Rechirei v. Diaz, 11 ROP 252 (Tr. Div. 2004)

RICHARD RECHIREI,
Plaintiff,

v.

ALFONSO DIAZ,
Defendant.

CIVIL ACTION NO. 01-356

Supreme Court, Trial Division
Republic of Palau

Decided: April 7, 2004

ARTHUR NGIRAKLSONG, Chief Justice:

This lawsuit is about a fight in a bar between plaintiff Richard Rechirei and defendant Alfonso Diaz. Mr. Moses Uludong, Trial Counselor, represented the plaintiff and Mr. Roman Bedor, Trial Counselor, represented the defendant.[1]

On October 24, 2001, defendant was sitting with Senator Koshiba, Randy Cunliffe, Margie Dalton, Encely Ngiraiwet, and others at a table at the Happy Lady's Club (HLC). Their table was fronting the water. Defendant was asked to order drinks at the bar. The first time he went to get the drinks, the plaintiff was sitting at the bar.

Defendant testified that when he got to ⊥253 the bar, plaintiff described to defendant Satski's (Yobech) and Monica's (Rechirikl) sexual organs. Satski and Monica are plaintiff's former wives and are close relatives of the defendant. Defendant testified that he tried to brush off the offensive comments. At the time there were not many people at the bar. However, before he left the bar with drinks, defendant remembered asking plaintiff "what is your problem?"

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[1]Mr. Moses Uludong filed a complaint on behalf of the plaintiff on December 20, 2001. In the complaint, he asked for relief in the amount of $151,000 against the defendant who is represented by Mr. Roman Bedor.

A "trial counselor . . . is a person who is not an attorney but who, by reason of study and experience, has acquired some legal skills and knowledge of the law, and is permitted by the Supreme Court to engage in a limited practice of law." Rule 2(a) of the Rules of Admissions for Trial Counselor. One of the limitations on a trial counselor's scope of practice is that he or she shall not represent a party in a civil suit with a value over $10,000 absent a waiver from his client and an approval by the Court. *Id.* at 2(c).

The Court, by its order of May 20, 2002, asked Mr. Uludong and Mr. Bedor to comply with the limitations on a trial counselor's practice. Mr. Uludong subsequently filed an amended complaint to comply with the monetary ceiling of no more than $10,000.

After awhile, defendant went back to the bar to order more drinks. The band had started playing and more people had come to the bar. Defendant testified that plaintiff repeated the derogatory remarks about Satski's and Monica's sexual organs, which angered the defendant. Defendant retaliated by telling the plaintiff that he is a "rapist." Plaintiff then pounded on the bar and said to defendant, "let's go outside."

Plaintiff denied that he said anything insulting about Satski and Monica at all. Instead, he testified that he told the defendant that looking at defendant's table from where the plaintiff sat (at the bar), it appeared through the glass window that Margie was about to hit the defendant on the head with a bottle of wine. This was said as a joke. And when defendant called the plaintiff a "rapist," plaintiff got up and said, "let's go outside."

The Court finds that the defendant's version of this exchange of insults is more credible than the plaintiff's. First, defendant's version is partially corroborated by Rdialul Rumong, the bar bouncer that evening. Rumong testified that he heard plaintiff and defendant argue and that he heard plaintiff mention the names of Satski and Monica to the defendant. As both women are Rumong's close relatives, he felt insulted and walked away. Second, the so-called joke about Margie's silhouette looking like she was about to hit defendant with a bottle of wine does not make any sense. It is difficult to see how such an innocuous joke, if it were said, would provoke the defendant to call the plaintiff a rapist. Plaintiff's trial counselor explained that this Margie joke challenged defendant's manhood. Again, this is difficult to accept. Defendant spent 23 years in the U.S. Military, two in Vietnam. Third, plaintiff's Margie joke was not corroborated by any of the witnesses.

It is undisputed that when defendant retaliated by telling the plaintiff that he was a rapist, plaintiff said to defendant, "let's go outside." Plaintiff testified, however, that he invited the defendant to go outside so that they could apologize to each other. Defendant testified that when plaintiff said, "let's go outside," he thought plaintiff was inviting him to a mutual combat, and defendant accepted the invitation.

The Court finds that when plaintiff said "let's go outside," after plaintiff had again described Satski's and Monica's sexual organs to defendant and after defendant had called plaintiff a rapist, that it was reasonable for the defendant to think that plaintiff was inviting him for a fight.

The testimonies of plaintiff and defendant differ about what happened after they got outside. Plaintiff said that defendant spoke first, telling plaintiff that what you said to me inside, meaning the Margie joke, angered me. Plaintiff supposedly replied, what you said to me, calling me a rapist, also angered me. Plaintiff testified that he then said, "let's forget what we said to each other. We are adults. Let's go back inside."

Defendant remembered things differently. He testified that he followed the plaintiff outside. On the way out they were ⊥254 arguing, after he got outside, plaintiff made a quick u-turn and re-entered the premises. Defendant followed the plaintiff. When plaintiff turned toward defendant with what looked to the defendant like a raise arm, defendant lunged at the plaintiff.

They collided and fell to the ground with the defendant on top of the plaintiff. Plaintiff was on his knees and hands or elbows and between defendant's legs.

It is undisputed that defendant, with the plaintiff between his legs, began hitting both sides of plaintiff's head with his fists. The hits were delivered from a short distance as defendant was also trying to steady the moving plaintiff. It is not clear how many times the defendant hit the plaintiff's head and for how long. Testimonies place the number of hits from three to five and the length of the fight from seconds to five minutes. It is clear that the fight did not last long. Noriwo Ubedei, who sat at the bar, testified that when he heard the commotion, he turned around and saw Rumong pulling the defendant away from the plaintiff. After plaintiff and defendant were separated, plaintiff went back to his seat at the bar, finished or ordered another drink, called the police on his cellphone and later left.

Plaintiff checked in at the Belau Hospital at 10:25 that evening. He told a nurse that he had been beaten up. Dr. Steven Kuartei examined him and found scratches on his knees and elbows. Both sides of his ears were a bit inflamed and tender. An x-ray of his head and neck showed arthritis of the neck, by no serious or permanent injuries to the head. Dr. Kuartei prescribed Motrin, a painkiller, to plaintiff and told him to return if pain persisted. Plaintiff did not return. A week or so later he saw Dr. Yano, who examined him and found illnesses not having anything to do with the assault at HLC.[2]

Since the fight took place inside HLC, the Court finds that plaintiff's claim that they apologized to each other outside and all was settled is not credible. It is reasonable to believe that they were still arguing and that plaintiff decided to change the venue of the fight by coming inside the bar where there were people, possibly because defendant is physically bigger than the plaintiff.

A related incident, but perhaps without any legal significance took place at the Single Lady's Club (SLC) in February this year. Mr. Hazime Telei, Director of Bureau of Public Safety, held his house party there. The President of the Republic was there at a table with George Sugiyama, Ellender Ngirameketii, and others. Mr. Diaz went and joined the President's table. Mr. Raynold B. Oilouch, attorney, went to the same house party with Mr. Rechirei. Later, Mr. Oilouch ⊥255 saw Mr. Diaz at the President's table, and joined Mr. Diaz. While the two were talking, Mr. Rechirei came up behind Mr. Diaz, tapped him on his shoulder and said, "let's forget

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[2]Defendant testified that plaintiff makes his living by going to bars, picking a fight, getting beaten up, checking into the Hospital, and threatening those who beat him up with lawsuits unless they pay him. In fact, Hans Arurang and Sabino Sbal beat the plaintiff in separate bar fights, and each paid the plaintiff to settle their case.

Defendant testified that, at the Furusato Restaurant after this case has been filed, plaintiff's trial counselor, Moses Uludong, joked to the defendant that Hans and Sabino have "bought" plaintiff's boat and now defendant will buy plaintiff's engine. Defendant's testimony was not contradicted or rebutted.

While it is true that Hans and Sabino paid plaintiff money to settle their cases, the evidence is insufficient to show that this is how plaintiff makes his living. The Court gives no credit to this suggestion.

our case. We are related. I will ask my lawyer to dismiss the case." He spoke loudly enough for many to hear, including his trial counselor, Mr. Moses Uludong, who sat nearby. Mr. Oilouch then said to Mr. Uludong, "alii, the case has been settled." Mr. Uludong's response was nonverbal. He held his head and bowed as if to say, "I had been pre-empted?"

The plaintiff also shook the defendant's hand three times and ordered a glass of wine for the defendant, presumably in celebration of the settlement and reconciliation. Plaintiff also went and told the defendant's wife that he had settled the case. Director Telei also testified to the same things.

Plaintiff's response to this "settlement" and "reconciliation" is that it did not happen and that, even if he said and did those things testified to by Mr. Oilouch and Mr. Telei, he was too drunk to know what he was saying and doing. In his cross-examination of Mr. Oilouch, Mr. Uludong asked if Mr. Oilouch knew how drunk plaintiff was that evening and if this whole "settlement" and public display of "reconciliation" was not done in jest. Mr. Oilouch replied that he did not know if the plaintiff was too drunk to know what he was saying and if the whole thing was just a joke, but when plaintiff heartily shook defendant' s hand three times, Mr. Oilouch thought that the settlement and reconciliation were sincere.

Although there is no settlement before the Court to consider nor a motion to dismiss, this incident at the SLC presents yet another credibility problem for the plaintiff. The Court believes the testimony of Mr. Oilouch and Mr. Telei as to what plaintiff said and did that evening at the SLC.

In summary, the Court finds that plaintiff started the exchange of insults, perhaps first as a harassing joke, which the defendant brushed aside. The second time the plaintiff hurled the same insult and with more people at the bar, the defendant rightly was provoked and retaliated by calling the plaintiff a rapist. It is the plaintiff who invited the defendant to go outside. Under the circumstances preceding the invitation to go outside, it is reasonable for the defendant to believe that he was being invited to a fair fight. Once outside, the plaintiff changed his mind, made a quick u-turn and sought the safety of the crowd inside the bar. Plaintiff and defendant did not make up outside as testified to by the plaintiff. What is clear is that both were still arguing. Once inside the bar, plaintiff's raised arm may have been innocuous, but under the heated circumstances, it is reasonable for the defendant to believe the fight had begun.

The plaintiff received nothing more than scratches to his knees and elbows and information around his ears on both sides of his head. There were no permanent or serious injuries. He was not hospitalized.

Because there is no dispositive statute or customary law on a plaintiff's right to recover damages in a case like this, it is necessary to look to the Restatement. 1 PNC § 303. "[C]onsent is effective to bar recovery in a tort action although the conduct consented to is a crime." Restatement (Second) of Torts § 892(B) (1977). As an illustration, the Restatement describes a situation in which "A and B, after an altercation, agree to a fist fight. A gives B a black eye. A is not liable to B." *Id.* cmt. b, ⊥256 illus. 2; *see also Baugh v. Redmond*, 565 So. 2d 953, 958 (La.

Ct. App. 2d Cir. 1990) ("[A]ggressor doctrine precludes tort recovery by plaintiff if the evidence establishes he was at fault in provoking the difficulty in which he was injured, unless the person retaliating has used excessive force to repel the aggression.") Here, plaintiff not only agreed to the fight, he both provoked the altercation with his comments about defendant's relatives and turned the argument from a verbal one to a physical one by suggesting they go outside. In addition, defendant did not use excessive force in the confrontation. Therefore, plaintiff is not entitle to damages for his injuries.

Plaintiff also alleges that defendant defamed him when he called him a "rapist" at HLC. Further, after the plaintiff has filed this case, defendant went on his radio talk show and said plaintiff has hired Moses Uludong who is not a "real attorney" to represent him in this case and that plaintiff is a "rapist," a criminal who has served time in jail. Plaintiff alleges that as a result of this slander, he suffered public ridicule, shame, anguish, emotional and mental distress, and sleeplessness.

Plaintiff has the burden of proving the defamatory nature of the communication. Restatement (Second) of Torts § 613(1)(a) (1977).[3] The Restatement sets forth certain factors to consider when determining whether certain communications, when applied to a certain person under certain circumstances, may be defamatory. *Id.*

The plaintiff did not make any attempt to prove that defendant's words were defamatory[4] when the defendant called plaintiff a "rapist" at the HLC and later, after this lawsuit was filed, referred on his talk show to plaintiff as a rapist, criminal who has served time in jail.

Secondly, the sum total of plaintiff's evidence of his sufferings as a result of the alleged defamation came from the plaintiff when he was asked what he felt when he heard defendant had referred to him as a rapist, criminal who spent time in jail. Mr. Uludong asked plaintiff if he was embarrassed. Plaintiff said he was embarrassed because people who heard the communication would think he was a rapist, a criminal, and had served time in jail. There was no evidence presented that the plaintiff suffered from sleepless nights, emotional and mental pain, anguish, ridicule or shame.

While plaintiff did not even try to carry his burden of proving the defamatory nature of defendant's remarks, it may be that the words were defamatory just the same. *See Ngiraingas v. Soalablai*, 7 ROP Intrm. 208, 209 (1999).

Defendant, however, has presented truth as a defense to his remarks.[5] Plaintiff ⊥257 was

[3]Again, in the absence of dispositive statutory or customary law on defamation, the Restatement of Law applies. 1 PNC § 303.

[4]"A communication is defamatory if it tends so to harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or dealing with him." Restatement (Second) of Torts § 559 (1997).

[5]In his answer to complaint, defendant denies allegations of defamation. During trial, defendant did not offer any evidence on the defamation allegation. During closing argument, defendant's trial counselor requested the Court to take judicial notice of the Court's file of *Trust Territory v. Rechirei*, Criminal Case. No. 17-79. That case is of plaintiff's conviction of rape and his incarceration thereto. Plaintiff objected

in fact tried and convicted of rape and sentenced to four (4) years of imprisonment. He served eight (8) months of this sentence in prison, and the remainder was suspended. *Trust Territory v. Rechirei*, Criminal Case No. 17-79.

And indeed, truth is a defense to charge of defamatory communication. Section 581A of the Restatement provides: "One who publishes a defamatory statement of fact is not subject to liability for defamation if the statement is true." Comment (a) elaborates:

> To create liability for defamation there must be publication of matter that is both defamatory and false. There can be no recovery in defamation for a statement of fact that is true, although the statement is made for no good purpose and is inspired by ill will toward the person about whom it is published and is made solely for the purpose of harming him.

Therefore, the Court finds that plaintiff's defamation charge is without merit.

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on the grounds of surprise and prejudice. The Court gave both parties an opportunity to amend the necessary pleadings to conform to the evidence and set the matter for further hearing. At the hearing, plaintiff withdrew his objection to defendant's motion to amend his pleadings. Plaintiff argues, however, that when defendant called plaintiff a rapist and a criminal, plaintiff was neither at the time the defamatory remarks were made. The Court fails to understand plaintiff's argument and as he did not provide authorities to guide the Court, the Court allowed plaintiff's record of his rape conviction evidence. Additionally, plaintiff introduced a copy of President Etpison's pardon, dated in May 18, 1989, of his rape conviction in August 3, 1979. Plaintiff's trial counselor failed to explain the effect of the pardon against truth as a defense against slander. Hence, truth in this case is still a defense against defamation.