

DISSENTING OPINION BY ACOBA, J.,  
WITH WHOM DUFFY, J., JOINS

I respectfully dissent and would uphold the majority opinion of the Intermediate Court of Appeals and the decision of the circuit court judge. In its appeal and its application for certiorari, Petitioner/Plaintiff-Appellant State of Hawai'i (the prosecution) challenges only the suppression of the responses of Respondent/Defendant-Appellee Lorna Alvarez (Respondent) to questioning by Detective Evangelista.<sup>1</sup>

According to the undisputed findings of the court, (1) "Detective Evangelista, acting upon the [undisclosed] information he had, gathered six other officers to proceed to [Respondent's] home to seek Dion Alvarez" who was "wanted for a felony"; (2) when the police arrived at Respondent's home they "surrounded it"; "[t]hree officers covered the back, officers were on either side and two officers approached the front of the home"; (3) they had neither an arrest warrant or search warrant, (4) "[a]ll officers were armed"; (5) "[a]ll officers were either in uniform or clearly identified as police"; (6) "Officer Feliciano and another uniformed officer knocked on [Respondent's] door"; (7) "Officer Feliciano asked [Respondent] if [her son,] Dion Alvarez was there; [Respondent] responded . . . 'No, he not here, rumors were he was in Puna'"; (8) Officer Feliciano requested permission to enter the home and [Respondent] refused

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<sup>1</sup> The responses of Respondent to Officer Feliciano were not suppressed.

entry"; (9) Officer Feliciano informed Detective Evangelista of . . . his conversation with [Respondent]"; (10) "Detective Evangelista went to the porch area and was standing near the front door; [a]nother uniformed officer was . . . on the steps leading to the porch"; (11) "[Respondent] was requested by Detective Evangelista to come out of the house on to the front porch"; (12) "Detective Evangelista . . . questioned [Respondent] about Dion Alvarez"; (13) "During the questioning of [Respondent], Detective [Evangelista] told [Respondent] that if he had to seek a search warrant and Dion was found in [Respondent's] home, [Respondent] could be arrested for Hindering Prosecution." (Capitalization omitted.)

The majority states, "At the times Officer Feliciano questioned [Respondent] and [Detective] Evangelista first reiterated the same questions, [Respondent] was neither in custody nor interrogated." SDO at 3 (emphases added). But Miranda is not limited to instances where a person "is taken into custody," but also extends to instances in which "a person . . . has been . . . otherwise deprived of his or her freedom of action in any significant way." Miranda v. Arizona, 384 U.S. 436, 444 (1966) (emphasis added). It is apparent based upon the circumstances found by the circuit court that Respondent was deprived of her freedom in a significant way. Cf. State v. Quino, 74 Haw. 161, 172-73, 840 P.2d 358, 363-64 (1992) (holding that a person is seized within the meaning of article I, section 7 of the Hawai'i Constitution when questioning during a stop


ceases to be conversational and becomes intrusive and accusatory in nature).

And interrogation consists of express questioning or words reasonably likely to elicit an incriminating response. See Rhode Island v. Innis, 446 U.S. 291, 300-01 (1980) (concluding that "the term 'interrogation' under Miranda refers not only to express questioning, but also to any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect"). Plainly there was express questioning by Detective Evangelista. Assuming the relevance of his information, his suspicion that Dion was on the premises, and Respondent's prior denial of Dion's presence, Detective Evangelista's repetition of Office Feliciano's questions was reasonably likely to elicit an incriminating response. That Detective Evangelista should have known this was confirmed by his follow-up threat to prosecute Respondent if her refusal to allow a search of the premises produced Dion.

In concluding that "[Respondent's] statement in [finding] No. 34 that 'No, you can't come into my house. He's not here. He's in Puna,' was erroneously suppressed[,] " SDO at 4, the majority focuses on the fact that Respondent's second denial did not follow, but preceded Detective Evangelista's coercive warning that he would prosecute Respondent if Dion was discovered on the premises. In doing so the majority fails to adhere to an objective view of the total circumstances test that

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it purports to apply from State v. Ketchum, 97 Hawai'i 107, 119, 34 P.3d 1006, 1018 (2001) (explaining that the determination of whether a police officer has subjected a person to interrogation is objectively assessed under "the totality of the circumstances" including factors such as "the conduct of the police, the nature of the questions asked, and any other relevant circumstance"). For in light of Detective Evangelista's prior "discussion with [Respondent] at her residence during which he informed [Respondent] that her son was wanted . . . and that it was best if he turned himself in to the police . . . [and inquiry of whether] her son had contacted her[,]"" the display of police force, the encirclement of Respondent's home by the police, and Officer Feliciano's prior questioning of Respondent, Detective Evangelista's subsequent repetition of the same questions asked by Officer Feliciano, can only be viewed objectively as conveying disbelief and rejection of her responses to Officer Feliciano. Under the circumstances, then, viewed in toto, Detective Evangelista's questioning extended beyond the so called brief confirmation of or attempt to dispel reasonable suspicion approved in Ketchum, but rather, police questioning had become sustained and coercive so as to require the giving of Miranda warnings. Id. at 123, 34 P.3d at 1022.

  
Kamea E. Duggan, Jr.