

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

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STATE OF HAWAI'I, Plaintiff-Appellee

v.

KAMALIN KAZMAR, Defendant-Appellant

NO. 22576

APPEAL FROM THE FIRST CIRCUIT COURT  
(CR. NO. 99-0310)

AUGUST 16, 2000

BURNS, C.J., WATANABE, J., AND CIRCUIT JUDGE PERKINS,  
IN PLACE OF LIM, J., DISQUALIFIED

ORDER DENYING MOTION FOR RECONSIDERATION

In the opinion filed on July 28, 2000, this court decided that the trial court erred when it gave an included offense instruction because it failed to comply with the requirements of State v. Kupau, 10 Haw. App. 503, 879 P.2d 559, aff'd, 76 Hawai'i 387, 879 P.2d 492 (1994).

In the August 7, 2000 Motion for Reconsideration, Defendant-Appellant Kamalin Kazmar (Kazmar) contends that this court erred when it vacated the judgment and remanded for a new trial. Kazmar cites the rule (The Rule) that "erroneous

instructions are presumptively harmful and are a ground for reversal unless it affirmatively appears from the record as a whole that error was not prejudicial" and contends that the judgment should have been reversed.

Although this is a criminal case, the precedent cited by Kazmar in her motion for reconsideration is the civil case of Ditto v. McCurdy, 86 Hawai'i 84, 91, 947 P.2d 952, 959 (1997). In Ditto, the court cited Calleon v. Miyagi, 76 Hawai'i 310, 315, 876 P.2d 1278, 1283 (1994). Although in Calleon, the court stated and applied The Rule, it vacated the relevant part of the judgment and remanded for a new trial.

In Calleon, the court cited Quedding v. Arisumi Bros. Inc., 66 Haw. 335, 340, 661 P.2d 706, 710 (1983). Although in Quedding the court stated and applied The Rule, it vacated the relevant part of the judgment and remanded for a new trial.

In Quedding, the court cited Turner v. Willis, 59 Haw. 319, 326, 582 P.2d 710, 715 (1978). In Turner, the court stated and applied The Rule and decided: "[W]e reverse and remand this case for new trial." Id., at 326, 582 P.2d at 715 (footnote omitted).

In Turner, the court cited City and County of Honolulu v. Bennett, 57 Haw. 195, 206, 552 P.2d 1380, 1388 (1976). In Bennett, the court stated and applied The Rule and decided: "[W]e reverse and remand for a new trial[.]" Id.

In Bennett, the court cited Gelber v. Sheraton-Hawaii Corp., 49 Haw. 327, 330-31, 417 P.2d 638, 640 (1966). In Gelber,

the court stated and applied The Rule and then decided:

"Reversed and remanded for a new trial."

The more relevant authority for the appropriateness of this court's disposition of Kazmar's case are the following two cases.

The first case is State v. Kupau cited above. In Kupau, an erroneously given included offense instruction resulted in the vacating of the judgment and a remand for a new trial.

The second case is State v. Jenkins, 93 Hawai'i 87, 997 P.2d 13 (2000). In Jenkins, the court stated and applied The Rule and then vacated the judgment and remanded for a new trial.

Obviously, as used in The Rule cited by Kazmar, the word "reversal" pertains not to the judgment but to the trial court's decision(s) regarding the jury instruction(s). The fact that the court gave a non-harmless erroneous instruction in a case does not result in a judgment for the defendant. It results in the vacating of the judgment and a new trial.

On the motion:

John R. Remis, Jr.,  
for Defendant-Appellant.

Chief Judge

Associate Judge

Associate Judge