SCAP-13-0000029

IN THE SUPREME COURT OF THE STATE OF HAWAIʻI

STATE OF HAWAIʻI,
Plaintiff-Appellee,

vs.

FAALAGA TOMA,
Defendant-Appellant.

APPEAL FROM THE CIRCUIT COURT OF THE FIRST CIRCUIT
(CAAP-13-0000029; CR. NO. 11-1-0452)

DISSENT TO PART I
(By: Pollack, J., with whom McKenna, J., joins)

In light of the vacation of Toma's conviction as directed by Part II of this opinion, it is unnecessary for this court to determine whether the circuit court erred by instructing the jury on accomplice liability. In Part II, the majority concludes that Toma was denied a fair trial because the circuit court instructed the jury that it could convict Toma of the charged offense based on a reverse-accomplice theory that

does not exist under our law. Thus, because the court's instruction to the jury was constitutionally and statutorily defective, it is of no consequence whether or not it was proper for the circuit court to instruct the jury on an accomplice theory of liability.

Additionally, Toma's assertion that he lacked notice regarding potential accomplice liability and was thus unable to adequately prepare a defense[1] will not arise in a future trial because there can be no question on remand that Toma now has notice that the theory of liability that he must be prepared to meet is reliant on complicity. In fact, the State is precluded from prosecuting Toma as a principal in a future trial because a jury already found that the State did not prove that Toma committed the offense by his own conduct. Thus, the only theory of criminal liability that the State may proceed upon in the new trial is one based upon an accomplice theory.

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[1] Toma argues in his Application that "[t]here was no notice to Toma in the charge, the opening, or the evidence that the State was pursuing Toma as an accomplice." Toma further maintains that because of the lack of notice, he was not able to adequately prepare for the case:

> If Toma had notice of the allegation of complicity, Toma's defense would have been different. Toma's questioning of the witnesses would have . . . focused on Toma's contact and communications with other individuals instead of solely focusing and emphasizing Toma's actions. The lack of notice prejudiced Toma because he relied upon the allegation, that he acted as a principal, in preparing his defense, identification, which was completely irrelevant as the jury found him liable only as an accomplice.

Even though Part II of the opinion rules that the court's jury instruction was fundamentally flawed, the majority in Part I concludes that "the circuit court did not err in giving the complicity instruction under Apao." Part I at 12. However, Part I is not only superfluous, but it also misapprehends this court's well-settled approach when considering a challenge based upon due process considerations regarding the submission of an accomplice instruction.

While our case law has not required that a defendant be charged as an accomplice to permit the giving of an accomplice instruction, it does not follow that charging a defendant as a principal provides a defendant sufficient notice that he or she must also be prepared to defend against an accomplice theory of liability. Instead, our case law has consistently looked to the facts and circumstances of each case in determining whether or not a defendant had sufficient notice to defend against an accomplice theory of liability.

In State v. Apao, 59 Haw. 625, 586 P.2d 250 (1978), the defendant asserted that the instruction on accomplice liability was reversible error because the indictment did not specify that he was being charged as either a principal or an accomplice. Apao noted that other jurisdictions had held that "when the indictment charges a defendant as [a] principle, it is not error for the court to instruct the jury that under the

facts of a particular case, the defendant may be guilty as an aider and abetter." Id. at 645-46, 586 P.2d at 263.[2] Thus, the court in Apao rejected the notion that an instruction on an accomplice theory of liability is error whenever the initial charge does not specify that the defendant may be convicted either as a principal or an accomplice.

Subsequently, in State v. Soares, 72 Haw. 278, 815 P.2d 428 (1991), this court held it was unfair to instruct a jury with regard to accomplice liability where the defendants were indicted separately but convicted in a consolidated trial. The Soares court stated, "While it is not necessary for the State to specifically charge a defendant as an accomplice, nevertheless, we hold that under the circumstances herein, where each defendant is charged separately and each charge involves different facts with different victims, an accomplice instruction should not have been given." 72 Haw. at 281, 815 P.2d at 430 (citation omitted) (citing Apao, 59 Haw. at 646, 586 P.2d at 263).

[2] As pointed out by Toma, in the cases relied upon by Apao the defendants in those cases were provided with some notice that they needed to be prepared to defend against complicity. See Nye & Nissen v. United States, 336 U.S. 613, 615, 620 (1949) (defendant charged with conspiracy); Theriault v. United States, 401 F.2d 79, 85 (8th Cir. 1968) (noting that the facts proven at trial and "the very testimony . . . of [defendant]" negated surprise); Giraud v. United States, 348 F.2d 820, 821 (9th Cir. 1965) (defendant charged with violating 18 U.S.C. § 2); Ransom v. State, 460 P.2d 170, 171 (Alaska 1969) (charged as codefendant in a joint indictment); State v. Cooper, 174 P.2d 545, 547 (Wash. 1946) (codefendants charged with "acting in concert").

The ruling in Soares was anchored in the fundamental requirement that defendants have the right to be informed of the charges against them: "The Hawaiʻi and the federal Constitutions as well as our rules of penal procedure clearly require that appellants be informed of the charges against them." 72 Haw. at 281, 815 P.2d at 430 (citing Haw. Const. art. I, § 14; U.S. Const. amend VI; Hawaiʻi Rules of Penal Procedure Rule 7(d); State v. Jendsrusch, 58 Haw. 279, 567 P.2d 1242 (1977)); see Haw. Const. art I, § 14 ("In all criminal prosecutions, the accused shall enjoy the right . . . to be informed of the nature and cause of the accusation . . . ."); U.S. Const. amend VI (same). Soares explained that "[g]iven that appellants were charged separately, it would only have been fair for the State to assert the circumstances in which appellants acted as accomplices." Id. Accordingly, Soares demonstrates that charging a defendant as a principal is not necessarily sufficient to provide the defendant with adequate notice of the charges as constitutionally required by both the Hawaiʻi and federal constitutions.

In State v. Fukusaku, 85 Hawaiʻi 462, 486, 946 P.2d 32, 56 (1997), this court rejected the defendant's assertion that "an allegation of accomplice liability is required at some point during the proceedings" to permit the giving of an accomplice instruction to the jury. The Fukusaku court considered whether

the defendant had sufficient notice of the nature of the charges. Fukusaku discussed the facts and circumstances in the case, including that "the trial court twice denied the defense request to foreclose the possibility of accomplice liability, evincing that the defendant "had clear notice that accomplice liability was still a possibility." 85 Hawaiʻi at 486-87, 946 P.2d at 56-57. Accordingly, the court held that the defendant in Fukusaku could not successfully argue that he did not have notice when it was the defendant's "own defense strategy and testimony of his own witnesses that raised the possibility of accomplice liability." Id.

Therefore, the Fukusaku court, even after discounting the necessity for notice of accomplice liability in the charging instrument, discussed the facts and circumstance of the case to demonstrate that the defendant did have notice that he could be charged with complicity. Our case law has thus consistently considered whether a defendant has received adequate notice of potential accomplice liability when the charging instrument has made no mention of accomplice accountability.[3] The majority's

[3] In State v. Acker, 133 Hawaiʻi 253, 327 P.3d 931 (2014), the defendant argued that "because the indictment charged her with 'shooting' [the victim], the State was required to prove the 'shooting' as an element of the offense." 133 Hawaiʻi at 286, 327 P.3d at 964. This court concluded that "the jury is not required to find 'shooting' by [the defendant] in order to convict [defendant] based on accomplice liability." 133 Hawaiʻi at 287, 327 P.3d at 965. The challenge in Acker did not involve lack of notice, unfair surprise, or impingement of the right to prepare a defense. Instead, the (continued. . .)

statement that "a charge as a principal gives a defendant sufficient notice of what he must defend against" is accordingly not an accurate reflection of the Apao holding and subsequent decisions of this court. See Part I at 15.

Similar to our cases, federal decisions also recognize that charging a defendant as a principal is not necessarily sufficient to protect against unfair surprise. See, e.g., United States v. Carter, 695 F.3d 690, 697 (7th Cir. 2012) ("[A]n instruction on aiding and abetting may be given so long as the evidence warrants the instruction and no unfair surprise results." (alteration in original) (quoting United States v. Powell, 652 F.3d 702, 708 (7th Cir. 2011)); United States v. Mayo, 14 F.3d 128, 132-33 (2d Cir. 1994) ("An indictment need not specifically allege a violation of § 2 for an aiding-and-abetting theory to be submitted to the jury, so long as there is no unfair surprise to the defendant."); United States v. Moore, 936 F.2d 1508, 1526 (7th Cir. 1991) ("This court has previously held that the aiding and abetting charge under 18 U.S.C. § 2(a) 'need not be specifically pleaded and a defendant indicted for a substantive offense can be convicted as an aider and abettor' upon a proper demonstration of proof so long as no unfair

(. . .continued)

defendant in Acker sought to overrule Fukusaku on the grounds that the State should be required "to prove what it charged." Id.

surprise results." (quoting United States v. Tucker, 552 F.2d 202, 204 (7th Cir. 1977)); United States v. Neal, 951 F.2d 630, 633 (5th Cir. 1992) ("Absent a showing of unfair surprise, it is not an abuse of discretion to give an aiding and abetting instruction."); United States v. Sanchez, 917 F.2d 607, 611 (1st Cir. 1990) ("A defendant can be convicted of aiding and abetting the commission of a substantive offense 'upon a proper demonstration of proof so long as no unfair surprise results.'" (quoting United States v. Galiffa, 734 F.2d 306, 312 (7th Cir. 1984)).

Further, the majority's conclusion that the "the circuit court did not err in giving the complicity instruction under Apao" is illogical given the accomplice instruction in this case was fundamentally flawed. This highlights the more obvious problem that, since the accomplice instruction violated Toma's due process and fair trial rights and requires the conviction to be vacated, any further discussion of this instruction is unnecessary. Underscoring this lack of necessity, our case law has evaluated the propriety of the submission of an accomplice instruction to the jury based upon the facts and circumstances of each case to determine whether the defendant has been prejudiced by lack of notice and impairment of the right to prepare a defense. Incontrovertibly,

Toma will not be prejudiced in a retrial based upon lack of notice to the giving of an accomplice instruction.

Accordingly, for the reasons stated, I dissent from the majority's opinion in Part I.

DATED: Honolulu, Hawaiʻi, December 21, 2015.

/s/ Sabrina S. McKenna

/s/ Richard W. Pollack