LOTON, and JELTAN, Appellants

v.

BARTIMIUS LANGRIN, Appellee

Civil Appeal No. 73

Appellate Division of the High Court

May 10, 1971

Appeal from judgment establishing certain rights in Mwinkuit *Wato*, Rita Island, Majuro Atoll. The Appellate Division of the High Court, D. Kelly Turner, remanded the case because the record was inadequate and incom-

plete, because manifest trial errors resulted in a denial of substantial justice, and because the lower court failed to give any reason for its holding.

1. **Civil Procedure—Generally**

   The court should be alert to see that a party is not prevented by ignorance or inadvertence from introducing important evidence that would appear readily available to him, and the usual trial procedure should not be adhered to so closely as to prevent the introduction of such evidence after the usual time for it, so long as the court is convinced that the party or inexperienced counsel is honestly endeavoring to proceed as properly as he knows how.

2. **Civil Procedure—Newly Discovered Evidence**

   The appellate court may not order a new trial on grounds of newly discovered evidence; such motion must be remanded to the Trial Division for consideration separate from the appeal.

3. **Appeal and Error—Evidentiary Error**

   Rejection of rebuttal evidence was a denial of due process and was inconsistent with substantial justice thus warranting reversal of the judgment.

4. **Appeal and Error—Record on Review—Findings of Fact and Conclusions of Law**

   While there is no mandatory rule in the Trust Territory requiring the Trial Division to make separate findings and conclusions of law as there is in the United States Federal Courts, the rules of law governing appeals in the Trust Territory make it imperative that findings be made.

Before BURNETT, *Chief Justice*, TURNER and BROWN, *Associate Justices*

TURNER, *Associate Justice*

This appeal was submitted on written argument from a Trial Division judgment holding that the *iroij erik*, *alab* and *dri jerbal* rights in Mwinkuit *Wato*, Rita Island, Majuro Atoll, "are held by the defendant, Bartimius Langrin."

The judgment conferred more rights than the defendant-appellee claimed. His answer asserted Lijuiar was the *iroij erik* and that he was *alab*. He did not list the *dri jerbal* but merely alleged Loton (the appellant) did not hold *dri jerbal* rights. The same position was taken in the pre-trial conference before the Master and at the trial in the High Court.

Consistently with appellee's position that he only held *alab* rights, he called the witness Jiawur, who asserted he had been *iroij erik* since German times and that the appellant and his predecessors had never been *iroij erik*. Nowhere in the record does appellee claim *dri jerbal* or *iroij erik* rights for himself which were awarded to him by the trial court.

If this simply were a matter of correcting an erroneous judgment granting greater rights than the prevailing party sought, the carelessness could be rectified by this court. Unfortunately, that is not the case. Not only is the judgment in conflict with the pleadings and testimony but the record sent up on appeal also shows serious errors.

The judgment result depends upon resolving several sharp conflicts in the evidence. The holding for appellee depends upon alternative issues of fact controlling the inheritance of the land in question. The Marshallese land tenure law to be applied depends upon what kind of land holding was involved—that is, whether it was "*ninnin*" or "*bwij*" land—and whether plaintiffs' or appellee's predecessors held control over it.

Appellants' appeal rests upon two reasons: (1) the judgment is contrary to Marshallese custom governing lineage inheritance rights; and (2) that the court failed to follow the genealogical order of inheritance applicable. Both sides, appellants and appellee, are members of the same family or lineage group except there apparently was a "separation" into two factions some time shortly before 1918. This, the appellee urges, resulted in a special arrangement as to inheritance of land rights which did not follow customary *bwij* patterns.

These conflicts in facts and law were recognized by the Master who held pre-trial conferences and listed major questions to be resolved at trial. Determinative issues largely depended upon the genealogical chart showing the order of inheritance.

It is impossible to resolve these conflicts on appeal because there were no findings of fact in the judgment which this court could test against the record and for the further reason that the record itself was inadequate because of the court's failure to include the genealogical chart as a part of the file after having considered it and heard counsel's explanation of it.

The court apparently did not have time to consider the chart during the trial in February, 1969, and it, therefore, continued the proceedings until the September, 1969 sitting. When trial was resumed, the court said (Tr. 45) :—

"Now, I take it you are both going to present those charts in evidence, is that correct?"

After hearing explanation and argument of counsel relating to the genealogy, the court said (Tr. 50) :—

"I don't think it would be of any help for me to take the charts to study. The explanation has helped but I am sure I am going to have to decide the case on the sworn testimony. The charts have helped but I don't think I need to take them."

Accordingly, they were not included in the record and this court, of course, cannot say what help they gave the trial court because of the absence of findings in the judgment.

There is, unfortunately, an equally serious inadequacy in the record resulting from the trial court's refusal to accept documentary evidence at the close of the trial. This rejection of evidence was on the theory the trial was ended at the conclusion of the February proceedings. The court stated, however, prior to the offer of the evidence that (Tr. 42) :—

"I believe we stopped with the defendant's case and no closing arguments were made, so we will continue at that point and permit the defendant to present his genealogical chart, if he has one at this time. Do you have separate charts or are they both the same?"

It appears from the transcript the documents were records of copra sales and payment of shares to the *iroij erik*, who appellants claimed to be their predecessor. Ap-

pellee denied this predecessor was the *iroij erik*. Appellee's witness Jiawur insisted he had been the *iroij erik* at all times. These record books may have had substantial bearing on this sharply crucial conflict in the evidence.

In any event, whether the trial was ended or not, which the court gave as reason for rejecting the evidence, it was serious error for the court to reject the offered evidence. It is first noted the trial was at that point at which the plaintiffs were entitled to present rebuttal evidence. Rule 15a(7), Rules of Civil Procedure.

[1] Either on a technical basis in accordance with the rule, or as a matter of basic fairness, the documents should have been received. We approve the statement in *Gaamew v. You*, 2 T.T.R. 98, 100:—

> " . . . the court should be alert to see that a party is not prevented by ignorance or inadvertence from introducing important evidence that would appear readily available to him, and the usual trial procedure should not be adhered to so closely as to prevent the introduction of such evidence after the usual time for it, so long as the court is convinced that the party or inexperienced counsel is honestly endeavoring to proceed as properly as he knows how."

The rejection of this evidence has been raised on appeal by suggesting a new trial should be granted for the purpose of receiving "new evidence." What appellants should have said is that the judgment should be reversed and remanded because of the erroneous rejection of evidence.

[2] The appellate court may not order a new trial on grounds of "newly discovered evidence." Such motion must be remanded to the trial division for consideration separate from the appeal. *Yamashiro v. Trust Territory*, 2 T.T.R. 638, 645. *Osawa v. Ludwig*, 3 T.T.R. 594, 597. *Tasio v. Yesi*, 3 T.T.R. 598.

[3] The evidence offered was not "new" evidence, it was rebuttal evidence attacking defendant's testimony.

When we find rejection of the evidence warrants reversal of the judgment, we are not unmindful of 6 T.T.C., Section 351, discussed in *Oingerang v. Trust Territory*, 2 T.T.R. 385 at 389. The procedural statute prohibits reversal because of trial error "unless refusal to take such action appears to the court inconsistent with substantial justice." We hold, therefore, the rejection of the offered evidence was a denial of due process and was "inconsistent with substantial justice."

It has been necessary for the court to examine the record, including the transcript of testimony, in an effort to ascertain whether the Marshallese land tenure custom applied to the facts sustains the judgment. In view of the record it is impossible, and would be improper in any event, for this court to attempt to make findings of fact to supply the omission of the trial court. At best we may only assume there were facts supporting the judgment. The trial court's reason for its holding was that:—

> "After considering the pleadings and the evidence, and the arguments of counsel having been heard, it is the opinion of the court that the law and facts are with the defendants."

An opinion such as this without more than an unsupported conclusion is unfair to the parties and worthless to the appellate court.

[4] There is not a mandatory rule in the Trust Territory requiring the trial division to make separate findings and conclusions of law as there is in the United States Federal Courts. Rule 16, Rules of Civil Procedure and Rule 52(a), Federal Court Rules. However, the rules of law governing appeals in the Trust Territory, and elsewhere, make it imperative that findings be made. An illustration of the statement of the need for findings is found in a case arising in the Virgin Islands, *Kruger v. Purcell*, 300 F.2d 830:—

"We are met at the outset by an insurmountable obstacle to an intelligent review, namely, the inadequacy of the findings of fact and conclusions of law. The present state of the record is such that a decision by this court could be based only on conjecture and this, of course, is not permissible."

The necessity for findings or reasons supporting a judgment, with or without a mandatory rule, is considered by the United States Supreme Court in *Ford Motor Company v. National Labor Relations Board*, 305 U.S. 364, 59 S.Ct. 301. In the absence of any or adequate findings, it is said at 59 S.Ct. 306:—

"It is familiar appellate practice to remand causes for further proceedings without deciding the merits, where justice demands that course in order that some defect in the record may be supplied. Such a remand may be made to permit further evidence to be taken or additional findings to be made upon essential points."

Also in Public Service Commission of *Wisconsin v. Wisconsin Telephone Company*, 289 U.S. 67, 53 S.Ct. 514, 515, it is said:—

"We have repeatedly emphasized the importance of a statement of the grounds of decision, both as to facts and law, as an aid to litigants and to this court."

Perhaps the easy answer to the failure to enter an adequate judgment is that under our rule a party must ask for findings of fact and apparently did not do so in this case. Such answer ignores the realities of the practice of law in the Trust Territory. It is unfair to place the burden upon untrained counsel when the court itself should be alert to the requirements of appropriate judicial practice.

Even the American Bar canons of judicial ethics obligate trial judges to make appropriate findings. The judges of the Trust Territory should be bound by these canons of proper performance of judicial duties. Canon 19 says:—

"In disposing of controverted cases, a judge should indicate the reasons for his action in an opinion showing that he has not disre-

garded or overlooked serious arguments of counsel. He thus shows his full understanding of the case, avoids the suspicion of arbitrary conclusion, promotes confidence in his intellectual integrity and may contribute useful precedent to the growth of law."

These principles should guide District Court judges as well as trial judges of the High Court who in the future may be inclined to take the easy out, as was done in the case on appeal, when entering judgments on complex issues of fact and law.

Perhaps if this court had before it the evidence excluded at the trial, the genealogical charts and appellants' rebuttal documents, it could make findings and conclusions sufficient to determine the propriety of the judgment. But it is not permissible for an appellate court to resolve conflicting evidence. That is the obligation of the trial court.

It is the appellate court's duty to determine if the appropriate law has been applied to the facts as proved. This cannot be done when the appellate court has no way of knowing what the trial court considered to have been proved or not proved. Any attempt to ascertain from this record what facts the trial court found to be "with the defendants" is an exercise in frustration. It is impossible from the record sent up on appeal.

This case must be retried in an attempt to find answers to the major unresolved questions. There was nothing produced in the record to answer decisive questions listed by the Master in the pre-trial memorandum. Retrial should be aimed at supplementing the existing record by answering these questions.

Because the record is inadequate and incomplete, because of manifest trial errors resulting in a denial of substantial justice, and because the court failed to give any reason for its holding, the case must be remanded for receipt of additional evidence upon which findings and conclusions may be made in support of such judgment as may then be entered.

The matter is remanded for further trial and judgment thereon.