

CONCURRING OPINION OF ACOBA, J.

I concur in the result, although I believe parts of Hawai'i Administrative Rules (HAR) § 13-75-12, as construed by Plaintiff-Appellee State of Hawai'i (the prosecution) and as applied under different circumstances, would be ambiguous. The Rule states:

(a) It is unlawful for any person engaged in gill net fishing to:

- (1) Leave the person's net unattended without visually inspecting the net every two hours and releasing or removing any undersized, illegal or unwanted catch; or,
- (2) Leave the net in the water for a period of more than four hours in any twenty-four hour period.

(b) For purposes of this section, "gill net" means a curtain like net suspended in the water with mesh openings large enough to permit only the heads of the fish to pass through, ensnaring them around the gills when they attempt to escape.

(Emphases added.)

Defendant-Appellant Dang Van Tran (Defendant) was not charged with violating subsection (a)(1) of HAR § 13-75-12.

Inasmuch as there is no evidence he ever inspected the net every two hours, he does not challenge subsection (a)(1). According to the evidence, Defendant lay his net at 6:15 p.m. and picked up the net at 10:00 p.m. He then dropped the net again at another location at 3:30 a.m. and picked up the net at "sunrise."<sup>1</sup> The prosecution charged Defendant with violating subsection (a)(2) because, under its interpretation of the rule, a fisherman can

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<sup>1</sup> The time of sunrise was not established.

only lay the net once for a "four hour" period in a "twenty-four hour" time span, and Defendant laid his net twice in a twenty-four hour span and, presumably,<sup>2</sup> in excess of a four-hour period. Subsection (a)(2) as applied by the prosecution would prohibit the dispersal of a net for more than four consecutive hours in a twenty-four-hour time span and under subsection (a)(1), require inspection of the net after the first two hours:

A [STATE OFFICER.] The law is set up that after two hours, whoever lays the net has to go out and inspect the net, physically inspect the net. After an additional two hours, which totals four hours, the net has to be physically removed from the water, and that net cannot go back into the water anymore for a period of 24 hours. So, from the time you lay the net till the 24-hour period, that's all.

Q [DEPUTY PROSECUTOR] So, what you're saying basically is you can only use one net within a 24-hour time period?

A That particular net, yes.

(Emphases added.) Under this application, Defendant would have been subject to subsection (a)(1) as well as subsection (a)(2) of the Rule.

Defendant maintained that the term "period" in subsection (a)(2) is ambiguous, and a reasonable construction of the rule would permit the laying of a net as many times a fisherman might choose in any twenty-four-hour period, so long as each use of the net did not exceed four hours. Further, as to subsection (a)(1), the defense argued the reference to "every" two hours was misleading, because it suggests that one "can reset [the] net and check it every two hours." Thus, Defendant

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<sup>2</sup> See supra note 1.

asserts, subsection (a)(1) renders subsection (a)(2) unnecessary.

The interpretation of rules involves principles of statutory construction. See State v. Lei, 95 Hawai'i 278, 281, 21 P.3d 880, 884 (2001); State v. Lau, 78 Hawai'i 54, 58, 890 P.2d 291, 295 (1995); Keaulii v. Simpson, 74 Haw. 417, 421, 847 P.2d 663, 666, reconsideration denied, 74 Haw. 650, 853 P.2d 542, cert. denied, 510 U.S. 814 (1993). "The interpretation of [a rule as in the case of] a statute is a question of law that this court reviews *de novo*." Konno v. County of Hawai'i, 85 Hawai'i 61, 71, 937 P.2d 397, 407 (1997) (quoting State v. Toyomura, 80 Hawai'i 8, 18, 904 P.2d 893, 903 (1995) (citation omitted)).

Applying a common understanding of the words used, I believe the Rule as written conveys, with respect to subsection (a)(1), that there is no time limit in leaving the net in the water so long as it is visually inspected every two hours and prohibited or unwanted catch removed. Read in *pari materia* with subsection (a)(1), see State v. Murray, 63 Haw. 12, 23, 621 P.2d 334, 341 (1980) ("Laws in *pari materia*, or upon the same subject, must be construed with reference to each other, . . . and a statute must be construed as part of and in harmony with the law of which it forms a part." (Internal quotation marks and citations omitted.)), subsection (a)(2) suggests that alternatively, i.e. "or," see State v. Sorenson, 44 Haw. 601, 604, 359 P.2d 289, 291 (1961) ("[T]he common usage of the word

'or' is as a disjunctive, indicating an alternative." ), a net may be left in the water for only four hours in every twenty-four-hour period if it is not visually inspected every two hours. In contrast, following the prosecution's reading of it, the Rule should (but does not) state that inspection take place after the first two hours rather than "every two hours," "and" (rather than "or," ) a net may not be left in the water for more than four consecutive hours, i.e., a net may be laid only once in a twenty-four-hour span.

However, because the Rule is worded in the disjunctive, in this case, the prosecution need prove only a violation of one of the sections. Subsection (a)(2), therefore, may be construed without reference to subsection (a)(1), Defendant not having been charged with or relied on subsection (a)(1). A reasonable construction of HAR § 13-75-12(a)(2) would indicate that it prohibits leaving a net in the water for more than four hours in any twenty-four-hour period. This is because the words "a period of more than four hours" may be commonly understood as one period and the words "in any" qualify the inclusive time span as that of twenty-four hours. Thus, under a reasonable and common reading of the statute, there was a violation committed by Defendant, viewing subsection (a)(2) as an alternative basis for liability. On that ground, I concur.