent or angry. Petitioner and his wife were originally from the Philippines. Petitioner's wife described Petitioner as "a good person" who was hard-working, nice, responsible, quiet, never violent, and faithful; "[t]here's nothing more [she] could [have] ask[ed] for." Petitioner moved to Hawai‘i in 1988, and would send money to the Philippines to support his family. Petitioner's wife and his children eventually joined him in Hawai‘i in 1994.

Petitioner's wife testified that she began a sexual relationship with the decedent in 1999. Rumors began circulating in the community that Petitioner's wife and the decedent were having an affair. While Petitioner's daughter was in high school, other students told her that her mother was having an affair. Petitioner's daughter also heard about the affair from her co-workers. Petitioner's son also found out about the affair when Petitioner made him listen to a voice mail message left on his mother's phone, in which a male voice said, "Oh, hi honey baby."

Petitioner confronted his wife about the affair at least three times but she denied it. The decedent's wife twice confronted Petitioner's wife about the affair but Petitioner's wife denied it. The decedent's wife then approached Petitioner. Thereafter, Petitioner confronted his wife but she denied that she was having an affair. Petitioner's wife admitted that she lied to the decedent's wife and to Petitioner when she told them she was not having an affair with the decedent. In late 2006, seven years after Petitioner's wife's affair with the decedent started, Petitioner found a note on his locker stating that his wife had been seen in Kona with the decedent. When Petitioner confronted his wife with the note, she again denied that she was having an affair. In December 2006 or January 2007, Petitioner received another note, and Petitioner's wife once again denied she was having an affair.

The defense expert witness testified that Petitioner told him that he approached the decedent and "begged him to stop seeing his wife." According to Petitioner's wife, Petitioner approached the decedent to talk, but the decedent "mocked him" by calling Petitioner, whose fingers were described by his wife a being "deformed," a "pukol." Petitioner's wife testified that "pukol" meant "doesn't have complete . . . fingers or hands."

The defense expert witness opined that "to a reasonable degree of psychological certainty," Petitioner's "mental state at the time of the offense was consistent with extreme mental and emotion[al] disturbance[,]" from both an "objective and subjective point of view." The expert explained this was the result of Petitioner's wife carrying on an affair "for a number of years[,]" and the "unusual and overwhelming stress" resulting from the fact that his wife's infidelity "was known by his co-workers" and "his family," and thus, "was a source of intense humiliation and disgrace."

The commentary to HRS § 707-702(2) states that "[i]n the case of an intentional or knowing killing, where mitigating circumstances are present, the prosecution may, but need not, bring a prosecution for murder. The prosecution may . . . bring a prosecution for manslaughter." The defense of manslaughter thus rests on "mitigating mental or emotional disturbances[,]" as expressly stated in HRS § 707-702(2). Id. There are more than ample "mitigating circumstances" here that warrant a second look at the jury's verdict of murder in the second degree.

(2) In this case, Respondent/Plaintiff-Appellee State of Hawai'i's (Respondent or the State) expert witness opined on Petitioner's credibility in violation of the rule that "expert testimony on a witness' credibility is

inappropriate." State v. Batangan, 71 Haw. 552, 556-557, 799 P.2d 48, 51 (1990) (quoting State v. Kim, 64 Haw. 598, 607, 645 P.2d 1330, 1337 (1982)). The State's expert witness testified that although Petitioner indicated that he was unable to remember the event, Petitioner had "made up, you know, not being able to remember." Plainly, "where the effect of the expert's opinion is 'the same as directly opining on the truthfulness of the complaining witness,' such testimony invades the province of the jury." Id. at 559, 799 P.2d at 52 (citation omitted).

(3) In addition, the State's expert testified to behavior the expert contended evidenced Petitioner's self-control in shooting the decedent.[1] However, under the State's expert's theory, if the loss of self-control was the criterion for availing onself of the defense, no defendant would be entitled to the manslaughter defense under HRS § 707-702(2) because the indicia of self control would be satisfied by the prerequisite proof that the defendant intentionally or knowingly caused the death of another. HRS § 707-701.5 This incorrect view also enabled Respondent to argue to the jury that Petitioner "showed self-control when he executed

[1] The State's expert witness testified, inter alia, that Petitioner's ability to formulate goals such as thinking about killing decedent for a week, taking his gun to the parking lot, traveling to the decedent, concealing the weapon, walking past the decedent, then turning around to shoot him, shooting only the decedent, reloading his handgun, which required motor and short-term memory skills, the ability to shoot the decedent in vital areas, and packing the handgun in his fanny pack and walking away, evidenced self-control.

his plan and ended with an [e]ffective and controlled performance." (Emphasis added.) In effect, Respondent was allowed to unduly limit the scope of the manslaughter defense by arguing that if Petitioner was capable of committing the acts charged, he possessed sufficient self-control to disqualify him from invoking the emotional disturbance defense. HRS § 707-702. However, since the manslaughter defense concedes that the defendant intentionally or knowingly caused the death of another, commission of the acts cannot be the basis for defeating the defense.

(4) Under HRS § 707-702(2), it is "[t]he code [that] clarifies substantially the statutory requirements for a conviction of manslaughter." Commentary to HRS § 702-202(2) (emphasis added). Id. The statutory standard under HRS § 702-202(2) is whether, "at the time the defendant caused the death of the other person[,]" he or she was "under the influence of extreme mental or emotional disturbance for which there is a reasonable explanation." HRS § 702-202 (emphasis added). Lack of "self control," as used in the commentary to HRS § 702-202, then, must refer to the impetus that underlies the defendant's volition, not the physical acts that evidence the intentional or knowing killing of another, HRS § 707-701.5, that the State's expert relied on, and as to which acts there is no dispute.

(5) It also appears that both Petitioner's and the State's experts read and referred to the examiners' reports in their opinions. This is a violation of HRS § 704-416[2] and of the right against self-incrimination. Prior to trial, defendant requested, and the court granted, a motion for examination under HRS § 704-403. To raise an insanity defense, Petitioner was required by HRS § 704-404 to submit to interviews by a panel of examiners. Petitioner was examined by three experts, but, before trial, Petitioner abandoned the insanity defense.

HRS § 704-416 prohibits statements made by a person subjected to examination "pursuant to this chapter," (emphasis added), to be used as evidence against the person "in any penal proceeding on any issue" other than that of the person's physical or mental condition. "[T]his chapter" refers to chapter 704. The intent of HRS § 704-416 "is to meet two

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[2] HRS § 704-416 provides:

§ 704-416. Statements for purposes of examination or treatment inadmissible except on issue of physical or mental condition

A statement made by a person subjected to examination or treatment pursuant to this chapter for the purposes of such examination or treatment shall not be admissible in evidence against the person in any penal proceeding on any issue other than that of the person's physical or mental condition, but it shall be admissible upon that issue, whether or not it would otherwise be deemed a privileged communication, unless such statement constitutes an admission of guilt of the offense charged.

(Emphases added.)

problems: (1) the inability of a jury to divorce a statement containing an admission of guilt from the determination of all issues, and (2) an objection to the examination of the defendant on the basis of defendant's privilege against self-incrimination." Commentary to HRS § 704-416 (emphasis added). Thus, self incrimination is only "waived" for the purpose of the examination and is not admissible on a "person's physical or mental condition" except in proceedings pursuant to HRS chapter 704. If statements made to an examiner could be used to prove a defendant's mental state even when the insanity defense is not at issue, HRS § 704-416 would provide no protection against self-incrimination because every offense contains a mental element, except for strict liability offenses. That would be contrary to the express intent of HRS § 704-416.

State v. Samuel, 74 Haw. 141, 838 P.2d 1374 (1992), is not to the contrary. In that case, the examiners appointed to examine the defendant pursuant to HRS chapter 704 testified regarding some of the statements the defendant had made to them concerning her mental state, and this court held that the testimony did not violate HRS § 704-416 because the testimony did not concern the ultimate issue of guilt.

Id. at 150-51; 838 P.2d at 1379. Here, it appears that both the State's and Petitioner's expert testified to the ultimate issue of guilt insofar as they evaluated Petitioner's self control. Both had reviewed and referred to the examiners' HRS chapter 704 reports concerning Petitioner. This appears to indicate that Samuel was violated in this case.

Moreover, Samuel did not address the self-incrimination issue under the fifth amendment to the United States Constitution or under article I, section 10 of the Hawai‘i Constitution. That issue was not discussed in Samuel, and so cannot be considered to have been decided by this court. To construe Samuel to allow experts to testify, based on statements obtained by the HRS chapter 704 examiners, as to whether a defendant was under extreme mental or emotional distress at the time of the commission of the offense, would eviscerate any protection expressly provided by HRS § 704-416 for the privilege against self-incrimination "in any penal proceeding on any issue" outside of proceedings based on an HRS chapter 704 defense.

Neither expert should have been allowed to testify based on statements given by Petitioner to the examiners. The error was not harmless. The fact that both sides engaged in this violation did not offset the injury done but doubled the impact from the disclosure

of such statements -- disclosure that violated the right against self incrimination embodied in HRS § 704-416.

This ground alone is sufficient to grant certiorari.

In my view, few cases come to this court with so compelling a basis for granting further review. We should exercise our discretion to do so. State v. Hussein, 122 Hawaiʻi 495, 514, 229 P.3d 313, 332 (2010) (noting that "'the acceptance or rejection'" of certiorari "'shall be discretionary upon the supreme court[,] HRS § 602-59(a)'" and "this court has [thus] posited additional grounds for accepting certiorari outside those expressly enumerated in HRS § 602-59(b)").

DATED: Honolulu, Hawaiʻi, March 23, 2012.

/s/ Simeon R. Acoba, Jr.

/s/ Richard W. Pollack