NABIEU AMADU *v.* AIAH SIDIKI

COURT OF APPEAL (Sir Samuel Bankole Jones, P., Dove-Edwin and Marcus-Jones, JJ. A.): May 5th, 1967
(Civil App. No. 3/67)

[1] Civil Procedure—appeals—point not taken below—illegality in cause of action is ground of appeal: Where a cause of action, whether in contract or tort, arises either *ex turpi causa* or from the transgression of a positive law of the land, and this, whether pleaded or not, comes to the court's notice at first instance or on appeal, the court will not assist the plaintiff; and where the defendant is implicated as well, *potior est conditio defendentis* (page 137, line 37—page 138, line 7; page 138, lines 32–36).

[2] Civil Procedure—pleading—defence—defendant succeeds if illegality apparent though not pleaded as defence: See [1] above.

[3] Civil Procedure—pleading—matters which must be specifically pleaded —illegality as defence—court will take notice of illegality becoming apparent though not pleaded: See [1] above.

[4] Civil Procedure—pleading—matters which must be specifically pleaded —statute relied on as bar: When a statute is relied on as a bar to an action it must be pleaded (page 138, lines 11–12).

[5] Contract—illegal contracts—effect of illegality—no right of action and defendant succeeds even if implicated: See [1] above.

[6] Tort—defence of illegality—effect of illegality—no right of action and defendant succeeds even if implicated: See [1] above.

The respondent brought an action against the appellant in the Supreme Court claiming the return of a diamond or its value.

The respondent found a diamond on the road and gave it to the appellant for safe keeping. The appellant sold it but did not pay the proceeds to the respondent. The respondent instituted the present proceedings and recovered judgment in the Supreme Court (Davies, J.) for the return of the diamond or its value.

On appeal, the appellant raised the question of illegality for the first time, and contended that the respondent could not recover because possession of the diamond and dealing with it were unlawful. The respondent contended that he was entitled to possession as a finder until dispossessed, and that the appellant could not raise the question of illegality because it had not been raised in the court below.

Cases referred to:

(1) *Armory* v. *Delamirie* (1722), 1 Strange 505; 93 E.R. 664, distinguished.

(2) *Taylor* v. *Chester* (1869), L.R. 4 Q.B. 309; [1861–73] All E.R. Rep. 154, applied.

Statute and Order construed:

Minerals Act (Laws of Sierra Leone, 1960, *cap.* 196), s.3:
The relevant terms of this section are set out at page 139, lines 24–33.

s.67: The relevant terms of this section are set out at page 139, lines 17–21.

Minerals (Application of Sections 67 to 74) Order in Council (Laws of Sierra Leone, 1960 (*cap.* 196), s.2:
"Section 67 to 74 of the Minerals Act shall apply to—

. . .

(c) diamonds in their rough or uncut state."

C.N. Rogers-Wright for the appellant;
McCormack for the respondent.

MARCUS-JONES, J.A.:

This is an appeal by the defendant Nabieu S. Amadu, *alias* Nabieu Musa, *alias* Aiah Nabieu, from a judgment of Davies, J. dated February 10th, 1967 which awarded the plaintiff Aiah Sidiki, now the respondent, the return of a gem-stone, to wit a diamond, or its value Le88,000.

The facts may be briefly stated as follows: Both parties live in Kono in the diamond area of Sierra Leone. The respondent said he was the ward of the appellant. He found a diamond stone on the road in Kono and gave it to the appellant for safe keeping. Later the appellant told the respondent he had sold the diamond stone for Le88,000, and despite several requests the appellant failed to pay over the proceeds of sale to the respondent. I do not propose to go any further into the facts except to say that I accept the learned judge's finding of fact that the respondent gave the diamond stone to the appellant who subsequently sold it for Le88,000 and failed to pay over the proceeds of sale to the respondent.

The appeal has come to this court on the question of illegality, which has been raised for the first time on appeal. Two questions fall to be considered: (a), whether this court can entertain the point now taken, and (b), if so, whether the illegality is of such a nature as to deprive the respondent of the fruits of his judgment having regard to the maxim *ex turpi causa non oritur actio.* This maxim,

founded in good sense, expresses a clear and well-recognised principle which is not confined to indictable offences only, and no court ought to enforce an illegal transaction or allow itself to be made the instrument of enforcing obligations alleged to arise out of a contract or transaction which is illegal, if the illegality is duly brought to the notice of the court and if the person invoking the court's aid is himself implicated in the illegality.

Mr. McCormack's contention that the appellant is estopped from raising the question of illegality before this court since it was not pleaded or raised in the court below, appears to me to be of no force or effect. Although whenever a statute is relied on as a bar to an action it must be pleaded, the court will itself take notice of an illegality if it appears from evidence brought before it even though the defendant has not pleaded the illegality.

Although an objection that a transaction is immoral or illegal as between the plaintiff and the defendant sounds at all times very ill in the mouth of the defendant, yet it is not for his sake that the objection is ever allowed. It is founded on the general principle of public policy which gives the defendant an advantage, by accident so to speak, contrary to the real justice of the case as between him and the plaintiff. No court will lend its aid to a man who founds his cause upon an illegal act. The court will itself however take notice of the illegality of the transaction on which the plaintiff is suing if it appears from the facts of the contract or the evidence brought before it by either party, although the defendant has not pleaded the illegality.

Mr. McCormack endeavoured to equate this case with that of *Armory* v. *Delamirie* (1), and stated that the respondent was entitled to possession of the diamond stone as a finder until dispossessed. This argument in my view is untenable. There is clear and unequivocal evidence that the gem-stone was a diamond stone such as could be dealt with only by licence. And if from the plaintiff's own evidence or otherwise the cause of action appears to arise *ex turpi causa* or from the transgression of a positive law of the land, then the plaintiff has no right to be assisted; and where both are at fault, *potior est conditio defendentis.*

In *Taylor* v. *Chester* (2), the plaintiff deposited with the defendant the half of a £50 bank note by way of pledge to secure the payment of money due from the plaintiff to the defendant. The debt was contracted for wine and suppers supplied to the plaintiff by the defendant, in a brothel kept by her, to be there consumed in a

debauch. The plaintiff having brought an action to recover the half note, it was held that the maxim *in pari delicto potior est conditio possidentis* applied and that as the plaintiff could not recover without showing the true character of the deposit, and that being on an illegal consideration to which he was himself a party, he was precluded from obtaining the assistance of the law to recover it back.

No distinction appears to me necessary to be drawn between illegality arising in cases of contract and that arising in cases of tort. In either case, if the plaintiff can prove his case without any reference to any illegality, or if this cannot be evinced from the evidence, he will succeed.

At this stage it is relevant to refer to the Minerals Act (*cap.* 196). In s.2 of that Act, "minerals" has been defined and includes diamond which is a precious stone. Section 67 prohibits the possession of any mineral except upon certain conditions. Section 67 reads:

> "No person shall possess any mineral unless he is the lessee of a mining lease, or the holder of a mining right, exclusive prospecting licence or a prospecting right, or of a licence granted under section 71 or the duly authorised employee of such lessee or holder."

Section 3 vests the property in and control of all minerals in Sierra Leone in the Crown, and reads:

> "(1) The entire property in and control of all minerals, and mineral oils, in, under or upon any lands in Sierra Leone, and of all rivers, streams and watercourses throughout Sierra Leone, is hereby declared to reside in the Crown, save in so far as such control may in any case have been limited by any express grant made by the Crown before the commencement of this Act:
>
> (2) Except as in this Act provided no person shall prospect or mine on any lands in Sierra Leone, or divert or impound water for the purpose of mining operations."

Neither the appellant nor the respondent is licensed to mine, purchase or deal in diamonds. The appellant is engaged as a drag-line driver for the Sierra Leone Selection Trust, a mining company in Kono in the diamond area of Sierra Leone. In so far as the respondent is concerned there is no evidence that he is in any employment.

It is an incontrovertible fact that when the respondent found this piece of diamond he had no right in law to keep it, and when

he handed it over to the appellant he also had no right to keep it, nay more, to sell it. Possession was and still is vested in the Crown, and their dealing with the diamond without a lawful right to do so was plainly illegal.

The true test for determining whether or not the respondent and the appellant were *in pari delicto* is by considering whether the respondent could make out his case otherwise than through the medium and by the aid of the illegal transaction to which he was himself a party. The evidence points clearly to an illegal transaction, and as this was obvious to the trial judge it was open to him to have taken the point despite the fact that it was not pleaded.

I reach the conclusion that the respondent could not have given evidence without disclosing the illegal nature of the transaction. This is amply supplied by the evidence, and consequently the respondent is not entitled to the fruits of his judgment. And were the proceedings reversed, so that the appellant found himself in the shoes of the respondent, he too could not have succeeded, and it follows he cannot benefit from this judgment.

Reverting to the provisions of the Minerals Act, possession of the diamond is still vested in the Crown and it remains so until the Crown is divested of it.

The learned trial judge found as a fact that the appellant did in fact convert the diamond into cash which is now lying to his credit in the Intra Bank and Standard Bank of West Africa in Koidu. He has also found that the amount of £44,000 or Le88,000 represents the sum of money into which it has been converted. Possession having vested in the Crown by the Act, it follows that the Crown is entitled to follow the diamond in its converted form.

The appeal succeeds, but the appellant is not entitled to keep the proceeds arising from the sale and for which a stop-order has been obtained. I would therefore order that the sum of Le88,000 standing in the account of the appellant at the Standard Bank of West Africa, Koidu, and Intra Bank, Koidu, be paid to the Crown.

SIR SAMUEL BANKOLE JONES, P. and DOVE-EDWIN, J.A. concurred.

Order accordingly.