Tell v. Rengiil, 4 ROP Intrm. 224 (1994)
HIDEO TELL,
Plaintiff/Appellant,

v.

ERNESTINE RENGIIL, SUSAN SCHWARTZ, REPUBLIC OF PALAU, SIKYANG OMISONG,

Defendants/Appellees.

CIVIL APPEAL NO. 1-94
Civil Action No. 344-93

Supreme Court, Appellate Division
Republic of Palau

Opinion
Decided: June 2, 1994

Attorney for Appellant: Martin Wolff

Attorney for Appellees: John Eichhorst, AAG

BEFORE: ARTHUR NGIRAKLSONG, Chief Justice; JEFFREY L. BEATTIE, Associate Justice; PETER T. HOFFMAN, Associate Justice

PER CURIAM:

This appeal concerns the applicability of the doctrines of prosecutorial and sovereign immunity in Palau. The case began with a complaint for malicious prosecution and abuse of process filed by plaintiff and appellant Hideo Tell. According to the complaint, defendants and appellees Ernestine Rengiil and Susan Schwartz, when they were serving as Attorney General and Deputy Attorney General respectively for the appellee Republic of Palau, conspired to bring false criminal charges against Tell, who was subsequently acquitted of all charges. Appellants Rengiil and Schwartz moved to dismiss the case against them on the grounds of prosecutorial immunity, and ⊥225 the Republic on the grounds of sovereign immunity. [1] The trial division granted the motions. We uphold the dismissals and accordingly affirm the judgment.

DISCUSSION

[1] Defendant Sikiyang Omisong was not a party to the motions.

Tell v. Rengiil, 4 ROP Intrm. 224 (1994)

I. Prosecutorial Immunity

The trial court dismissed the complaint against appellees pursuant to the common law doctrine of prosecutorial immunity, as stated in section 656 of the Restatement (Second) of Torts, which provides that a "public prosecutor acting in his official capacity is absolutely privileged to initiate or continue criminal proceedings." The restatement provision is incorporated into Palauan law pursuant to 1 PNC § 303: "The rules of the common law, as expressed in the restatements of the American Law Institute . . . shall be the rules of decision in the courts of the Republic in applicable cases, in the absence of written law . . . or local customary law . . . to the contrary . . . ."

Tell argues that the statutory adoption of the prosecutorial immunity doctrine violates the equal protection, due process, and taking clauses of the Palau Constitution. These constitutional arguments were not presented before the trial division, however, and may not be raised for the first time on appeal. *Udui v. Temol* , 2 ROP Intrm. 251, 254 (1991); *In Re Eriich v. Reapportionment Commission*, 1 ROP Intrm. 150, 151 (1984); *Youakim v. Miller*, 96 S.Ct. 1399, 1401 (1976). The rationale for the waiver rule has ⊥226 been articulated as follows:

> Enormous confusion and interminable delay would result if counsel were permitted to appeal upon points not presented to the court below. Almost every case would in effect be tried twice under any such practice. While the rule may work hardship in individual cases, it is necessary that its integrity be preserved.

Miller v. Avirom , 384 F.2d 319, 322 n.11 (D.C. Cir. 1967), quoting *Johnston v. Reily* , 160 F.2d 249, 250 (D.C. Cir. 1947).

Tell urges us to apply two exceptions to the waiver rule. The first permits a reviewing court to address an issue not raised below to prevent the denial of fundamental rights, especially in criminal cases where the life or liberty of an accused is at stake. This exception to the waiver rule is only to be applied in exceptional circumstances, however, and the present case does not fall within its purview. Tell appeals as a civil litigant, not a criminal defendant, and neither his life, his liberty, nor any other fundamental right is at stake.

The second exception to the waiver rule arises in cases affecting the public interest. This exception, applicable when the general welfare of the people is at stake, affords the court the opportunity, in its discretion, to consider the public good over the personal interests of the litigants. The present appeal clearly falls outside the intended reach of this exception, for the only interest at stake is the right of a civil litigant to recover monetary damages in tort, not any interest shared by the public at large.

In addition to his constitutional arguments, Tell contends that applying the common law doctrine of prosecutorial immunity in ⊥227 Palau is unsound. Tell's policy arguments are unavailing, however, for it lies squarely and uniquely within the domain of Palau's legislature, the Olbiil Era Kelulau ("OEK"), to weigh such considerations, including the possible benefits and drawbacks. By enacting 1 PNC § 303, the OEK has directed us to apply the common law

doctrine of prosecutorial immunity as expressed in the Restatement of Torts. It is for the OEK, not the courts, to judge the wisdom, fairness, and logic of the doctrine.

II. Sovereign Immunity

Tell next challenges the sovereign immunity provision of 14 PNC § 502(e) [2] as a violation of three separate provisions of the Palau Constitution. He first argues that Article II of the Constitution, which addresses sovereignty, fails to mention any form of immunity and thereby forbids it. This contention ignores the inherent nature of sovereign immunity stemming from the government's status as a sovereign. The government is immune from lawsuits except to the extent it consents to be sued, and the terms of that consent define a court's jurisdiction to entertain the suit. *United States v. Mitchell*, 100 S.Ct. 1349, 1351 (1980). In Palau the OEK has provided consent to sue the national government under certain circumstances enumerated in 14 PNC § 501, [3] but the ⊥228 following section specifically exempts malicious prosecution and abuse of process.

Second, Tell contends that the jurisdictional language in 14 PNC § 502 violates the provision in Article X, Section 5 of the Constitution that the "trial division of the Supreme Court shall have original and exclusive jurisdiction over . . . those matters in which the national government or a state government is a party." It is true that the OEK's use of jurisdictional language in both 14 PNC § 501 and 502 was perhaps misadvised, [4] as the trial court also realized. Nevertheless, Tell's argument is essentially semantic. By its plain language, Section 502 does not purport to limit the court's jurisdiction as conferred by the Constitution, but rather only the court's "jurisdiction under the foregoing section 501." It is the substance and not the form of a statute which counts, the controlling test being the provision's operation and effect. *Gregg Dyeing Co. v. Query*, 52 S.Ct. 631, 633 (1932). The clear effect of 14 PNC § 502, regardless of how it is phrased, is to preserve the Republic's sovereign immunity in certain cases, including suits based on malicious prosecution and abuse of process. This ⊥229 conclusion, moreover, is consistent with Section 502's heading: "Exceptions."

Tell's third argument is that sovereign immunity violates the provision in Article IV, Section 7 of the Constitution whereby the national government may be held liable in a civil

---

[2] Section 502 provides: "Exceptions. The Trial Division of the high court or Supreme Court shall not have jurisdiction under the foregoing section 501 of: . . . (e) Any claim arising out of . . . false arrest, malicious prosecution, abuse o[f] process, libel, slander, misrepresentation, deceit . . . ."

[3] Section 501 provides in pertinent part as follows:

(a) Actions upon the following claims may be brought against . . . the Republic in the Trial Division . . . which shall have exclusive jurisdiction thereof: . . . (3) Civil actions against the . . . Republic on claims for money damages . . . for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the government while acting within the scope of his office or employment . . . ."

[4] But see *United States v. Mitchell*, 100 S.Ct. 1349, 1351 (1980) ("the terms of [the overnment's] consent to be sued in any court define that court's jurisdiction to entertain the suit," quoting *United States v. Sherwood*, 61 S.Ct. 767, 769 (1940)).

action for unlawful arrest. This provision is inapplicable to the case at hand, however, because Tell's complaint does not assert a claim for unlawful arrest.

III. Citation of Authorities

Appellant cites certain cases and publications in his opening brief that are not contained in the court's law library. We would like to remind all attorneys and trial counselors practicing before the Palau Supreme Court that we cannot consider authorities outside our collection unless the Court is provided a copy.

CONCLUSION

The doctrine of prosecutorial immunity has been incorporated into Palauan law pursuant to 1 PNC § 303. We also uphold the government's sovereign immunity for cases of malicious prosecution and abuse of process pursuant to 14 PNC § 502(e).

The judgment of the trial division is AFFIRMED.