

NO. 23361

IN THE INTERMEDIATE COURT OF APPEALS
OF THE STATE OF HAWAI'I

STATE OF HAWAI'I, Plaintiff-Appellee, v.
CATHERINE Z. FERNANDEZ, Defendant-Appellant

APPEAL FROM THE DISTRICT COURT OF THE FIRST CIRCUIT
(CR. NO. 00-041201)

MEMORANDUM OPINION

(By: Burns, C.J., Watanabe and Lim, JJ.)

Defendant-Appellant Catherine Z. Fernandez (Fernandez) appeals the March 9, 2000 judgment, entered by District Court Judge Leslie Hayashi, convicting Fernandez of Theft in the Fourth Degree and sentencing her to pay a \$25 fine and, as required by Hawaii Revised Statutes (HRS) § 351-62.6(a)(3) (Supp. 2000), a \$25 Criminal Injuries Compensation Fee. We affirm.

RELEVANT STATUTES

HRS (1993) state, in relevant part, as follows:

§ 708-830 Theft. A person commits theft if the person does any of the following:

. . . .

(8) Shoplifting.

(a) A person conceals or takes possession of the goods or merchandise of any store or retail establishment, with intent to defraud.

. . . .

§ 708-833 Theft in the fourth degree. (1) A person commits the offense of theft in the fourth degree if the person commits theft of property or services of any value not in excess of \$100.

(2) Theft in the fourth degree is a petty misdemeanor.

EVIDENCE

The store detective employed by Long's Drug Store testified that she saw Fernandez carrying a large purse in her right hand and a large black plastic bag, like a garbage bag, in her left hand. Fernandez selected a Max Factor pancake compact and a bottle of liquid Neutrogena and held both items and the black bag in her left hand. Fernandez walked down the aisle, looked around, unrolled the black bag, and then with her right hand put the two items into the black bag. Fernandez then went to the photo department and picked up some processed film.

Q And then you said she picked up her film. What did that entail? Like, what did she have to do to get the film?

A She has to ask the cashier, I guess gave her a-- there's a slip that you give a tag for your processing film. She gave the lady that and the lady got the processing film; and then the cashier, which is normal for the cashier to ask if there's anything else. She didn't respond and she only paid for the processing film.

After Fernandez and her aunt had a conversation, Fernandez and her aunt exited the store where Fernandez was confronted by the Longs Drug Store detective about the items. Fernandez responded that "she forgot, that she was in a rush."

Fernandez testified that she "was carrying three big bags, . . . one black plastic bag from Ross, one plastic bag also I bought from a store across Ross and my shoulder bag." After carrying the cosmetics, she put them in her plastic bag "when

[she] was getting tired and hard in carrying the bag[.]" She left the store without paying for the items because, in her words, "I forgot all about it and my aunty was rushing me to go out to meet my mother at Ross and I was, too, was feeling rushing to go to the washroom."

RELEVANT RULE

Hawai'i Rules of Penal Procedure Rule 23(C) states that

[i]n a case tried without a jury the court shall make a general finding and shall in addition, on request made at the time of the general finding, find such facts specially as are requested by the parties. Such special findings may be orally in open court or in writing at any time prior to sentence.

ORAL FINDINGS OF FACT

At the conclusion of the trial, the court orally found as follows:

THE COURT: All right. At this time, the Court is ready to rule. Having heard the testimony of the State's witnesses as well as that of [Fernandez], this is obviously an issue of credibility. And in this case, the Court does find the State's witnesses to be more credible.

Specifically, the Court finds that on or about February 1st, 2000, in the City and County of Honolulu, that [Fernandez] entered Long's Drug Store

Court further finds that [Fernandez] went into the cosmetics aisle, picked up two items which were the property of the Long's Drug Store, a Max Factor pancake compact worth \$7.75 and a bottle of liquid Neutrogena, which was valued at 11-75, for a total of \$19.50.

Brenda Kong, a store detective, happened to be in the cosmetic aisle at the same time that [Fernandez] was there and in fact observed [Fernandez] pick up those two items. [Fernandez] then proceeded out of the cosmetic aisle and headed towards the photo department area.

On her way to the photo department area, [Fernandez] looked around before opening the shopping plastic black bag which she was holding in her [sic] and dropped the two items into the black bag, thereby concealing them.

[Fernandez] then proceeded to the photo department where she picked up photographs which had been developed. The cashier had asked [Fernandez] if she had anything else. [Fernandez] didn't reply, but just paid for the film; and [Fernandez] then proceeded out of the store, passing eight other check-out stands [that] were open and in operation.

Therefore, the Court finds that the State has met its burden of proof beyond a reasonable doubt to show that [Fernandez] is guilty of Theft in the Fourth Degree.

DENIAL OF ORAL MOTION FOR RECONSIDERATION

Fernandez immediately moved for reconsideration on the basis that "[t]his was an honest mistake[.]" The court denied the motion and responded that "[t]he point is, . . . that Miss Fernandez put the items inside of a black plastic bag."

POINT ON APPEAL

Fernandez points out that the court's finding that "[t]he cashier had asked [Fernandez] if she had anything else" is clearly erroneous because the evidence was that Fernandez was asked "if there's anything else" when she paid for the processed film.

The sole point on appeal asserted by Fernandez is that "there was insufficient evidence on the record to support a finding that Ms. Fernandez concealed or took possession of the merchandise belonging to Longs Drug Store with intent to defraud[.]"

STANDARD OF REVIEW

We have long held that evidence adduced in the trial court must be considered in the strongest light for the prosecution when the appellate court passes on the legal sufficiency of such evidence to support a conviction; the same standard applies whether the case was before a judge or a jury.¹ The test on appeal is not whether guilt is established beyond a reasonable doubt, but whether there was substantial evidence to support the conclusion of the trier of fact. Indeed, even if it could be said in a bench trial that the conviction is against the weight of the evidence, as long as there is substantial evidence to support the requisite findings for conviction, the trial court will be affirmed.

"Substantial evidence" as to every material element of the offense charged is credible² evidence which is of sufficient quality and probative value to enable a [person] of reasonable caution to support a conclusion. And as a trier of fact, the trial judge is free to make all reasonable and rational inferences under the facts in evidence, including circumstantial evidence.

State v. Batson, 73 Haw. 236, 248-49, 831 P.2d 924, 931 (1992),
reconsideration denied, 73 Haw. 625, 834 P.2d 1218, 1227-28
(1994) (citations omitted) (footnotes added).

It is for the trial judge as fact-finder to assess the credibility of witnesses and to resolve all questions of fact; the judge may accept or reject any witness's testimony in whole or in part. Lono v. State, 63 Haw. 470, 473, 629 P.2d 630, 633 (1981). As the trier of fact, the judge may draw all reasonable and legitimate inferences and deductions from the evidence, and the findings of the trial court will not be disturbed unless clearly erroneous. Id. at 473-74, 629 P.2d at 633. An appellate court will not pass

¹ We note that

[a]ppellate review of factual determinations made by the trial court deciding pretrial motions in a criminal case is governed by the clearly erroneous standard. A finding of fact is clearly erroneous when (1) the record lacks substantial evidence to support the finding, or (2) despite substantial evidence in support of the finding, the appellate court is nonetheless left with a definite and firm conviction that a mistake has been made.

State v. Anderson, 84 Hawai'i 462, 466-67, 935 P.2d 1007, 1011-12 (1997)
(citation omitted).

² In light of the precedent that "[i]t is for the trial judge as fact-finder to assess the credibility of witnesses and to resolve all questions of fact[,]" State v. Eastman, 81 Hawai'i 131, 139, 913 P.2d 57, 65 (1996), we question the presence of the word "credible" in this standard of review.

upon the trial judge's decisions with respect to the credibility of witnesses and the weight of the evidence, because this is the province of the trial judge. Domingo v. State, 76 Hawai'i 237, 242, 873 P.2d 775, 780 (1994); Amfac, Inc. v. Waikiki Beachcomber Investment Co., 74 Haw. 85, 117, 839 P.2d 10, 28 (1992), *reconsideration denied*, 74 Haw. 650, 843 P.2d 144 (1992); State v. Aplaca, 74 Haw. 54, 65-66, 837 P.2d 1298, 1304-05 (1992).

State v. Eastman, 81 Hawai'i 131, 139, 913 P.2d 57, 65 (1996).

DISPOSITIVE QUESTION ON APPEAL

The dispositive question is whether the evidence is of sufficient quality and probative value to enable a person of reasonable caution to decide that Fernandez is guilty as charged.

Fernandez contends that

[t]aking the evidence in the light most favorable to the State, and considering the lower court's factual findings in context of their occurrence and the totality of the circumstances of the case, the record lacks substantial evidence, on the part of Ms. Fernandez, of an intent to defraud.

. . . .

. . . [I]n context, the fact that Ms. Fernandez placed the cosmetic items into her black bag does not evince that she had the intent to defraud when she placed the cosmetics in her bag.

What the uncontradicted record evidence shows is that placing the items in her bag stemmed from having her hands too full.

We disagree. Fernandez is viewing the evidence in a light most favorable to Fernandez. Viewing the evidence in a light most favorable to the State, the evidence is of sufficient quality and probative value to enable a person of reasonable caution to decide that Fernandez is guilty as charged.

CONCLUSION

Accordingly, we affirm the district court's March 9, 2000 judgment convicting Defendant-Appellant Catherine Z. Fernandez of Theft in the Fourth Degree and sentencing her to pay a \$25 fine and a \$25 Criminal Injuries Compensation Fee.

DATED: Honolulu, Hawai'i, September 6, 2001.

On the briefs:

Rose Anne Fletcher,
Deputy Public Defender, Chief Judge
for Defendant-Appellant.

James M. Anderson,
Deputy Prosecuting Attorney, Associate Judge
City and County of Honolulu,
for Plaintiff-Appellee.

Associate Judge