

NO. 24831

IN THE SUPREME COURT OF THE STATE OF HAWAI'I

STATE OF HAWAI'I, Plaintiff-Appellee

vs.

EDNA-EUNICE SILVA, Defendant-Appellant

APPEAL FROM THE DISTRICT COURT OF THE THIRD CIRCUIT
(POLICE REPORT NO. G-20672)

SUMMARY DISPOSITION ORDER

(By: Moon, C.J., Levinson, Nakayama, and Acoba, JJ.,
and Intermediate Court of Appeals Chief Judge Burns,
assigned by reason of vacancy)

Defendant-Appellant Edna-Eunice Silva (Defendant) appeals from the judgment entered on October 24, 2001 by the district court of the third circuit¹ (the court), adjudging Defendant guilty of assault in the third degree, Hawai'i Revised Statutes § 707-712 (1993). On appeal, Defendant argues that the court (1) erred in denying her motion to dismiss for violation of Hawai'i Rules of Penal Procedure (HRPP) Rule 48 and (2) committed plain error by not complying with the requirements of State v. Tachibana, 79 Hawai'i 226, 900 P.2d 1293 (1995).

In accordance with Hawai'i Rules of Appellate Procedure Rule 35, and after carefully reviewing the record and the briefs submitted by the parties, duly considering and analyzing the law

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¹ The Honorable John P. Moran presided over this matter.

relevant to the arguments and issues raised by the parties, and having heard oral argument, we vacate the October 24, 2001 judgment of conviction on the ground that 181 days had elapsed before trial was begun, see HRPP Rule 48(b) ("the court shall dismiss a charge with or without prejudice if trial is not commenced within 6 months"), because (1) Plaintiff-Appellee State of Hawai'i (the prosecution) filed its complaint on July 5, 2000, (2) the complaint was dismissed without prejudice on October 18, 2000, a total of 105 days thus elapsing, (3) there was no evidence adduced that the period between July 6, 2000 and August 23, 2000 should be excluded for the alleged unavailability of Defendant, (4) the identical complaint was refiled on June 26, 2001, (5) the defense filed a motion to dismiss on HRPP Rule 48 grounds on October 23, 2001, (6) an additional 118 days had elapsed between June 26, 2001 and October 22, 2001, (7) the parties agree that forty-two days, the period between July 9, 2001 to August 20, 2001, are excluded, (8) accordingly, 76 days were to be included under HRPP Rule 48 after the refileing of the complaint, for an overall total of 181 included days as of October 22, 2001, (8) Defendant was tried on October 24, 2001, and, thus, not within 180 days.² Therefore,

² We note, as Defendant contends, that the court also erred in failing to engage Defendant in any colloquy as to her right to testify or not testify. This colloquy is mandated by Tachibana and State v. Lewis, 94 Hawai'i 292, 12 P.3d 1233 (2000), and must be performed by all trial courts.

IT IS HEREBY ORDERED that the court's October 24, 2001 judgment of conviction is vacated and the case remanded to the court to dismiss the charge with or without prejudice, in its discretion, pursuant to HRPP Rule 48(b).

DATED: Honolulu, Hawai'i, January 22, 2003.

Edward K. Harada, Deputy
Public Defender, for
defendant-appellant.

Jason M. Skier, Deputy
Prosecuting Attorney,
County of Hawai'i, for
plaintiff-appellee.