

IN THE SUPREME COURT OF THE STATE OF HAWAI'I

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STATE OF HAWAI'I, Respondent/Plaintiff-Appellee,

vs.

RAYMOND K.K. AUGUSTIN, Petitioner/Defendant-Appellant.

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NO. 23105

CERTIORARI TO THE INTERMEDIATE COURT OF APPEALS  
(CR. NO. 94-1294)

DECEMBER 17, 2002

MOON, C.J., LEVINSON, NAKAYAMA, JJ.; AND  
ACOBIA, J., DISSENTING, WITH WHOM RAMIL, J., JOINS

ORDER DISMISSING CERTIORARI PROCEEDING

We dismiss the petitioner/defendant-appellant Raymond K.K. Augustin's application for a writ of certiorari as improvidently granted because the summary disposition order of the Intermediate Court of Appeals in State v. Augustin, No. 23105 (Haw. Ct. App. Dec 27, 2001), contains no grave errors of law or fact and is not obviously inconsistent with the appellate case law of this state. See Hawai'i Revised Statutes (HRS) 602-59(b) (1993).

We disagree with Augustin that that part of the trial court's instructions advising the jury to consider Augustin's justification claims "from the viewpoint of a reasonable person

in [Augustin's] position under the circumstances of which [Augustin] was aware or as [Augustin] reasonably believed them to be" was prejudicially incorrect, because the instructions in question -- derived from Hawai'i Pattern Jury Instructions - Criminal (HAWJIC) 7.01 ("Self-Defense") and 7.02 ("Defense of Others") -- are fully consonant with the controlling statutory and case law of this state.

For purposes of the present appeal, the material language of the trial court's jury instructions regarding self-defense and defense-of-others was as follows:

The reasonableness of the defendant's belief that the use of such protective force was immediately necessary shall be determined from the viewpoint of a reasonable person in the defendant's position under the circumstances of which the defendant was aware or as the defendant reasonably believed them to be.

(Emphasis added.) The foregoing language derives from the statutory defenses of "use of force in self-protection," as codified in HRS § 703-304 (1993), and "use of force for the protection of other persons," as codified in HRS § 703-305. HRS § 703-304 provides in relevant part:

(1) . . . [T]he use of force upon or toward another person is justifiable when the actor believes that such force is immediately necessary for the purpose of protecting himself against the use of unlawful force by the other person on the present occasion.

. . . .  
(3) . . . [A] person employing protective force may estimate the necessity thereof under the circumstances as he believes them to be . . . .

(Emphases added.) Similarly, HRS § 703-305 provides in relevant part:

(1) . . . [T]he use of force upon or toward the person of another is justifiable to protect a third person when:  
(a) Under the circumstances as the actor believes them to be, the person whom the actor seeks to protect would be justified in using such protective force; and  
(b) The actor believes that the actor's intervention is necessary for the protection of the other person.

(Emphases added.)

With respect to the use-of-force defenses, the defendant's belief must be "reasonable," see HRS § 703-300 (1993) ("'Believes' means reasonably believes."). Moreover, a defendant may only be charged with "knowledge" of those "circumstances" of which he or she is actually "aware." See HRS § 702-206(2)(b) (1993) ("A person acts knowingly with respect to attendant circumstances when he is aware that such circumstances exist."). That is why,

[u]nder Hawai'i law, the standard for judging the reasonableness of a defendant's belief for the need to use deadly force is determined from the point of view of a reasonable person in the [d]efendant's position under the circumstances as he believed them to be. The jury, therefore, must consider the circumstances as the [d]efendant subjectively believed them to be at the time he tried to defend himself.

State v. Pemberton, 71 Haw. 466, 477, 796 P.2d 80, 85 (1990) (emphasis in original) (citation omitted). It is therefore error to judge the reasonableness of a defendant's viewpoint based on circumstances "shown in the evidence" but of which the defendant is not "aware." Id. at 477-78, 796 P.2d at 85. The fact remains, however, that the defendant's belief regarding the immediate necessity of the use of protective force must be reasonable. See HRS § 703-300.

HAWJIC Instructions 7.01 and 7.02 come right out of the Hawai'i Penal Code and Pemberton and cover all possible conditions under which a defendant can prevail with respect to his or her use-of-force defense. Either the prosecution will fail to disprove beyond a reasonable doubt (1) that a reasonable person (objective standard) in the defendant's position would believe that the use of protective force was immediately necessary, given the circumstances of which he or she was actually (i.e., subjectively) aware or (2) that a reasonable person (objective standard) in the defendant's position would

believe that the use of protective force was immediately necessary, given the circumstances (subjective) as the defendant reasonably (i.e., objectively) but perhaps mistakenly (objective) believed them to be. Both conditions cannot be present simultaneously. Accordingly, it would be erroneous, misleading, and confusing to require the substitution of the conjunctive "and" for the disjunctive "or" that the trial court utilized in its use-of-force instructions in the present case.

Augustin's other points of error raised in his application for a writ of certiorari are likewise without merit.

For the foregoing reasons, Augustin's application for a writ of certiorari is hereby dismissed as improvidently granted.

Arthur E. Ross, for the  
petitioner/defendant-  
appellant Raymond K.K.  
Augustin, on the writ