MARTIN MOOLANG, Plaintiff

v.

MOSES FIGIR, Defendant

Civil Action No. 45

Trial Division of the High Court

Yap District

March 29, 1968

Hearing on motion to dismiss in action seeking recovery of money damages for destruction of plaintiff's home by defendant. The Trial Division of the High Court, D. Kelly Turner, Associate Justice, held that a judgment in a criminal prosecution is not a bar to a subsequent civil action based upon the same offense of which the party stands convicted and thus plaintiff could recover for damages caused' by defendant's setting his house <n fire even though defendant had already been convicted of arson and ordered. to pay "restitution" to the plaintiff. (T.T.C.,Sec. 171)

1. Civil Procedure--Generally

The general rule is that a judgment in a criminal: prosecution is not a bar to a subsequent civil action based upon the same offense of which the party stands convicted.

2. Torts-Generally

The same act may constitute both a crime and a tort and there may be civil recovery as well as criminal prosecution.

3. Criminal Law-Restitution

Section 171 of the Trust TerritQTY Code which gives the court discretion to order restitution or compensatiQn contemplates restitution as punishment. (T.T.C., Sec. 171)

4. Civil Procedure—Damages

Civil damages are not punishment.

5. Constitutional Law-Double Jeopardy

Under Section 4 of the Trust Territory Code a person may not be twice punished or put in double jeopardy of two punishments for the same offense. (T.T.C., Sec. 4)

6. Constitutional Law-Double Jeopardy

A criminal judgment imposed as punishment for a crime is not a bar upon the theory of double jeopardy, to a subsequent civil action. (T.T.C.: Sec. 4)

7. Judgment&-Res Judicata

The doctrine of res judicata is distinguishable from the double jeopardy provision barring two punishments for the same offense in that it precludes a second trial of the same facts between the same parties. (T.T.C., Sec. 4)

8. Judgment&-Res Judicata

The doctrine of res judicata is that an existing final judgment rendered upon the merits, without fraud or collusion, by a court of competent jurisdiction, is conclusive of rights, questions, and facts in issue, as to the parties and their privies in all other actions in the same or any other jurisdictional tribunal of concurrent jurisdiction.

9. Judgments-Res Judicata

A criminal judgment, including the provision for restitution under statute, is not a bar to a civil action under the doctrine of res judicata. (T.T.C., Sec. 171)

Assessor:	JUDGE JOSEPH FANECHOOR
Interpreter:	THOMAS A. FAIMAU
Reporter:	NANCY K. HATTORI
Counsel for Plaintiff:	LINUS RUUAMAU
Counsel for Defendant:	FRANK F ALOUNUG

TURNER, *Associate Justice*

RECORD OF PROCEEDINGS

Proceedings were held in this case before D. Kelly Turner, Associate Justice, on February 7, 8, and 9, 1968, at Colonia, Yap Islands. After consideration and denial of motions to dismiss, submitted by counsel for the defendant, trial commenced and on the second day of trial, the parties, by stipulation, agreed to entry of judgment for the plaintiff and against the defendant.

OPINION

This case presents two interesting procedural questions. Defendant had not filed an answer at the time the matter was called for pre-trial conference but submitted, instead, an instrument designated "Motion to Dismiss". The ground for dismissal was a denial of liability. It, in effect, was an answer by way of general denial. What a pleading is called is not important. The substance and effect of the'pleading determines its nature. 41 Am. Jur., Pleading,§ 26.

The plaintiff had not moved for entry of default, which would have precluded a trial upon the defendant's liability but which would not prevent resistance to the amount of plaintiff's claim. *Aichi Ngirchokebai v. Santos,* 3 T.T.R. 337.·-

)Accordingly, because the motion was in fact an answer hy.,general denial, dismissal was denied and the motion accepted as an answer.

Defendant then submitted a second motion to dismiss based upon the doctrine of res judicata. In view of the judgment requiring restitution in a prior criminal proceeding against the defendant, the motion raised a new and novel question in the Trust Territory.

This action sought recovery of money damages for destruction of plaintiff's home and contents,including a substantial amount of historical Yapese shell money. The defenda,nt was convicted of arson at trial held in October, 1967, and was fined, sentenced to prison and ordered, pursuant to Trust Territory Code Section 171, to pay as restitution to the complaining witness, the plaintiff in the present civil case, the sum of three hundred sixty dollars ($360.00), payable at the rate of ten dollars ($10.00) per month commencing with the first month after the defendant was released from jail on suspension of the last three years of the five-year sentence.

In defendant's motion to dismiss, it was urged the civil recovery was barred upon the theory that the statutory provision for restitution merged both the civil liability and the criminal liability in the criminal judgment. In other words, the criminal judgment was res judicata to the civil action. The theory of the plea is found in Miller on Criminal Law, page 21, note 26, which cites a South Carolina case in support.

[1] The general rule is that a judgment in a criminal prosecution is not a bar to a subsequent civil action based upon the same offense of which the party stands convicted. 30-A Am. Jur., Judgments, § 473. 1 Am. Jur. 2d, Actions, § 57.

[2] It is undisputed that the same act may constitute both a crime and a tort and there may be civil recovery as well as criminal prosecution. This rule, however, does not consider the effect of an order in the criminal judgment, authorized by statute, requiring restitution to the injured person.

However, the rule relied upon by the defendant and cited in the Miller text is not applicable to a subsequent civil action. The case Miller cites in support, *State v. Hilton,* 65 S.E. 1011 (N.C. 1909), does not relate to a subsequent civil suit for damages but applies only to the continuing jurisdiction of the criminal court in either suspending the criminal judgment or granting probation of sentence upon condition that restitution be made. The essential point in the North Carolina case is shown in the following quotation from it which demonstrates that the case and the Miller rule have no relationship to the situation where a civil action is brought, as here, in addition to an order for restitution as a condition of suspending a criminal sentence:

"In this state, as shown in Crook's case *(State v. Crook,* 115 N.C. 760, 20 S.E. 513) the power to suspend judgment and later

impose sentence has been somewhat extended in its scope so as to "How a suspension of judgment on payment of costs or other reasonable condition, or continuing the prayer for judgment from term to term to afford defendant opportunity to pay the cost or to make some compensation to the party injured to be considered in the final sentence, or requiring him to appear from term to term and for a reasonable period of time and offer testimony to show good faith in some promise of reformation or eontinued obedience to the law."

There are many illustrations of statutes and cases relating to suspension of sentence or granting probation on condition restitution is made. These statutes do not, however, prevent a subsequent civil action.

The Federal statute providing that restitution may be required as a condition of probation is found at 18 *U.S.C. 3651*. Restitution as a condition of probation is not a bar, but is an offset against a subsequent recovery of civil damages. 30-A Am. Jur., Judgments, § 473. 31 A.L.R. 262. 18 A.L.R.2d 1290. 42 A.L.R.2d 636.

It is permissible for the legislature to enact a statute requiring the court in a criminal case to adjudicate civil liability at the same time. Such a statute was in effect in the Philippine Islands prior to independence of these islands from United States Commonwealth status.

Chantango v. Abaroa, 28 U.S. 476, 31 S.Ct. 34 (1910) was a case originating in the courts of the Philippine Islands which was appealed to the United States Supreme Court. On its facts, other than the statutory provision, the Philippine case was very similar to the present case. Suit was brought to recover indemnification for the destruction by the defendant of a warehouse and stock of goods by arson. In the Philippine case, however, the defendant was convicted, sentenced to prison and ordered to pay restitution during the suspension of the last three years of his sentence.

Because of the acquittal of the defendant in the *Chantango* case, no civil liability was imposed. The aggrieved party brought the civil action and the defendant pleaded the criminal judgment of acquittal as res judicata.

The United States Supreme Court acknowledged the prevailing rule that a criminal judgment is not a bar to subsequent civil action for damages. It then rested its decision, sustaining the bar of the criminal acquittal to the subsequent civil action, in these words (31 S.Ct. 37):-

"The Philippine Code contemplated that the civil liability of the defendant shall be ascertained and declared in the criminal proceedings. Thus, Sec. 742 of the Code of Criminal Procedure, often requiring that, in a criminal proceeding, all of the minor or incidental offenses included in the principal crime shall be decided, adds: 'All questions relating to the civil liability which may have been the subject matter of the charge shall be decided in the sentence.' By Section 108 of the same Code, the prosecuting official is required to prosecute the right of the injured person to restitution or indemnity, unless such person renounces the right."

There is, of course, no such provision in the Trust Territory Code. Section 171 gives the court discretion *"in lieu of or in addition to other lawful punishment,* (to) order restitution or compensation to the owner or person damaged or the forfeiture of the article to the Trust Territory or municipality thereof". (Emphasis added)

[3-6] The Trust Territory Code contemplates restitution as punishment. Civil damages are not punishment. A person may not be twice punished or put in double jeopardy of two punishments for the same offense under Section 4 of the Trust Territory Code, which is similar to the Fifth Amendment to the United States Constitution. It is well-settled law that a criminal judgment imposed as punishment for a crime is not a bar, upon the theory of double jeopardy, to a subsequent civil action.

For cases distinguishing between the effect of the prior criminal action upon the subsequent civil action in which

the defense of double jeopardy was raised, see: *In re Debs,* 158 U.S. 564,15 S.Ct. 900. *Stone v. U.S.,* 167 U.S. 178, 17 S.Ct. 778. *Coffey v. U.S.,* 116 U.S. 436, 6 S.Ct. 437.

Also see: 1 Am. Jur. 2d, Actions, § 57. 30-A Am. Jur., Judgments, §§ 473-477.

[7,8] The doctrine of res judicata is distinguishable from the double jeopardy provision barring two punishments for the same offense in that it precludes a second trial of the same facts between the same parties. Res judicata is defined in 30-A Am. Jur., Judgments, § 324:-

"The doctrine of res judicata is that an existing final judgment rendered upon the merits, without fraud or collusion, by a court of competent jurisdiction, is conclusive of rights, questions, and facts in issue, as to the parties and their privies in all other actions in the same or any other jurisdictional tribunal of concurrent jurisdiction."

That the present civil case is not barred by res judicata is readily apparent by comparing the differences between this case and the criminal prosecution. In this case, the "aggrieved person" who suffered the loss by arson was the plaintiff. In the criminal case, the Trust Territory Government brought the action on behalf of the public. The order for restitution of three hundred sixty dollars ($360.00) under authority of Code Section 171, was imposed as punishment and was not a judgment on the merits on the issue of the aggrieved person's actual loss. No evidence was taken nor opportunity given to show the injured party's loss. There was no judgment "rendered on the merits" as between the plaintiff and defendant as to the amount of loss. or damage caused by the fire.

In *U.S. v. Hess,* 317 U.S. 537, 63 S.Ct. 379, the Supreme Court said on the same doctrine:

"It is, of course, well accepted that for one act a person may be liable both to pay damages and to suffer a criminal penalty."

[9] The leading case on refusal to apply the doctrine of res judicata in a subsequent civil action is *Helvering v. Mitchell,* 303 U.S. 391, 58 S.Ct. 630, in which the court permitted the government to bring civil suit for recovery of unpaid taxes after the defendant had been convicted of the criminal offense of non-payment of taxes. The Supreme Court held that the criminal judgment, including the provision for restitution under the code section, was not a bar to a civil action under the doctrine of res judicata.

At the trial of this case, the only witness called prior to the settlement agreement was the plaintiff. As a part of his complaint for damages, he attached an itemized list of items lost in the fire. These included Yapese shell money, household items including fish nets and other fishing gear, as well as the materials used in the construction of the house some twenty-five years before it was destroyed by the fire. Also included was the sum of eight hundred eighty U.S. dollars. Five hundred dollars ($500.00) belonged to plaintiff's brother, Yuw, who with his wife and children lived in plaintiff's house with plaintiff's wife and children. Plaintiff did not live in his house at the time of the fire as he had been returned to prison in 1966, after eight years' release on probation, on a fifteen-year sentence in 1952 for murder in the second degree. As a sidelight, the victim of the ancient homicide was the father of the defendant Figir, who was five years old at the time of the murder. It is apparent the earlier crime had a bearing on the arson case fifteen years later.

In addition to Yuw's money held by plaintiff for safekeeping, the plaintiff, who held an important title in the village, was custodian of some of the Yapese shell money for the people of three villages. It is noted one string of shell money, *Gaw Gomer Angumang,* which also had historical worth, was valued by plaintiff at the equivalent of one thousand U.S. dollars.

Although it was very difficult for plaintiff to substantiate his valuation of his loss of household goods and building materials, it is equally certain that plaintiff's loss of both his own and other's property and money substantially exceeded the amount of three hundred sixty dollars ($360.00) ordered to be paid to him as restitution in the criminal case.

The amount stipulated between the parties for plaintiff's recovery, in view of the difficulties of proof of value, is reasonable.

Because of the necessity of taking into account defendant's prison sentence which will run until October 3, 1969, before he is eligible for release or suspension of the balance of the sentence, the court believes it appropriate to permit a delayed payment of the judgment upon condition. This should provide some atonement to the people of Riy and other adjacent villages for the losses resulting from the arson, in addition to the payment of money damages. This. atonement maybe accomplished by obligating the defendant Figir, as a condition to delaying payment of the money judgment, to contribute to the rebuilding of the house destroyed by the fire by furnishing both materials and his labor within his means and abilities.

Accordingly, it is

Ordered, adjudged, and decreed : –

Plaintiff be and hereby is granted judgment against the defendant in the sum of one thousand one hundred dollars ($1,100.00), together with interest at the rate of six percent (6%) per annum, from the date of this judgment until paid, plus costs taxable in accordance with the law.

It is further ordered : –

That any payment made by defendant Figir to plaintiff Moolang pursuant to the order of restitution entered by this court in *Trust Territory v. Figir,* Yap District Crim-

inal Case No. 108, shall be credited against the judgment amount above ordered.

It is further ordered : –

That the above judgment amount shall become due and payable to plaintiff by defendant from and after thirty (30) days from defendant's release from Yap District Prison, or thirty (30) days from and after October 3, 1969, whichever first shall occur, provided however, that upon defendant Figir's release from confinement under the criminal sentence, he shall, during the period of Suspension of the three-year remainder of the criminal sentence, promptly and in good faith, contribute both labor and materials to the rebuilding of the house in Riy Village, Rumung Municipality, Yap District, destroyed by fire as a result of defendant Figir's commission of the crime of arson, and that during such three-year period, if defendant Figir complies with the foregoing condition, payment of the judgment amount, including interest, shall be extended to permit payment at the rate of ten dollars ($10.00) per month for the three-year period of suspension of criminal sentence imposed in Yap District Criminal Case No. 108, and thereafter until the entire judgment, with interest, is paid and satisfied.