

NO. 23754

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

STATE OF HAWAI'I, Plaintiff-Appellee, v.  
JOSEPH L. GONSALVES, Defendant-Appellant

APPEAL FROM THE DISTRICT COURT OF THE FIRST CIRCUIT  
(CR. NO. 00-017676)

MEMORANDUM OPINION

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

Defendant-Appellant Joseph L. Gonsalves (Gonsalves) appeals the August 22, 2000 judgment, entered by District Court Judge Tenney Z. Tongg, convicting Gonsalves of Theft in the Fourth Degree, Hawai'i Revised Statutes (HRS) §§ 708-830(7) and 708-833 (1993). We reverse.

Gonsalves was charged as follows:

[O]n January 14, 2000, in the City and County of Honolulu, State of Hawaii, you did intentionally receive, retain, or dispose of property of another, knowing that it had been stolen, with intent to deprive the owner of the property. Said property or services having had a value not in excess of \$100.00, thereby committing the offense of theft in the fourth degree, in violation of section 708-830 and 708-833, sub-section (7), of the Hawaii Revised Statutes.

Theft in the Fourth Degree is a petty misdemeanor. HRS § 708-833(2) (1993).

Gonsalves was not charged with violating HRS § 708-8102 (1993):

**Theft, forgery, etc., of credit cards.** (1) A person who takes a credit card from the person, possession, custody, or control of another without the cardholder's consent or who, with knowledge that it has been so taken, receives the credit card with intent to

use it or to sell it, or to transfer it to a person other than the issuer or the cardholder commits the offense of credit card theft. If a person has in the person's possession or under the person's control credit cards issued in the names of two or more other persons, which have been taken or obtained in violation of this subsection, it is prima facie evidence that the person knew that the credit cards had been taken or obtained without the cardholder's consent.

. . . .

(8) Credit card theft is a class C felony.

. . . .

Gonsalves was not charged with violating HRS § 708-8100

(1993):

**Fraudulent use of a credit card.** (1) A person commits the offense of fraudulent use of a credit card, if with intent to defraud the issuer, or another person or organization providing money, goods, services, or anything else of value, or any other person, the person:

(a) Uses or attempts or conspires to use, for the purpose of obtaining money, goods, services, or anything else of value a credit card obtained or retained in violation of section 708-8102 . . . .

. . . .

(3) Fraudulent use of a credit card is a misdemeanor, if the value of all money, goods, services, and other things of value obtained or attempted to be obtained does not exceed \$300 in any six-month period.

#### BACKGROUND

The sole witness for Plaintiff-Appellee State of Hawai'i (the State) was Clarissa Droge (Claire or Clarissa or Miss Droge). Claire testified that on January 14, 2000, at the Zanzibar Club, she had two "Bacardi and coke" drinks from midnight to 1:45 a.m. At 2:00 a.m., she arrived with some friends at the crowded nightclub, Pago Pago Club. While there, she did not have anything to drink. She was not drunk. She had a bag with a "long-handle," "taller than it is wider," "[s]ix by

eight" inch, hanging over her shoulder more toward her back than her side. At 2:45 a.m., she noticed her shoulder bag felt lighter. She had "never set [the bag] down[,] " "[i]t was always on [her] person[,] " and she "never passed it to anyone." Although the zipper of the bag had been closed and she had not opened it, she noticed that it had been opened. Claire also noticed that she was missing her wallet containing cash, a bank card, three credit cards, gift certificates, pictures, identification, and social security card. She had not given her credit card to anybody. She had not offered to buy a round of drinks for the friends she was with. Within 15 to 20 minutes later, Claire noticed her Fidelity Investments credit card (FICC) on the bar "in front of [Gonsalves]." She had never previously seen Gonsalves. "[She] saw [Gonsalves] at the bar with [her FICC] getting the drinks back." She did not "see the bartender swipe the card[.]" In her words, "[The bartender] had already swiped it." She asked, "[W]ho's using this fucking card[?]" She stated, "This is my credit card." When asked by the prosecutor, "[W]hat made you believe that it was Mr. Gonsalves who was in possession of your credit card?", Claire's response was "[b]ecause I immediately demanded to know who was using my card, and his response was that his friend gave it to him." Claire caused a scene and was taken outside. The police were called and Claire reported a theft. Claire subsequently noticed that a

charge had been made on her FICC at the "Music Café," which is the Pago Pago Club. She had not made the charge. The charge was for "[t]wenty-one dollars or so[.]"

At the close of the State's case, Gonsalves moved for a judgment of acquittal on the ground that the State had failed to present substantial evidence that he "did intentionally receive, retain, or dispose of property of another, knowing that it had been stolen, with intent to deprive the owner of the property." The State responded, "[Gonsalves] was in front of the card. He purchased four drinks.<sup>1</sup> Miss Droge said that she did not give permission to anyone to use her card. So at least for a judgment of acquittal, Your Honor, the State has met its burden."

(Footnote added.) The court denied the motion.

A friend of Gonsalves, James Pulu (Pulu), testified for the defense that he was with Gonsalves and Malu Talbot (Malu) at the Pago Pago Club that night. Pulu approached Claire and introduced himself by his first name and she introduced herself as "Clarissa." According to Pulu, she did not introduce herself as "Claire," all of them were "drunk" and, after he and Claire talked for "twenty or thirty minutes," [s]he asked me if I wanted something to drink[.]

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<sup>1</sup> There is no evidence that Defendant-Appellant Joseph L. Gonsalves purchased "four drinks."

On direct examination, Pulu testified, in relevant part, as follows:

A She asked me if I wanted something to drink.

Q Uh-huh. And what did you say?

A And I told her sure, and she gave me her card to go-- go get something to drink. I told her that I can't sign the slip because it's under her name.

Q And what did she say to that?

A She said just to go order it.

[PUBLIC DEFENDER]: Okay.

A And then--so I gave it to Joseph to go order the drinks.

[PUBLIC DEFENDER]: Joseph Gonsalves.

WITNESS: Yeah.

Q Okay. And then what did he do?

A He went up there to order it, and she said she would come over and sign it.

[PUBLIC DEFENDER]: After he orders it.

WITNESS: Yeah.

[PUBLIC DEFENDER]: Okay.

WITNESS: But he--she didn't know that I gave it to him, though.

Q Okay. And what did you tell Joseph to do with the card?

A To order a few drinks.

[PUBLIC DEFENDER]: And he did.

WITNESS: Yeah.

On cross-examination, Pulu testified, in relevant part, as follows:

Q So were you and Malu talking to Clarissa?

A No. He was just standing next to me.

[PROSECUTOR]: Okay. So it was just you and her.

WITNESS: Yeah.

[PROSECUTOR]: Okay. And after about thirty minutes, she offered to buy you a drink.

WITNESS: Uh-huh.

Q Did she know that you were--did she offer to buy your four friends drinks?

A No.

[PROSECUTOR]: Okay. Now, you said that you had given the credit card to defendant Joseph Gonsalves.

WITNESS: Uh-huh.

THE COURT: Is your answer yes? You have to answer verbally.

A Yes.

Q How was it that you gave the credit card to Joseph Gonsalves?

A I walked up to him and told him to order a drink.

Q Okay. Why did you walk up to Joseph Gonsalves to ask him to order the drinks for and [sic] Clarissa?

A I don't know.

[PROSECUTOR]: There must be a reason.

WITNESS: I just walked up to him.

Q Why would you have Joseph Gonsalves buy a drink for you and Clarissa?

A Because he was there by the bar.

Q Why couldn't you do it?

A It was packed that night. I just handed it over the crowd.

Q When you gave it to him, did you wait around, or did you leave?

A Yeah, I waited around. Like we were--it was crowded. I had to reach over and get it. I just waited where I was.

. . . .

[PROSECUTOR]: Okay. So you and Clarissa were standing about thirty-two feet from the bar.

WITNESS: Yeah. But only I walked up. She stayed where she was.

[PROSECUTOR]: Okay.

WITNESS: You understand.

[PROSECUTOR]: So you left her, and you went over to the bar to give Mr. Gonsalves the credit card.

WITNESS: Yes.

Q Okay. And when you gave the credit card to Mr. Gonsalves, what did you tell him?

A To order a drink.

Q How many drinks did you ask him to order?

A Three.

[PROSECUTOR]: Three. And how many drinks--who were the drinks for?

A Me, her, and Malu.

[PROSECUTOR]: Malu. Okay. Now, did--you're aware that after--why did Clarissa--when you left Clarissa, did you tell her that you were going to buy drinks with her credit card?

A Yeah. She told me to go do it.

[PROSECUTOR]: Okay.

A She didn't know that I gave it to him to go do it.

[PROSECUTOR]: Okay. But when--

WITNESS: That's why.

[PROSECUTOR]: But when Mr. Gonsalves was standing at the bar, you were standing right behind him, right.

A Not right behind him.

[PROSECUTOR]: In the area.

WITNESS: In the area.

[PROSECUTOR]: So did you see when Clarissa went up to the bar?

A Yes, I did.

[PROSECUTOR]: And did you see her start to get upset?

A Yeah.

[PROSECUTOR]: And so you immediately went to her, and said oh, that's okay, he's my friend.

WITNESS: Yeah.

[PROSECUTOR]: You did?

WITNESS: I told her that.

[PROSECUTOR]: So she would have recognized you.

A Yeah, she would have.

Q Okay. And did she recognize you?

A She was just flipping out.

Q Okay. Did she recognize you as the person she had been talking to for thirty minutes?

A Yeah.

Q And what did she do?

A Nothing. She was flipping out.

[PROSECUTOR]: Okay. But she still continued to have the police called, and press charges, is that right?

A Yes.

On direct examination, Gonsalves testified that Pulu gave him the FICC. He further testified, in relevant part, as follows:

Q And what did he tell you to do with the credit card?

A Get some drinks.

Q Okay. And did you do that?

A Yeah.

Q Okay. Did you know it was stolen, or whether or not it was stolen? You know anything about?

A No. I had no clue.

On cross-examination, Gonsalves testified that Pulu was a good friend whom he had known for three or four years. He had not gone out drinking with Pulu too often because Pulu was



underage. However, he did not know Pulu's age. When asked how many drinks Pulu asked him to buy, Gonsalves responded, "I forget." He testified that he had drank "[a]bout two beers" that night; that "I don't know how much beers I bought" with Claire's card.

On rebuttal, Claire stated she always introduced herself as "Claire" and not "Clarissa."

The State called Claire's friend, Alice Fink, to testify that Claire always goes by the name "Claire." Although her testimony was not stipulated into evidence, Alice Fink did not testify.

There is no evidence whether there was a credit card charge slip or, if there was one, of who, if anybody, signed it. As noted above, however, Claire testified that a charge had been made on her FICC at the Pago Pago Club.

Based upon its finding that Claire's testimony was credible and its conclusion that "[a]ny time a person uses someone else's credit card without approval of the authorized owner, you're put on notice that the charges are unauthorized, or the card was stolen[,] " the court found Gonsalves guilty.

Prior to sentencing, the court asked Gonsalves if he had anything to say. Gonsalves stated, "Yeah. I can't believe I'm being convicted of a crime I didn't do. And that's how the State is. That's how it is."

The court sentenced Gonsalves to "a fine of \$100.00, along with a \$25 assessment to the Crime Victims Compensation Fund." The sentence was stayed pending appeal.

#### POINT ON APPEAL

On appeal, Gonsalves contends that

[t]here was no evidence, direct or indirect, that Gonsalves knew the card was stolen. . . . It would be highly improbable that Gonsalves would take the card from Pulu knowing that it was stolen from Droge and then immediately attempt to use it publicly at the scene of the crime. . . . What is probable is that Pulu stole the card and gave it to Gonsalves to use to protect himself from being blamed for the theft. Without something more than the mere fact that Gonsalves was using the card he received from Pulu, there was no substantial evidence that Gonsalves knew that the card was stolen.

#### 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. 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 credible evidence which is of sufficient quality and probative value to enable [a person] of reasonable caution to support a conclusion. And as 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. Eastman, 81 Hawai'i 131, 135, 913 P.2d 57, 61 (1996) (quoting State v. Pone, 78 Hawai'i 262, 265, 892 P.2d 455, 458 (1995) (quoting State v. Batson, 73 Haw. 236, 248-49, 831 P.2d 924, 931 (1992) *reconsideration denied*, 73 Haw. 625, 834 P.2d 1315 (1992))) (brackets in original).

## DISCUSSION

Is there substantial evidence that Claire's FICC was stolen? Yes. There is evidence that Pulu exerted unauthorized control over Claire's FICC. The word "stolen" means "obtained by theft or robbery." HRS § 708-800 (1993). A "theft" occurs when "[a] person . . . exerts control over, the property of another with intent to deprive the other of the property." HRS § 708-830(1) (1993). The deprivation does not have to be permanent.

Is there substantial evidence that Gonsalves intentionally received/retained another person's credit card, knowing that it had been stolen, with intent to deprive that other person of his/her credit card? There is evidence that Gonsalves knew that Pulu was not old enough to purchase or consume alcoholic beverages and that the FICC was not Pulu's credit card.

Is there substantial evidence that Gonsalves knew that the FICC he received from Pulu and presented to the bartender was a stolen credit card?

The district court's conclusion that "[a]ny time a person uses someone else's credit card without approval of the authorized owner, you're put on notice that the charges are unauthorized, or the card was stolen" is wrong because it lacks an essential element. It fails to note that the person who uses

the card must know that he/she is using the card without the approval of the authorized owner.

Suppose your friend hands you a credit card that is not his and tells you to get some drinks. You present the credit card to the bartender and, in return, the bartender delivers more than one beer to you. There is no evidence that any of the beers was for you or that you consumed any of them. There is evidence that the credit card was stolen. There is no evidence that there was a credit card charge slip or, if there was one, of who, if anybody, signed it. Is this substantial evidence that you "used" the card? Is this substantial evidence that you knew that the owner of the credit card did not approve of the use of the credit card to obtain the beers? Is this substantial evidence that you knew that the credit card was stolen? Is this substantial evidence that you "did intentionally receive, retain, or dispose of [the card] of another, knowing that it had been stolen, with intent to deprive the owner of the property?"

Gonsalves received Claire's FICC from Pulu, presented it to the bartender, and received, in return, more than one beer for others to drink. There is no evidence that there was a credit card charge slip or, if there was one, of who, if anybody, signed it. Reasonable and rational inferences from the evidence do not permit the finding that, at the time that Gonsalves received Claire's FICC from Pulu and/or at or before the time

that Gonsalves presented it to the bartender and received, in return, more than one beer for consumption by others, Gonsalves knew that Claire's FICC had been stolen.

CONCLUSION

Accordingly, we reverse the district court's August 22, 2000 judgment convicting Defendant-Appellant Joseph Gonsalves of Theft in the Fourth Degree, HRS §§ 708-830(7) and 708-833 (1993).

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

On the briefs:

Jon N. Ikenaga,  
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Associate Judge