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SCMF-11-0000315

IN THE SUPREME COURT OF THE STATE OF HAWAI'I

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In the Matter of the Publication and Distribution  
of the  
Hawai'i Pattern Jury Instructions - Criminal

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ORDER APPROVING PUBLICATION AND DISTRIBUTION  
OF HAWAI'I PATTERN JURY INSTRUCTIONS - CRIMINAL

(By: Recktenwald, C.J., Nakayama, McKenna, Pollack, and Wilson, JJ.)

Upon consideration of the request of the Standing Committee on Pattern Criminal Jury Instructions to publish and distribute the revision of Criminal Instructions 6.01, 7.5, 10.00A(3), 10.05A, 10.05C, 10.07, 10.07A, 10.09, and 10.09A of the Hawai'i Pattern Jury Instructions - Criminal,

IT IS HEREBY ORDERED that the request is granted as to the revisions proposed to Criminal Instructions 6.01, 7.5, and 10.00A(3), as amended in this order.

IT IS FINALLY ORDERED that this approval for publication and distribution is not and shall not be considered by this court or any other court to be an approval or judgment as

to the validity or correctness of the substance of any instruction.

DATED: Honolulu, Hawai'i, May 5, 2017.

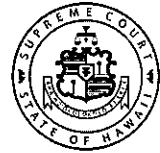
/s/ Mark E. Recktenwald

/s/ Paula A. Nakayama

/s/ Sabrina S. McKenna

/s/ Richard W. Pollack

/s/ Michael D. Wilson



## 6.01 ACCOMPLICE

A defendant charged with committing an offense may be guilty because he/she is an accomplice of another person in the commission of the offense. The prosecution must prove accomplice liability beyond a reasonable doubt.

A person is an accomplice of another in the commission of an offense if:

1. With the intent to promote or facilitate the commission of the offense, he/she
  - a. solicits the other person to commit it; or
  - b. aids or agrees or attempts to aid the other person in the planning or commission of the offense; [or]
  - [c. having a legal duty to prevent the commission of the offense, fails to make a reasonable effort to do so;] [or]
- [2. His/her conduct is expressly declared by law to establish his/her complicity.]

Mere presence at the scene of an offense or knowledge that an offense is being committed, without more, does not make a person an accomplice to the offense. However, if a person plans or participates in the commission of an offense with the intent to promote or facilitate the offense, he/she is an accomplice to the commission of the offense.

"Intent to promote or facilitate" means to have the conscious objective of bringing about the commission of (charged offense).

### Commentary

*HRS §§ 702-221 through 702-226* describe "liability for conduct of another" or accomplice liability. If an indictment charges a defendant as a principal, it is not error to instruct the jury that under the facts of a particular case, the defendant may be guilty as an accomplice. *State v. Apao*, 59 Haw. 625, 644, 586 P.2d 250, 262 (1978); see also *State v. Fukusaku*, 85 Hawai'i 462, 946 P.2d 32 (1997) (one who is charged as a principal can be convicted as an accomplice without accomplice allegations being made in the indictment); *State v. Sequin*, 9 Haw.App. 551, 851 P.2d 926 (1993) (a person can violate *HRS § 134-6*, place to keep firearms, either as a principal or as an accomplice). The Commentary to *HRS § 702-221* states that "distinctions between principals and accessories have been dispensed with and a defendant may be convicted directly of an offense committed by another for whose conduct he is accountable." *Apao*, 59 Haw. at 644, 586 P.2d at 262; *State v. Churchill*, 4 Haw.App. 276, 283, 664 P.2d 757, 762 (1983).

In *State v. Soares*, 72 Haw. 278, 815 P.2d 428 (1991), the court set aside an accomplice conviction because the accomplice instruction did not contain a mens rea

element thereby relieving the prosecution of its burden of proving that defendants acted with the requisite intent. To be guilty as an accomplice, a person must act with the intent of promoting or facilitating the commission of the crime. *Id.* For example, "with regard to accomplice liability for second degree murder, it is not necessary for the State to prove that the defendant 'intentionally or knowingly' caused the death of another. Rather, under *HRS* § 702-222, the accomplice liability statute, the State is required to prove beyond a reasonable doubt that with regard to his or her state of mind, the defendant had the intent to 'promote or facilitate' the commission of second degree murder." *State v. Brantley*, 84 *Hawai'i* 112, 121, 929 *P.2d* 1362, 1371 (*App.* 1996). The definition of "intent to promote or facilitate" given in this instruction is taken from the opinion in *State v. Basham*, 132 *Hawai'i* 97, 109, 319 *P.3d* 1105, 1117 (2014).

An accomplice instruction which advises the jury that such testimony should be viewed with caution or suspicion is not required in every case where the accomplice substantially aids the prosecution's proof. *State v. Okumura*, 78 *Hawai'i* 383, 894 *P.2d* 80 (1995) (overruling *State v. Chang*, 46 *Haw.* 22, 374 *P.2d* 5 (1962)). A court in its discretion may give such an instruction, considering whether the jury's attention was adequately drawn to the possible motives that the accomplice witness may have had to testify falsely. *Okumura*, 78 *Hawai'i* 383, 894 *P.2d* 80. See HAWJIC 6.01A.

The theory of accomplice liability applies when use or possession of firearm is an element of the offense or is a separate offense, even though the defendant did not engage in the requisite conduct. *Garringer v. State*, 80 *Hawai'i* 327, 332, 909 *P.2d* 1133 (1996). However, *HRS* § 706-660.1(1) precludes the imposition of enhanced sentencing with respect to a defendant's conviction of robbery where the defendant did not personally possess, threaten to use, or use a firearm while engaged in the commission of that felony. *Garringer*, 80 *Hawai'i* at 333-34, 909 *P.2d* at 1148-49. The circuit court should instruct the jury, by special verdict interrogatories, to make any and all findings relevant to the imposition of an enhanced sentence under *HRS* § 706-660.1. *Garringer*, 80 *Hawai'i* at 335, 909 *P.2d* at 1150. See HAWJIC 6.01C.

## 7.05 CONSENT

In any prosecution, the complaining witness' consent to the conduct alleged or to the result thereof, is a defense if the consent negatives an element of the offense or precludes excuses the infliction of the harm [or evil] sought to be prevented by the law defining the offense.

[Consent is not a defense if:

(1) It is given by a person who is legally incompetent to authorize the conduct alleged; or

(2) It is given by a person who by reason of youth, mental disease, disorder, or defect, or intoxication is manifestly unable or known by the defendant to be unable to make a reasonable judgment as to the nature or harmfulness of the conduct alleged; or

(3) It is given by a person whose [improvident] consent is sought to be prevented by the law defining the offense; or

(4) It is induced by force, duress, or deception.]

Consent may be express or implied.

"Consent" means a voluntary agreement or concurrence.

The burden is upon the prosecution to prove beyond a reasonable doubt that the complaining witness did not give express or implied consent to the conduct alleged or the result thereof. If the prosecution fails to meet its burden, then you must find the defendant not guilty.

### **Commentary**

At common law, consent was generally not a defense to a criminal prosecution. *State v. Lira*, 70 Haw. 23, 27, 759 P.2d 869, 872 (1988). HRS § 702-233, however, based on Model Penal Code § 2.11, provides that consent is a defense in a criminal prosecution "if the consent negatives an element of the offense or precludes the infliction of the harm or evil sought to be prevented by the law defining the offense." See also *State v. Suka*, 70 Haw. 472, 478, 777 P.2d 240, 243 (1989) ("if the consent negatives an element of the offense"). See HRS §§ 702-234 ("consent to bodily injury") and 702-235 ("ineffective consent").

A defendant may raise the defense of consent and the court should so instruct the jury even though it is inconsistent with other defenses, such as denial that the conduct occurred. *Lira*, 70 Haw. 23, 759 P.2d 869 (1988). A defendant is entitled to a jury instruction on the defense of consent where there is any evidence of consent in a trial on sexual assault, however, the consent instruction need not be included in the same instruction as the elements of sexual assault and can be given separately. *State v. Horswill*, 75 Haw. 152, 857 P.2d 579 (1993).

When a defendant requests an instruction on consent in a sex offense prosecution, and there is evidence of consent, the trial court must instruct the jury on the defense of consent notwithstanding the giving of instructions requiring the jury to find forcible compulsion. *Suka*, 70 Haw. 472, 777 P.2d 240. "Consent is a valid defense to the first degree sexual offenses since consent to the sexual conduct clearly negatives forcible compulsion." *Id.* at 478, 777 P.2d at 243. "Only the giving of a consent instruction will ensure that the defense of consent is not compromised." *Id.* However, consent is not a defense to statutory sexual assault (sexual penetration or contact with a person less than fourteen years old) since the complainant's consent or lack thereof is not an element of this form of the offense. *State v. Cardus*, 86 Hawai'i 426, 949 P.2d 1047 (App. 1997).

Consent must be informed consent. "Consent does not constitute a defense if . . . it is induced by force, duress or deception." HRS § 702-235(4). A teller's mistake in paying out too much money on cashing a check did not afford the defendant a consent defense. *Territory v. Lee*, 29 Haw. 30 (1926); see also *State v. Oshiro*, 5 Haw. App. 404, 696 P.2d 846 (1985) (the rape victim did not consent to the nitrous oxide administered by the defendant dentist). Consent also does not constitute a defense if it "is given by a person whose improvident consent is sought to be prevented by the law defining the offense." HRS § 702-235(3); *Cardus*, 86 Hawai'i 426, 949 P.2d 1047 (in those provisions of HRS §§ 707-730 and 707-733 where compulsion or strong compulsion is not an element of the offense, as in HRS § 707-731(1)(c), the lack of consent is not relevant to the harm sought to be prohibited by the statute, and thus an inmate's consent to sexual penetration is deemed "improvident" and "prevented" by law).

Consistent with the rationale that a youth or mentally defective person is incapable of giving consent, HRS § 702-235(2) provides that consent does not constitute a defense if "it is given by a person who by reason of youth, mental disease, or defect is manifestly unable or known by the defendant to be unable to make unreasonable judgment as to the nature or harmfulness of the conduct alleged. *In re Doe*, 81 Hawai'i 447, 918 P.2d 254 (App. 1996) (defendant could not be found guilty of HRS § 707-731(1)(b) unless it is proved beyond a reasonable doubt that (1) complainant was mentally defective, mentally incapacitated, or physically helpless, and (2) defendant was aware that complainant was such a person).

See *State v. Adams*, 10 Haw. App. 593, 605, 880 P.2d 226, 234 (1994) (consent may be express or implied).

**10.00A(3) Valuation of Property---Common Scheme: H.R.S. §708-801(6)**

- A. Amounts involved in thefts committed pursuant to one scheme or course of conduct, whether the property taken be of one person or several persons, may be aggregated in determining the class or grade of offense.
- B. Amounts involved in offenses of criminal property damage committed pursuant to one scheme or course of conduct, whether the property damaged be of one person or several persons, may be aggregated in determining the class or grade of the offense.