SCWC-11-0000765

IN THE SUPREME COURT OF THE STATE OF HAWAIʻI

STATE OF HAWAIʻI, Petitioner/Plaintiff-Appellee,

vs.

MATTHEW LOCKEY, Respondent/Defendant-Appellant.

CERTIORARI TO THE INTERMEDIATE COURT OF APPEALS
(CAAP-11-0000765; FC-CR. NO. 11-1-1241)

DISSENTING OPINION BY ACOBA, J., IN WHICH POLLACK, J., JOINS

The Complaint filed by Petitioner/Plaintiff-Appellee State of Hawaiʻi (the State) herein charged Respondent/Defendant-Appellant Matthew Lockey (Defendant) with Harassment HRS § 711-1106(1)(a) (Supp. 2009)[1] in that he allegedly "did strike, shove,

[1] HRS § 711-1106(1)(a) states in relevant part as follows:

§ 711-1106 Harassment.

(1) A person commits the offense of harassment if, with intent to harass, annoy, or alarm any other person, that person:
(a) Strikes, shoves, kicks, or otherwise touches another person in an offensive manner or subjects the other person to offensive physical contact[.]

kick, or otherwise touch [Complainant] in an offensive manner or subject [Complainant] to offensive physical contact[.]" (Emphasis added.) Defendant's oral motion to dismiss the Complaint because it failed to provide him adequate notice of the charge was denied by the Family Court of the First Circuit (the court) at the time of arraignment.

However, as this court indicated in State v. Jendrusch, 58 Haw. 279, 567 P.2d 1242 (1977), "[i]n charging the defendant in the disjunctive rather than in the conjunctive, [the Complaint] left the defendant uncertain as to which of the acts charged was being relied upon as the basis for the accusation against him. Where a statute specifies several ways in which its violation may occur, the charge may be laid in the conjunctive but not in the disjunctive." Jendrusch, 58 Haw. at 282 n.4, 567 P.2d at 1245 n.4 (citing Territory v. Lii, 39 Haw. 574, 579 (1952)) (emphases added). Indeed, "the use of the word 'or' would indicate to a lay person that he or she was charged with one of the acts described in the statute, but would not indicate which one." State v. Codiamat, No. SCWC-11-0000540, --- Hawaiʻi ---, --- P.3d ----, 2013 WL 6831727, at *13 (2013) (Acoba, J., dissenting, with whom Pollack, J., joins) (emphasis in the original).

Thus, "[g]iven that 'or' is most known as a disjunctive in its ordinary significance . . . it signals to a lay person

that he or she is in jeopardy of being convicted of the first category of conduct to the exclusion of the second, or of the second category of conduct to the exclusion of the first, without" advising the defendant "of what prohibited conduct he or she is actually on trial for and must defend against." Id. (citing HRS § 1-14).

Nevertheless, a majority of this court in Codiamat decided that a charge similarly employing "or" was legally viable. In Codiamat, the majority stated that this court has "never relied upon the rule against charging in the disjunctive in reaching the holding of a case," and that "Hawaiʻi courts have never enforced a strict rule against charging in the disjunctive." Id. at *3-4 (majority opinion). However, respectfully, "[t]his amounts to an argument for abolishing precedent, for we have clearly-established governing case law on the sufficiency of a charge, with respect to conjunctive and disjunctive language." Id. at *17 (Acoba, J., dissenting). As was noted,

> In [State v. Batson, 73 Haw. 236, 831 P.2d 924 (1992)] this court held that it is sufficient "that one offense allegedly committed in two different ways be charged conjunctively in a single count[,]" and that under these circumstances, "the disjunctive 'or' [is] subsumed within the conjunctive 'and.'" This court's conclusion in Batson followed from its holding in [State v. Lemalu, 72 Haw. 130, 809 P.2d 442 (1991)] and the ICA opinion in [State v. Cabral, 8 Haw. App. 506, 810 P.2d 672 (1991)]. Lemalu reiterated the holding from Jendrusch's footnote four, that "[p]hrasing a complaint in the disjunctive would not provide [] notice as it would leave the defendant 'uncertain as to which of the acts charged was being relied upon as the basis for the accusation against him.'" In Cabral, the ICA held that "[i]n our

> view, the most appropriate method to allege one offense committed in two different ways is to allege in one count that the defendant committed the offense (a) in one way 'and/or' (b) in a second way."

Id. at *14 (internal citations omitted) (emphasis in original).

Thus, the majority "revert[s] to pre-Jendrusch law, disregarding the limitations on disjunctive charging adopted by this court after Jendrusch." Id. at *16. Additionally, "[i]n reinterpreting Jendrusch, the majority contends that this court . . . 'expressed no concern as to charging [the different non-synonymous acts contained within subsection ©] disjunctively.'" Id. at *17. But, "[t]he import of Jendrusch is not simply that specific errors would result in charging disjunctively . . . but rather, that [w]here a statute specifies several ways in which its violation may occur, the charge may be laid in the conjunctive but not in the disjunctive[,], in order to comport with due process." Id. (internal quotation marks omitted) (emphasis in original). Contrary to the majority's view, "Jendrusch did not state that it applied only to subsections in a statute . . . but unambiguously applied to the several ways in which a violation may occur." Id. (internal quotation marks omitted) (emphasis in original). For "[t]he guarantee that the accused must be informed of the nature and the cause of the accusations . . . cannot be satisfied in any other way." Id. (citing Haw. Const. art. 1, § 14) (emphases in original).

It is axiomatic that "'the principle of fundamental fairness, essential to the concept of due process of law, dictates that the defendant in a criminal action should not be relegated to a position from which he or she must speculate as to what crime he [or she] will have to meet in defense.'" State v. Israel, 78 Hawaiʻi 66, 71, 890 P.2d 303, 308 (1995) (quoting Kreck v. Spalding, 721 F.2d 1229, 1233 (9th Cir. 1983)) (internal brackets omitted). The majority's construction of HRS § 711-1106(1) places the defendant in the dilemma article 1, section 14 of the Hawaiʻi Constitution mandates must be avoided. Accordingly, I respectfully dissent and would affirm the ICA's majority opinion vacating the September 28, 2011 judgment of the family court against Defendant and remanding the case to the court with instructions to dismiss without prejudice.

DATED: Honolulu, Hawaiʻi, January 28, 2014.

/s/ Simeon R. Acoba, Jr.

/s/ Richard W. Pollack