CHAPTER 701
PRELIMINARY PROVISIONS

Section

Note

L 2001, c 91, §4 purports to amend this chapter.

" **§701-100 Title and effective date of amendments.** Title 37 shall be known as the Hawaii Penal Code. Amendments made to this Code by Act 314, Session Laws of Hawaii 1986, shall become effective on January 1, 1987. [L 1972, c 9, pt of §1; am L 1986, c 314, pt of §1]

COMMENTARY ON §701-100

The purpose of this Code is to codify the major part of Hawaii's penal law. The law has never before been completely codified. Judicial construction has been relied on to supply definitions, defenses, and general principles of penal liability. The statutory law, dating from time long past, uses language which is now obscure or mysterious. Unmeritorious defenses have been allowed because of the law's incompleteness, and some persons have escaped punishment because some new variation of criminal conduct is not defined as a crime. On the other hand, certain acts are defined as crimes which are not considered criminal today by a great majority of the people. This Code corrects these defects in the law, while putting it in a more rational and accessible form.

SUPPLEMENTAL COMMENTARY ON §701-100

Act 314, Session Laws 1986, provided that that Act's amendments to the Code take effect on January 1, 1987. By delaying the effective date of the amendments, the legislature intended to give criminal justice agencies time to determine how the amendments will affect them and to make provisions for the changes. Conference Committee Report No. 51-86.

" **§701-101 Applicability to offenses committed before the effective date of amendments.** (1) Except as provided in subsection (2), amendments made by Act 314, Session Laws of Hawaii 1986, to this Code do not apply to offenses committed before the effective date of Act 314, Session Laws of Hawaii 1986. Prosecutions for offenses committed before the effective date of Act 314, Session Laws of Hawaii 1986, are governed by the prior law, which is continued in effect for that purpose, as if amendments made by Act 314, Session Laws of Hawaii 1986, to this Code were not in force. For purposes of this section, an offense is committed before the effective date of Act 314,

Session Laws of Hawaii 1986, if any of the elements of the offense occurred before that date.

(2) In any case pending on or commenced after the effective date of amendments made by Act 314, Session Laws of Hawaii 1986, to this Code, involving an offense committed before that date upon the request of the defendant, and subject to the approval of the court, the provisions of chapter 706 amended by Act 314, Session Laws of Hawaii 1986, may be applied in particular cases. [L 1972, c 9, pt of §1; am L 1986, c 314, pt of §1]

Revision Note

Reference to subsection (3) in subsection (1) deleted.

Cross References

Application of the Penal Code to persons sentenced prior to its effective date, see L 1975, c 188.

COMMENTARY ON §701-101

In general this Code does not apply to offenses committed before its effective date. Subsection (1) contains a saving clause which keeps the prior law in effect to cover offenses committed prior to the effective date.

Subsection (2) permits, in trials after the effective date of the Code, limited exceptions to the foregoing general rule. Subsection (2)(a) provides, upon request of the defendant, that defenses and mitigations under the new Code shall apply in trials of offenses committed prior to its effective date. The policy behind this provision is humanitarian. In enacting a defense, or in omitting from the Code an offense defined in previous law, the legislature will have determined that certain conduct is not criminal, or is justifiable or excusable. That conduct should not be penalized after such a decision is made even though technically it occurred before the effective date of the decision. This is, of course, quite a different matter from enacting retroactive offenses, which would be unconstitutional. Subsection (2)(b) covers two points. First it provides that, upon the request of the defendant and the approval of the court, the procedural provisions of the Code shall apply to prior offenses. These would include provisions on burden of proof and the procedures provided in chapter 704 relating to a determination of fitness to proceed and penal responsibility. Finally, the subsection permits use of the new sentencing provisions of this Code for offenses committed before the

effective date. Again, the rationale is that defendants ought to be allowed the advantage of the new Code's more enlightened sentencing provisions in light of a legislative determination that they are preferable to the old.

Subsection (3) applies the provisions of this Code to release and discharge of prisoners and to probation of persons sentenced for crimes committed before its effective date. Any other rule would create great administrative difficulties. The subsection specifies, however, that minimum and maximum periods shall not be increased. It also makes clear that the Code may not be used to attack the procedural or substantive validity of any judgment of conviction entered prior to the effective date of the Code, regardless of the fact that appeal time has not run or that an appeal is pending. If prior convictions were to be opened to attack on the basis of the Code, an intolerable burden would be placed on the prosecution and the courts.

SUPPLEMENTAL COMMENTARY ON §701-101

Act 314, Session Laws 1986, provided that that Act's amendments to the Code take effect on January 1, 1987. By delaying the effective date of the amendments, the legislature intended to give criminal justice agencies time to determine how the amendments will affect them and to make provisions for the changes. Conference Committee Report No. 51-86.

Case Notes

"Applicable offense" in subsection 2(a) construed. 56 H. 129, 531 P.2d 855 (1975).

Subparagraph (2)(b)(ii) does not grant authority to alter sentences imposed under pre-Hawaii Penal Code. 60 H. 309, 588 P.2d 927 (1979).

Language of subsection (1) means that all elements necessary to prove a crime charged under Penal Code must be shown to have occurred after its effective date. 62 H. 364, 616 P.2d 193 (1980).

State may prosecute welfare fraud defendant under an indictment which covers only part of the duration of a continuing offense. 62 H. 364, 616 P.2d 193 (1980).

Section 701-108(6)(a) does not apply as a "defense" for purposes of subsection (2). 62 H. 474, 617 P.2d 84 (1980).

" **§701-102 All offenses defined by statute; applicability to offenses committed after the effective date.** (1) No behavior constitutes an offense unless it is a crime or violation under this Code or another statute of this State.

(2) The provisions of this Code govern the construction of and punishment for any offense set forth herein committed after the effective date, as well as the construction and application of any defense to a prosecution for such an offense.

(3) The provisions of chapters 701 through 706 of the Code are applicable to offenses defined by other statutes, unless the Code otherwise provides. [L 1972, c 9, pt of §1]

COMMENTARY ON §701-102

There are no common-law offenses in Hawaii, although Hawaii has to some extent adopted the common law of England.

> The common law of England, as ascertained by English and American decisions, is declared to be the common law of the State of Hawaii in all cases, except as otherwise expressly provided by the Constitution or laws of the United States, or by the laws of the State, or fixed by Hawaiian judicial precedent, or established by Hawaiian usage; *provided, that no person shall be subject to criminal proceedings except as provided by the written laws of the United States or of the State.*[1]

In Territory v. Rogers,[2] the court noted in passing that there are no common-law offenses in Hawaii.

Despite these clear rules, it appears wise to enact specifically that no behavior is penal unless it is made so by this Code or by another statute. That all offenses should be adequately proscribed by statute seems at this point of legal development a dictate of fundamental fairness.

Subsection (2) makes it clear that on the effective date this Code shall become the penal law of this State, and thereafter shall govern both the definitions (construction) and punishment of all offenses defined in the Code, and the defenses to those offenses.

Subsection (3) holds that all of the general provisions (chapters 701 to 706) of the Code are applicable to all offenses defined by other statutes. The purpose is to bring uniformity to the area of non-Code statutory offenses. One result of this rule will be to make defenses defined by the Code generally available. The Code's definitions of state of mind requirements will also be applicable, as will the general principles of construction, time limitations, and res judicata provisions.

Case Notes

Criminal statutes must be reasonably certain and definite to give notice of required conduct. 56 H. 481, 541 P.2d 1020 (1975).

No common-law offenses in this jurisdiction, and the applicable statute or ordinance itself must provide a penalty. 62 H. 656, 619 P.2d 93 (1980).

No offense of "murder for hire". 3 H. App. 107, 643 P.2d 807 (1982).

§701-102 Commentary:

1. H.R.S. §1-1. (Emphasis added.)

2. 37 Haw. 566 (1947).

" **§701-103 Purposes of this Code.** The purposes of this Code are to codify the general principles of the penal law and to define and codify certain specific offenses which constitute harms to basic social interests which the Code seeks to protect. [L 1972, c 9, pt of §1]

COMMENTARY ON §701-103

This section states the general purposes of the Code which are twofold. First, the Code defines the general principles of the penal law, including those principles relating to liability, justification, responsibility, inchoate behavior, and disposition of convicted defendants. Many of these basic principles are not presently defined in the statutory law and depend, for recognition and development, on decisional law. Secondly, the Code undertakes to codify a major portion of the penal law by defining and codifying the bulk of those specific offenses which constitute harms to social interests which the law in general and this Code in particular seek to protect: i.e., offenses against the person, property rights, the family and incompetents, public administration, public order, and public health and morals. In this respect the purpose of the Code is not different than that of existing law; however, the Code, unlike present law, reflects this purpose in its organization: the definition of offenses in chapters 707 through 712 are arranged according to the social interest offended, rather than in a somewhat alphabetical fashion as was the case in the former Title 38, now repealed.

" **§701-104 Principles of construction.** The provisions of this Code cannot be extended by analogy so as to create crimes not provided for herein; however, in order to promote justice and effect the objects of the law, all of its provisions shall be given a genuine construction, according to the fair import of

the words, taken in their usual sense, in connection with the context, and with reference to the purpose of the provision. [L 1972, c 9, pt of §1]

COMMENTARY ON §701-104

This section, read in conjunction with §701-103, is intended to assure that this Code will be construed by the courts in such a way as to effectuate the declared purposes of the law.

SUPPLEMENTAL COMMENTARY ON §701-104

Section 104 of the Proposed Draft of the Code read: "The rule that a penal statute is to be strictly construed does not apply to this Code, but the provisions herein must be construed according to the fair import of their terms." The legislature found that such broad wording would subject the Code to unwarranted argument and attempted to avoid this possibility by revising the entire section. Through the section, as enacted, the legislature sought to limit the scope of the fair import principle. See Conference Committee Report No. 2 (1972). The committee report also states: "It is the intent of the Committee that definitions of crimes are to be strictly construed."

Case Notes

In Coray v. Ariyoshi, 54 H. 254, 506 P.2d 13 (1973), and State v. Rackle, 55 H. 531, 523 P.2d 299 (1974), the court reiterated without discussion the doctrine of strict construction. The offenses in each case occurred prior to enactment of the Code.

Where words of general description follow enumeration of specific things, the words are restricted to like objects. 56 H. 481, 541 P.2d 1020 (1975).

Rule of strict construction does not override other fundamental rules of construction. 59 H. 456, 583 P.2d 337 (1978).

Proscription of distribution of lysergic acid "diethylamine" under §329-14 (1974) cannot be extended by analogy to distribution of lysergic acid diethylamide. 61 H. 74, 595 P.2d 288 (1979).

Cited in construing "accident". 1 H. App. 625, 623 P.2d 1271 (1981).

Cited in construing "possession". 8 H. App. 610, 822 P.2d 23 (1991).

" **§701-105 Effect of commentary.** The commentary accompanying this Code shall be published and may be used as an aid in understanding the provisions of this Code, but not as evidence of legislative intent. [L 1972, c 9, pt of §1; am L 1975, c 163, §8; am L 1986, c 314, §2]

COMMENTARY ON §701-105

Section 105 of the Proposed Draft of the Code provided: "The commentary accompanying this Code shall be published with the Code and may be used as evidence of legislative intent and as an aid in construing the provisions of this Code in the event of ambiguity."

In considering the initial draft of §105, the legislature concluded that the commentary, as revised to reflect legislative changes, should be published as aid to the bench, bar, and others charged with the administration of justice in criminal cases. However, in view of the strong judicial deference given legislative committee reports and other evidence of legislative intent authored by the legislature or its staff, the legislature refrained from adopting the initial commentary accompanying the Judicial Council's Proposed Draft and according it the same status as a legislative work product.

The Commentary and Supplemental Commentary on the Code are intended to explain the provisions of the Code. The Supplemental Commentary attempts to explain the changes that were made by the legislature to the Proposed Draft of the Hawaii Penal Code (1970) which was prepared under the auspices of the Judicial Council of Hawaii. It also deals with subsequent legislative changes in 1973, 1974 and 1975. The commentaries are designed to give the reader a better understanding of the provisions of the Code. Together they provide an explanation of the considerations involved in the drafting of various sections of the Code. The commentaries also point out the treatment in the Model Penal Code and certain state revisions of provisions the same as or similar to those contained in the Hawaii Penal Code. Finally, the commentaries explain the changes to previous Hawaii law which are brought about by the new Code.

Act 163, Session Laws 1975, amended the section by deleting the requirement that the commentary be published with the Code. The Revisor of Statutes was authorized to publish the commentary in any manner the Revisor deemed would "promote its basic purpose [as an] aid in understanding the provisions of the Code." Conference Committee Report No. 19.

Case Notes

As an example of judicial use of the Commentary to this Code, see State v. Nobriga, 56 H. 75, 527 P.2d 1269 (1974), a case in which the court was called upon to interpret certain sentencing provisions of chapter 706. The court said that, as the forerunner of the Code, the Commentary to the Hawaii Penal Code (Proposed Draft) (1970) "sheds some light on the purpose underlying the provision even though it was not intended to be a definitive statement of legislative intent." In using the Commentary as an aid in reaching its conclusion, the court said: "Although it is not considered evidence of legislative intent, we look to the Commentary pertaining to the pre-sentence investigation section in the Penal Code for some understanding of what that section was designed to achieve."

Commentary, while not evidence thereof, is expressive of legislative intent. 57 H. 418, 558 P.2d 1012 (1976).

Commentary may be used as aid in understanding the code. 59 H. 92, 576 P.2d 1044 (1978).

Commentary can be looked to as an aid in interpreting the statutory provisions. 61 H. 531, 606 P.2d 920 (1980).

" **§701-106 Territorial applicability.** (1) Except as otherwise provided in this section, a person may be convicted under the law of this State of an offense committed by the person's own conduct or the conduct of another for which the person is legally accountable if:

(a) Either the conduct or the result which is an element of the offense occurs within this State;

(b) Conduct occurring outside the State is sufficient under the law of this State to constitute an attempt to commit an offense within the State;

(c) Conduct occurring outside the State is sufficient under the law of this State to constitute a conspiracy to commit an offense within the State and an overt act in furtherance of such conspiracy occurs within the State;

(d) Conduct occurring within the State establishes complicity in the commission of, or an attempt, solicitation, or conspiracy to commit, an offense in another jurisdiction which also is an offense under the law of this State;

(e) The offense consists of the omission, while within or outside this State to perform a legal duty imposed by the law of this State with respect to domicile, residence, or a relationship to a person, thing, or transaction in the State; or

(f) The offense is based on a statute of this State which expressly prohibits conduct outside the State, when

the conduct bears a reasonable relation to a legitimate interest of this State and the actor knows that the actor's conduct is likely to affect that interest.

(2) Subsection (1)(a) does not apply when a specified result, or conduct creating a risk of such a result, is an element of an offense and the result occurs, or is intended or is likely to occur, only in another jurisdiction where the conduct charged would not constitute an offense, unless a legislative purpose plainly appears to declare that the conduct constitutes an offense regardless of the place of the result.

(3) Subsection (1)(a) does not apply when a particular result is an element of an offense and the result is caused by conduct occurring outside the State which conduct would not constitute an offense if the result had occurred there, unless the actor intentionally or knowingly caused the result within the State.

(4) When the offense involves a homicide, either the death of the victim or the bodily impact causing death constitutes a "result", within the meaning of subsection (1)(a). If the body of a homicide victim is found within the State, it is prima facie evidence that the result occurred within the State.

(5) This State includes the land and water and the air space about the land and water with respect to which the State has legislative jurisdiction. [L 1972, c 9, pt of §1; gen ch 1993]

Revision Note

In subsection (1)(a), (b), (c), and (d), "or" deleted pursuant to §23G-15.

COMMENTARY ON §701-106

The intent of this section is to expand the penal jurisdiction of Hawaii's courts to the fullest extent possible, within the limits of fundamental fairness and constitutionality. (It does not govern the jurisdiction of individual courts.) The section therefore makes the penal law of this State applicable to conduct or results occurring within the State; to conduct within the State which establishes complicity in, or constitutes an attempt, solicitation, or conspiracy to commit, an offense in another jurisdiction which is also an offense under Hawaii law; and to a penal omission to perform a duty imposed by Hawaii law. Certain kinds of conduct occurring outside the State are also covered: conduct outside the State which is sufficient under this Code to constitute an attempt to commit an offense under

the laws of this State, conduct outside the State which is sufficient under this Code to constitute a conspiracy to commit a crime within the State (provided that an overt act in furtherance of the conspiracy occurs within the State), and conduct outside the State expressly prohibited by Hawaii law "when the conduct bears a reasonable relation to a legitimate interest of this State and the actor knows that the actor's conduct is likely to affect that interest."

Subsections (2) and (3) provide exceptions to the coverage of subsection (1). Subsection (2) excepts conduct which causes, or creates the risk of causing, a result in another jurisdiction where the conduct does not constitute an offense in the other jurisdiction, unless the statute clearly indicates a purpose to make the conduct penal regardless of the place of the result. Subsection (3) relieves the actor of criminality for a result occurring in this State if it is a result of conduct outside the State which would not have been an offense there, provided that the actor did not intentionally or knowingly cause the result within this State. Both subsections recognize that culpability does not exist in the situations described, and recognize that the actor probably intended to abide by the law of the other jurisdiction.

Subsection (4) provides a special rule for homicide cases, giving the State jurisdiction either when death occurs within the State or when the bodily impact causing death occurs within the State. It also establishes a rule that evidence that the body of a homicide victim is found within the State is prima facie evidence that either death or bodily impact causing death occurred within the State.

Subsection (5) is intended to encompass the entire territorial area over which the State has legislative jurisdiction.

The territorial applicability of the previous Hawaii penal law was defined by statute.[1] The penal liability of a person outside the State of Hawaii occurred:

> Where an act is done or a fact of effect takes place *within* the State, affecting the welfare of the State, or the personal safety, the property or rights of any of its inhabitants, being *within* the State, any person causing, procuring, machinating or promoting the same, or instigating another thereto, or aiding or assisting therein, is amenable to the laws of the State, *whether he be at the time within or without its limits*.[2]

Offenses partly within the State were also covered:

> Where the commission of an *offense commenced without* the State, *is consummated within* it, the offender is subject to be prosecuted and punished therefor in the State.[3]

The case law pertaining to territorial applicability upholds and supports the above statutes. In Territory v. Hart,[4] it was held that the trial court in Hawaii had jurisdiction over a defendant who cabled from Honolulu to New York directing a broker in New York to sell certain stock which was in the defendant's control for a client, the proceeds of which the defendant had embezzled. The controlling factor in the court's decision was that the crime had been commenced within Hawaii. In The King v. Chock Hoon,[5] it was held that the defendant was guilty of embezzlement within the Kingdom where the defendant received X's money for the purpose of delivering that money to X's mother in China, and having failed to deliver the money, refused to return the money to X after returning to the Kingdom from China.

Case Notes

For purposes of establishing subject matter jurisdiction, telephone call constitutes conduct in the jurisdiction in which the call is received. 72 H. 591, 825 P.2d 1062 (1992).

Circuit court had jurisdiction under subsection (1)(d) over defendant where defendant's call to Honolulu police department from mainland constituted overt act in Hawaii and co-defendant committed one act in furtherance of conspiracy by meeting in Honolulu with undercover agents to discuss drug transaction. 83 H. 187, 925 P.2d 357 (1996).

Where the State charged defendant based on defendant's conduct in Kona, county and State of Hawaii, defendant was subject to the State's criminal jurisdiction; defendant's apparent claim to be a citizen of the Hawaiian Kingdom and not of the State did not exempt defendant from application of the State's laws. 128 H. 479, 291 P.3d 377 (2013).

The State's criminal jurisdiction encompasses all areas within the territorial boundaries of the State of Hawaii. 105 H. 319 (App.), 97 P.3d 395 (2004).

Where a Hawaii county ordinance made the enforcement of marijuana laws the lowest enforcement priority in the county, the ordinance was preempted by state laws governing the investigation and prosecution of alleged violations of the Hawaii Penal Code concerning the adult personal use of cannabis. 132 H. 511 (App.), 323 P.3d 155 (2014).

§701-106 Commentary:

1. H.R.S. §§701-5, 701-6.

2. Id. §701-5 (emphasis added).

3. Id. §701-6 (emphasis added).

4. 24 Haw. 844 (1918).

5. 5 Haw. 372 (1885).

" **§701-107 Grades and classes of offenses.** (1) An offense defined by this Code or by any other statute of this State for which a sentence of imprisonment is authorized constitutes a crime. Crimes are of three grades: felonies, misdemeanors, and petty misdemeanors. Felonies include murder in the first and second degrees, attempted murder in the first and second degrees, and the following three classes: class A, class B, and class C.

(2) A crime is a felony if it is so designated in this Code or if persons convicted thereof may be sentenced to imprisonment for a term which is in excess of one year.

(3) A crime is a misdemeanor if it is so designated in this Code or in a statute other than this Code enacted subsequent thereto, or if it is defined in a statute other than this Code which provides for a term of imprisonment the maximum of which is one year.

(4) A crime is a petty misdemeanor if it is so designated in this Code or in a statute other than this Code enacted subsequent thereto, or if it is defined by a statute other than this Code that provides that persons convicted thereof may be sentenced to imprisonment for a term not to exceed thirty days.

(5) An offense defined by this Code or by any other statute of this State constitutes a violation if it is so designated in this Code or in the law defining the offense or if no other sentence than a fine, or fine and forfeiture or other civil penalty, is authorized upon conviction or if it is defined by a statute other than this Code which provides that the offense shall not constitute a crime. A violation does not constitute a crime, and conviction of a violation shall not give rise to any civil disability based on conviction of a criminal offense.

(6) Any offense declared by law to constitute a crime, without specification of the grade thereof or of the sentence authorized upon conviction, is a misdemeanor.

(7) An offense defined by any statute of this State other than this Code shall be classified as provided in this section and the sentence that may be imposed upon conviction thereof shall hereafter be governed by this Code. [L 1972, c 9, pt of §1; am L 1987, c 181, §1; am L 2005, c 18, §1]

Cross References

Authorized disposition of convicted defendants, see §706-605.
Classes of felonies, see §706-610.

COMMENTARY ON §701-107

This section makes it clear that the Code retains the ancient distinction between felonies and misdemeanors, which is important for many procedural purposes. Its main thrust, however, is to govern the classification of offenses defined outside the Code. Subsection (7) declares that all offenses are hereafter to be classified according to this section and punished in accordance with this Code. The purpose is to rationalize the often anomalous classification and punishment of offenses that appear in many parts of the statutory laws.

Hereafter an offense is a felony if it is so designated or if imprisonment for a term in excess of one year is possible. A crime is a misdemeanor if it is so designated in the Code or in a statute enacted after the Code or if it is defined in another statute which sets the maximum term of imprisonment at exactly one year. Other crimes are petty misdemeanors. This will have the effect of reducing the possible sentence for crimes defined in other statutes which provide now for imprisonment for periods ranging from 31 days to just under one year, because the maximum permissible period of imprisonment for a petty misdemeanor is 30 days. The alternative of making such offenses misdemeanors was rejected, because such a classification would in many cases have the undesirable effect of increasing the permissible punishment to one year, the Code's maximum for misdemeanors. However, subsection (6) makes it clear that where no specification of grade or punishment is made, but the offense is declared to be a crime, classification will be as a misdemeanor for purposes of sentencing under this Code.

Subsection (5) creates a class of non-criminal offenses, called violations. No imprisonment may follow conviction of a violation, nor may any civil disabilities be imposed. Classification as a violation would be appropriate for many sumptuary offenses and other offenses of strict liability.

SUPPLEMENTAL COMMENTARY ON §701-107

Act 181, Session Laws 1987, added language to this section to reflect the recently created statutory murder and attempted murder crimes. These crimes are murder in the first and second

degree and attempted murder in the first and second degree. Senate Standing Committee Report No. 1130.

Act 18, Session Laws 2005, amended this section to clearly define a petty misdemeanor as a criminal offense for which the maximum prison term is not to exceed thirty days. Act 18 addressed an inconsistency in the Penal Code with respect to the statutory definition of a petty misdemeanor and the maximum prison term that may be imposed for the conviction of a petty misdemeanor offense. Senate Standing Committee Report No. 1303.

Case Notes

Subsection (5) cited: 62 H. 222, 615 P.2d 730 (1980).

"Choice of evils" defense applies to violations. 9 H. App. 115, 826 P.2d 884 (1992).

Although a violation does not constitute a crime, it constitutes a penal offense and the legislature intended its penalties to be criminal penalties. 10 H. App. 220, 864 P.2d 1109 (1993).

Defendant did not have a constitutional right to a jury trial for a violation of §852-1, refusal to provide ingress or egress while walking a labor picket line, where the maximum punishment was thirty days in jail or a $200 fine, or both, and violation was thus a petty misdemeanor under subsection (4). 110 H. 139 (App.), 129 P.3d 1167 (2006).

Cited: 132 H. 36, 319 P.3d 1044 (2014).

" **§701-108 Time limitations.** (1) A prosecution for murder, murder in the first and second degrees, attempted murder, and attempted murder in the first and second degrees, criminal conspiracy to commit murder in any degree, criminal solicitation to commit murder in any degree, sexual assault in the first and second degrees, and continuous sexual assault of a minor under the age of fourteen years may be commenced at any time.

(2) Except as otherwise provided in this section, prosecutions for other offenses are subject to the following periods of limitation:

(a) A prosecution for manslaughter where the death was not caused by the operation of a motor vehicle must be commenced within ten years after it is committed;

(b) A prosecution for a class A felony must be commenced within six years after it is committed;

(c) A prosecution for any felony under part IX of chapter 708 must be commenced within five years after it is committed;

(d) A prosecution for any other felony must be commenced within three years after it is committed;

(e) A prosecution for a misdemeanor or parking violation must be commenced within two years after it is committed; and

(f) A prosecution for a petty misdemeanor or a violation other than a parking violation must be commenced within one year after it is committed.

(3) If the period prescribed in subsection (2) has expired, a prosecution may nevertheless be commenced for:

(a) Any offense an element of which is fraud, deception as defined in section 708-800, or a breach of fiduciary obligation or the offense of medical assistance fraud under section 346-43.5, within three years after discovery of the offense by an aggrieved party or by a person who has a legal duty to represent an aggrieved party and who is oneself not a party to the offense, but in no case shall this provision extend the period of limitation by more than six years from the expiration of the period of limitation prescribed in subsection (2);

(b) Any offense based on misconduct in office by a public officer or employee at any time when the defendant is in public office or employment or within two years thereafter, but in no case shall this provision extend the period of limitation by more than three years from the expiration of the period of limitation prescribed in subsection (2); and

(c) Any felony offense involving evidence containing deoxyribonucleic acid from the offender, if a test confirming the presence of deoxyribonucleic acid is performed prior to expiration of the period of limitation prescribed in subsection (2), but in no case shall this provision extend the period of limitation by more than ten years from the expiration of the period of limitation prescribed in subsection (2).

(4) An offense is committed either when every element occurs, or, if a legislative purpose to prohibit a continuing course of conduct plainly appears, at the time when the course of conduct or the defendant's complicity therein is terminated. Time starts to run on the day after the offense is committed.

(5) A prosecution is commenced either when an indictment is found or a complaint filed, or when an arrest warrant or other process is issued, provided that such warrant or process is executed without unreasonable delay.

(6) The period of limitation does not run:

(a) During any time when the accused is continuously absent from the State or has no reasonably

ascertainable place of abode or work within the State, but in no case shall this provision extend the period of limitation by more than four years from the expiration of the period of limitation prescribed in subsection (2);

(b) During any time when a prosecution against the accused for the same conduct is pending in this State; or

(c) For any felony offense under chapter 707, part V or VI, during any time when the victim is alive and under eighteen years of age. [L 1972, c 9, pt of §1; am L 1974, c 93, §1; am L 1982, c 28, §2; am L 1983, c 63, §1; am L 1986, c 296, §1; am L 1987, c 181, §2; am L 1993, c 186, §1; gen ch 1993; am L 1995, c 171, §1; am L 1996, c 148, §1; am L 1997, c 149, §1; am L 2001, c 33, §2; am L 2005, c 112, §2; am L 2006, c 99, §1; am L 2014, c 113, §1; am L 2016, c 94, §2]

Cross References

Elements of an offense, see §702-205.

COMMENTARY ON §701-108

Several important policies underlie the proposed statute of limitations. The most persuasive is the fact that after a certain time, evidence tending to prove or disprove criminal liability becomes stale. Witnesses die, move away, or forget; physical evidence disintegrates, and it becomes impossible to ascertain what actually happened. Statutes of limitations may also be viewed as statutes of repose. Even a person who has committed a penal act is entitled, after the passage of some time, to conduct the person's affairs on the assumption that they will not be disrupted by a prosecution. This is particularly true in the case of someone who has ceased to engage in penal activity and is leading a law-abiding life. These policies explain why, even when a time limitation is extended by one of the provisions in this section, an upper limit is set.

Subsection (1) follows previous Hawaii law in providing no time limitation on murder.[1] Here, the community's justifiable desire to require the murderer to pay for the murderer's act outweighs the policies discussed above.

Subsection (2) represents a change in the prior law. The limitation period was two years, but there were many statutory exceptions:

> No person shall be prosecuted for any offense under the laws of the State, except murder in the first and second

degrees, manslaughter, rape, assault with intent to ravish, carnal abuse of a minor under the age of twelve years, kidnapping, arson in the first and second degrees, burglary in the first and second degrees, forgery, robbery in the first and second degrees, larceny in the first degree, giving, promising or receiving a bribe, extortion in the first and second degrees, compounding an offense punishable by imprisonment for life, and embezzlement, unless the prosecution for the offense is commenced within two years next after the commission thereof. Nothing herein contained shall bar any prosecution against any person who flees from justice, or absents himself from the State, or so secretes himself that he cannot be found by the officers of the law, so that process cannot be served upon him.[2]

In accord with the policies articulated above, subsection (2) sets more realistic time limitations than prior law. For the most serious class of felonies, other than murder, a six-year period is set, while for the other classes of felonies, three years is deemed sufficient. Consistent with prior law, a two-year period is set for misdemeanors. Prosecution for petty misdemeanors and violations must be commenced within one year.

Subsection (3) seeks to identify situations in which the statute of limitations ought to be tolled. In the cases of fraud, breach of fiduciary obligation, and misconduct in public office, the difficulties of detecting the offense suggest that an extension of the normal time is required. Thus, in the case of fraud and breach of fiduciary obligation, a prosecution may be commenced within one year after discovery, and a prosecution for offenses relating to misconduct in office may be commenced at any time when the defendant is in public office, or within two years thereafter. In both cases, however, the applicable time limitation may not be extended by more than three years.

Subsection (4) defines the time at which an offense is to be considered as committed, and subsection (5) defines the time at which a prosecution is commenced. Subsection (6) tolls the statute of limitations for the period when the accused is continuously absent from the State or has no reasonably ascertainable place of abode therein. This continues the previous law. Note, however, that again the time period may not be extended by more than three years. This seems fair in light of procedures available for extradition. Subsection (6) also declares that the statute of limitations does not run during any time when a prosecution based on the same conduct is pending against the accused. This prevents any claim that the statute has run preventing retrial after reversal on appeal or dismissal for some reason which would not make retrial a matter of double jeopardy.

SUPPLEMENTAL COMMENTARY ON §701-108

Act 93, Session Laws 1974, amended subsection (2)(c) to include within the two-year time limitation period the commencement of a prosecution for a parking violation.

Act 28, Session Laws 1982, deleted from subsection (2), the reference to §707-740, a section repealed by Act 213, Session Laws 1981.

Act 63, Session Laws 1983, amended subsection (5) to allow prosecution to commence by the filing of a complaint, thereby conforming the section to the 1982 amendment to article I, §10 of the Hawaii State Constitution and to the procedure adopted by the state supreme court, which made the complaint the charging document following a preliminary hearing. Senate Standing Committee Report No. 349, House Standing Committee Report No. 757.

Act 296, Session Laws 1986, increased the limitations period from one to two years after discovery for offenses involving fraud or breach of fiduciary duty. Those cases are difficult to prosecute because misleading or fraudulent bookkeeping and records often hide criminal wrongdoing. The extended limitations period allows authorities more time to collect and analyze those records and documents to determine the nature and extent of criminal activity. Senate Standing Committee Report No. 1084-86.

Act 181, Session Laws 1987, added language to this section to reflect the recently created statutory murder and attempted murder crimes. These crimes are murder in the first and second degree and attempted murder in the first and second degree. Senate Standing Committee Report No. 1130.

Act 186, Session Laws 1993, amended this section to provide for a nonvehicular manslaughter limitations period of ten years. Conference Committee Report No. 67.

Act 171, Session Laws 1995, amended subsection (6) to toll the statute of limitations for bringing a prosecution regarding sexual offenses or child abuse during the time the victim is alive and less than eighteen years of age. The extension of the statute of limitations recognized that child victims may be unable to report crimes to law enforcement within the existing statute of limitations time period. House Standing Committee Report No. 693, Senate Standing Committee Report No. 1205.

Act 148, Session Laws 1996, increased the limitations period for offenses involving fraud or a breach of fiduciary obligation from two to three years after discovery of the offense. The legislature recognized that these complex crimes can take years to uncover, investigate and prove, and can involve numerous

victims and large losses. The Act also clarified language relating to the extension of the statute of limitations for offenses involving fraud or a breach of fiduciary obligation, offenses based on misconduct in office by a public officer or employee, and cases in which the accused is continuously absent from the State or has no reasonably ascertainable place of abode or work within the State, by stating that the extensions shall begin from the expiration of the period of limitation prescribed in subsection (2). House Standing Committee Report No. 1015-96, Senate Standing Committee Report No. 2030.

Act 149, Session Laws 1997, amended subsection (1) to include criminal conspiracy to commit murder and criminal solicitation to commit murder as offenses for which prosecution may be commenced at any time. The legislature found that the offense of murder warranted punishment under the Code sufficient to fit the grave consequences of the crime, and that persons found guilty of conspiracy or solicitation to commit murder should also be penalized to a similarly serious degree. Senate Standing Committee Report No. 1600.

Act 33, Session Laws 2001, strengthened the State's computer crime laws by, among other things, setting the statute of limitations for [felony] computer-related crimes to within five years after the crime was committed. The legislature found that society was adopting at a rapid pace, computer technology to conduct activities of daily living. Computer technology was being utilized not only for purposes of business and recreation, but also for criminal activity. Thus, computer-related criminal activity was on the rise as society's dependence on computers increased. Senate Standing Committee Report No. 1508.

Act 112, Session Laws 2005, amended this section by extending the statute of limitations for felony cases where deoxyribonucleic acid evidence has been recovered. Conference Committee Report No. 184.

Act 99, Session Laws 2006, added crimes that include deception as an element to the group of offenses for which the date of discovery is used to calculate the time limitations within which the crime must be charged. Senate Standing Committee Report No. 2244, House Standing Committee Report No. 1119-06.

Act 113, Session Laws 2014, eliminated the statute of limitations for a criminal prosecution of sexual assault in the first or second degree, and continuous sexual assault of a minor under the age of fourteen years. The legislature found that child sexual abuse is an epidemic that unfortunately is not adequately addressed because a vast majority of child sexual abuse victims fail to report their sexual assaults to authorities. Studies have estimated that between sixty to eighty per cent of child sexual abuse victims withhold

disclosure. Furthermore, studies examining latency in disclosure report an average delay of three to eighteen years. By eliminating the statute of limitations for criminal actions for claims arising from certain sexual assault crimes, Act 113 recognized and provided the time it generally takes for victims of child sexual abuse to develop the strength and courage to report incidences of child sexual abuse. Conference Committee Report No. 57-14, Senate Standing Committee Report No. 3321.

Act 94, Session Laws 2016, amended this section by extending the statute of limitations for prosecutions of medical assistance fraud beyond the three-year statute of limitations established by subsection (2). Conference Committee Report No. 27, Senate Standing Committee Report No. 3564.

Case Notes

Date of the most recent act of a continuing offense governs application of statute of limitations. 62 H. 364, 616 P.2d 193 (1980).

Statute of limitations of prior law held applicable to defendant absent from State. 62 H. 474, 617 P.2d 84 (1980).

Subsection (6)(a) does not apply as a "defense" for purposes of §701-101(2). 62 H. 474, 617 P.2d 84 (1980).

Under subsection (4), an offense of a continuing nature such as the possession of mace is committed when the course of conduct is terminated. 63 H. 345, 627 P.2d 776 (1981).

Subsection (5) does not define when adversary criminal judicial proceedings commence for purpose of determining when the Sixth Amendment right to counsel attaches. 63 H. 354, 628 P.2d 1018 (1981).

Court correctly concluded that statute of limitations for conspiracy to commit murder is three years (under 1993 version of this section). 84 H. 280, 933 P.2d 617 (1997).

Where defendant entered no contest plea knowingly and voluntarily, defendant effectively waived the statute of limitations upon entry of plea. 103 H. 214, 81 P.3d 394 (2003).

For purposes of the tolling provisions of subsection (3)(a), the fraudulent component of §708-830(2) is the use of deception in the taking of property. 111 H. 17, 137 P.3d 331 (2006).

When the charged offense is theft by deception, as defined by §708-830(2), and the prosecution is relying on the tolling provision of subsection (3)(a), relating to "any offense an element of which is fraud", the prosecution must not only allege the timely date or dates of commission of the offense in the indictment, but also the earliest date of the "discovery of the offense by an aggrieved party or a person who has a legal duty to represent the aggrieved party"; where indictment failed to

aver the date of the earliest discovery of the alleged offenses, trial court order dismissing the indictment with prejudice affirmed. 111 H. 17, 137 P.3d 331 (2006).

Despite the fact that the charge against defendants was deficient, the prosecution was still "pending"; the statute of limitations was tolled for the period beginning with the prosecution's filing of its complaint and ending when the court issued its judgment dismissing the case without prejudice. 132 H. 36, 319 P.3d 1044 (2014).

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§701-108 Commentary:

1. H.R.S. §707-1.

2. Id.

" **§701-109 Method of prosecution when conduct establishes an element of more than one offense.** (1) When the same conduct of a defendant may establish an element of more than one offense, the defendant may be prosecuted for each offense of which such conduct is an element. The defendant may not, however, be convicted of more than one offense if:

(a) One offense is included in the other, as defined in subsection (4) of this section;

(b) One offense consists only of a conspiracy or solicitation to commit the other;

(c) Inconsistent findings of fact are required to establish the commission of the offenses;

(d) The offenses differ only in that one is defined to prohibit a designated kind of conduct generally and the other to prohibit a specific instance of such conduct; or

(e) The offense is defined as a continuing course of conduct and the defendant's course of conduct was uninterrupted, unless the law provides that specific periods of conduct constitute separate offenses.

(2) Except as provided in subsection (3) of this section, a defendant shall not be subject to separate trials for multiple offenses based on the same conduct or arising from the same episode, if such offenses are known to the appropriate prosecuting officer at the time of the commencement of the first trial and are within the jurisdiction of a single court.

(3) When a defendant is charged with two or more offenses based on the same conduct or arising from the same episode, the court, on application of the prosecuting attorney or of the

defendant, may order any such charge to be tried separately, if it is satisfied that justice so requires.

(4) A defendant may be convicted of an offense included in an offense charged in the indictment or the information. An offense is so included when:

(a) It is established by proof of the same or less than all the facts required to establish the commission of the offense charged;

(b) It consists of an attempt to commit the offense charged or to commit an offense otherwise included therein; or

(c) It differs from the offense charged only in the respect that a less serious injury or risk of injury to the same person, property, or public interest or a different state of mind indicating lesser degree of culpability suffices to establish its commission.

(5) The court is not obligated to charge the jury with respect to an included offense unless there is a rational basis in the evidence for a verdict acquitting the defendant of the offense charged and convicting the defendant of the included offense. [L 1972, c 9, pt of §1; gen ch 1993]

Revision Note

In subsections (1)(a), (b), and (c), and (4)(a), "or" deleted pursuant to §23G-15.

Cross References

Elements of an offense, see §702-205.

COMMENTARY ON §701-109

Subsection (1) permits the State's case against the defendant to go to the jury on as many offenses as to which the State can meet its burden of making out a prima facie case. The jury may convict the defendant of as many offenses as the defendant has committed unless: one offense is included within the other (in which case the jury may find the defendant guilty of either offense if both are submitted to it), one offense consists only of a conspiracy or solicitation to commit the other, inconsistent findings of fact are required to establish the commission of the offenses, the offenses differ only in that one is a specific instance of the general conduct prohibited by the other, or the offense is defined as a continuing course of conduct and the defendant's course of conduct was uninterrupted (unless the law provides that specific periods of conduct

constitute separate offenses). This subsection reflects a policy to limit the possibility of multiple convictions and extended sentences when the defendant has basically engaged in only one course of criminal conduct directed at one criminal goal, or when it would otherwise be unjust to convict the defendant for more than one offense.

Subsection (2) requires joinder of the trials of two or more offenses based on the same conduct, subject to the court's power, in subsection (3), to order severance, if "justice so requires." These rules reflect a policy that defendants should not normally have to face the expense and uncertainties of two trials based on essentially the same episode.

Subsection (4) provides a definition of included offenses. Paragraph (a) provides the standard definition. An offense is included within another if it is established by the same or less than all the facts required to establish the commission of the offense charged. Paragraph (b) adds offenses which constitute an attempt to commit the offense charged or an offense otherwise included in the offense charged. Finally, paragraph (c) is concerned with cases in which the included offense involves a less serious injury or risk of injury to the same person, property, or public interest or a lesser kind of culpability. Paragraph (c) differs from paragraph (a) in that, although the included offense must produce the same result as the inclusive offense, there may be some dissimilarity in the facts necessary to prove the offense. Therefore (a) would not strictly apply and (c) is needed to fill the gap. For example, negligent homicide would probably not be included in murder under (a), because negligence is different in quality from intention. It would obviously be included under (c), because the result is the same and only the required degree of culpability changes.

Subsection (5) is consistent with prior law. The jury need not be bothered with an instruction on a lesser included offense unless there is a rational basis in the evidence for a verdict acquitting the defendant of the offense charged and convicting the defendant of the lesser offense.

Section 701-109 is not unlike previous Hawaii law, which stated that:

> Where the same act constitutes two or more diverse and distinct offenses, different in their nature and character, one not being merged in the other, the offender may be proceeded against for each, and cannot plead a conviction or acquittal for one, in bar of proceedings against him for the other.[1]

An example of merger (one offense included in the other) is Territory v. Ouye.[2] In that case it was held that the defendant's unlawful act of being present at a gambling game,

for which the defendant had been convicted, was merged in the defendant's alleged act of conducting the game. Likewise, in Territory v. Silva,[3] it was held that the defendant could not be held guilty of rape when the defendant was previously convicted of assault and battery based on the same conduct.

Law Journals and Reviews

Included Offenses in Hawaii Case Law and the Rights to Trial by Jury: Coherence or Confusion. II HBJ, no. 13, at 77 (1998).

Case Notes

In State v. Pia, 55 H. 14, 514 P.2d 580 (1973), the defendants were charged with a battery on a police officer with intent to obstruct the officer in the performance of the officer's duties and with interference with a police officer while executing the officer's duties (as those offenses were defined under previous Hawaii law). The court held that a plea of guilty and conviction for one offense did not bar prosecution for the other where the offenses were "separate not only statutorily but also spatially and temporally"--even though the separation in space was only a short distance and the separation in time was only a few seconds. The court said that "where a defendant in the context of one criminal scheme or transaction commits several acts independently violative of one or more statutes, he may be punished for all of them if charges are properly consolidated by the State in one trial. Indeed, joinder of offenses is now mandatory in such circumstances under Hawaii Penal Code §109(2), a provision which seeks to insulate individuals from the harassment of multiple trials for the same general criminal episode under technically different statutory provisions. Cf. State v. Ahuna, [52 H. 321, 474 P.2d 704 (1970)]." State v. Pia, supra at 19, 514 P.2d at 584.

Subsection (2) acts as procedural limitation to State's power under subsection (1) to seek convictions for all offenses. 59 H. 92, 576 P.2d 1044 (1978).

Prosecutorial knowledge requirement met where prosecutor knows more than one charge is pending and fails to join the charges; police officer's knowledge of additional offense was not knowledge of an "appropriate prosecuting officer" under subsection (2). 61 H. 127, 596 P.2d 779 (1979).

Reckless endangering in the second degree is a lesser included offense of attempted murder. 62 H. 637, 618 P.2d 306 (1980).

Harassment is not a lesser included offense of assault in the third degree under subsection (4)(a) or (c). 63 H. 1, 620 P.2d 250 (1980).

The "same episode" in subsection (2) construed. 63 H. 345, 627 P.2d 776 (1981).

Harassment not a lesser included offense of disorderly conduct under subsection (4). 63 H. 548, 632 P.2d 654 (1981).

Rape and sodomy not specific instances of kidnapping; prohibition against multiple convictions not applicable where defendant's actions constituted separate offenses. 68 H. 246, 710 P.2d 1193 (1985).

Assault in the third degree is not a lesser included offense of assault in the second degree. 68 H. 276, 711 P.2d 1289 (1985).

No double jeopardy where crimes charged involved different mens rea requirements and different facts proved each crime. 68 H. 280, 711 P.2d 731 (1985).

No basis in evidence for acquitting defendant of offense charged and convicting defendant of included offense. 68 H. 463, 718 P.2d 280 (1986).

Harassment is not a lesser included offense of terroristic threatening in the first degree. 70 H. 85, 762 P.2d 164 (1988).

Section 707-111 does not prevent a retrial where charges for DUI and driving with 0.10 per cent alcohol are brought together, and a mistrial is declared on one charge because of the jury's inability to agree. 70 H. 332, 770 P.2d 420 (1989).

Theft in the second degree is not a lesser included offense of fraudulent use of a credit card. 70 H. 434, 774 P.2d 888 (1989).

State was barred from prosecuting defendant for felony offenses by defendant's conviction for misdemeanor marijuana possession charge. 72 H. 35, 804 P.2d 1347 (1991).

Compulsory joinder of offenses requirement applies to criminal contempt charges under §710-1077(4). 72 H. 164, 811 P.2d 815, cert. denied, 112 S. Ct. 194 (1991).

Negligent homicide is a lesser included offense of manslaughter. 72 H. 217, 811 P.2d 1100 (1991).

Where petitioner's convictions on counts I (attempted first degree murder), II (second degree murder), and III (attempted second degree murder) violated subsection(1)(c)'s clear prohibition against inconsistent factual findings, the failure to raise this issue, both at trial and on appeal, resulted in withdrawal of not only a potentially meritorious defense, but a defense that would have altered the outcome. 74 H. 442, 848 P.2d 966 (1993).

Trial court did not commit plain error when it allowed defendant to be convicted of kidnapping in addition to sexual assault and assault. 75 H. 152, 857 P.2d 579 (1993).

Terroristic threatening not a lesser included offense of intimidating a witness within the meaning of subsection (4)(a);

multiple conviction of terroristic threatening and intimidating a witness not barred by subsection (4)(c). 75 H. 517, 865 P.2d 157 (1994).

Circuit court was obligated, even absent a request by either party, to instruct the jury regarding the included offense of assault in third degree where appellant was charged with committing offense of assault in second degree; court's failure to do so constituted plain error. 76 H. 387, 879 P.2d. 492 (1994).

Trial judge erred in refusing to instruct jury regarding the possible merger of the robbery and kidnapping counts against defendant. 77 H. 17, 881 P.2d 504 (1994).

Where appellant convicted of committing two burglaries and of criminal conspiracy contended that jury was not adequately instructed with respect to its ability to convict appellant of both the conspiracy and substantive burglary offense charges, appellant's requested instructions did not adequately explicate the law in this area and were properly rejected; failure to properly instruct the jury was harmless as to convictions for the two substantive burglaries; supreme court could not conclude that circuit court's failure to properly instruct jury as to which overt acts it could consider was harmless. 78 H. 383, 894 P.2d 80 (1995).

Sexual assault in the fourth degree and attempted sexual assault in the fourth degree are included offenses of attempted sexual assault in the second degree, within the meaning of subsection (4)(c). 79 H. 46, 897 P.2d 973 (1995).

Theft and attempted theft, regardless of degree, are included offenses of first degree robbery. 81 H. 309, 916 P.2d 1210 (1996).

Trial court should have applied subsections (1)(a) and (4)(b) to merge defendant's conviction for attempted first degree murder into conviction for first degree murder. 81 H. 358, 917 P.2d 370 (1996).

Sexual assault in the fourth degree under §707-733(1)(a) not an included offense of sexual assault in the third degree under §707-732(1)(b) as defined by subsection (4). 83 H. 308, 926 P.2d 599 (1996).

Subsection (1)(d) prohibits conviction under both §712-1203 and §842-2(2), as both statutes seek to redress the same conduct--the control of an enterprise involved in criminal activity. In such case, the specific statute, §712-1203, governs over the general statute, §842-2(2). 88 H. 19, 960 P.2d 1227 (1998).

When a defendant is charged in a single indictment or complaint and one or more counts are terminated on a basis unrelated to factual guilt or innocence, retrial not barred by

subsection (2) and §701-111(1)(b); thus, defendant's retrial on place to keep firearms charge under §134-6 not barred. 88 H. 389, 967 P.2d 221 (1998).

The crime underlying a §134-51(b) offense is, as a matter of law, an included offense of the §134-51(b) offense, within the meaning of subsection (4)(a), and defendant should not have been convicted of both the §134-51(b) offense and the underlying second degree murder offense; thus, defendant's conviction of the §134-51(b) offense reversed. 88 H. 407, 967 P.2d 239 (1998).

Where defendant's conviction and sentence under §708-840 was an included offense under §134-6(a) and defendant's convictions under both §§134-4(a) and 708-840 violated subsection (1)(a), defendant's conviction and sentence under §708-840 reversed. 91 H. 33, 979 P.2d 1059 (1999).

Under either subsection (4)(a) or (4)(c), a petty misdemeanor assault under §707-712(2) is not a lesser included offense of family abuse under §709-906. 93 H. 63, 996 P.2d 268 (2000).

Pursuant to §§705-500(1)(b) and (3), 134-7(b), and subsection (4)(b), attempted prohibited possession of a firearm is an included offense of prohibited possession of a firearm. 93 H. 199, 998 P.2d 479 (2000).

Trial courts must instruct juries as to any included offenses when, pursuant to subsection (5), "there is a rational basis in the evidence for a verdict acquitting the defendant of the offense charged and convicting the defendant of the included offense". 94 H. 405, 16 P.3d 246 (2001).

Trial courts must instruct juries on all lesser included offenses as specified by subsection (5), despite any objection by the defense, and even in the absence of a request from the prosecution. 94 H. 405, 16 P.3d 246 (2001).

The original 1990 enactment of §134-6(a) prohibited the conviction of a defendant for both a §134-6(a) offense and its underlying felony. 101 H. 187, 65 P.3d 134 (2003).

Where question whether defendant's conduct constituted separate and distinct culpable acts or an uninterrupted continuous course of conduct was one of fact that should have been submitted to the jury, trial court's jury instructions, which omitted the possible merger of counts I and II, pursuant to subsection (1)(e), were prejudicially insufficient and erroneous. 102 H. 300, 75 P.3d 1191 (2003).

Given the reasonable possibility that the jury's verdict led to two convictions for "the same conduct", the trial court's failure to charge the jury with respect to merger contravened subsection (1)(e) and was not harmless beyond a reasonable doubt. 114 H. 76, 156 P.3d 1182 (2007).

Where charged offenses in search warrant case and drug buy case arose from the "same episode" inasmuch as defendant's conduct was "so closely related in time, place and circumstances that a complete account of one charge could not have been related without referring to the details of the other charge", trial court erred in denying defendant's motion to dismiss based upon the prosecution's failure to join the search warrant offenses and the drug buy offenses in a single prosecution. 118 H. 44, 185 P.3d 229 (2008).

There was a rational basis for the jury to find defendant guilty of unlawful imprisonment in the first degree, had the jury been given the appropriate instruction. The failure to instruct the jury on a lesser included offense for which the evidence provided a rational basis warranted vacating defendant's conviction for kidnapping. 131 H. 43, 314 P.3d 120 (2013).

Under subsection (4)(c), unlawful imprisonment in the first degree is a lesser-included offense of kidnapping because unlawful imprisonment in the first degree involves a less culpable mental state than kidnapping. 131 H. 43, 314 P.3d 120 (2013).

Under subsection (1)(c), petitioner could not be convicted of both robbery in the second degree (§708-841) and assault in the first degree (§707-710); the jury inconsistently found that petitioner intentionally or knowingly and recklessly inflicted serious bodily injury on complainant. 131 H. 419, 319 P.3d 338 (2014).

Assault in the first degree is a lesser included offense of murder in the second degree. The circuit court erred in failing to instruct the jury on the included offense of assault in the first degree. 132 H. 451, 323 P.3d 95 (2014).

Fact that kidnapping continued during sexual abuse did not cause kidnapping to be included offense of sexual abuse. 5 H. App. 127, 681 P.2d 573 (1984).

Kidnapping not necessarily and incidentally committed during robbery may be charged as separate offense. 5 H. App. 644, 706 P.2d 1321 (1985).

"Convicted" means guilty verdict, not sentence and judgment; under this section and §705-531, defendant cannot be found guilty of being an accomplice to an attempted crime and of conspiracy to commit the same crime. 5 H. App. 651, 706 P.2d 1326 (1985).

Under this section and §705-531, defendant cannot be found guilty of conspiracy to commit crime and the crime itself. 5 H. App. 670, 706 P.2d 1331 (1985).

Criminal trespass in the first degree is a lesser included offense of burglary in the first degree; when lesser included

offense instruction should be given. 6 H. App. 17, 708 P.2d 834 (1985).

Kidnapping was not necessarily and incidentally committed during rape; prohibition against multiple convictions not applicable. 6 H. App. 77, 711 P.2d 1303 (1985).

Assault in the third degree is not a lesser included offense of robbery in the first degree. 6 H. App. 115, 711 P.2d 736 (1985).

Although section bars conviction of a person for committing an offense and the conspiring to commit that same offense, section does not preclude conviction of a person for conspiring to commit more than two criminal acts and of committing two of the criminal acts planned by the conspiracy. 7 H. App. 526, 783 P.2d 1232 (1989).

Jury is to consider the charged offense then the lesser included offenses in descending order. 8 H. App. 1, 791 P.2d 407 (1990).

Theft and forgery charges had to be paired together. 8 H. App. 284, 800 P.2d 623 (1990).

An offense under §291C-15 is an included offense under §§291C-13 and 291C-14. 9 H. App. 156, 828 P.2d 298 (1992).

Terroristic threatening in second degree can be an offense included in terroristic threatening in first degree; trial court's failure to instruct jury on the lesser included offense was not plain error, where defendant contended there was a rational basis in the record for jury to decide that, although defendant made a terroristic threat, defendant did not do so with a dangerous instrument as defined in §707-700. 10 H. App. 584, 880 P.2d 213 (1994).

Since to sell and to barter do not include to prescribe, §712-1248(1)(d) is not a lesser included offense of §712-1247(1)(h). 78 H. 488 (App.), 896 P.2d 944 (1995).

Driving without license under §286-102 not lesser included offense of driving while license suspended under §286-132. 81 H. 76 (App.), 912 P.2d 573 (1996).

Based on subsection (4)(a), fourth degree sexual assault under §707-733(1)(a) is a lesser included offense of third degree sexual assault under §707-732(1)(e). 85 H. 92 (App.), 937 P.2d 933 (1997).

Third degree sexual assault committed in violation of §707-732(1)(e) not a continuous offense; defendant's convictions of five counts of that offense, each based on a separate sexual contact thus did not violate subsection (1)(e). 85 H. 92 (App.), 937 P.2d 933 (1997).

Under subsections (1)(a) and (4), defendant could not be convicted of kidnapping charge in addition to sexual assault charges where jury relied on same leg restraint on complainant

to convict defendant of both charges. 85 H. 92 (App.), 937 P.2d 933 (1997).

Under subsection (4)(a) and (c), reckless endangering in the first degree under §707-713 is an included offense of attempted murder in the second degree under §707-701.5. 94 H. 513 (App.), 17 P.3d 862 (2001).

Subsection (1)(e) prohibition against conviction for more than one offense when defendant's conduct establishes an element of more than one offense not violated by defendant's convictions for driving under the influence of drugs under §291-7 and inattentive driving under §291-12 as driving under the influence of drugs required defendant to be under the influence of drugs and inattention to driving did not. 98 H. 188 (App.), 46 P.3d 1 (2002).

As rational basis existed in the record to support trial court's determination that jury could find defendants guilty of attempted assault in the second degree but not attempted assault in the first degree, trial court did not err in giving lesser included offense instruction. 104 H. 517 (App.), 92 P.3d 1027 (2004).

Trial court did not err when it interpreted the relevant provisions of subsection (2) and §701-111(1)(b) as prohibiting the court from granting defendant's pretrial motion to dismiss where the three charges against the defendant were based upon incidents occurring on different dates and at different places under distinct circumstances, and were patently not "based on the same conduct or arising from the same episode". 108 H. 195 (App.), 118 P.3d 678 (2005).

As attempted assault in the first degree is an included offense of assault in the first degree, under subsection (4), the trial court properly instructed the jury on the included offense of attempted assault in the first degree; as trial court's instructing the jury on the included offense of attempted assault in the first degree only placed defendant in jeopardy once, defendant's double jeopardy rights not violated. 112 H. 278 (App.), 145 P.3d 821 (2006).

Subsection (1)(e) only prohibits conviction for two offenses if the offenses merge; it specifically permits prosecution on both offenses; even if the felon-in-possession and the place-to-keep charges merged pursuant to this subsection, conviction on one of the two charges was possible; thus, where trial court committed plain error in failing to give an instruction regarding the possible merger of the two counts, "a new trial was not necessary because the State could obviate the error by dismissing either count". 114 H. 507 (App.), 164 P.3d 765 (2007).

§701-109 Commentary:

1. H.R.S. §706-4.

2. 37 Haw. 176 (1945).

3. 27 Haw. 270 (1923).

" **§701-110 When prosecution is barred by former prosecution for the same offense.** When a prosecution is for an offense under the same statutory provision and is based on the same facts as a former prosecution, it is barred by the former prosecution under any of the following circumstances:

(1) The former prosecution resulted in an acquittal which has not subsequently been set aside. There is an acquittal if the prosecution resulted in a finding of not guilty by the trier of fact or in a determination by the court that there was insufficient evidence to warrant a conviction. A finding of guilty of a lesser included offense is an acquittal of the greater inclusive offense, although the conviction is subsequently set aside on appeal by the defendant.

(2) The former prosecution was terminated, after the information had been filed or the indictment found, by a final order or judgment for the defendant, which has not been set aside, reversed, or vacated and which necessarily required a determination inconsistent with a fact or a legal proposition that must be established for conviction of the offense.

(3) The former prosecution resulted in a conviction. There is a conviction if the prosecution resulted in a judgment of conviction which has not been reversed or vacated, a verdict of guilty which has not been set aside and which is capable of supporting a judgment, or a plea of guilty or nolo contendere accepted by the court.

(4) The former prosecution was improperly terminated. Except as provided in this subsection, there is an improper termination of a prosecution if the termination is for reasons not amounting to an acquittal, and it takes place after the first witness is sworn but before verdict. Termination under any of the following circumstances is not improper:

(a) The defendant consents to the termination or waives, by motion to dismiss or otherwise, the defendant's right to object to the termination.

(b) The trial court finds the termination is necessary because:

(i) It is physically impossible to proceed with the trial in conformity with law;

(ii) There is a legal defect in the proceedings which would make any judgment entered upon a verdict reversible as a matter of law;

(iii) Prejudicial conduct, in or outside the courtroom, makes it impossible to proceed with the trial without injustice to either the defendant or the State;

(iv) The jury is unable to agree on a verdict; or

(v) False statements of a juror on voir dire prevent a fair trial. [L 1972, c 9, pt of §1; gen ch 1993]

Revision Note

In paragraph (4)(b)(i), (ii), and (iii), "or" deleted pursuant to §23G-15.

COMMENTARY ON §701-110

Section 701-110 bars a new prosecution for an offense under the same statutory provision and based upon the same facts as a former prosecution when there is an acquittal, when there is an unreversed conviction, or when there is a termination by final order or judgment for the defendant which is necessarily conclusive of a fact which must be established for conviction. An improper termination is also conclusive, because the defendant has a right not to be harassed by repeated prosecutions. Subsection (4) sets forth the circumstances under which a termination is not improper. These are the situations in which the defendant consents to termination or in which under preexisting law the court would declare a mistrial. Subsection (1) is written to reflect the possibility that the legislature may give certain appeal rights to the prosecution as part of a revision of penal procedural law.

Subsection (1) states an important rule as to which there is some variance of opinion among the states. If the accused is found guilty of a lesser included offense, that is an automatic acquittal on the greater inclusive offense, and the accused may not later be tried or convicted for that greater offense, despite reversal of the accused's conviction for the lesser

offense.[1] This seems to follow from the fact that the jury has been unable to agree, for whatever reason, on the defendant's guilt of the more serious offense. At that point, the defendant should be free from the threat of a renewed prosecution for that offense. If the defendant faces reprosecution for an offense of which the defendant has been acquitted, the defendant may be unfairly hampered in the defendant's decision about whether to contest the validity of the conviction for the lesser offense. An appeal by the State, if permissible, may of course have the effect of reversing this rule in individual cases.

Case Notes

Declaration of mistrial--when a bar to retrial. 58 H. 377, 569 P.2d 900 (1977); 62 H. 108, 612 P.2d 107 (1980).

Upon reversal of conviction of reckless endangering, a lesser included offense, defendant may not be retried for attempted murder, the greater charge. 62 H. 637, 618 P.2d 306 (1980).

Where defendant's conviction on non-existent attempted reckless manslaughter charge vacated, remand for retrial on original charge of attempted first degree murder unconstitutional and also violation of paragraph (1). 83 H. 335, 926 P.2d 1258 (1996).

A nonjudicial punishment resulting from a Uniform Code of Military Justice Article 15 proceeding is not a criminal conviction within the meaning of paragraph (3). 100 H. 132, 58 P.3d 643 (2002).

A Uniform Code of Military Justice Article 15 nonjudicial proceeding does not amount to a criminal prosecution, and thus, could not result in a "judgment of conviction" pursuant to paragraph (3); thus, none of the circumstances barring state prosecution outlined in §701-112 were met. 100 H. 132, 58 P.3d 643 (2002).

Section does not bar court from vacating an erroneously accepted plea of guilty. 4 H. App. 566, 670 P.2d 834 (1983).

Where district court's dismissal of the charges against defendant did not constitute an acquittal under subsection (1), there was no statutory bar to the district court granting the State's motion for reconsideration. 128 H. 449 (App.), 290 P.3d 519 (2012).

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§701-110 Commentary:

1. A rule similar to that proposed in subsection (1) obtains both in Pennsylvania and in New York. See People v. Ressler, 17

N.Y.2d 174, 216 N.E.2d 582 (Ct. App. 1966); cf. Commonwealth v. Frazier, 216 A.2d 337 (Pa. Sup. Ct. 1966). A contrary rule previously obtained in Hawaii, but the matter is now before the U.S. Supreme Court in a case arising in another jurisdiction. For the former rule, see Territory v. Gamaya, 25 Haw. 581 (1920).

" **§701-111 When prosecution is barred by former prosecution for a different offense.** Although a prosecution is for a violation of a different statutory provision or is based on different facts, it is barred by a former prosecution under any of the following circumstances:

(1) The former prosecution resulted in an acquittal which has not subsequently been set aside or in a conviction as defined in section 701-110(3) and the subsequent prosecution is for:
   (a) Any offense of which the defendant could have been convicted on the first prosecution;
   (b) Any offense for which the defendant should have been tried on the first prosecution under section 701-109 unless the court ordered a separate trial of the offense; or
   (c) An offense based on the same conduct, unless:
      (i) The offense for which the defendant is subsequently prosecuted requires proof of a fact not required by the former offense and the law defining each of the offenses is intended to prevent a substantially different harm or evil; or
      (ii) The second offense was not consummated when the former trial began.

(2) The former prosecution was terminated by an acquittal or by a final order or judgment for the defendant which has not been set aside, reversed, or vacated and which acquittal, final order, or judgment necessarily required a determination inconsistent with a fact which must be established for conviction of the second offense.

(3) The former prosecution was improperly terminated, as improper termination is defined in section 701-110(4), and the subsequent prosecution is for an offense of which the defendant could have been convicted had the former prosecution not been improperly terminated. [L 1972, c 9, pt of §1]

Revision Note

In paragraph (1)(a), "or" deleted pursuant to §23G-15.

COMMENTARY ON §701-111

This section parallels §701-110, but has to do with different offenses rather than the same offense. It would thus, for example, be the appropriate section to use in the case of a new prosecution for an offense already prosecuted for under the law existing prior to the effective date of this Code. In short, it forbids reprosecuting when the defendant has previously been prosecuted for an offense arising out of the same factual situation in certain specified cases. The section must be read in conjunction with §701-109(2) which requires joinder of trials of "multiple offenses based on the same conduct or arising from the same episode." Both §701-109(2) and §701-111 effectuate the policy of preserving the defendant from numerous and vexatious prosecutions.

Subsection (1) applies where the former prosecution resulted in a conviction or an acquittal and the subsequent prosecution is either (a) for any offense of which the defendant could have been convicted in the first prosecution (e.g., an included offense), (b) for any offense for which the defendant should have been tried at the earlier trial under §701-110, or (c) for an offense based on the same conduct, unless proof of a fact not required by the former prosecution is required and the law defining each offense is intended to prevent a substantially different harm or evil, or unless the second offense was not consummated when the former trial began.

Subsection (2) is an important provision, giving a sort of collateral estoppel effect to a former prosecution resulting in acquittal or final order or judgment for the defendant which required a determination inconsistent with a fact which must be established for conviction of the second offense. As an example of how this would work, we may take the case of an injury caused by allegedly reckless driving by D. Suppose, for example, that D is first charged with a traffic offense which by definition is limited to reckless driving, and the case results in an explicit determination that, under all the circumstances, D was not reckless. If D is later charged with manslaughter, which requires proof of recklessness,[1] D would be entitled to an acquittal. D would not, however, be able to avoid a trial for negligent homicide, which requires proof of a lesser degree of culpability.

Subsection (3) deals with the case of improper termination of a prosecution. The defendant may not later be tried for an offense of which the defendant could have been convicted had the former prosecution not been improperly terminated. Once the

trial has begun, only exceptional circumstances should permit the State to discontinue it. Otherwise the defendant may be prejudiced by having the defendant's trial tactics exposed and the defendant's witnesses subjected to unfair pressures.

Case Notes

In 1970, prior to the enactment of the Penal Code, the Supreme Court adopted the standard set forth in §111 of the Proposed Draft, Hawaii Penal Code 1970, as "a satisfactory approach" to the problem of when a former prosecution for a different offense (i.e., violation of a different statutory provision) will constitute a bar to a current prosecution. The court quoted subsection (1)(c)(i). The entire section was adopted by the legislature without change. See State v. Ahuna, 52 H. 321, 326, 474 P.2d 704 (1970). See also State v. Pia, 55 H. 14, 514 P.2d 580 (1973), which dealt primarily with §701-109.

Subsection (1)(c) applies only when §701-109(2) does not apply. 59 H. 92, 576 P.2d 1044 (1978).

Section does not prevent a retrial of charges brought together pursuant to §701-109. 70 H. 332, 770 P.2d 420 (1989).

Appellate determination that insufficient evidence was presented at trial to support a conviction does not constitute an "acquittal", as that term is used in paragraph (1); thus, retrial on lesser included offenses following such determination did not violate paragraph (1)(c). 80 H. 126, 906 P.2d 612 (1995).

When a defendant is charged in a single indictment or complaint and one or more counts are terminated on a basis unrelated to factual guilt or innocence, retrial not barred by §701-109(2) and paragraph (1)(b); thus, defendant's retrial on place to keep firearms charge under §134-6 not barred. 88 H. 389, 967 P.2d 221 (1998).

Where charged offenses in search warrant case and drug buy case arose from the "same episode" inasmuch as defendant's conduct was "so closely related in time, place and circumstances that a complete account of one charge could not have been related without referring to the details of the other charge", trial court erred in denying defendant's motion to dismiss based upon the prosecution's failure to join the search warrant offenses and the drug buy offenses in a single prosecution. 118 H. 44, 185 P.3d 229 (2008).

Trial court did not err when it interpreted the relevant provisions of paragraph (1)(b) and §701-109(2) as prohibiting the court from granting defendant's pretrial motion to dismiss where the three charges against the defendant were based upon incidents occurring on different dates and at different places

under distinct circumstances, and were patently not "based on the same conduct or arising from the same episode". 108 H. 195 (App.), 118 P.3d 678 (2005).

§701-111 Commentary:

1. Cf. §707-702.

" **§701-112 Former prosecution in another jurisdiction: when a bar.** When behavior constitutes an offense within the concurrent jurisdiction of this State and of the United States or another state, a prosecution in any such other jurisdiction is a bar to a subsequent prosecution in this State under any of the following circumstances:

(1) The first prosecution resulted in an acquittal which has not subsequently been set aside or in a conviction as defined in section 701-110(3), and the subsequent prosecution is based on the same conduct, unless:
   (a) The offense for which the defendant is subsequently prosecuted requires proof of a fact not required by the former offense and the law defining each of the offenses is intended to prevent a substantially different harm or evil; or
   (b) The second offense was not consummated when the former trial began.

(2) The former prosecution was terminated, after the information was filed or the indictment found, by an acquittal or by a final order or judgment for the defendant which has not been set aside, reversed, or vacated and which acquittal, final order, or judgment necessarily required a determination inconsistent with a fact which must be established for conviction of the offense for which the defendant is subsequently prosecuted.

(3) The former prosecution was improperly terminated, as improper termination is defined in section 701-110(4), and the subsequent prosecution is for an offense of which the defendant could have been convicted had the former prosecution not been improperly terminated. [L 1972, c 9, pt of §1]

COMMENTARY ON §701-112

If the defendant has engaged in only one course of penal conduct, it seems very unjust to permit the defendant to be

prosecuted twice simply because of the fortuitous circumstance that the defendant's behavior constitutes an offense in more than one jurisdiction. It is increasingly true that the federal law has made criminal various acts which are also criminal under this Code. If the federal prosecution is conducted first, it is unseemly as well as unfair for a state prosecution to follow, perhaps adding another penalty to the penalty set by federal law for the same act. Of course, a principle that there should be only one prosecution will require close cooperation between the authorities in both jurisdictions to assure that justice is done.

Subsection (1) bars a prosecution in Hawaii for the same conduct which has already resulted in an acquittal or a conviction in another jurisdiction unless the offense for which the defendant is subsequently prosecuted requires proof of a fact not required by the former offense and the law defining each of the offenses is intended to prevent a substantially different harm or evil, or unless the second offense was not completed when the former trial began.

Subsection (2) gives a collateral estoppel effect similar to that given in §701-111(2), and subsection (3) has the same effect as §701-111(3).

The proposed section differs from previous law. In Territory v. Lii,[1] it was held that the conviction of a person under the federal law for violation of the Mann Act did not preclude the person's conviction for procuring and pimping under Hawaii law.[2] The court looked upon the defendant's conduct as constituting two separate offenses and stated that:

> The Fifth Amendment, having for its objective that no person shall be subjected to punishment for the same offense more than once, does not prohibit presentation of evidence in another and separate trial for a different offense. Neither does the Amendment nor our own statute prohibit successive prosecutions if the alleged wrongful act constitutes separate offenses in violation of two separate and distinct criminal statutes.[3]

Although the Lii case accords with the Constitution, it seems purely formalistic and harsh to subject a defendant to multiple prosecution simply because two jurisdictions have determined that the defendant's behavior constitutes an offense.

Case Notes

A Uniform Code of Military Justice Article 15 nonjudicial proceeding does not amount to a criminal prosecution, and thus, could not result in a "judgment of conviction" pursuant to §701-110(3); thus, none of the circumstances barring state

prosecution outlined in this section were met. 100 H. 132, 58 P.3d 643 (2002).

Where appeals court correctly held that defendant's theft offense under §708-830(1) and §708-830.5(1)(a) required proof of a value element which defendant's federal conspiracy offense did not, and was designed to prevent a substantially different harm--the deprivation of property rights versus the threat posed by agreements to commit criminal conduct, defendant's prosecution in state court was not barred under this section and the circuit court did not err in denying defendant's motion to dismiss in this respect. 126 H. 205, 269 P.3d 740 (2011).

§701-112 Commentary:

1. 39 Haw. 574 (1952).

2. H.R.S. §768-56.

3. 39 Haw. 574, 581 (1952).

" **§701-113 Former prosecution before court lacking jurisdiction or when fraudulently procured by the defendant.** A prosecution is not a bar within the meaning of sections 701-110, 701-111, and 701-112 under any of the following circumstances:

(1) The former prosecution was before a court which lacked jurisdiction over the defendant or the offense.

(2) The former prosecution was procured by the defendant without the knowledge of the appropriate prosecuting officer and with the purpose of avoiding the sentence which might otherwise be imposed.

(3) The former prosecution resulted in a judgment of conviction which was held invalid on appeal or in a subsequent proceeding on a writ of habeas corpus, coram nobis, or similar process. [L 1972, c 9, pt of §1]

COMMENTARY ON §701-113

A subsequent prosecution should not be barred when the former prosecution was before a court lacking jurisdiction over the defendant or the offense. A prosecution by a court without jurisdiction is a nullity, and reprosecuting the defendant does not place the defendant twice in jeopardy because the defendant never in fact was in jeopardy. Likewise, if the defendant improperly procured the former prosecution without the knowledge of the appropriate prosecuting officer and with the intention of

avoiding the sentence which might otherwise be imposed, the former prosecution is not a bar. Finally, if defendant succeeds in having the former proceeding held invalid by means of habeas corpus or coram nobis, a reprosecution should not be barred.

" **§701-114 Proof beyond a reasonable doubt.** (1) Except as otherwise provided in section 701-115, no person may be convicted of an offense unless the following are proved beyond a reasonable doubt:

(a) Each element of the offense;

(b) The state of mind required to establish each element of the offense;

(c) Facts establishing jurisdiction;

(d) Facts establishing venue; and

(e) Facts establishing that the offense was committed within the time period specified in section 701-108.

(2) In the absence of the proof required by subsection (1), the innocence of the defendant is presumed. [L 1972, c 9, pt of §1; am L 1973, c 136, §2(a)]

Cross References

Elements of an offense, see §702-205.

COMMENTARY ON §701-114

This section announces the usual burden of proof in criminal cases; the prosecution must prove its case beyond a reasonable doubt. The matters which must be so proved are spelled out in detail. They include elements of the offense, the requisite state of mind, and facts establishing jurisdiction, venue, and timeliness.

SUPPLEMENTAL COMMENTARY ON §701-114

Section 114(2) of the Proposed Draft of the Code had provided that the "innocence of the defendant is assumed." The legislature found that "the use of the word 'assumed' in this manner is novel and prefers the term 'presumed' since it has a definite meaning in jurisprudence." Conference Committee Report No. 2 (1972).

Act 136, Session Laws 1973, amended this section by adding the introductory phrase now contained in subsection (1) ("Except as otherwise provided in section 701-115, ...") to eliminate the possibility of confusion in the application of §§701-114 and 701-115.

Law Journals and Reviews

Agonizing Over Aganon: A New Approach to Drafting Jury Instructions in Criminal Cases. 10 HBJ, no. 13, at 73 (2007).

Case Notes

Appearance in court by defendant did not waive right to insist that State prove venue. 66 H. 530, 668 P.2d 32 (1983).

State need not establish jurisdiction of trial court by proving defendant is over eighteen years of age. 67 H. 68, 678 P.2d. 1080 (1984).

Proof beyond a reasonable doubt not established where trial judge found defendant guilty based on substantial credible evidence. 72 H. 296, 815 P.2d 1025 (1991).

Requirements of HRPP rule 18 and article I, §14 of Hawaii constitution having been satisfied, venue was proven beyond a reasonable doubt. 78 H. 185, 891 P.2d 272 (1995).

State tax maps could not be used to establish venue in DUI prosecution where maps did not represent legislatively authorized schematics of official district boundaries for non-taxation purposes. 80 H. 291, 909 P.2d 1106 (1995).

Officer's testimony regarding Ewa boundary of Honolulu district, being probative of "facts establishing venue" under this section, was relevant and admissible under chapter 626, rule 803(b)(20). 80 H. 297, 909 P.2d 1112 (1995).

Testimony of officer supplemented with tax map information which court could have taken judicial notice of pursuant to chapter 626, rule 201, constituted substantial evidence supporting "facts establishing venue" with respect to DUI offense. 80 H. 297, 909 P.2d 1112 (1995).

Where defendant requested court to instruct jury on time-barred lesser included offense of simple trespass under §708-815, defendant waived statute of limitations under subsection (1)(e). 87 H. 108, 952 P.2d 865 (1997).

Defendant's right to have all elements of an offense proven beyond a reasonable doubt was statutorily protected under this section and constitutionally protected under the Hawaii and federal constitutions; as only defendant personally could have waived such fundamental right and such right could not have been waived or stipulated to by defendant's counsel, stipulation by defendant's counsel of the fact that defendant committed defendant's crime within two years of a second or prior conviction of abuse for purposes of the §709-906(7) charge violated defendant's due process rights. 116 H. 3, 169 P.3d 955 (2007).

Trial court erred in convicting defendant for illegal camping pursuant to county ordinance where there was insufficient evidence adduced at trial to show that defendant illegally camped "in any park not designated as a campground" because the evidence at trial established that the beach park was designated as a campground and defendant was in the designated camping area on the night defendant was cited. 123 H. 369, 235 P.3d 365 (2010).

Where the evidence adduced at trial demonstrated that the offense, or at least a "part of it" occurred on the island of Oahu, a reasonable mind could have "fairly concluded" that the events occurred on the island of Oahu; thus, venue in the first circuit was established beyond a reasonable doubt. 131 H. 365, 319 P.3d 284 (2013).

Failure to instruct jury as to venue and timeliness of prosecution is error harmless beyond a reasonable doubt. 5 H. App. 644, 706 P.2d 1321 (1985).

State proved jurisdictional facts beyond a reasonable doubt. 8 H. App. 497, 810 P.2d 668 (1991).

Failure to instruct jury on state of mind element under §134-7, as required by subsection (1)(b), was prejudicial and not harmless error. 78 H. 422 (App.), 895 P.2d 173 (1995).

Judicial notice taken that trial, being held in first circuit, was held in proper circuit. 78 H. 422 (App.), 895 P.2d 173 (1995).

Where, under subsection (1)(a), proof of each element of an offense is required for a conviction, and the term "habitual" or "habitual operator" in the indictment did not convey the narrow definition that the person charged with habitually operating a vehicle under the influence of an intoxicant had to have three or more convictions within the previous ten years, the phrase "habitual operator" did not provide adequate notice to defendant what the State was required to prove as an element of the offense; thus, defendant's conviction vacated. 128 H. 132 (App.), 284 P.3d 905 (2012).

" **§701-115 Defenses.** (1) A defense is a fact or set of facts which negatives penal liability.

(2) No defense may be considered by the trier of fact unless evidence of the specified fact or facts has been presented. If such evidence is presented, then:

(a) If the defense is not an affirmative defense, the defendant is entitled to an acquittal if the trier of fact finds that the evidence, when considered in the light of any contrary prosecution evidence, raises a reasonable doubt as to the defendant's guilt; or

(b) If the defense is an affirmative defense, the defendant is entitled to an acquittal if the trier of fact finds that the evidence, when considered in light of any contrary prosecution evidence, proves by a preponderance of the evidence the specified fact or facts which negative penal liability.

(3) A defense is an affirmative defense if:

(a) It is specifically so designated by the Code or another statute; or

(b) If the Code or another statute plainly requires the defendant to prove the defense by a preponderance of the evidence. [L 1972, c 9, pt of §1; am L 1973, c 136, §2(b)]

COMMENTARY ON §701-115

The Code establishes two classes of defenses. As to both, it places an initial burden on the defendant to come forward with some credible evidence of facts constituting the defense, unless, of course, those facts are supplied by the prosecution's witnesses.

As to the burden of persuasion, two different rules are codified. In the case of defenses which are not affirmative, the defendant need only raise a reasonable doubt as to the defendant's guilt. The other side of the coin is that the prosecution must prove beyond a reasonable doubt facts negativing the defense. The prosecution in fact does this when the jury believes its case and disbelieves the defense.

In the case of affirmative defenses, the burden on the defendant increases. Now the defendant must prove by a preponderance of the evidence facts which negative the defendant's penal liability. Subsection (4) defines "affirmative defense," making it clear that this type of defense needs special legislative prescription. Unless the legislature has made a particular defense affirmative, the defendant's burden is only to raise a reasonable doubt.

Case Notes

Provisions of this section and §702-237, requiring defendant to prove entrapment by preponderance of the evidence, do not violate due process. 58 H. 234, 566 P.2d 1370 (1977).

Provisions on entrapment not inconsistent with §702-205. 58 H. 479, 572 P.2d 159 (1977).

Requirement that defendant establish entrapment is not violation of due process. 58 H. 479, 572 P.2d 159 (1977).

Justification is not an affirmative defense and prosecution has burden of disproving it once evidence of justification has been adduced. 60 H. 259, 588 P.2d 438 (1978).

Due process violation where jury may have reached verdict by improperly shifting burden of proof from prosecution to defense by concluding that defendant had not established defendant's claim of extreme mental or emotional distress before considering whether prosecution had disproved that defense beyond a reasonable doubt. 80 H. 172, 907 P.2d 758 (1995).

Trial courts must specifically instruct juries, where the record so warrants, that the burden is upon the prosecution to prove beyond a reasonable doubt that the defendant was not ignorant or mistaken as to a fact that negates the state of mind required to establish an element of the charged offense or offenses. 107 H. 239, 112 P.3d 725 (2005).

Rule of lenity required the construction, under the specific facts of the case, of §§329-121, 329-122, and 329-125 against the government, as there was an irreconcilable inconsistency between the authorized transportation of medical marijuana under §329-121, and the prohibition on transport of medical marijuana through "any ... place open to the public" under [§329-122(c)(2)(E)]; thus, under subsection (2)(b), petitioner was entitled to an acquittal because petitioner's evidence, when considered in light of any contrary prosecution evidence proved by a preponderance of the evidence the specified fact or facts with negatived penal liability. 129 H. 397, 301 P.3d 607 (2013).

Synthesizing and applying this section, its commentary, and the Hawaii supreme court's ruling in State v. Malaega in the context of this case, in the case of an unrequested mistake of fact jury instruction denominated as error for the first time on appeal, subsection (2) and its commentary place the burden of production on the defendant to present [("credible")] evidence of the specified facts going to the defense. Further, failure to give the mistake of fact jury instruction under these circumstances constitutes plain error; moreover, where the omission of the instruction constitutes plain error, it shall be a basis for reversal of the defendant's conviction only if an examination of the record as a whole reveals that the error was not harmless beyond a reasonable doubt. 130 H. 196, 307 P.3d 1142 (2013).

Defendant's claim of justification, in defense against prosecution for terroristic threatening, was established regardless of whether or not defendant used deadly force. 1 H. App. 167, 616 P.2d 229 (1980).

Court's instruction that defendant had the burden of proving self defense by a preponderance of the evidence was plain error

which affected substantial rights of the defendant. 1 H. App. 214, 617 P.2d 573 (1980).

Since exception to animal nuisance offense, if proved, would negative defendant's penal liability for animal nuisance, it constituted a defense; because defendant offered absolutely no evidence at trial, and the facts constituting defendant's defense were not supplied by the State, the State was not required to present any evidence disproving defendant's defense beyond a reasonable doubt. 10 H. App. 353, 873 P.2d 110 (1994).

Defense that someone other than defendant confessed to the offense and alibi defense, i.e., evidence that defendant was not present at the time of the crime, are not affirmative defenses. 10 H. App. 448, 877 P.2d 891 (1994).

Defendants did not prove affirmative defense of entrapment under §702-237(1)(b) by preponderance of evidence as required by subsection (2)(b); officer's conduct merely provided defendants with opportunity to commit offense of promoting a dangerous drug in the first degree. 82 H. 499 (App.), 923 P.2d 916 (1996).

Proof of self-insurance under §431:10C-105 is a "defense" within the meaning of this section. 90 H. 130 (App.), 976 P.2d 444 (1999).

" **§701-116 Proving applicability of the Code.** When the application of the Code depends on the finding of a fact which is not required to be found beyond a reasonable doubt:

(1) The burden of proving the fact is on the prosecution or defendant, depending on whose interest or contention will be furthered if the finding should be made; and

(2) The fact must be proved by a preponderance of the evidence. [L 1972, c 9, pt of §1]

COMMENTARY ON §701-116

The draft follows the Model Penal Code in defining a standard of proof of facts called for in application of the Code. It would cover, for example, a finding that the defendant lacks mental capacity to proceed.[1] It logically places the burden of proof on the side whose interest or contention would be furthered if the finding is made. Proof must be by a preponderance of the evidence. Thus when facts making the defendant subject to increased penalties must be proved,[2] the prosecution need not prove them beyond a reasonable doubt, but only by preponderant evidence. The Model Penal Code draftsmen explain:

> ... proof that satisfies the court is not likely to leave room for a substantial doubt; and this, in our view, affords

an adequate protection in an area where we deliberately have sought to broaden the discretion of the court.[3]

§701-116 Commentary:

1. Cf. §§704-403 to 406.

2. Cf. §706-662.

3. M.P.C., Tentative Draft No. 4, comments at 114 (1955).

" **§701-117 Prima facie evidence.** Prima facie evidence of a fact is evidence which, if accepted in its entirety by the trier of fact, is sufficient to prove the fact. Prima facie evidence provisions in this Code are governed by section 626-1, rule 306. [L 1972, c 9, pt of §1; am L 1986, c 314, §3]

COMMENTARY ON §701-117

In drafting the Code, we have substituted the concept of prima facie evidence for presumptions, which appear to create insurmountable difficulties for lawyers, courts, and juries. Often it is desirable to enable the prosecution to get to the jury on something less than positive proof of a fact which may be almost solely within the knowledge of the defendant. As an example, §701-106(4) makes proof of the finding of a body of a homicide victim within the State prima facie evidence that the bodily impact causing death or the death itself occurred within the State, giving Hawaii's courts jurisdiction. Obviously it may be very difficult to prove where the criminal result occurred, and the presence of the body is a good indication that the result occurred here. On the other hand, although the prosecution's case gets to the jury on this point, the defendant can win by suggesting a reasonable doubt that the death or bodily impact did occur within the State. Thus, the prima facie evidence rule helps the prosecution to get its case to the jury without necessarily meeting its burden of persuasion. This is consistent with modern rules of evidence. See California Evidence Code §§601-02, 604.

Law Journals and Reviews

The Lum Court and the First Amendment. 14 UH L. Rev. 395 (1992).

Case Notes

Section merely creates a permissible inference of fact. 57 H. 526, 560 P.2d 110 (1977); 61 H. 99, 595 P.2d 1072 (1979).

" **§701-118 General definitions.** In this Code, unless a different meaning plainly is required:

"Act" or "action" means a bodily movement whether voluntary or involuntary.

"Acted" includes, where relevant, "omitted to act".

"Actor" includes, a person who acts, or, where relevant, a person guilty of omission.

"Another" means any other person and includes, where relevant, the United States, this State and any of its political subdivisions, and any other state and any of its political subdivisions.

"Conduct" means an act or omission, or, where relevant, a series of acts or a series of omissions, or a series of acts and omissions.

"Law enforcement officer" means any public servant, whether employed by the State or county or by the United States, vested by law with a duty to maintain public order or, to make arrests for offenses or to enforce the criminal laws, whether that duty extends to all offenses or is limited to a specific class of offenses.

"Omission" means a failure to act.

"Person", "he", "him", "actor", and "defendant" include any natural person, including any natural person whose identity can be established by means of scientific analysis, including but not limited to scientific analysis of deoxyribonucleic acid and fingerprints, whether or not the natural person's name is known, and, where relevant, a corporation or an unincorporated association.

"State" means a state of the United States, the District of Columbia, the Commonwealth of Puerto Rico, and any territory or possession of the United States.

"Statute" includes the Constitution of the State and a local law or ordinance of a political subdivision of the State. [L 1972, c 9, pt of §1; am L 2001, c 91, §2; am L 2005, c 112, §3]

Revision Note

Numeric designations deleted and definitions rearranged pursuant to §23G-15.

Cross References

Other definitions, see specific chapters of this Code.

COMMENTARY ON §701-118

Act 91, Session Laws 2001, amended this section by providing a definition of "law enforcement officer." The term "peace officer," as used in the Penal Code, caused the Intermediate Court of Appeals to question whether the term meant "law enforcement officer." Act 91 resolved the ambiguity by providing a definition of "law enforcement officer" and substituting that term for "peace officer" [in the Penal Code]. Conference Committee Report No. 23.

Act 112, Session Laws 2005, established a statewide deoxyribonucleic acid database and data bank identification program for all convicted felons. Conference Committee Report No. 184. Act 112 amended this section by amending the definition of "person," "he," "him," "actor," and "defendant."

Case Notes

A dolphin is not "another" within the meaning of paragraph (8). 1 H. App. 19, 613 P.2d 1328 (1980).

" **§701-119 REPEALED.** L 1988, c 260, §§4, 7; L 1996, c 104, §6.

Cross References

Forfeiture of property used as benefit or pecuniary benefit in the commission of an offense, see §710-1001.

Forfeiture of property used in illegal gambling, see §712-1230.

Hawaii omnibus criminal forfeiture act, see chapter 712A.