IN THE
SUPREME COURT OF THE REPUBLIC OF PALAU
APPELLATE DIVISION

ALMAS SOBAHAN,
Appellant,
v.
REPUBLIC OF PALAU,
Appellee.

Cite as: 2017 Palau 6
Criminal Appeal No. 16-001
Appeal from Criminal Case No. 15-080

Decided: February 22, 2017

Counsel for Appellant .....DeJon M. Redd
Counsel for Appellee .....Elizabeth A. Miles

BEFORE: ARTHUR NGIRAKLSONG, Chief Justice
JOHN K. RECHUCHER, Associate Justice
R. BARRIE MICHELSEN, Associate Justice

Appeal from the Trial Division, the Honorable Kathleen M. Salii, Associate Justice, presiding.

OPINION

MICHELSEN, Justice:

[¶ 1] Appellant Almas Sobahan appeals his conviction for Sexual Assault in the Third Degree (17 PNC § 1605).[1] The Court's pertinent findings of fact include that he told the victim, a 10-year-old girl, to meet him in his living area and, once there, kissed her on the mouth and rubbed her vagina both outside and inside of her clothing. Following the close of evidence, Defendant moved to dismiss the information on the grounds that the statute's definition of "sexual contact" is impermissibly vague and unconstitutionally overbroad. The Trial Division denied that motion, holding that: (1) Defendant could not bring a facial vagueness challenge because his conduct was specifically proscribed by the statute; and (2) the title of the statute at issue

---

[1] Defendant was found not guilty of continuing sexual assault of a minor, 17 PNC § 1606.

refers to "sexual" crimes; therefore his examples of hypothetical situations in which constitutionally protected or otherwise wholly innocent conduct were not criminal were rejected. The Trial Division held that the statute's scope only relates to sexual activity between the actor and the subject of the contact. On appeal, Sobahan asks the court to vacate his conviction because the challenged statute is both vague and overbroad.

[¶ 2] We deny the appeal and affirm the conviction.

APPLICABLE STATUTORY PROVISIONS AND STANDARD OF REVIEW

[¶ 3] The relevant statutory provisions of 17 PNC are as follows:

> § 1605(a): A person commits the offense of sexual assault in the second degree if: . . . (2) The person knowingly subjects to sexual contact another person who is less than fifteen years old or causes such a person to have sexual contact with the person.
>
> § 1601(o): "Sexual contact" means any touching, other than acts of "sexual penetration", of the sexual or other intimate parts of a person not married to the actor, or of the sexual or other intimate parts of the actor by the person, whether directly or through the clothing or other material intended to cover the sexual or other intimate parts.

[¶ 4] In this appeal, Defendant challenges the Trial Division's interpretation of law, which we review de novo. *ROP v. Terekiu Clan*, 21 ROP 21, 23 (2014). The Trial Division's factual findings are not a subject of this appeal.

DISCUSSION

[¶ 5] While there is substantial overlap between Defendant's overbreadth challenge and his vagueness challenge, a vagueness challenge to a statute is conceptually distinct from an overbreadth challenge. A vague law is one that is so lacking in clarity and precision that "it leaves the public uncertain as to the conduct it prohibits or leaves judges and jurors free to decide, without any legally fixed standards, what is prohibited and what is not in each particular case." *Ngirengkoi v. ROP*, 8 ROP Intrm. 41, 43 (1999) (quoting *Giaccio v. Pennsylvania* , 86 S. Ct. 518, 520-21 (1966)). "A vague statute violates the Due Process Clause of Article IV, Section 6 of the Constitution, and violates

a defendant's right to be informed of the nature of the accusation against him guaranteed in Article IV, Section 7." *Diaz v. ROP*, 21 ROP 62, 65 (2014). On the other hand, an overbreadth challenge claims that the statute "may be clear and precise in its terms, [but] sweep so broadly that constitutionally protected conduct is included in its proscriptions." *Am. Promotional Events, Inc.-Nw. v. City & Cnty. of Honolulu*, 796 F. Supp. 2d 1261, 1282 (D. Haw. 2011).

I. 1. VAGUENESS

A. Defendant Cannot Attack Palau's Sexual Assault Statute as Vague on its Face

[¶ 6] Generally speaking, a Defendant "who engages in some conduct that is clearly proscribed cannot complain of the vagueness of the law as applied to the conduct of others." *Ngirengkoi*, 8 ROP Intrm. at 43 (quoting *Hoffman Estates v. Flipside, Hoffman Estates Inc.*, 102 S. Ct. 1186, 1191 (1982)). Defendant argues, relying on United States case law, that although his conduct is at the "core" of the activities this statute is designed to prohibit, he may still raise a facial vagueness defense if the statute is one that is likely to chill the exercise of constitutionally protected conduct by others. However, the case law relied on by Defendant deals with vagueness challenges to statutes that chill the exercise of freedom of expression and freedom of association, which are protected by the First Amendment to the United States Constitution. Defendant does not suggest that Palau's sexual assault statute implicates freedom of expression or association, protected by Palau Const. Art. IV § 2 or § 3, and has given us no reason to depart from our previous holding that "vagueness challenges to statutes not involving [conduct protected by Palau Const. Art. IV § 2 or § 3] must be examined in light of the facts of the case at hand." *See Ngirengkoi*, 8 ROP Intrm. at 43. As such we hold he may not bring a facial vagueness challenge.

B. Palau's Sexual Assault Statute is Not Vague as Applied to Defendant

[¶ 7] Vaguely worded statutes raise due process concerns because

> First, they trap the innocent by not providing fair warning. Second, they impermissibly delegate basic policy matters to lower level

> officials for resolution on an *ad hoc* and subjective basis, with the attendant dangers of arbitrary and discriminatory application.

California Teachers Ass'n v. State Bd. of Educ., 271 F.3d 1141, 1150 (9th Cir. 2001).

[¶ 8] Defendant asserts that 17 PNC § 1601(o) violates his due process rights for two reasons: (1) the undefined term "other intimate parts" is vague and overbroad; and (2) the provision lacks a specific intent requirement. He argues that these deficiencies result in a statute that defines sexual contact so vaguely that wholly innocent conduct can be found to be included in the statute, and therefore the public does not have fair warning of what is criminal and not criminal. Secondly, Defendant argues that because the law is broadly worded, it therefore requires police officers, prosecutors, and judges to decide which individuals who violate the law should be prosecuted. Defendant argues that this results is *per se* arbitrary and discriminatory enforcement because it requires these individuals to supplement the statutory definition with their own interpretation of what behavior violates the law.

[¶ 9] We first consider whether the term "other intimate parts" is unconstitutionally vague. This Court considered a similar vagueness argument in *ROP v. Ngirasoi*, 2 ROP Intrm. 257 (1991). The issue in *Ngirasoi* was whether "use of a firearm" was a vague term. The Court began "with the assumption that the legislative purpose is expressed by the ordinary meaning of the word used."[2] *Id.* at 264. In that case, defendant shot the victim with a shotgun "causing the very type of injury sought to be prevented by the Firearms Control Act." *Id*. Because intentionally firing a shotgun at the victim would fall within any definition of the expression "use of a firearm," the Court concluded it was "unnecessary at this time to consider whether "use" of a firearm is unconstitutionally vague as it applies to some unconventional manner of using a firearm." *Id*. at 264-265.

[¶ 10] Similarly, in *Ngirengkoi*, the defendant raised an issue regarding whether taking "indecent and improper liberties" with a victim was too vague

---

[2] "Words and phrases as used in this code . . . shall be read in context and shall be interpreted according to the common and approved usage of the English language." 1 PNCA § 202.

to be the basis of a criminal conviction. 8 ROP Intrm. at 42. We noted that "indecent and improper liberties" was a "common statutory term" of discernible meaning, and hence not vague because it provided "adequate warning of the denounced conduct." *Id.* at 42-43. Furthermore, when Ngirengkoi "took a twelve year old girl in his taxi, parked the car, [and] touched her breasts and vagina," *id*. at 43, his behavior was undoubtedly within the statutory prohibition.

[¶ 11] Here, as in the above-cited cases, Defendant's actions are clearly within the purview of the applicable statute. Like "indecent liberties," "sexual or other intimate parts" is a common statutory term used to define sexual contact in many jurisdictions.[3] More importantly, Defendant cannot complain that the statute does not completely enumerate what parts of the body are "intimate" because he was not convicted of contact with the victim's "other intimate parts." Rather, he was convicted of touching a 10-year-old victim's vagina, which is clearly one of the victim's "sexual parts" under any conceivable construction of that term. As such, Defendant has no claim that any vagueness in the term "intimate parts" deprived him of fair warning.

[¶ 12] Additionally, we do not believe an enumerated list of "intimate parts" is necessary, or even particularly helpful, in providing fair warning as to what conduct is criminalized. "Although we recognize in many English words there lurk uncertainties . . . to meet the fair warning prong an ounce of common sense is worth more than an 800-page dictionary." *United States v. Cullen*, 499 F.3d 157, 163 (2d Cir. 2007) (internal citation omitted). The public's understanding of what constitutes intimate parts,[4] coupled with a

---

[3] *See, e.g.*, Model Penal Code § 213.4 ("Sexual contact is any touching of the sexual or other intimate parts . . .), which is based on New York Penal Law § 130.00(3) (defining "sexual contact" as a touching of "the sexual or other intimate parts"); *see e.g.*, Alabama Code § 13A-6-60(3) (same); Kentucky Rev. Stat. § 510.010(7) (same); Hawai'i Rev. Stat. § 707-700 (same); Montana Code § 45-2-101(67) (same); North Dakota Code § 12.1-20-02(54) (same); Oregon Rev. Stat. § 163.305(6) (same); Rev. Code Washington 9A.44.010(2) (same); Pennsylvania Consolidated Stat. § 3101 (defining "indecent contact" as a touching of "the sexual or other intimate parts").

[4] *See, e.g., State v. Woodley*, 760 P.2d 884, 887 (Oregon 1988) (holding that an intimate part is one that is "subjectively intimate to the person touched, and

consideration of the legal definitions adopted elsewhere,[5] means that the term is not subject to *ad hoc* interpretations of arresting officers or prosecution officials. Hence, the term does not create a subjective standard for enforcement.[6]

---

either known by the accused to be so or to be an area of the anatomy that would be objectively known to be intimate by any reasonable person."); *People v. Rivera*, 525 N.Y.S.2d 118, 119 (N.Y. Sup. Ct. 1988) ("It is also clear that intimacy, as regards parts of the body, must be viewed within the context in which the contact takes place. To put it another way, a body part which might be intimate in one context, might not be intimate in another"). *See also State v. Silver*, 249 P.3d 1141, 1147-48 (Hawai'i 2011) (holding that the victim's buttock was not an "intimate part" when defendant was using it to lift him and throw him about in the pool, but was intimate when defendant gave the victim a "late night massage" several days later).

[5] S*ee e.g.*, Michigan Comp. Laws § 750.520a(f) ("'Intimate parts' includes the primary genital area, groin, inner thigh, buttock, or breast of a human being."); Minnesota Stat. § 609.341(5) (same); Guam Code § 25.10(3) (same); Virginia Code § 18.2-67.10(2) ("'Intimate parts' means the genitalia, anus, groin, breast, or buttocks of any person."); Colorado Rev. Stat. § 18-3-401(2) ("'Intimate parts' means the external genitalia or the perineum or the anus or the buttocks or the pubes or the breast of any person."); Wisconsin Stat. § 939.22(19) ("'Intimate parts' means the breast, buttock, anus, groin, scrotum, penis, vagina, or pubic mound of a human being"); R.I. Gen. Laws § 11-37-1(3); (Intimate parts are the "genital or anal areas, groin, inner thigh or buttock of any person or the breast of a female.").

[6] *See, E.g., People v. Victor P.*, 120 Misc. 2d 770, 772-3 (N.Y.C. Crim. Ct., 1983) (rejecting vagueness challenge to New York Penal Law § 130.00(3) and holding that "sexual contact" is not unconstitutionally vague despite the lack of an explicit standard as to what constitutes a "sexual or other intimate part[]"); *Harris v. Warden Dewayne Estes*, Case No. 5:14-CV-1871-SLB-TMP, 2016 WL 4123660 at *7 (N.D. Ala., August 3, 2016) (rejecting vagueness challenge to Alabama Code § 13A-6-60(3)); *State v. Pagel*, 16 Or.App. 412, 414-16 (Oregon Ct. App. 1974) (holding that the phrase "sexual or other intimate parts" in ORS 163.425(7) is not unconstitutionally vague); *State v. C.C.*, 141 Wash.App. 1008 at *8 (Ct. App. Wash. 2d Div. 2007) (rejecting vagueness challenge to RCW 9A.44.010(2) asserted on the grounds that "intimate parts" is not defined with sufficient precision).

[¶ 13] Defendant's argument that the statutes are vague because there is no specific intent requirement., *i.e.*, they do not specify that the touching must be "for the purpose of arousing or gratifying sexual desire."[7] This argument is similarly meritless. Defendant does not contend that the absence of a specific intent requirement deprived him of fair warning that his actions were prohibited. Instead, Defendant argues that without a specific intent provision, 17 PNC §§ 1601(o) & 1605(a) criminalize "wholly innocent conduct, such as changing a diaper, acts necessary to care for a ward, an accidental brush in a crowded space or . . . the act of a mother breastfeeding." Defendant therefore argues that because the statute is so broad that it covers a large amount of innocent conduct, police officers, jurists, and judges are left without any legally fixed standards to judge who is guilty, and therefore "supplement the statutory definition" of Sexual Assault to punish what they judge to be "guilty" statutory violators while allowing "innocent" statutory violators to go free, resulting in arbitrary and discriminatory enforcement.

[¶ 14] The only case cited by Defendant where a sexual assault statute was struck down as unconstitutional is a 40-year-old Kansas case where the statute at issue prohibited "any fondling or touching of the person of either the child or the offender done or submitted to with the intent to arouse or satisfy the sexual desires of either the child or the offender or both." *State v. Conley*, 531 P.2d 36, 37 (Kansas 1975). The *Conley* Court held that this statute violates due process since it "can scarcely be said to contain ascertainable standards of guilt" because of "the combined indefiniteness as to the type of contact and the part of the body involved as set out in the statute." *Id.* at 39. A law which prohibits *any* sexually motivated physical contact with a child, even if the touching was non-sexual and was not of a sexual or other intimate area also violates the "fundamental principle that 'the law does not punish criminal thoughts.'" *See State v. Dinh Loc Ta*, 290 P.3d 652, 660-61 (Kansas 2012). The reasoning of *Conley* is inapplicable here because the Palauan sexual assault statute is crafted to punish inappropriate sexual *acts*, not inappropriate sexual *desires*.

---

[7] *See, e.g.*, Model Penal Code § 213.4 ("Sexual contact is any touching of the sexual or other intimate parts of the person *for the purpose of arousing or gratifying sexual desire*.") (emphasis added).

[¶ 15] Defendant argues that a specific intent requirement is "the very element that makes [sexual assault] criminal," ignoring the fact that the harm sexual assault laws seek to prevent is not the arousing or gratifying of the perpetrator's sexual desires, but rather harmful sexual touching of the victims regardless of motivation. In fact, the American Bar Association currently recommends that sexual abuse statutes *not* contain specific intent provisions because "motivation for committing sex offenses varies widely" and "prosecutors should not have to prove as an element of the crime the perpetrator's intent or purpose when he sexually touches a child."[8] Over the last several decades, many United States jurisdictions have removed specific intent provisions because "the legislature has a legitimate interest in prohibiting certain types of sexual contact with minors even when it cannot be proved that the defendant acted with the conscious intent of achieving sexual arousal or gratification." *Peratrovich v. State*, 903 P.2d 1071, 1077 (Alaska Ct. App. 1995); *see also State v. Holle*, 379 P.3d 197, 202-03 (Arizona 2016) (holding that the prosecution would not be required to prove specific intent to convict defendant for child molestation and sexual abuse.) Despite these widespread changes, Defendant has not pointed to a single example of a United States sexual assault statute without a specific intent requirement being struck down as vague.

[¶ 16] As explained in the Section II below, Palau's sexual assault statute criminalizes contact described not as "physical contact" but as "sexual contact," and we agree with the Trial Division's holding that the use of the term "sexual" in Chapter 16 of Title 17 connotes that the contact must relate to or involve sexual behavior in some way. The purpose may be for the actor's sexual gratification. It might be to inflict humiliation or punishment. But whatever the perpetrator's purpose, it is the fact that a touching is sexual which makes contact between an adult and a child under the age of fifteen a crime. Since "it is possible to determine what particular acts are prohibited," the lack of a specific intent requirement does not create a subjective standard for enforcement. *Ngirengkoi*, 8 ROP Intrm. at 43.

---

[8] American Bar Association's National Legal Resource Center for Child Advocacy and Protection, Recommendations for Improving Legal Intervention in Intrafamily Child Sexual Abuse Cases, p. 15 (1982), *available at* https://www.ncjrs.gov/pdffiles1/Digitization/87385NCJRS.pdf.

II. 2. OVERBREADTH

[¶ 17] This Court has not yet determined whether and under what circumstances, a Defendant whose conduct is not constitutionally protected may bring an overbreadth challenge to a criminal statute. We note that the American case law relied on by Defendant would not allow him to bring this overbreadth challenge in United States federal courts. Arguing exclusively from United States case law, Defendant argues that he may bring an overbreadth claim because, while his own conduct was found to be clearly covered by the statute's terms and is not constitutionally protected, enforcement of the statute threatens others not before the court who might wish to engage in protected activity but who may refrain from doing so rather than risk prosecution or undertake to have the law declared invalid. Yet the United States case law that Defendant cites only allows overbreadth challenges to laws that implicate freedom of expression and association, and the United States Supreme Court has repeatedly stated, in the very cases cited by Defendant, that "outside [this limited] context, a criminal statute may not be attacked as overbroad." *Schall v. Martin*, 467 U.S. 253, 268 n.18 (1984). However, since the Republic has not argued that Defendant cannot bring an overbreadth claim, we will assume without deciding that an overbreadth claim may be asserted, and we will therefore address Defendant's argument.

[¶ 18] Defendant's overbreadth argument is very similar to his argument that Palau's sexual assault statutes are unconstitutionally vague because they lack a specific intent requirement. As discussed above, the American Bar Association currently recommends that sexual abuse statutes *not* contain specific intent provisions, and a specific intent requirement is not required to avoid the criminalization of wholly innocent conduct. Statutes without specific intent provisions take a variety of approaches to exclude non-sexual touching, including requiring that the touching be done in a sexual manner,[9]

---

[9] *See*, *e.g.*, Michigan Comp. Laws § 750.520a(q): ("Sexual contact includes the intentional touching of the victim's or actor's intimate parts or the intentional touching of the clothing covering the immediate area of the victim's or actor's intimate parts, if that intentional touching can reasonably be construed as being for the purpose of sexual arousal or gratification, done for a sexual purpose, or in a sexual manner for: (i) Revenge; (ii) To inflict humiliation; (iii) Out of anger.")

excluding touching that falls into specific categories,[10] or by adding affirmative defenses that require the defendant to prove that he was not motivated by a sexual interest.[11]The Olbiil Era Kelulau restructured Palau's sexual offenses in 2012 as part of the Palau Family Protection Act, RPPL 8-51 § 5, using language that is identical to the Hawai'i sexual assault statute in all relevant respects. *See* Hawai'i Rev. Stat. §§ 707-700, 707-732. While we are not bound by Hawai'i case law, "when one jurisdiction adopts the statute of another jurisdiction as its own, there is a presumption that the construction placed upon the borrowed statute by the courts of the original jurisdiction is adopted along with the statute." *Becheserrak v. ROP*, 7 ROP Intrm. 111, 115 (1998) (quoting *United States v. Aguon*, 851 F.2d 1158, 1164 (9th Cir. 1988). The Hawai'i sexual assault statute was amended in 1986 to remove the specific intent requirement without making any additional changes, so deletions of the specific intent provision in the Hawai'i statute was clearly intentional. *See State v. Kalani*, 118 P.3d 1222, 1228 (Hawai'i 2005). In responding to vagueness and overbreadth challenges to the definition of "sexual contact," the Supreme Court of Hawai'i has stated that it gives this definition "a limited and reasonable interpretation . . . in order to preserve its overall purpose and to avoid absurd results," and has thus rejected arguments that "sexual contact" includes contact routinely engaged in by "dance instructors, fashion designers, and tailors [as well as] sitting on the lap of Santa Claus, or the Easter Bunny." *State v. Richie*, 960 P.2d 1227, 1240 (Hawai'i 1998). The Supreme Court of Hawai'i has also summarily rejected an overbreadth challenge to the sexual assault statute based on its lack of a specific carve-out for normal interactions with a child. *State v. Hicks*, 148 P.3d 493, 509 (Hawai'i 2006) ("the difference between Alaska's definition

---

[10] *See, e.g.*, Alaska Stat. § 11.81.900(52)(B) ("but 'sexual contact' does not include acts (i) that may reasonably be construed to be normal caretaker responsibilities for a child, interactions with a child, or affection for a child; or (ii) performed for the purpose of administering a recognized and lawful form of treatment that is reasonably adapted to promoting the physical or mental health of the person being treated.")

[11] *See, e.g.*, Arizona Rev. Stat. § 13-1407(E) ("It is a defense to a prosecution [for sexual abuse or molestation of a child] that the defendant was not motivated by a sexual interest.")

statute [containing a specific carve-out] and Hawaii's definition statute does not somehow render Hawaii's sexual assault statutes unconstitutional"). Based on this reasoning, Hawai'i courts have considered and summarily dismissed several additional overbreadth challenges to Hawaii's sexual assault statute in several unpublished decisions. *See State v. Quiros*, 160 P.3d 1271 (Haw.Int.Ct.App. Jun. 29, 2007) (unpublished); *State v. Rita*, 88 P.3d 1209 (Hawai'i 2004) (unpublished).

[¶ 19] In light of this Hawai'i case law, the OEK had every reason to believe that it was creating a limited and reasonable definition of "sexual contact" by adopting the language used by Hawai'i. Although the statute Palau adopted from Hawai'i is not as detailed as some other jurisdictions, the reasonable interpretation of "sexual contact" is that it requires the touching to be done in a sexual manner. While we do not rely on the names of the crimes enumerated in Chapter 16 of Title 17 to determine the elements of those crimes, *see* 1 PNCA § 205, courts can and should consider the plain meaning of the defined terms chosen by the OEK, as well as the overall policies and objectives of the legislation containing these definitions. *See* 1 PNCA § 201-202. At an absolute minimum, the Court will not interpret the OEK's definitions in a way that "would lead to absurd results." *See Lin v. ROP*, 13 ROP 55, 58 (2006). Palau's sexual assault statute criminalizes contact described not as "physical contact" but as "sexual contact," and the areas that constitute sexual contact when touched consist not of an enumerated list of anatomical areas, but of the general category of "sexual or other intimate parts." Because of this, we agree with the Trial Division's holding that the use of the term "sexual" in Chapter 16 of Title 17 connotes that the contact must relate to or involve sexual behavior in some way. We hold that even assuming Defendant can bring an overbreadth challenge to section 1605(a), it fails because the statute cannot reasonably be interpreted to reach his non-sexual hypothetical examples, since they represent examples of physical contact, but do not relate to or involve sexual behavior.

CONCLUSION

[¶ 20] For the foregoing reasons, the Defendant's conviction is **AFFIRMED**.

SO ORDERED, this 22nd day of February, 2017.