

Kidwell, J., dissenting

drug distribution is carried on by persons who are licensed to possess and dispense the drug. So far as Appellant is concerned, the statute draws no line between a licit and an illicit distribution, if the authorization to distribute was extended to Appellant by a licensed person.

At the conclusion of this analysis, I find myself wondering whether the permissible inference, from these circumstances, that Appellant's supplier was not within one of the statutory categories was not too weak to support a conviction, regardless of what alternative inferences were also permissible. In any event, it seems clear that the circumstances permitted an inference that Appellant's supplier was a licensed person selling drugs in the more profitable illicit market. The reasonableness of this inference depends, I believe, in part on the strength of any contrary inference. Where the inference of guilt is nearly matched in weight by the inference of innocence, as it is here, I would conclude that the circumstances do not exclude a reasonable hypothesis of innocence. The motion to acquit should have been granted.

I would reverse the conviction.

Syllabus

STATE OF HAWAII, Plaintiff-Appellee v. TOMMIE MODICA, Defendant-Appellant

NO. 5889

APPEAL FROM CIRCUIT COURT OF THE FIRST CIRCUIT  
HONORABLE WALTER M. HEEN, JUDGE

AUGUST 4, 1977

RICHARDSON, C.J., KOBAYASHI, OGATA,  
MENOR AND KIDWELL, JJ.

CRIMINAL LAW — *constitutional law — construction and operation — misdemeanor/felony — due process — equal protection.*

Where the act committed under the same circumstances is punishable either as a felony or as a misdemeanor, under either of two statutory provisions, and the elements of proof essential to either conviction are exactly the same, a conviction under the felony statute would constitute a violation of defendant's right to due process and the equal protection of the law.

SAME — *statutory construction — essential element — carrying "on the person".*

Where the carrying of a pistol or revolver on the person is an essential element of the conduct proscribed by the statute, the phrase "on the person" has been construed to mean physical connection with or attaching to the person.

SAME — *same — indictment and information — defenses.*

Statutes may on occasion overlap, depending on the facts of a particular case, but it is generally no defense to an indictment under one statute that the accused might have been charged under another.

SAME — *same — same — prosecutor's discretion.*

Where statutes overlap, depending on the facts of a particular case, the matter is necessarily and traditionally subject to the prosecuting attorney's discretion.

OPINION OF THE COURT BY MENOR, J.

The defendant was found guilty by a jury upon an indictment charging him with carrying a revolver without a permit or license to do so, in violation of HRS § 134-9. From the judgment and sentence of the trial court, the defendant appeals.

The operative facts are that the defendant was found with a loaded revolver, for which he had no permit, in the municipal parking lot at the corner of Smith and Pauahi Streets in the City and County of Honolulu. On the basis of these facts, he could have been charged for a misdemeanor under HRS

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§ 134-6,<sup>1</sup> for carrying a loaded firearm on a public highway, but he was charged instead with carrying a revolver on his person in violation of HRS § 134-9.<sup>2</sup>

The defendant does not contend that the two statutes are unconstitutionally vague, but he does assert that "[i]t is the arbitrary and unbridled discretion vested in the prosecutor which allows the prosecutor to charge the same conduct either as a felony, under HRS § 134-9, or as a misdemeanor, under HRS § 134-6, which violates the [defendant's] rights to the equal protection of the laws and due process of law." He argues that inasmuch as HRS § 134-6 and HRS § 134-9 prescribe different degrees of punishment for the same conduct committed under the same circumstances by similarly situated persons, his conviction and the entry of judgment against him pursuant to the terms of HRS § 134-9 violated his rights to due process of law and the equal protection of the laws.

We find no violation of the defendant's constitutional rights. A denial of these rights would be the result, only if a violation of the misdemeanor statute (HRS § 134-6) would invariably and necessarily constitute a violation of the felony provision (HRS § 134-9). *Palmore v. United States*, 290 A.2d 573 (D.C.App. 1972); *United States v. Coppola*, 425 F.2d 660 (2d Cir. 1969); *cf. State v. Canady*, 69 Wash.2d 886, 421 P.2d 347 (1966); *State v. Reid*, 66 Wash.2d 243, 401 P.2d 988

<sup>1</sup> HRS § 134-6, in pertinent part provides as follows:

"It shall be unlawful for any person to have in his possession or to carry on any public highway any firearm loaded with ammunition; provided that the provisions of this paragraph shall not apply to any person who has in his possession or carries a pistol or revolver and ammunition therefor in accordance with a license or permit issued, as provided in section 134-9.

Any person who violates any provision of this section shall be fined not more than \$1,000 or imprisoned not more than one year, or both."

<sup>2</sup> HRS § 134-9, in pertinent part provides as follows:

"... No person shall carry concealed or unconcealed on his person a pistol or revolver without being licensed to do so under this section or in compliance with section 134-6.

Any person violating this section shall be imprisoned for a term of not less than two years nor more than five years, without probation."

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(1965); *State v. Reed*, 34 N.J. 554, 170 A.2d 419 (1961). Thus, where the same act committed under the same circumstances is punishable either as a felony or as a misdemeanor, under either of two statutory provisions, and the elements of proof essential to either conviction are exactly the same, a conviction under the felony statute would constitute a violation of the defendant's rights to due process and the equal protection of the laws. *Olsen v. Delmore*, 48 Wash.2d 545, 295 P.2d 324 (1956); *State v. Pirkey*, 203 Or. 697, 281 P.2d 698 (1955). We do not, however, find this to be the case here.

Carrying a pistol or a revolver *on the person* is an essential element of the conduct proscribed by HRS § 134-9, but it is not a requirement under the provisions of HRS § 134-6.<sup>3</sup> The phrase "on the person" in a statute has been construed to mean physical connection with or attaching to the person. *Schraeder v. State*, 28 Ohio App. 248, 162 N.E. 647 (1928); *State v. Breckenridge*, 282 S.W. 149, 219 Mo.App. 587 (1926). Black's Law Dictionary (4th ed. 1976) defines the phrase "on the person" to mean "[i]n common parlance, . . . that [the article] is either in contact with his person or is carried in his clothing." Thus, the carrying of a pistol or revolver within a vehicle, not on the person, would constitute a violation of HRS § 134-6, but it would not be an offense under HRS § 134-9. See *Hampton v. Commonwealth*, 257 Ky. 626, 78 S.W.2d 748 (1934); *Blashfield, Cyc. of Automobile Law and Prac.*, Perm. Ed., § 5528.88.

Statutes may on occasion overlap, depending on the facts of a particular case, but it is generally no defense to an indictment under one statute that the accused might have been charged under another. *Territory v. Awana*, 28 Haw. 546 (1925); *In re Converse*, 137 U.S. 624 (1891); *State v. Swan*, 55 Wash. 97, 104 P. 145 (1909). *Cf. State v. Travis*, 45 Haw. 435, 368 P.2d 883 (1962). Under those circumstances, the matter is necessarily and traditionally subject to the prosecuting

<sup>3</sup> HRS § 134-6 also directs itself to all types of firearms, as defined in HRS § 134-1, as well as ammunition therefor, while the weapons covered by HRS § 134-9 are strictly limited to pistols and revolvers.

## Syllabus

attorney's discretion. *Newman v. United States*, 382 F.2d 479 (D.C.Cir. 1967); *Hutcherson v. United States*, 345 F.2d 964 (D.C.Cir. 1965), cert. denied 382 U.S. 894.

Affirmed.

Steven J. Levinson (Schutter, Levinson & O'Brien) for defendant-appellant.

Randolph Slaton, Deputy Prosecuting Attorney (Michael Gibson, Deputy Prosecuting Attorney on the brief, Maurice Sapienza, Prosecuting Attorney, of counsel) for plaintiff-appellee.

## Opinion of the Court

SAME — same — *circumstantial evidence*.

Whether the threat of harm was imminent, and whether the defendant was reasonable in his assessment of the situation and in acting as he did are to be determined from the facts and circumstances of the particular case.

SAME — same — *constitutional right — determination by jury*.

An accused is entitled to a jury determination of his guilt or innocence, and it is his constitutional right to present any and all competent matters in his defense.

SAME — *right to trial by jury — due process*.

A right to a trial by jury and the right to adduce evidence in his behalf are two of the fundamentals inherent in the due process guarantee of a fair trial.

SAME — *rejection of evidence — reversible error*.

It would be reversible error for the trial court to reject evidence which, if admitted, would present an essential factual issue for the trier of fact.

*Per Curiam*. The defendants, Horn and Ortiz, were indicted and convicted by a jury of the crime of escape in the second degree (HRS § 710-1021). They appeal from the judgment and sentence of the circuit court.

We are called upon to decide whether and to what extent the "choice of evils" or "necessity" defense (HRS § 703-302) is available to the accused in escape situations. We hold that the defense is available to the escapee provided certain conditions are met, and in this regard we adopt the rationale and the conditions imposed by *People v. Lovercamp*, 43 Cal.App.3d 823, 118 Cal.Rptr. 110 (1974), with one principal modification. In that case, the court held that a limited defense of necessity in escape situations is available to the accused if the following conditions exist:

- (1) The prisoner is faced with a specific threat of death, forcible sexual attack or substantial bodily injury in the immediate future;
- (2) There is no time for a complaint to the authorities or there exists a history of futile complaints which make any result from such complaints illusory;
- (3) There is no time or opportunity to resort to the courts;
- (4) There is no evidence of force or violence used towards prison personnel or other innocent persons in the escape; and

STATE OF HAWAII, Plaintiff-Appellee, v. GLENN KALANI HORN, LARRY JAMES ORTIZ, Defendant-Appellants, and DELBERT KAAHANUI WAKINEKONA, Defendant

NO. 5901

APPEAL FROM CIRCUIT COURT OF THE FIRST CIRCUIT  
HONORABLE MASATO DOI, JUDGE

AUGUST 5, 1977

RICHARDSON, C.J., KOBAYASHI, OGATA,  
MENOR AND KIDWELL, JJ.

CRIMINAL LAW — *defense of necessity — rights of defendant*.

The defense of necessity in escape situations is available to the accused when specific and articulable conditions within the prison exist which seriously expose the prisoner to severe injury.

SAME — same — *sufficiency of evidence*.

There must be some support in the evidence that the danger existed, that the defendant was vulnerably exposed to the danger, and that the threatened harm to him was imminent.