DISSENT BY ACOBA, J., WITH WHOM DUFFY, J., JOINS

Because to do otherwise would sustain what appears to be a great injustice, I would accept the petition for writ of certiorari filed by Petitioner/Plaintiff-Appellant/Cross-Appellee Esther R. DeCambra, Individually, and as Special Administrator of the Estates of Carla Jean Russell, deceased, and Rachel Elma DeCambra, deceased, (Petitioner) on July 30, 2008.

The Application states that "[Petitioner's] mother Carla Russell [(Russell)] and sister Rachel DeCambra [(DeCambra) [collectively, the victims] were murdered in their Hilo home on September 29, 1996. Russell's estranged ex-husband, [Respondent/Defendant-Appellee/Cross-Appellant Tetsuya Yamada (Respondent)], who lived next door to the victims with his wife[, Respondent/Defendant-Appellee Regina Puanani Haaheo Haili (Haili)], was arrested at the scene holding the murder weapon."

In relevant part Petitioner's first amended complaint alleged alternatively against Respondent that:

> 12. . . .[Respondent] . . . unlawfully threatened to shoot and did shoot [Russell] and [DeCambra] with a shotgun.
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> . . . .
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> 33. . . . [Respondent] and Haili maliciously conspired together with the intent to assault, batter, kill or otherwise injure [Russell] and [DeCambra].
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> . . . .
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> 49. In the event [Respondent's] claim that Haili killed [Russell] and [DeCambra] is true, [Respondent] owed a duty of care to [Russell] and [DeCambra.]

(Emphases added.) Respondent's answer alleged "that Haili killed [Russell] and [DeCambra.]" Respondent's cross-claim stated in pertinent part that "[t]he gunshots were by [Haili]; she acted alone, not with [Respondent.]" Despite allegations and evidence

pointing to one or both of Respondent and Haili as the murderers, "[t]he jury . . . answered 'no' to questions 1, 2, 8 and 9 [of the verdict form], finding that neither [Respondent] nor Haili had killed the victims."

Petitioner filed a motion for new trial on July 31, 2006. However, on September 5, 2006, the court denied the motion.

Petitioner lists the following questions in her Application:

> 1. Whether [the court] committed plain error by submitting a special verdict form that allowed the jury to exonerate both [Respondent] and [Haili] for the September 29, 1996 shotgun murders of [Petitioner's] mother and sister, when the evidence and claims presented at trial showed that the only possible perpetrator was either [Petitioner] or Haili.
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> 2. Whether [the court] abused its discretion when it denied [Petitioner's] motion for new trial which asserted that the special verdict was inherently inconsistent and against the substantial weight of the evidence.

(Emphases added.)

As to the first question, Petitioner maintains that "[c]ontrary to the jury's answers to the special verdict form's questions, the evidence and claims presented at trial showed that the only possible perpetrator of these murders was either [Respondent] or Haili, and no one else." (Emphasis in original.) Petitioner cites to the dissenting opinion of Chief Judge Recktenwald "that 'the special verdict was against the substantial weight of the evidence, . . . '" including, in relevant part, the following from that dissent:

> The jury here found that neither [Respondent] nor Haili murdered the victims. However, that conclusion is clearly against the manifest weight of the evidence presented at

> trial, which established that at least one of them had committed the murders. Indeed, neither [Petitioner] nor [Respondent] even suggested in closing argument that anyone else had committed the murders.

(Quoting SDO dissent at 4.) (Emphasis added.)

In applying Hawai'i Revised Statutes (HRS) § 635-56 (1993)[1] and Hawai'i Rules of Civil Procedure (HRCP) Rule 59 relating to new trials,[2] this court reviews a trial court's grant or denial of a motion for new trial based on the following standard:

> Both the grant and the denial of a motion for new trial is within the trial court's discretion, and we will not reverse that decision absent a clear abuse of discretion. An abuse of discretion occurs where the trial court has clearly exceeded the bounds of reason or disregarded rules or principles of law or practice to the substantial detriment of a party litigant.

Carr v. Strode, 79 Hawai'i 475, 488, 904 P.2d 489, 502 (1995) (internal quotation marks and citation omitted).

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[1] HRS § 635-56 reads:

> **Grounds for new trial.** In any civil case or in any criminal case wherein a verdict of guilty has been rendered, the court may set aside the verdict when it appears to be so manifestly against the weight of the evidence as to indicate bias, prejudice, passion, or misunderstanding of the charge of the court on the part of the jury; or the court may in any civil or criminal case grant a new trial for any legal cause.

(Boldfaced font in original.) (Emphasis added.)

[2] HRCP Rule 59 reads, in pertinent part:

> **New trials; amendments of judgments.**
>
> (a) Grounds. A new trial may be granted to all or any of the parties and on all or part of the issues (1) in an action in which there has been a trial by jury, for any of the reasons for which new trials have heretofore been granted in actions at law in the courts of the State . . . .
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> . . . .
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> (d) On court's initiative; notice; specifying grounds. No later than 10 days after entry of judgment the court, on its own, may order a new trial for any reason that would justify granting one on a party's motion. . . .

(Boldfaced font in original.) (Some emphases in original and some added.)

Aside from the verdict being against the manifest weight of the evidence, new trials may also be granted for "any legal cause." HRS § 635-56. This court has affirmed or granted new trials on grounds other than that a verdict is contrary to the manifest weight of the evidence.[3] New trials have also been granted "for any of the reasons for which new trials have heretofore been granted." HRCP Rule 59. Thus, it appears that the court's discretion to grant a new trial is not limited to instances where the verdict is against the manifest weight of the evidence but, rather, extends to any circumstances where the verdict is legally or factually incorrect, thereby rendering it unjust. Other jurisdictions have allowed for a new trial after an "unjust" verdict.[4]

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[3] See State v. Espiritu, 117 Hawai'i 127, 143, 176 P.3d 885, 901 (2008) (granting new trial where prosecutor made misstatements of law that were not corrected by the court); State v. Eberly, 107 Hawai'i 239, 251, 112 P.3d 725, 737 (2005) (granting new trial where jury was improperly instructed regarding the burden of proof related to the mistake-of-fact defense); Doe v. Doe, 98 Hawai'i 144, 156, 44 P.3d 1085, 1097 (2002) (granting new trial where the family court failed to find apply the "good cause" standard to reopen custody hearing when confronted with evidence that supported allegations that the custodial parent was abusive).

[4] See Jackson Nat. Life Ins. Co. v. Snead, 499 S.E.2d 173, 176 (Ga. Ct. App. 1998) (upholding the grant of new trial "on the general grounds 'to correct what it considers to be an unfair and unjust verdict' and 'to accomplish justice'" (emphasis added)); Guidry v. Winn-Dixie of La., Inc., 546 So.2d 1326, 1331 (La. Ct. App. 1989) (explaining that "granting a motion for a new trial merely gives the party an opportunity to present evidence to a second jury, since the first jury has returned an unauthorized or unjust verdict" (emphasis added) (internal quotation marks and citation omitted)); Canadian Nat'l/Ill. Cent. R. Co. v. Hall, 953 So.2d 1084, 1093 (Miss. 2007) (holding that "a new trial becomes appropriate when a trial court determines that error within the trial mechanism itself has caused a legally incorrect or unjust verdict to be rendered" (emphasis added) (internal quotation marks and citation omitted)).

Respectfully, in my view, the court erred in denying the motion for a new trial. With all due respect, it is no answer, as the ICA majority maintained, that "it was possible that there was both no preponderance of the evidence that [Respondent] killed the victims and no preponderance of the evidence that Haili did so." SDO at 4 (emphasis added). It is undisputed that Petitioner's decedents were murdered and that the evidence indicated that Respondent and/or Haili committed the murders. There was no evidence that anyone else committed the murders and no such claim was made by the parties. While there were contending claims between Petitioner and Respondent as to who killed Petitioner's decedents, "there is no evidence which would exonerate both defendants." Salvio v. Musgrave, 214 A.2d 226, 227 (Pa. 1965) (emphasis in original). There is a paucity of authority regarding the course that should be taken by a court in such a situation. As cited by the ICA dissent, the Pennsylvania cases appear to be the only authoritative pronouncement bearing on this issue and the rationale adopted in Pennsylvania is relevant and persuasive.

In Salvio, cited by Petitioner and the ICA dissent, an injured passenger, Salvio, sued the oncoming driver who in turn sued Salvio's driver. Id. The jury returned a verdict against Salvio and in favor of both defendants. Id. On appeal, the Supreme Court of Pennsylvania ordered a new trial. Id. The Salvio court noted that the "[t]rial [j]udge's sense of justice

was understandably shaken by the verdict [as] he declared: 'The injustice of these verdicts is apparent and shocks one's fundamental sense of justice and cannot be permitted to stand.'" Id. The trial court's ruling ordering a new trial was affirmed. The Salvio court apparently concurred with the trial court judge's assessment that "the 'divergence in testimony was on the question of which defendant was negligent, not that neither defendant was negligent.'" Id. (emphasis in original).[5] Such is the case here.

In light of the foregoing proposition, the ICA majority's view that there was not a preponderance of the evidence as to who committed the murders merely reflects that the jury failed to find fault. According to the ICA majority, there was substantial evidence that neither had done so. "Substantial evidence means credible evidence which is of sufficient quality and probative value to enable a person of reasonable caution to reach a conclusion." Wilton v. State, 116 Hawai'i 106, 110, 170 P.3d 357, 361 (2007) (quoting State v. Bui, 104 Hawai'i 462, 467, 92 P.3d 471, 476 (2004) (internal quotation marks omitted)). But as pointed out by the dissent, there was substantial evidence that either Respondent and/or Haili had committed the murders which would have supported a verdict against at least one of them. Neither Petitioner nor Respondent takes issue with the evidence at trial as set forth in the ICA dissent.

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[5] In contrast to the instant case, in Salvio, the trial court had granted a new trial.

Moreover, in closing argument Petitioner told the jury that the evidence showed Respondent had caused the death of the victims. Correspondingly, in closing argument Respondent told the jury that Haili had caused the death of the victims, asserting that, "I say that it's time for you to answer the questions that [Haili] shot 'em, both [Russell] and [DeCambra]. And [Respondent] was not in conspiracy with them -- with her." Thus, in rendering no verdict against either or both of Respondent and Haili, it appears the jury simply failed to decide the issues before it.

> Were the jury to have resolved the liability against either one of these defendants one could observe that the jury had resolved the conflict in testimony that appeared before them. Where, however, as here, the jury has exonerated both defendants it is manifestly clear that the jury simply disregard [sic] or misunderstood its duty or the issues presented for their decision[.]

Salvio, 214 A.2d at 227 (internal quotation marks omitted) (emphasis added). As in Salvio, it appears the jurors failed to "resolve[] the conflict in testimony that appeared before them." Id. Hence, it should be "manifestly clear that the jury . . . misunderstood its duty or the issues presented for their [sic] decision[.]" Id.

In the instant case the jury, in effect, rendered no verdict and left the issues that had been presented to it unanswered, and the dispute in the same position as it had been prior to trial. However, as observed in Salvio, "[p]laintiffs have a right to a day in court before a jury which will hear and

evaluate the testimony and decide the issues presented for decision under the law submitted to them." Id. (internal quotation marks omitted). There was evidence which would lead a reasonably prudent and cautious person to conclude that one or both of Respondent and Haili committed the murders inasmuch as no other mechanism for the deaths was suggested in the evidence, arguments, and instructions.

In this case, the jury did not indicate it was "hung," i.e., that it could not reach a verdict as to the liability of either Respondent or Haili, although it did make an inquiry of the court as to "at what point will a hung jury be decided."[6] Accordingly, the jury was duty bound to render a verdict based on the verdict form given it. But its verdict was the functional equivalent of a hung verdict. Under such circumstances, as Salvio stated, "our only method of rectifying such a grave

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[6] It is observed that Communication No. 3 from the jury to the court stated:

> At what point will a hung jury be declared?
>
> [Undecipherable] — Foreperson
> 1615 12/15/05 — Date & Time
>
> MESSAGE TO THE JURY:
>
> There is no specific timeframe in which a jury has to reach a verdict.
>
> [Undecipherable] — Judge of the above-entitled Court
> 12/15/05, 4:35 p.m. — Date & Time

Communication No. 3 and the court's response were not mentioned or argued in the briefs, the ICA opinion, or the application.

miscarriage of justice is to grant a new trial against both the original defendant and the additional defendant." 214 A.2d at 227 (internal quotation marks omitted).

Weinstein v. Philadelphia Transp. Co., 295 A.2d 111 (Pa. Super. Ct. 1972), and Fair v. Snowball Express, Inc., 310 A.2d 386 (Pa. Super. Ct. 1973), held similarly. Fair, relying on Weinstein and Salvio, noted that:

> It is very difficult from the evidence presented in this case to decide who was negligent. However, the difficulty of such a decision does not justify the jury's avoiding it completely by finding for all of the defendants, when such a finding cannot be supported by the record. The Court in Salvio faced this issue of a jury's dereliction of duty[.]

Id. at 389 (emphasis added). The Pennsylvania cases set forth a cohesive rationale for the issue at hand, on the ground that in failing to resolve contending evidence, the jury misunderstood its duty or the issues for decision. It would appear evident that the verdict was against the manifest weight of the evidence, taking the evidence as a whole, insofar as no fault was found. The immutable fact is that either Respondent or Haili, or both committed the murders. In the face of this the jury's verdict ignored such evidence, because its ultimate outcome was to negate liability in any circumstance, a manifest impossibility.

Thomas E. Dubbs, Jr.