Udui v. Dirrecheteet, 1 ROP Intrm. 114 (1984)

CHIEF UORUYOS FELICIANO E. UDUI and UODELCHAD IROROW, Individually and Representing Ngeruos Clan,
Plaintiffs-Appellants,

v.

NGIRUR DIRRECHETEET, TIMARONG ADALBERT, and NGARAMADARRAK, Represented by NGIRAIBAI TULOP, SECHALKEBUR NGIRARIKEL, and MISCH MAKILONG,
Defendants-Appellees.

CIVIL APPEAL NO. 8-82
Civil Action No. 27-82

Supreme Court, Appellate Division
Republic of Palau

Opinion
Decided: February 21, 1984

Counsel for Appellants: Johnson Toribiong
Counsel for Appellees: John O. Ngiraked, Jonas Olkeriil

BEFORE: MAMORU NAKAMURA, Chief Justice; ALAN L. LANE, Associate Justice; LOREN A. SUTTON, Associate Justice.

LANE, Justice:

The Appellants appeal the decision of the Trial Division of the Supreme Court, Republic of Palau, which held that Appellee, Timarong Adalbert, was vested with traditional title of Chief Uoruyos, the highest ranking title of Chief in Ngeruos Clan of Ngiwal State. This title dispute began between the parties in 1978. Prior to that time, Appellant, Feliciano E. Udui, without apparent objection by anyone, assumed and acted the role of Chief Uoruyos following the death of his father in 1974, the previous and undisputed holder of the title.

⊥115 STATEMENT OF FACTS

In 1978 Eoulsau, the Uodelchad, or the highest female title bearer of Ngeruos Clan, appointed Appellant Udui as Chief Uoruyos by letter (Plaintiff's Exhibit 1). Subsequent to this appointment there was no formal meeting or "acceptance" by the Clan or the Ngiwal Council of Chiefs, called Ngaramadarrak. In 1980, Eoulsau sent a letter to the House of Chiefs (Defendant's Exhibit A) appointing Appellee Adalbert as Chief Uoruyos. Subsequent to this event, Eoulsau died, and in 1981 Dirrecheteet reaffirmed and submitted Appellee Adalbert's name to the Ngaramadarrak, whereupon he was formally seated in the traditional Abai as Uoruyos. A feast and exchange of money followed. By unanimous vote, the Ngaramadarrak

accepted Appellee Adalbert as Uoruyos. Dirrecheteet, being Ochell in the Clan and from a weaker lineage than Eoulsau, nevertheless claimed the role of Uodelchad as there were no longer any other Ochell members of the stronger lineage.

ISSUES PRESENTED

The Court must decide, under Palauan custom, what, if any, approval must be given, and in what form after an appointment of Uoruyos by Uodelchad. Ancillary to this issue is the status of Dirrecheteet, being Ochell from a weaker lineage of Ngeruos Clan, in becoming the senior female member, or Uodelchad, of the Clan where no Ochell members remain in the stronger lineage.

ANALYSIS

Appellants filed their Notice of Appeal on December 2, 1982, and raised numerous issues involving factual matters decided at trial. It is not the role of the Appellate Court to re-weigh the evidence, test the credibility of witnesses, or draw inferences from the evidence. The trial judge is the fact finder for all purposes, and his analysis and consideration will not be disturbed on appeal unless clearly erroneous. *Sato v. Bedul*, 7 TTR 600, 602 (App. Div. 1978). We find no reason to depart from the well settled concept that if the facts are presented and decided at the trial, the Appellate Court will not interfere.

A different problem exists where the law of custom is involved. Although a similar presentation of facts is required at trial, we hold that a higher standard of proof is necessary to sort out the complexities of this unique unwritten law. Normally, an expert witness will assist the court by tracing the historical application of customary law to the facts. The court will frequently appoint an assessor to resolve any ⊥116 conflict in the expert testimony.

The use of custom is not unique to Palau or other places in Micronesia. Custom has its place in modern society in various fields of the law. The most common usage of custom in the law in the United States appears in business and trade. Although business and trade custom and cultural custom are in no way similar, the concepts of proof of custom are analogous.

In the United States, in offering evidence of custom, expert testimony is widely used to show the common practice, recognition and acceptance by members of the particular association or industry. "To establish a custom, there must have existed a uniform, long established, widely, universally and notoriously known and recognized commercial habit to transact business in a certain way . . . [.]" *Robinson v. United States*, 80 U.S. 363, 20 L.Ed. 653 (1872); *Shipley v. Pittsburgh and L.E.R. Co.*, 83 F.Supp. 722, 749 (1949), *affd*, without op., 489 F.2d 756. In order to qualify a witness as an expert as to general custom, it must appear that he has complete and full knowledge and experience on the subject about which he speaks. *Robinson v. United States, supra*.

The higher standard of proof required is shown through application of numerous court decisions on the subject of custom and usage in the United States.

> "A person seeking to establish custom or usage has the burden of proving it by evidence so clear, un-contradictory and distinct as to leave no doubt as to its nature and character. Proof of certain isolated instances is not sufficient to establish a usage or custom." *United States, Etc., v. Guy H. James Construction Co.*, 390 F.Supp. 1193, 1209 (1972), affd. without op., 489 F.2d 756.
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> "A practice to arise to the dignity of a custom . . . must possess those elements of certainty, generality, fixedness, and uniformity, as are recognized by the law as essential to constitute a custom. A loose, variable custom or discretionary practice does not arise to the dignity of a custom so as to control the rights of the parties. . . [.]" *Shipley v. Pittsburgh and L.E.R. Co., supra*.

An expert witness on custom must state facts clearly ⊥117 supporting a conclusion of law, and may not offer his opinion as to what the custom is. *Shipley v. Pittsburgh and L.E.R. Co., supra*. This, as stated earlier, is accomplished by clear and convincing evidence. To aid the court in determining a conflict in expert testimony, or to clear up and confirm the evidence presented on custom, the court frequently appoints an assessor to advise the court in such technical matters. However, in so doing, the court must make all such discussions a matter of record. Republic of Palau Law No. 1-17, § 15.

The record herein clearly indicates that an assessor was appointed and used at trial. However, the record is silent as to what role the assessor played with the Trial Court in establishing the existence of the customs relied on in the Judgment. These critical conclusions of law must be clearly supported by the record before this Court can make its review. Lacking reference in law to the issues presented creates a review of guesswork.

CONCLUSION

The law of custom, by its very nature, must be reduced to written form by the record at trail, and with clear and convincing evidence. Only then may the Appellate Court review the law presented and test the standard of proof required. The Court finds that these standards were not satisfied in this case. The record of the assessor is critical and required by law.

In view of the foregoing, the Judgment of the Trial Court is hereby reversed, and this matter is remanded for a new trial consistent with the opinions stated herein.