Ngirmekur v. Municipality of Airai, 1 ROP Intrm. 22 (1982)

JONATHAN NGIRMEKUR,
Plaintiff-Appellee,

v.

MUNICIPALITY OF AIRAI
by its MAGISTRATE, et al.,
Defendants-Appellants.

CIVIL APPEAL NO. 173
Civil Action No. 42-76

Trust Territory of the Pacific Islands
Appellate Division of the High Court

Opinion
Decided: March 10, 1982

Counsel for Appellants: Johnson Toribiong
Counsel for Appellee: John O. Ngiraked

BEFORE: HAROLD W. BURNETT, Chief Justice; MAMORU NAKAMURA, Associate Justice.

NAKAMURA, Justice:

Plaintiff-Appellee, Jonathan Ngirmekur, brought this action in tort against the Municipality of Airai, Palau District, and its agents for certain damages to Plaintiff's property sustained as a result of his eviction from Airai by the defendants-appellants.

Appellants urge several grounds of error:

1. That the trial court erred as a matter of law when it denied defendants-appellants' motion to dismiss the subject tort action against Airai Municipality under the doctrine of sovereign immunity.

2. That the trial court erred as a matter of law when it refused to recognize the local custom of evicting persons from a community.

3. That the trial court erred as a matter of law when it permitted and assessed $5,000.00 punitive damages against the defendants-appellants.

⊥23 4. That there was insufficient evidence to show that eviction measures authorized and sanctioned by Airai Municipality were the proximate cause of any compensable damage to the plaintiff-appellee's property and that the trial court's assessment of $7,025.50 as

compensatory damages had no basis in evidence in that the plaintiff-appellee's Exhibit No. 1 (i.e. plaintiff's inventory of items allegedly lost or damaged) was never offered or admitted into evidence and any other testimony on property damage was so speculative and uncertain as to have had no probative value.

In October of 1970, the plaintiff moved from the Municipality of Ngardmau, Palau District, and requested the permission of the magistrate of Airai to move onto the property in Airai to build his house. Permission was granted, and the plaintiff was told he could stay there as long as he complied with certain community rules and regulations and local obligations to the community. No written lease was prepared and no written rules and regulations were provided to the plaintiff.

The plaintiff built his home on the property and began to live there along with 15 other dependents and family members. Sometime thereafter, the plaintiff started using a portion of a concrete building which was built by the Japanese and left over from World War II. The concrete building is about 200 yards from the plaintiff's house. The plaintiff used the building for a shop to build boats and to do carpentry work. The last boat the plaintiff built was completed in 1974 and was of sufficient size to demand a price of $15,000. The Municipality used a portion of the second floor of the same concrete building for an office.

The plaintiff also commenced using an adjacent smaller concrete building to house a generator. Extensive overhead wires were strung from the generator house to the plaintiff's house and five other houses in the vicinity. The plaintiff did not charge his neighbors for the power supplied to them.

After judgment was entered in a companion case in which the appellee was a party-intervenor (Civil Action 6-74), the council of chiefs and the municipal council of Airai met several times and a decision was made to evict the plaintiff. A delegation first called upon the plaintiff sometime around the latter part of July informing him that he had not met his "responsibilities and obligations" to the Airai Municipality[,] and he was given 45 days to vacate the premises.

At least one or two other notices were conveyed to the ⊥24 plaintiff that he had to move. At one time, he was advised that if he apologized to the Chief of Airai, he may not have to move. However, the plaintiff did not apologize. Nor did the plaintiff move from his house or the concrete building.

Shortly before September 16, 1975, Chief Ngiraked Matlab and the Municipality met and arranged to have an association of the younger men of Airai, known as Ngarabras, evict the plaintiff. The leader of the Ngarabras was Edeluchel Eungel.

Sometime during the day of September 16, 1975, approximately 10 members of Ngarabras came to the house of the plaintiff. At that time only the plaintiff's daughter was at home.

The men broke a locked door of the house and entered, and threw the personal property of the plaintiff out of the house, including a heavy wooden bar which had been nailed to the floor of the house. In addition, they ripped off sinks from an outdoor wall and then nailed all the doors shut. On one of the front doors there was painted "Airai Municipality" or words of similar effect.

At the same time, the tools, equipment, and generator of the plaintiff were removed from the concrete buildings and left outside. The lock on the generator house was broken.

During this time, the daughter of the plaintiff hid in the trees and then left Airai the next morning. The plaintiff was in Ngardmau on September 16th.

On or about September 17, 1975, the plaintiff learned of the incident and on September 18, 1975, went to the property. On September 20, 1975, the plaintiff and some of his relatives moved his tools and equipment back inside the concrete buildings and salvaged some of his personal belongings. Also, at this time, he prepared an inventory of items he alleges became lost or damaged (plaintiff's Exhibit 1).

The plaintiff and his family were frightened, and they never returned to the property until the morning of September 30, 1976, when the court viewed the premises.

During the trial of this matter, the court, after motions by the defendants, dismissed the complaint as to all defendants except the Municipality of Airai, Chief Ngiraked Matlab, Edeluchel Eungel, and the Ngarabras Organization.

On October 8, 1976, the trial court entered judgment ⊥25 jointly and severally against the defendants-appellants in the sum of $12,025.50 of which $7,025.50 was the court's assessment of compensatory damages, the remaining $5,000.00 being awarded as punitive damages. In addition the defendants, their agents, employees, or representatives were enjoined from interfering with the plaintiff's recovery of his remaining property from the concrete buildings, and from disturbing the peaceful occupation of the house of the plaintiff.

Appellants' first assignment of error is that the trial court erred as a matter of law when it denied the appellants' motion to dismiss against Airai Municipality under the doctrine of sovereign immunity.

Areas and limits of municipal liability are largely defined by case law, not by statute. Dissatisfaction with the common law rule of municipal immunity from tort liability led early on to a number of qualifications of the rule designed to permit the municipality to be held liable under certain circumstances.

There has been a historical recognition of the dual nature of municipal functions into two categories, governmental and proprietary. In determining municipal liability for torts, in the absence of a statutory provision, the majority of courts have adhered to the principle that in the exercise of so-called governmental functions, the municipality is immune from liability. In the

exercise of proprietary functions, the municipality is liable in tort. *See* 57 Am. Jur. 2d., *Municipal, School, and State Tort Liability*, Section 27: 60 ALR2d 1198.

The line between municipal operations that are proprietary and therefore, a proper subject of suits in tort, and those that are governmental, and therefore immune from suits, is not clearly defined. *District of Columbia v. Totten*, 5 F.2d 374 (D.C. Cir. 1925). But the modern tendency is to restrict rather than extend the doctrine of municipal immunity. *Madison v. San Francisco*, 234 P.2d 995, 106 Cal. App. 2d 232 (1951).

In this particular case, the trial court found that the acts of the appellants involved a wilful tort and not one of simple negligence or failure to perform some duty. We hold that where the municipality through its officials, agents or employees is engaged in positive misfeasance or wrongful acts as distinguished from mere negligence, the municipality sheds its mantle of immunity from tort liability.

We believe that it is a wise and just public policy for the law to make its artificial creatures responsible for ⊥26 the harm inflicted by those through whom they must act.

Accordingly, we find that the trial court did not err when it denied defendants-appellants' motion to dismiss against Airai Municipality under the doctrine of sovereign immunity.

Appellants' next contention is that the trial court erred as a matter of law when it refused to recognize the local custom of evicting persons from a community simply because it was infrequently used.

The appropriate starting point for a discussion of the applicability of local custom to the facts of this case is 1 TTC § 102:

> The customs of the inhabitants of the Trust Territory not in conflict with the laws of the customary law of the various parts of the Trust Territory shall have the full force and effect of law so far as customary law is not in conflict with the laws mentioned in Section 101 of this Chapter.

We disagree with the appellants' assessment of the trial court's reasons for subjugating the submitted custom to the law which was ultimately applied to the facts of this case. Certainly, one reason for refusing to allow the custom to be recognized as valid was that the court felt it was not firmly established and that it was infrequently used (citing *Lajutok v. Kabua*, 3 TTR 630 (App. Div. 1968). But moreover, as the court stated, there were "several reasons" why the custom could not be used to give legal sanction to the acts of the defendants.

The testimony introduced at trial relating to the custom of eviction, offered without foundation as to the expertise of the witness or objection on the ground, was as follows:

> THE COURT: In the olden times, what was done when somebody was being asked to leave a village?

A. In the olden days, if a particular person is not complying with the affairs and responsibility of the public of that community, the action will be taken to force him out. First, words will be sent to him regarding the plan that the community is taking against him; second, they will make a bamboo raft and present it to him to show that he has to leave the specific area; third, the men would get together by order of the chief and be sent by the chief to ⊥27 kill that particular person. If he is still not complying with those four rules, then the fifth action would be that the chief will send many people to go over to burn the house and kill everyone in the family.

Q. Has Airai Municipality done a similar thing in the past?

A. Yes, twice in German times and once in Japanese times.

It is significant that, even if the custom was a viable one, the defendants did not afford the appellee the process due him according to the custom's procedure. A bamboo raft was never presented to him prior to the forcible removal of his property. The absence of this vital step in the procedure is in itself sufficient for a finding that the custom was not implemented in accordance with its own precepts.

Of far greater import, however, are the extreme remedial measures called for in steps 3 and 5 of the eviction process. The killing of a human being is justifiable only in the narrowest of circumstances, and never, under any circumstance, can it be utilized as a lawful evictionary measure. As the trial court aptly pointed out, public policy forbids the enforcement of those customs which are inherently disruptive of maintaining law and order. *Yangilemau v. Mahoburimalei*, 1 TTR 429 (Tr. Div. 1958). If the custom as submitted was carried as far as the third step, the defendants would have been guilty of homicide. Where a crime is committed the criminal cannot use custom as a shield from prosecution. *Figir v. Trust Territory*, 4 TTR 368 (Tr. Div. 1969). Nor does motive, no matter how compelling, ever make an act lawful which is declared by statute to be a crime. *Id.*, at 376.

As a general rule, appropriate means to exercise police power rests with the discretion of municipal authorities, and courts will not interfere unless the means employed amount to unreasonable and oppressive interference with individual and property rights. *Ngirasmengesong v. Trust Territory*, 1 TTR 615 (App. Div. 1958). In the instant case, the trial court properly "interfered" with the exercise of police power implemented through custom.

Lastly, we disagree with the trial court's determination that the custom was invalid because it was only infrequently used. Testimony at trial revealed that the submitted custom was used in Airai Municipality twice in German times and once in Japanese times. Such an extreme measure is hardly likely to be used more often than a few times, if at ⊥28 all, and the viability of the custom, though not sanctioned by this Court, is not abrogated merely because of the relative infrequency of its implementation.

We now turn to the issue of damages.

Appellants' claim, and the record reflects, that the plaintiff-appellee's Exhibit 1, which is an inventory of the items he allegedly lost or had damaged in the "eviction", was never formally offered or admitted into evidence. Notwithstanding this exclusion of the list as documentary evidence, the trial court's award of $7,025.50 in compensatory damages is sustained for three reasons. First, the plaintiff-appellee was allowed at trial to read from the list ultimately marked as Exhibit 1. Counsel had adequate opportunity to object to its being read into evidence, but failed to do so. Secondly, although the court recessed before the entire inventory was read into evidence, the submitted aggregate worth of the items allegedly lost or damaged was considerably in excess of the $7,025.50 awarded by the court.

Finally, in addition to receiving testimony from the plaintiff as to his losses, the court had viewed the equipment in the concrete building, and had based in part its appraisal of the plaintiff's losses on this view. Findings of fact by the trial court will not be set aside by the appellate court unless they are clearly erroneous. *Jatios v. Levi*, 1 TTR 578 (App. Div. 1954); *Yamashiro v. Trust Territory*, 2 TTR 638 (App. Div. 1963); *see* also, *Arriola v. Arriola*, 4 TTR 486 (App. Div. 1968); 6 TTC 355(2). Upon review of the record, we are satisfied that the trial court found sufficient evidence to support its finding as to the property damage sustained by the plaintiff-appellee.

Appellants' last assignment of error is that the trial court erred as a matter of law when it permitted and assessed $5,000.00 in punitive damages against them.

Although there is some authority to the contrary, the general rule is that in the absence of statutory authority, there is no right to recover punitive damages against a municipal corporation. *Lauer v. Young Men's Ass'n of Honolulu*, 557 P.2d 1334 (Haw. 1976); *Nixon v. Oklahoma City*, 555 P.2d 1283 (1976); 57 Am. Jur. 2d., *Municipal, School, and State Tort Liability*, § 318. We concur with the public policy behind the rule denying recovery against municipalities and see no purpose in penalizing the entire people of Airai. However, the award of punitive damages is affirmed as against the other defendants as the trial court found them jointly and severally liable.

⊥29 The judgment of the trial court is affirmed as to its award of compensatory damages against the Municipality of Airai, Chief Ngiraked Matlab, Edeluchel Eungel, and the Ngarabras Association, and reversed as to its award of punitive damages against the Municipality of Airai.