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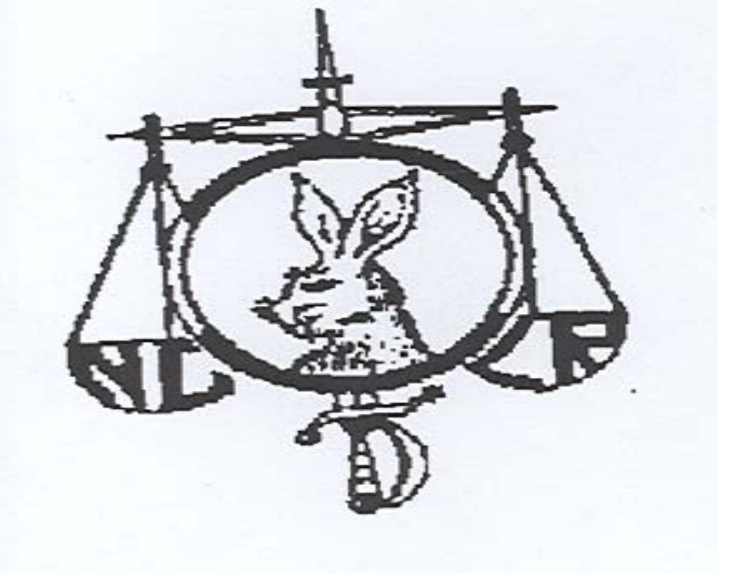

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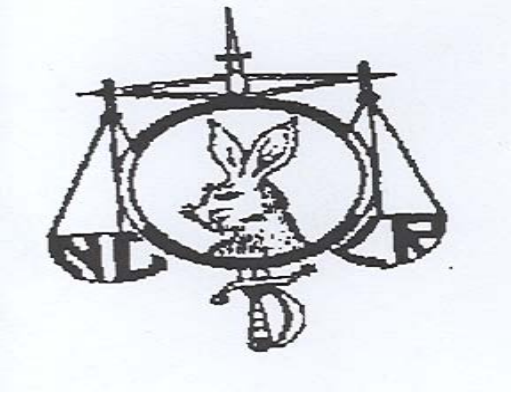

THE GAMBIA LAW REPORT

JUNE 2008

THE

GAMBIA LAW REPORTS

1960-1993

Being Selected Judgments and Rulings determined

between 1960 and 1993 by the

Superior Courts

of The Republic of The Gambia

and on appeal by the Judicial Committee of the Privy Council.

BANJUL, THE GAMBIA

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1960 - 1993

Being Selected Judgments and Rulings determined by the

Superior Courts

of The Gambia

DONALDSON v COMMISSIONER OF POLICE

SUPREME COURT, (HIGH COURT), BATHURST

(Criminal Appeal No 6 of 1960)

10 March 1960

WISEHAM CJ

Criminal law and procedure-Autrefois acquit-Plea of-When available-Appellant previously tried on charge of forgery-Appellant discharged at previous trial and freed upon quashing of committal proceedings as invalid-Subsequent trial and conviction of the appellant by magistrate on same charge of forgery-Whether plea of autrefois acquit available to appellant at second trial for same offence.

Held, *dismissing the appeal against conviction for forgery:* the plea of *autrefois acquit* raised by the appellant cannot be sustained because at his previous trial on the same charge of forgery, he was not acquitted of the offence but merely discharged, following the quashing of the committal proceedings for being invalid.

Per Wiseham CJ. I was referred to *Stroudt's Judicial Dictionary* Vol 1 at page 202, para 4 under the commentaries to "*Autrefois Acquit.*" The first requisite is the accused must have been acquitted. Now in this case or rather the last case that came before me, the appellant was not acquitted of anything. The committal proceedings were quashed because they were invalid and I therefore had no jurisdiction to try a person improperly committed; my jurisdiction was ousted; there was nothing to try; the appellant was set at liberty or discharged, but that was a far cry from an acquittal.

Cases referred to:

(1) Edu v *Commissioner of Police* 14 WACA 168.

(2) R v *Otu* 9 WACA 194.

(3) R v *Flower* (1956) 40 Cr APP R 193.

APPEAL against conviction by the colonial magistrate for forgery on the ground, inter alia, of *autrefois acquit*. The facts are sufficiently stated in the judgment of the court.

PS N'jie for the appellant.

PR Bridges, Assistant Attorney-General, for the Commissioner of Police.

WISEHAM CJ. The appellant in this appeal was tried for the offence of forgery by the colonial magistrate and found guilty and sentenced to three months' imprisonment with hard labour and further ordered to pay 50 shillings sterling in costs and in default thereof to suffer a further three months' imprisonment.

The grounds of appeal were that the trial magistrate was wrong in law; that the evidence was insufficient to warrant a conviction; and that the verdict was unreasonable. Additional grounds of appeal were taken on the morning of this hearing to which the respondent did not object to be taken by surprise.

In actual argument before this court, the points are two in number. The first is that the plea of *autrefois acquit* should have succeeded. The second is that the proceedings were irregular.

The appellant was before this court some time ago on the same charge of forgery, but the committal proceedings were quashed and the appellant set at liberty. Subsequently, the appellant was tried by the colonial magistrate for what was undoubtedly the same offence. The learned counsel for the appellant relies on the case of *Edu* v *Commissioner of Police* 14 WACA 168 where it is said that the cardinal point is whether the offence is the same. There are four cardinal points to the compass, north, south, east and west, each equally effective; and the authority does not say that this is the only point involved. I respectfully agree with the decision, but there is the question whether the appellant was put in peril and whether the appellant was tried the first time he came before this court.

I was referred to *Stroudt's Judicial Dictionary* Vol 1 page 202, para 4 under the commentaries to "*Autrefois Acquit*." The first requisite is that the accused must have been acquitted. Now, in this case or rather the last case that came

before me, the appellant was not acquitted of anything. The committal proceedings were quashed because they were invalid and I therefore had no jurisdiction to try a person improperly committed; my jurisdiction was ousted; there was nothing to try; the appellant was set at liberty or discharged, but that was far from an acquittal. The second requisite is that there must have been a previous trial. Here gain, the point of the invalidity of committal proceedings was taken at the very commencement of proceedings before me and the result was that I ruled that I could not proceed to trial. I admit that the third requisite stated by *Stroudt* is that the offences are not only substantially but exactly the same. The plea of *autrefois acquit* must, however, fail on the two prior points mentioned.

The next reference was *R* v *Otu* 9 WACA 149. It was a case stated. The offence was rape. It had been tried before a native court. The subsequent trial was improper. I agree with the decision respectfully, but it does not help in relevance to the present appeal.

So, on these facts, I say that the appellant was not acquitted, not tried by me and that the plea of *artrefois acquit* must fail.

Lastly, however, there is the case of *R* v *Flower* (1956) 40 Cr Appeal R 193 where the English Court of Appeal quashed certain convictions because previous convictions had been before the jury but the court went on to say that, if the accused was charged with a fresh charge at Southend, his plea of *autrefois acquit* would probably not avail that he had been tried by the Buckinghamshire Quarter Sessions, which had no jurisdiction over Southend. *Archbold* (34th ed), para 438, citing *R* v *Flower* says: "The defence of *autrefois acquit* has no application where the prisoner was not liable to lawfully suffer judgment in the first trial because the court lacked jurisdiction." Similarly, the accused not having elected to be tried by jury, or there being no record thereof, I quashed the committal proceedings and did not proceed to trial on the basis of no jurisdiction on an invalid committal.

The second ground of appeal actually argued is that the proceedings were irregular. I agree that a plea of *autrefois acquit* should have been taken at the very first instance and should not have been sandwiched in mid-trial, but it was done at the request of counsel for the appellant. The irregularity has not prejudiced the appellant. He knew what the original charge was. The evidence went on unimpeded. No appeal should be allowed for irregularities in charge, etc or proceedings unless a failure of justice has resulted, which I do not think has happened in this case: see section 312 of the Criminal Procedure Code.

I have disposed of both grounds of appeal argued. It remains to add that the colonial magistrate exceeded his powers in awarding 50 shillings costs under section 147(1) of the Criminal Procedure Code. I would reduce it to 25

shillings costs or in default of payment thereof, three months' imprisonment with hard labour.

The appeal is otherwise dismissed.

Appeal against conviction

for forgery dismissed.

SYBB

JOBE & FYE v COMMISSIONER OF POLICE

SUPREME COURT (HIGH COURT), BATHURST

(Criminal Appeal No 8/60)

4 April 1960

WISEHAM CJ

Criminal law and procedure-Defence-Right to counsel-Need for-Accused arraigned before magistrate on charge of stealing-Request by accused for permission to engage counsel-Refusa

l of request by trial magistrate because accused had ample time to engage counsel-Magistrate proceeding with trial-Refusal resulting in accused being unable to cross-examine prosecution witnesses-Accused giving evidence on oath without prior explanation by magistrate of no need for evidence to be given on oath-Subsequent conviction of accused for stealing to be set aside and accused to be re-tried before another magistrate.

APPEAL against conviction and sentence by the trial magistrate for stealing on the ground, inter alia, of the refusal by the trial magistrate to grant the request by the appellants to engage counsel before the hearing. The facts are sufficiently stated in the judgment of the court.

P S Njie for the appellants.

P R Bridges, Assistant Attorney-General, for the respondent,

s CJ. Both the appellants in this case were tried by the colonial magistrate at Bathurst on a charge of stealing and both were sentenced to twelve months' imprisonment. On the date of the trial, they both asked for permission to engage counsel and the magistrate recorded that they had ample time and there were plenty of lawyers and refused adjournment. The result was that both accused were not represented, did not cross-examine any of the prosecution witnesses; and lastly gave evidence on oath while it was not explained to them that they need not have done so. And the need for direction on other alternatives at the close of the prosecution case does not appear to have been complied with according to the record. Mr P S N'jie, counsel for the appellant in this appeal against conviction and sentence, also says that he has additional evidence which could not have been produced at the time of trial.

I am not going into the merits of this. But I am merely setting aside the conviction and sentence chiefly because the accused must not get the impression that there has been haste in the conduct of their case and that they

have been deprived of professional aid. For that reason, I am ordering a retrial of this case before another magistrate. The appeal is allowed to that extent.

Appeal allowed and

re-trial ordered.

SYBB

KAGNIE & Others v COMMISSIONER OF POLICE

SUPREME COURT (HIGH COURT), BATHURST

(Misc Criminal Cause Nos H 38/60-53/60)

18 November 1960

WISEHAM CJ

Criminal law and procedure-Bail-Application for bail pending appeal-Bail pending appeal to be granted only in very exceptional circumstances-Application for bail pending appeal against conviction and sentence of nineteen accused persons to varying terms of imprisonment from six to twelve months-Application founded on claim that period of imprisonment coinciding with harvest time and there being no one to look after the farms of convicted applicants-Whether ground constituting special circumstances.

APPLICATIONS for bail pending appeal by nineteen accused persons convicted and sentenced to varying terms of imprisonment ranging from six to twelve months.

A S B Saho and E D N'jie for the applicants.

L Weston QC and Ben W Prescod for the respondents.

WISEHAM CJ. These are nineteen applications by the accused who were found guilty, convicted and sentenced to varying terms of imprisonment ranging from six to twelve months. These applications are for bail pending appeal.

There are two categories of bail: bail granted to under-trial prisoners and bail granted to convicted prisoners. In the former case, the accused are presumed to be innocent until found guilty. In the latter case, they are already found guilty by a competent court and should therefore be serving their sentences forthwith. *Archbold*, (34th ed), para 882, quotes several cases to show exceptional circumstances. I have done so in the past cases of very short sentences where the likelihood of the Court of Appeal sitting would be some time when the sentences would have been fully served. But here in this case, the appeals can be heard long before the sentences would have been served. It is not a question whether the accused will stand their trial; that has already been done and they had been tried. It is a question of why they should not serve their sentences forthwith.

The ground put forward in all the affidavits is that it being harvest time there is no one to look after their farms in the Protectorate. If I were to accept this ground, I would never be able to consistently refuse bail in future in every

other case; and the same argument applies to the other ground that the convicted persons should give instructions to their counsel in this case. It was the same counsel who appeared for them in the lower court and no further instructions are necessary from prison.

I will try and expedite the hearing of these appeals as soon as possible but, in the meantime, all the applications for bail are dismissed.

Applications for bail

pending appeal dismissed. SYBB

DARBOE (No 1) & Others v COMMISSIONER OF POLICE (No 1)

SUPREME COURT (HIGH COURT), BATHURST

(Criminal Appeal No H 22/60)

18 January 1961

WISEHAM CJ

Criminal law and procedure-Execution-Obstructing court officers-Order or warrant of court-Section 111 of Cap 10 providing that any person who willfully obstructs or resists any person lawfully charged with execution of order or warrant of any court commits offence-Whether incumbent on prosecution to prove that the person is a court officer-Criminal Code, Cap 10, s111.

It is provided by the Criminal Code, Cap 10, s111 that:

"Any person who willfully obstructs or resists any person lawfully charged with the execution of an order or warrant of any court, is guilty of a misdemeanour, and is liable to imprisonment for a term of one year."

Held *dismissing the appeal against conviction and sentence for obstructing a court officer*: the effect of section 111 of the Criminal Code, Cap 10 is that any person lawfully charged with the execution of the warrant of any court should not be obstructed or resisted; and it is also not incumbent on the prosecution to prove that the person being obstructed is a court officer even though the side note to the section says "obstructing court officers."

APPEAL against conviction and sentence for obstructing court officers contrary to section lll of the Criminal Code, Cap 10. The facts are sufficiently stated in the judgment of the court.

A S B Saho for the appellants.

L Weston, O C for the respondent.

WISEHAM CJ. This is an appeal by 23 appellants who were convicted and sentenced for obstructing court officers contrary to section lll of the Criminal Code, Cap 10. The facts of the case as deposed to by the prosecution witness were shortly as follows:

Four Badge Messengers of the Seyfu's Court of Jarra East District were asked to go and arrest four boys at Sukuta. The reason for this arrest was that the four boys had been previously summoned to the district tribunal and had not appeared before the court.

The warrant for their arrest was the usual warrant which one issues either to an accused person or to a witness who has disobeyed process of the court; and in order that that person may be prosecuted before the court forthwith, such a warrant is issued. It is in effect a warrant for contempt of court; and in those circumstances, an offence need not be specified.

To continue, however, with the facts of the case, the badge messengers on arrival at Sukuta were met by one Sanah who, in conjunction with one Konaji, called a meeting of the village and decided that the boys should not go. In the meantime, the boys had taken hiding somewhere. The badge messengers returned and were again sent out by the seyfu to effect the arrest. On that evening, in the same village, a further meeting was called and the meeting decided that the villagers would not surrender the four young men. Eventually, in the morning, one of the young men, Bunja Tarawally, was arrested. After his arrest, the villagers surrounded and attacked one of the badge messengers who was holding the boy and thus got the boy released. As a result thereof, the badge messengers were unable to execute the warrant and on that basis, the prosecution alleged the accused had obstructed the execution of the warrant. Those are the facts, shortly, of the case.

Several grounds of appeal have been argued. But before coming to them, I must draw attention to several paragraphs in the judgment which are extraneous to the issues involved. It is one of the canons of judicial judgments not to import into a judgment anything which is not on record on the evidence. Apart from that, I would say the issues were very simply these: First was there a warrant for arrest? Second, was there obstruction in the execution of that warrant? And third, are the accused sufficiently identified to be the people who obstructed the execution of that warrant? It is quite irrelevant as to the motive - political or otherwise - for the obstruction. The issues I have stated are all that concerned the court. The motive may be interesting; but it is unnecessary for a conviction; and looking at the record, in spite of the extraneous matter imported, I cannot say that the magistrate had misdirected himself in any way; and that on the evidence in the case, in spite of this matter, he could have come to no other conclusion than the one he did - namely - that the appellants were guilty of the crime as charged.

The first ground of appeal argued by Mr Saho, counsel for the appellants, was that no offence was specified in the warrant. The warrant, unfortunately, is not before this court; but it has been before the lower court and was produced as exhibit A. I would look at it if I had to be satisfied that an offence was disclosed. But there is oral evidence in the case in the evidence of the first

prosecution witness that this warrant was issued as a result of a disobedience of the four boys to come to court and I have already dealt with this point at the beginning of this judgment.

The second point made by Mr Saho is that the magistrate should not have believed the evidence of the badge messengers. They are undoubtedly servants of the chief, but they are the best evidence available as to what happened in the village. They had all the surroundings opposed to them and it would be difficult to find independent evidence in the village opposing itself to the rest of the members of the village. In those circumstances, the best evidence is called, seen and heard and believed by the magistrate and I find he was entitled to do so.

The next question is are the badge messengers court officers? Section 16 (2) of the Protectorate Ordinance, Cap 47 has been referred to by the magistrate as providing that badge messengers exercised police powers; and to my mind, any one, even a police officer who is instructed by the court to execute a particular warrant thereby becomes a court officer. But the Learned Attorney- General has pointed out that in any event, under section lll of the Criminal code, "court officer" is not actually mentioned in the section itself. The section says that any person who willfully obstructs or resists any person lawfully charged with the execution of an order or warrant of any court is guilty of a misdemeanour and is liable to imprisonment for one year. I come to the conclusion therefore, that any person lawfully charged with the execution of the warrant of any court should not be obstructed or resisted: and is therefore not incumbent on the prosecution to prove that the person is a court officer. I am of course aware that the side note to this section says "obstructing court officers." But it is a rule of interpretation well known that marginal notes or side notes should never be taken into consideration in interpreting a section of a statute.

For that reason, and for the other reasons that I have given already, the convictions were correct and are confirmed. As regards the sentences, I have given serious thought to these; and the learned magistrate has taken into account one or two factors which have been well considered - namely - the remoteness of these villages and the general fear in the minds of the villagers; and his sentences are indeed very reasonable. In those circumstances the appeals are dismissed.

Appeal dismissed.

SYBB

BOJANG v COMMISSIONER OF POLICE

SUPREME COURT (HIGH COURT), BATHURST

(Criminal Appeal No 65 1/61)

30 January 1961

WISEHAM CJ

Criminal law and procedure-Wounding-Charge of-Proof-Desirable but not always possible to call medical evidence in proof of injuries sustained by complainant-Circumstances when oral evidence sufficient.

Held, *dismissing appeal against conviction for wounding contrary to section 217 of the Criminal Code*: it is desirable that medical evidence should always be called in cases where injuries are to be justified. However, it is not always possible to get medical examination in cases such as where the wounding takes place in the bush and medical evidence cannot therefore produced. In the instant case where the complainant was detained in hospital for three days and sustained injury over the left eye, oral evidence by the complainant to that effect is sufficient to prove wounding.

APPEAL against conviction and sentence for the offence of wounding contrary to section 217 of the Criminal Code, Cap 10. The facts are sufficiently stated in the judgment of the court.

Saho for the appellant.

B W Prescod for the Commissioner of Police.

WISEHAM CJ. The appellant was charged with the offence of wounding contrary to 217 of the Criminal Code, Cap 10. He was found guilty, convicted and sentenced to a month's imprisonment by the learned colonial magistrate.

Mr Saho, counsel for the appellant, now contends that the charge of wounding was not proved; that there was no medical or out patient's card produced. It is, indeed, desirable that medical evidence should always be called in cases where injuries are to be justified. I realise that in the bush it is not always possible to get medical examination and such evidence cannot therefore be produced. In this case, the

complainant gave evidence that he was detained in hospital for three days; that he had a cut over his left eye and that it was bleeding. That oral evidence is in itself sufficient to ensure that some membrane was cut and that a wounding resulted.

The accused, as Mr Saho says, wanted to call five defence witnesses but was not allowed to do so. This does not appear from the record and as section 172 of the Criminal Procedure Code was complied with according to the record, and as the accused had nothing to say further, it did not appear except for his unsworn statement that he wanted to call any witnesses. Again, Mr Saho says the magistrate proceeded to read out his judgment when the accused had actually wanted to give sworn evidence. Here again, I must only go by the record and from it such things do not appear. If the record is intended to be challenged, there should be an affidavit sworn to by some person who was present in court to challenge the correctness of the record.

The case is not a very serious one of wounding. In fact, it is what is commonly known as "giving a man a black eye with the bare fist." No offensive or lethal weapon was involved and the sentence of a month's imprisonment does appear to be harsh in the case of a young man of 23 years old with no previous convictions and a conscientious employee in the Survey Department. In view of the fact that the accused has already served 21 days' imprisonment, I propose to confirm the conviction but to reduce the sentence to the exact number of days that he has already served - which will mean that the accused can be released forthwith. In addition, I would point out by way of comment for the information of the Superintendent of Surveys, that this is an offence which does not involve any moral or dishonesty or question of not being trusted or capable of being trusted in the department; but nothing more than a physical assault which should not be taken into account as regards his future service. It occurred outside working hours and was the result of a sudden altercation in which there was no doubt some provocation. In those circumstances, I would recommend that he is allowed to continue in service.

Appeal against

conviction dismissed

but sentence allowed in part.

SYBB

SALIEU JOBE & Another v COMMISSIONER OF POLICE

SUPREME COURT (HIGH COURT), BATHURST

(Criminal Appeal No H 16/1961)

11 December 1961

WISEHAM CJ

Criminal law and procedure-Evidence-Accomplice-Need for corroboration-Duty of trial court to warn itself on need for corroboration of accomplice evidence-Evidence of an accomplice cannot corroborate evidence of prosecution witness also an accomplice to same offence-Rationale for rules relating to accomplice evidence.

Held, *allowing the appeal against the conviction and sentence of the second accused for stealing*: the rules relating to accomplice evidence have become rigid law and consist of safeguards which experience has shown to be necessary if a man accused of an offence is to be sure of obtaining justice so that he will not be convicted on tainted evidence open to suspicion. In the instant case, the whole evidence against the second accused in support of his conviction and sentence for stealing was based on the evidence of the first accused, an accomplice. The trial magistrate correctly warned himself that such evidence must be corroborated. However, he erred in finding such corroboration in the evidence of the second prosecution witness, who on the facts, was also an accomplice to the offence of stealing and he should have been so treated. As an accomplice, he cannot corroborate the evidence of the first accused. There was therefore nothing left in the evidence against the second accused and the case against him must fail.

APPEAL by the second and third accused against their conviction and sentence by the trial magistrate for the offences of stealing and receiving respectively. The facts are sufficiently stated in the judgment of the court.

ASB Saho for the appellants.

PR Bridges for the Commissioner of Police.

WISEHAM CJ. The appellants, the second and third accused at the trial, were convicted of the offences of stealing and receiving respectively. The first accused has not appealed.

The evidence of the prosecution was that one drum of Shell kerosene had been stolen from the stock of the Sapu Experimental Station. This drum had been loaded by the first and second accused and one Jerreh Jaju (the second prosecution witness) unto a Landrover, driven by the first accused. The drum

was valued at ten pounds sterling was sold by the first accused to the third accused for six pounds sterling at his shop at Wallikunda. On this evidence, the first and second accused were found guilty of stealing, while the third accused was found guilty of receiving.

Mr Saho, counsel for the third accused, submitted that there was no evidence of stealing against the third accused; that the whole evidence was based on that of the accomplice, the first accused, a self-confessed criminal; and that the third accused's explanation should have been accepted. It is true with regard to the third accused that there was no evidence of stealing, but the magistrate was entitled to convict him of the offence of receiving. The magistrate very correctly warned himself that the evidence of the first accused was that of an accomplice, and finding corroboration, he acted upon it. In actual fact, there was no necessity to consider the first accused's evidence against his co-accused. In a case of receiving, the prosecution have merely to prove a theft, the satisfactory identification of the article stolen, and recent possession of that stolen article with the third accused. It is then for the third accused to give a satisfactory explanation how he came by that stolen article.

I am satisfied that there was evidence of the theft of the drum of Shell kerosene, and that it was satisfactorily identified. What was the explanation of the third accused? It was that he had taken over the shop from the previous owner. That previous owner, Badu Sinyang (the fourth defence witness), deposed that there was only one drum of Shell kerosene handed over, whereas in the police search, two drums of Shell kerosene were discovered, one empty and one full.

Even apart from this, the magistrate considered the total number of drums of all brands and found the third accused's explanation unsatisfactory as it left one drum unaccounted for. There was further evidence that no drums of Shell kerosene had been consigned to that shop through the usual agency, the LCA, at any material time before this case. In these circumstances, the third accused was rightly convicted of receiving and his appeal is dismissed.

To revert now to the case of the second accused, the magistrate correctly warned himself that the first accused was an accomplice, but he found he was "corroborated in so far as the second accused's part in helping to load the drum on the vehicle…by the evidence of the second prosecution witness." This is all the corroboration that can be found against the second accused. If this line of reasoning is correct and the second accused becomes a thief for loading a drum unto a vehicle, then it must with justice be equally applied to the witness, the second prosecution witness (Jerreh Jaju). He, too, becomes an accomplice and a thief and should have been so treated. One accomplice cannot corroborate the evidence of another accomplice. There is nothing therefore left in the evidence against the second accused and the case against him must fail. The rules relating to

accomplice evidence have become rigid law and consist of safeguards which experience has shown to be necessary if a man accused of an offence is to be sure of obtaining justice so that he will not be convicted on tainted evidence open to suspicion.

The appeal of the second accused is allowed, the conviction and sentence are set aside, and the second accused must be set at liberty.

Appeal by second accused against

conviction and sentence allowed.

SYBB

JOOF & JAMMEH v COMMISSIONER OF POLICE

SUPREME COURT (HIGH COURT), BATHURST

(Criminal Appeal No H 6/62)

6 August 1962

AG CHIEF JUSTICE

Criminal law procedure-Accused-Hearing-Absence by reason of illness-Statement of co-accused alleging admissions put in evidence by prosecution witness in absence of co-accused-Duty of trial magistrate to order further adjournment of hearing in interest of justice-Criminal Procedure Code, Cap 23, s 168 (2).

Criminal law and procedure-Evidence-Accused-Competent witness for defence-Co-accused giving evidence exculpating himself or incriminating other accused-Duty of trial magistrate to give opportunity to other accused to cross-examine co-accused-Rationale for such cross-examination-Criminal Evidence Ordinance, Cap 26, s 4.

Held, setting *aside the convictions and sentences of the appellants and ordering retrial*: (1) section 168 (2) of the Criminal Procedure Code, Cap 23 provides that where a court is satisfied that an accused person was by reason of illness unable to attend at an adjourned hearing of a case, the court may order a further adjournment as may be lawful and reasonable. In the instant case, a prosecution witness at the trial gave evidence in the absence of the third accused and put in evidence a statement alleged to have been made by that accused in which certain admissions were alleged to have been made by that accused. In the circumstances, and particularly so as the information about the illness of that accused came from the prosecution and that he had gone to hospital for treatment, the trial magistrate ought to have adjourned the hearing so that justice would not only have been done but would appear to have been done.

(2) Section 4 of the Criminal Evidence Ordinance, Cap 26 makes every person charged with an offence a competent witness for the defence at every stage of the proceedings whether such a person is charged solely or jointly with another person. Therefore if a co-accused person gives evidence either exculpating himself or incriminating another accused person, it is the duty of the trial

magistrate to give an opportunity to the other accused person with whom he is jointly charged to put questions to such an accused person giving evidence. It is quite possible and perhaps probable that, by an accused person putting questions to another co-accused person giving evidence, he may be able to bring out evidence which may go to establish his innocence or raise reasonable doubt in the mind of the trial magistrate as to his guilt. The failure by the trial magistrate to have given such an opportunity to the accused person constituted a denial of one of the fundamental principles of natural justice.

APPEAL against conviction by the trial magistrate for the offence of assault causing bodily actual harm contrary to section 228 of the Criminal Code, Cap 21. The facts are sufficiently stated in the judgment.

A A Da Costa for the appellants.

B W Prescod for the Commissioner of Police.

AG CHIEF JUSTICE. The two appellants in this appeal, namely, Amadi Joof (who was the fifth accused in the court below) and Basiru Jammeh (who was the fourth accused in the court below), were jointly charged with eight other accused persons with the offence of assault causing actual bodily harm contrary to section 228 of the Criminal Code, Cap 21. The particulars of offence are that: "On June 1962 at Sitanuku village in the North Bank Division you lawfully assaulted Amadou Senghore and Foday Senghore of Sitanunku village thereby causing actual bodily harm." All the accused appeared before the trial magistrate on the 15 June 1962, at Essau and each pleaded not guilty to the charge. On that same date, three witnesses, namely, Foday Senghore, Amadou Senghore and Suntukung Drammeh, gave evidence for the prosecution and the case was then adjourned to 25 June 1962. At the resumed hearing, one of the accused persons, namely, Lamin N'gum (who was the third accused) was absent. At page 17 of the record of proceedings the following appears:

"All ten accused with the exception of the third accused, Lamin N'gum, present in court. Prosecution states that the accused is ill and has gone to the Victoria Hospital, Bathurst, for treatment. Prosecution further states that the third accused is not admitted in hospital."

The hearing continued in the absence of the third accused and on that date two witnesses namely, PC 58 Musa Cham, and Police Sergeant William Touray, gave evidence for the prosecution and the prosecution closed their case. The first and second accused and the fourth accused (the second appellant in this case), the fifth accused (the first appellant in this case), and the sixth accused gave evidence. The seventh, eighth and tenth accused said they had nothing to say. The ninth accused made an unsworn statement from the dock. Judgment was given on 6 July 1962 and all ten accused were found

guilty of the charge and the first appellant was sentenced to six month's imprisonment with hard labour and the second appellant was sentenced to two month's imprisonment with hard labour.

There appears nothing on the record to show that the accused persons who gave evidence were cross-examined by the co-accused, nor is there anything to show that an opportunity was given to the co-accused to cross-examine those accused persons who had given evidence.

From this conviction and sentence, the appellants have appealed to this court on the following grounds:

"(a) that the weight of the evidence is against the verdict;

(b) that your lordship's petitioners were denied the right to call witnesses;

(c) that the sentences are excessive; and

(d) that the learned magistrate should have recorded his reasons for his decisions with regard to the discriminatory nature of the sentence imposed on the ten accused persons.

As regards grounds (b), this can easily be disposed of by saying there is no substance at all in it. The trial magistrate at page 24 of the record of proceedings clearly stated as follows: "The accused informed of provision of section 172 of the Criminal Procedure Code". That section provides:

"(1) At the close of the evidence is support of the charge, if it appears to the Court that a case is made out against the accused person sufficiently to require him to make a defence, the court shall call upon him to enter into defence and shall inform him that, if he so desires, he may give evidence himself on oath or may make a statement. The court shall then hear the accused if he desires to be heard and any evidence he may deduce in his defence,

(2) If the accused person states that he has witnesses to call but that they are not present in court, and the court is satisfied that the absence of such witnesses is not due to any fault or neglect of the accused person, and that there is a likelihood that they could, if present, give material evidence on behalf of the accused person, the court may adjourn the trial and issue process, or take other steps, to compel the attendance of such witnesses.

(3) If the accused person shall have examined any witnesses or given any evidence other than as to his, the accused's general character, the court may grant leave to the prosecutor to give or adduce evidence in reply."

I find that the trial magistrate complied with the provisions laid down by law and if the appellant had wished to call any witnesses on their behalf the would clearly have so stated and done so.

There are two points in this appeal, however, which need serious consideration and although they were not raised by the appellants in their grounds of appeal, the court itself has raised them since this is a criminal proceeding in which the liberty of the subject is involved. The first point I wish to raise is that although the prosecution made it clear to the trial magistrate that one of the accused person was ill and had gone to Victoria Hospital, the magistrate did not think it advisable in those circumstances to have adjourned the trial in order to give an opportunity to that accused person either to cross-examine the other witnesses who had given evidence for the prosecution or to give evidence on his own behalf or to call witnesses if he so thought fit, or to cross-examine the other accused persons who had given evidence. It is true that this is a case of misdemeanour and not a felony and section 168(1) Criminal Procedure Code, Cap 23 empowers the court to proceed with the hearing in the absence of an accused person; but sub-section 2 of that same section provides that where a court is satisfied that an accused person was by reason of illness unable to attend at an adjourned hearing of the case, the court may order a further adjournment as may be lawful and reasonable. The trial magistrate did not make any findings on the record that he was or was not satisfied that the accused was absent by reason of illness. It is perhaps unreasonable to infer that by proceeding with the case in the absence of third accused, the trial magistrate was not so satisfied.

Upon examination of the record of proceedings, it is seen that one of the witnesses who gave evidence for the prosecution in the absence of third accused, was PC 58 Musa Cham who put in evidence a statement alleged to have been made by that accused and in which certain admissions were alleged to have been made by that accused. I think in those circumstances, particularly so as the information about the illness of that accused came from the prosecution and that he had gone to Bathurst for treatment at Victoria Hospital and furthermore the remaining witnesses who were being called by the prosecution were police witnesses - public officers, not private individuals - the trial magistrate ought to have adjourned the hearing so that justice would not only have been done but would appear to have been done.

The next point of importance worth considering in this case is the fact that none of the accused persons present in court when the co-accused gave evidence was given opportunity to cross-examine those accused persons who gave evidence. Section 4 of the Criminal Evidence Ordinance, Cap 26, makes every person charged with an offence a competent witness for the defence at every stage of the proceedings whether such a person is charged solely or jointly with another person. It follows therefore that if a co-accused person goes into the witness box and gives evidence either exculpating himself or incriminating another person, it is the duty of the trial magistrate to give an opportunity to the other accused person with whom he is jointly

charged to put questions to the co-accused person giving evidence. It is quite possible and perhaps probable that, by an accused person putting questions to a co-accused person giving evidence, he may be able to bring out evidence which may go to establish his innocence or raise reasonable doubt in the mind of the trial magistrate as to his guilt. It is my considered opinion that failure on the part of the trial magistrate to have given such an opportunity to the accused person was tantamount to a denial one of the fundamental principles of natural justice.

Taking all the circumstances of the case into consideration, I think it is but proper that the convictions and sentences in this appeal be set also aside and that a retrial by another magistrate be ordered and I so order.

Mr Prescod drew my attention to the provisions of section 312 of the Criminal Procedure Code, Cap 23 and has urged me to apply those provisions. I regret that the circumstances in this case, in my view, do not warrant the application of the provisions of that section.

Convictions and sentences

set aside . Order for re-trial

of accused persons by another magistrate.

SYBB

NYANG v COMMISSIONER OF POLICE

SUPREME COURT (HIGH COURT), BATHURST

(Criminal Appeal No S 11/62)

28 September 1962

AG CHIEF JUSTICE

Criminal law and procedure-Trial-Summary or on indictment-Mode of-When proper for accused to change election to be tried summarily-Criminal Procedure Code, Cap 23, s 179(1).

Held, *allowing the appeal and declaring the whole trial a nullity*: the effect of section 179(1) of the Criminal Procedure Code, Cap 23 is that at any time between the recording by the magistrate of the decision of the accused to be tried summarily and the beginning of the trial, the accused can properly change his election for summary trial. But when once the magistrate has begun the trial, ie taken evidence of relevance to the charge or charges, the magistrate must of necessity carry out the express wishes of the legislature, ie to try the accused. Since in the instant case, the magistrate had not begun to try the case, he erred in refusing the appellant's application for leave to withdraw his consent to be tried summarily. *R* v *Craske*; *Ex parte Commissioner of Police of the Metropolis* [1957] 2 All ER 772 and *Cham* v *Commissioner of Police* Supreme Court (High Court), Misc Criminal Cause S 9/62, 26 September 1962, unreported cited.

Cases referred to:

(1) Cham v *Commissioner of Police*, Misc Criminal Cause Nos 9/62, Bathurst, 26 September 1962, unreported.

(2) R v *Craske*: *Ex parte Commissioner of Police of the Metropolis* [1957] 2 All ER 772.

(3) B v *Bennett* [1960] 1 All ER 335.

CRIMINAL APPEAL from the decision of the colonial magistrate, convicting and sentencing the appellant of one count of storebreaking and two counts of stealing. The facts are sufficiently stated in the judgment of the court.

S A Njie for the appellant.

B W Prescod for the Commissioner of Police.

AG CHIEF JUSTICE. When this appeal came up on 28 September 1962, I allowed the appeal and stated that I would file the reasons for allowing the appeal. I record the reasons for so doing.

It is clear from the wording of the petition of appeal that the petition relates only to Ousainou Nyang. This appellant and one Batch Saine were jointly charged before the Colonial Magistrate sitting at Bathurst with three counts. The first count related to storebreaking contrary to section 283 (*c*) of the Criminal Code, Cap 21 of the Laws of the Gambia; and the second and third counts related to stealing, contrary to section 252 of that Code. In the case of the first count, the maximum punishment provided under the Code is seven years but that in respect of the second and third counts is three years. The first count was caught by the provisions of section 179(1) of the Criminal Procedure Code, Cap 21; whilst the second and third counts were not. The first count required an entirely different treatment from the second and third counts. Both the appellant and Batch Saine, who before the magistrate, were the first and second accused, respectively, first appeared before the magistrate on 28 March 1962 on separate charges but that same day the magistrate, on the application of the prosecution, ordered a joinder of the charges. At the time the magistrate made the order, it appears from the record of proceedings that he had not dealt with the charge of storebreaking preferred against both the appellant and Batch Saine as a separate and distinct charge in the manner required by section 179(1) of the Criminal Procedure Code, Cap 23. In the case of the first count, the magistrate had jurisdiction to try it only after certain events have taken place; whilst he had complete jurisdiction in respect of the second and third counts. It was after the order had been made that the magistrate proceeded to deal with all the charges in the manner set out in section 179(1) of the Criminal Procedure Code, Cap 23. It is my considered view that the magistrate in those circumstances, erred in ordering the joinder at the stage he did. The magistrate should have directed his mind to the provisions of section 118 of the Criminal Procedure Code, Cap 23 and should have considered whether a joinder at the stage would not have been prejudicial or embarrassing to the appellant and the second accused in their defence. It appears he did not do so.

After the order for the joinder of the charges had been made, the magistrate that same day proceeded to put to each of the appellant and second accused the question set out in section 179 (1) of the Criminal Procedure Code, Cap 23. Each said he consented to be tried summarily and each then pleaded not guilty to each of the counts. The magistrate then adjourned the case to 4 April 1962. At the adjourned hearing and before any evidence was taken, the appellant and the second accused applied to the magistrate for leave to

withdraw their consent and to elect to be tried by jury. The magistrate refused the application and he proceeded to try the case. The appellant and the second accused were undefended throughout. The trial ended on 12 April 1962, when the appellant and the second accused were convicted on each count. The appellant was sentenced to two years' imprisonment on each count; and the second accused was bound over himself in hundred pounds sterling and one surety in hundred pounds sterling to keep the peace and be of good behaviour for one year.

It is against these convictions and sentences that the appellant has appealed to this court. At the hearing of the appeal, learned counsel for the appellant sought leave which was granted to amend the grounds of appeal by the addition of another ground, namely:

"(c) that the trial magistrate was wrong in law in refusing the appellant leave to withdraw his consent to be tried summarily and elect to be tried by jury since at the stage the application was made, no evidence had been taken and therefore in law the trial had not begun."

He then abandoned the other grounds of appeal. Learned Counsel for the appellant in arguing this ground relied on a decision in the case of *Cham* v *Commissioner of Police*, Miscellaneous Criminal Cause No s 9/62, given by me on 26 September 1962. He also relied on the case of *R* v *Craske: Ex parte Commissioner of Police of the Metropolis* [1957] 2 All ER 772 which case he submitted was more or less on all fours with this case. In the course of my decision in the *Cham* case (supra) when I construed the meaning of section 179 (1) of the Criminal Procedure Code, Cap 23 I said, inter alia:

"It is my considered opinion that at any time between recording by the magistrate of his answer (meaning the appellant's answer) and the beginning of the trial the defendant-appellant can properly apply to change his election; but when once the magistrate has begun the trial, the magistrate must of necessity carry out the express wishes of the legislature, that is to try the defendant-appellant."

I held in that case - *Cham*'s case - relying on the authority of *R* v *Bennett* [1960] 1 All ER 335 -that a trial begins as soon as magistrate starts to take evidence of relevance to the charge or charges but not otherwise. In *Craske's* case the accused entered a plea of not guilty to the charges against him and was granted an adjournment. At the adjournment hearing, the accused applied for leave to withdraw his consent to summary trial of one of the charges and asked for trial by jury. The magistrate consented to this. The Queen's Bench Divisional Court held that at the stage he granted leave to withdraw consent, the magistrate had not begun to try the case. That appears to be the position in this appeal. I hold that the magistrate in refusing the appellant and the second accused leave to withdraw their consent acted on wrong legal principles.

For the above reasons, I allowed the appeal and declared the whole trial a nullity.

Appeal allowed

and proceedings

declared a nullity.

SYBB

SAILU JALLOW v COMMISSIONER OF POLICE

SUPREME COURT (HIGH COURT), BATHURST

(Criminal Appeal No s 22/1962)

2 November 1962

AG CHIEF JUSTICE

Criminal law and procedure-Appeal-Additional evidence-Adduction before appellate court-Principles guiding appellate court in granting leave for adduction of additional evidence.

Held, *allowing the appeal and setting aside the conviction and sentence for the offence of receiving*: the legal principles guiding the appellate court in granting leave to the appellant to call additional evidence are: (i) it is only in the most exceptional circumstances, and subject to exceptional conditions, that the court is ever willing to listen to additional evidence; (ii) the additional evidence must be such that, in the opinion of the court, it probably would have affected the verdict of the trial court; and (iii) the evidence sought to be given had not been in any true sense available at the trial. In the instant case, the court is satisfied that if the trial magistrate had heard the additional evidence admitted before the appellate court, he would, in all probability, have come to a different verdict of the appellant not being guilty of the offence charged.

APPEAL against the decision of the colonial magistrate, convicting and sentencing the appellant of the offence of receiving contrary to section 297(1) of the Criminal Code, Cap 21. The facts are sufficiently stated in the judgment of the court.

ASB Saho for the appellant.

BW Prescod, Ag Assistant Attorney-General for the respondent.

AG CHIEF JUSTICE. On the 29 August 1962, the appellant was convicted by the Colonial Magistrate sitting in Bathurst of the offence of receiving contrary to section 297(1) of the Criminal Code, Cap 21 and sentenced to eighteen months' imprisonment with hard labour. Against that conviction and sentence, he has appealed to this court. The facts found by the magistrate were as follows:

"Bobo Jallow, Momodou Jallow and Ousman Jallow occupy apartments in a house at 44 Leman Street, Bathurst. Bobo Jallow has a particular box in his room and in it, on 30 July 1962, he had a sum of one hundred

pounds and eighteen pence sterling. Some time about 8 and 9 pm, on that date, the three persons said their evening prayers and dined together in the yard or compound of the house. Bobo Jallow locked the box in which his money was and the door of his room, with padlocks, and went to see a friend. During his absence, Momodou Jallow and Ousman Jallow broke and entered the room and broke open the padlock on the box and extracted the sum of money in the box, being currency notes to the value of one hundred and one pounds sterling and coins amounting to eighteen shillings. Later, the same night, Momodou Jallow handed over 41 pounds and eighteen shillings of the sum stolen to the accused Sailu Jallow and Ousman Jallow similarly handed over 60 pounds to him, making up a total of one hundred and one pounds, eighteen shillings. Momodou Jallow and Ousman Jallow were put on trial, charged with housebreaking and entering and stealing and convicted; they are now serving a sentence of imprisonment. It is the prosecution case that Sailu Jallow, the accused, received the money knowing or having reason to believe that it was stolen property." The grounds of appeal as amended are:

(a) that the conviction was unreasonable having regard to the evidence adduced at the trial;

(b) that the trial magistrate did not address his mind to the caution with which the evidence of accomplices should be treated;

(c) that the trial magistrate was wrong in law in basing his findings on the evidence of accomplices; and

(d) that the sentence of eighteen months' imprisonment is harsh and excessive.

In the course of the hearing of this appeal, the appellant sought for, and was granted leave to call fresh evidence. Prisons Officer Francis Omar Wadda, who has been the Reception Officer at the Central Prisons, Mile 2, for six years, was called by the appellant. He gave evidence before this court. He deposed that in the course of his duty, he received the appellant as a convicted prisoner on 29 August 1962 in the Central Prisons. The appellant, on 30 August 1962, saw him and informed him that he intended to appeal against his conviction and sentence. The appellant outlined his case to him and he in the course of his duty sent for Momodou Jallow and Ousman Jallow who where also convicted prisoners confined in the Central Prisons. Those prisoners were the Momodou Jallow and Ousman Jallow who had given evidence before the trial magistrate against the appellant and their

evidence was accepted by the magistrate. These persons told Wadda in effect that they both had told lies on the appellant before the magistrate; that neither of them handed over to the appellant any money; and that they had picked on the appellant because they knew other persons used to give the appellant money to keep; and that the money stolen by them was buried some where they refused to disclose. These confessions appeared to have been made voluntarily. There is no evidence to the contrary. This witness Wadda then told his superior officer, Chief Officer, Ceesay what had transpired. The appellant then lodged his appeal which was filed on 3 September 1962. I am satisfied on the evidence before me that the convicted prisoners Momodou Jallow and Ousman Jallow made the confessions in question and that they did so voluntarily.

I have considered the two grounds of appeal relating to the evidence of accomplices and I find no substance in them. The trial magistrate, in his judgment, considered carefully the law relating to accomplices and, in my view, correctly applied it to the facts of the case before him. I am also satisfied that from the state of the evidence before the trial magistrate at the end of the trial, there was sufficient material to support the conviction.

The point worth considering now is what is the effect of the evidence of Prisons Officer Wadda, a responsible and reliable officer? In granting leave to the appellant to call additional evidence, I was guided by the legal principles established by case law, namely:

(i) that it is only in the most exceptional circumstances, and subject to what may be described as exceptional conditions, that the court is ever willing to listen to additional evidence;

(ii) the additional evidence must be such that, in the opinion of the court, it probably would have affected the verdict of the trial court; and

(iii) the evidence sought to be given had not been in any true sense available at the trial.

Having given the most careful consideration to the evidence before the trial magistrate and that given before this court by Prisons Officer Wadda, I feel that if the trial magistrate had heard the evidence given by such a responsible and reliable officer, he might very likely, and indeed, probably would have come to a different verdict. The question is not whether, I, if I were the trial magistrate would have accepted and acted on the evidence of Wadda; but whether the trial magistrate in all probability would have allowed his verdict to be affected by it. One significant point I must make and that is that although the sum of eighteen shillings in coins was alleged by the prosecution to have formed part of the money stolen and part of the money handed by Momodou Jallow to the appellant, there was no evidence before the magistrate that any coins was found with the appellant. No uncertainty at

all that the trial magistrate, in the face of Wadda's evidence, would have felt precluded from saying that he was satisfied that the case had been conclusively proved by the prosecution.

For these reasons, I have come to the conclusion that the appeal must be allowed and the conviction set aside and I so order.

Appeal allowed and conviction and

sentence for receiving set aside.

SYBB

BERCKWOLDT & CO v KHUSHAL (LONDON) LTD

COURT OF APPEAL, BANJUL

(Civil Appeal No 1/1963)

15 March 1963

AMES P, DOVE-EDWIN AND MARCUS-JONES JJA

Practice and Procedure-Execution-Interim attachment of property-Effect of order for interim attachment- Whether order for interim attachment in pending suit having priority over judgment creditor seeking leave of court to attach property already in custodia legis- Rules of the Supreme Court (High Court), Sched II, Cap 6:01, Order 11, r 1.

Held, *allowing the* appeal: (1) the effect of an interim attachment obtained under Order 11, r1 of the Rules of the Supreme Court (High Court), Sched II, Cap 6:01, is not in execution of a decree but merely on attachment before judgment. It is to prevent the defendant from stultifying the process of the court and removing property out the jurisdiction before judgment. The property though taken *in custodia legis* remains the property of the defendant. The interim attachment confers no right in the property on the plaintiff who obtains the order. Everything remains as before except that the defendant is unable to dispose of the property attached or remove it out of jurisdiction.

(2) An interim attachment in a pending suit has no priority to a judgment creditor who seeks the leave of the court to attach the property already *in custodia legis*. Consequently, the writ of *fifa* obtained by the appellants dated 17 December 1962 and delivered to the sheriff, takes priority to the judgment and order for immediate execution subsequently obtained by the respondents, notwithstanding an order of interim attachment in their favour in respect of the property *in custodia legis*. The trial court erred in holding otherwise.

Case referred to:

(1) *Disheshardas* v *Prasah* Allahabad Series (1915) Vol 37, Cap 575.

(2) *Mohamed* v *Mohamed,* Rangoon Series (1930) Vol 8 at 494.

(3) *Hunt v Hooper* 12 Mason & Welsby 664.

APPEAL against the judgment of Wiseham CJ, dismissing an application under Order 44, r 13 of the Rules of the Supreme Court by the appellants, the judgment- creditors, to discharge a prior interim attachment of property

granted under Order 11, r 1 of the Rules of the Supreme Court and secured by the respondents in a previous suit between the respondents and another party. The facts are sufficiently stated in the judgment of Marcus -Jones JA.

***S G Davis* for the appellants.**

J L Mahoney for the respondents.

MARCUS-JONES JA. This is an appeal against the judgment of the learned Chief Justice of the Gambia (Wiseham CJ), dismissing an application by the appellants to discharge an interim attachment secured by the respondents in a previous suit the between the respondents and one Jamil S Hocheimy.

With the leave of the court, learned counsel for the appellants substituted and argued the following grounds of appeal:

(1) that the learned Chief Justice was wrong in law in holding that the first application of the applicants-appellants could not be investigated as a claim under Order 11, r 5, of the Rules of the Supreme Court. (2) that the learned Chief Justice was wrong in law in holding that a judgment creditor is unable to oust the prior interim attachment of property made under Order 11, r 1, of the Rules of Supreme Court, on the application of the plaintiff in another suit;

(3) that the learned Chief Justice was wrong in law in holding that a judgment creditor cannot under Order 44, r 13 of the Rules of the Supreme Court or otherwise attach the property of his judgment-debtor held, by reason of an order for interim attachment obtained on the application of the plaintiff in another action, *in custodia legis*;

(4) that the learned Chief Justice was wrong in law in holding that the effect of an order for interim attachment for a debtor's property made on the application of a creditor under Order 11, r 1 of the Rules of the Supreme Court is to preserve the said property for the benefit of the said creditor; and

(5) that the learned chief Justice misdirected himself in holding that the question was not one of priority between writs of *fieri facias*."

They prayed leave under Order 44, r 13 of the Rules of the Supreme Court to attach in execution of the decree granted to them, the property of Jamil S Hocheimy held *in custodia legis*; an order that the sheriff be commanded to satisfy the writ of *fieri facias* delivered to him by the applicants-appellants in priority to all writs of *fieri facias* or other orders for execution subsequently delivered to him; and finally for an order that the proceeds of the sales of the judgment-debtor's goods now held in court be paid out forthwith to the applicants-appellants.

The facts and circumstances attending this matter are as follows: Breckwoldt & Co, the appellants in this appeal, commenced trading activities with Jamil Hocheimy some time in 1958. Hocheimy was also in business transaction with the respondents, Khushal (London) (Ltd). Some time in 1962, Breckwoldt learnt of Hocheimy' activities with Khushal and as Hocheimy's indebtedness to Breckwoldt stood at over £42,000, Hocheimy entered in a bill of sale assigning his goods to Breckwoldt. Khushal instituted proceedings in August 1962 for the recovery of the sum of £23,596.13.4d owing to them by Hocheimy and on 5 September obtained an order from the court for an interim attachment of the goods of Hocheimy, which were taken *in custodia legis* by the sheriff acting under the said interim attachment.

In an action instituted by Khushal (Ltd) against Jamil Hocheimy & Breckwoldt, Khushal tried to set aside the bill sale entered into between Hocheimy & Breckwoldt. The bill of sale was declared void on a technical ground of attestation.

This being so Breckwoldt sued Hocheimy and on 13 December 1962 and obtained judgment for the sum of £42,436.14.3. They took out a writ of *fifa* on 27 December 1962, which they lodged on 31 December 1962. Later they moved the court, joining Hocheimy & Khushal, for a discharge of the interim attachment and for an order for the sheriff to levy on the goods *in custodia legis* in satisfaction of appellants' judgment-debt.

The decision of the trial judge, Wiseham CJ, given on 2 January 1963, is set out in full as follows:

"This is an application by Berckwoldt & Co. They have a judgment for over £42,00 against Jamil Hocheimy and have taken out a writ of *fifa* against his properties.

These properties are under interim attachment (prior to the judgment referred to above) in a pending suit No S 80/62 between Khushal (London) Ltd and the said Jamil Hocheimy for over £26,000.

The application before this court is for the removal of that prior interim attachment and for the execution of the subsequent writ of *fifa*. There is no doubt that this application cannot be treated as an interpleader proceeding and cannot be investigated as a claim under 0rder 11.

The reasons for the application are that:

`there is firstly about £100,000 worth of goods under attachment; and secondly, that judgment has been obtained by the second creditor Berckwoldt & Co, while the claim by the first creditor Khushal (London) Ltd is still dragging on in a pending suit with only an interim attachment.'

If the first contention is true, then there will be ample assets to satisfy both creditors, without any anxiety. As regards the second reason, I know of no law, by which in The Gambia, a subsequent judgment creditor to a previously instituted suit by another creditor, should be allowed priority to oust this interim attachment of the court under Order 11, r 1 of the Supreme Court Rules. This would defeat the security gained by the first creditor (the claim in his pending suit is admitted partially to the extent of over £17,000) under his interim attachment. The properties are furthermore *in custodia legis* and can only be attached under 0rder 44, r 13 of the Supreme Court Rules with leave of the court.

It would appear to me iniquitous and scandalously unreasonable for a court to attach and preserve property on behalf of one creditor and then subsequently give it away in preference to another creditor in satisfaction of a judgment debt. The premium for vigilance would have no meaning.

The application is dismissed with costs."

On 8 January 1963, the respondents Khushal obtained judgment in the sum of £25,596.4.1 against Hocheimy with order for execution forthwith. That same day the appellants filed a notice of motion praying that leave be granted under 0rder 44, r13 of the Rules of the Gambia Supreme Court, for the property attached by the respondents to be levied upon by them; that priority of execution be accorded with writ of *fifa* issued by them on 27 December 1962 against Jamil Hocheimy, or in the alternative, for a proportionate levy between the parties of the gsoods *in custodia legis*. This motion was heard and dismissed by the learned Chief Justice. He ruled as follows:

"This is a motion that leave be granted to the applicants to levy on properties attached by the respondents under Order 44, r 13, S C Rules: that the writ of *fifa* of the applicants be given priority; or alternatively that there be a proportionate levy for both parties.

On 13 December 1962, Breckwoldt & Co obtained judgment against Jamil S Hocheimy for £42,436.15.5d. At that time the goods of Hocheimy were under an interim attachment by Khushal Ltd in a pending suit and the goods had been so attached since August 1962. On 8 January 1963, the respondents obtained judgment against the same judgment-debtor for £23,596.3s.4d and execution on the goods attached was ordered forthwith.

On 2 January 1963, on a motion by the applicants for the removal of that interim attachment I passed an order dismissing the motion. I adhere to the reasons given therein."

Order 11, r 1 of the Rules of the Supreme Court of Gambia provides as follows:

"If the defendant in any suit for an amount or value of twenty pounds (200 dalasis) or upwards, with the intent to obstruct or delay the execution of any decree that may be passed against him, is about to dispose of his property, or any part thereof, or to remove any such property from the jurisdiction of the Court, the plaintiff may apply to the Court either at the time of the institution of the suit or any time thereafter until final judgment to call upon the defendant to furnish sufficient security to fulfil any decree that may be made against him in the suit, and on his failing to give such security, to direct that any property movable or immovable belonging to the defendant shall be attached until the further order of the Court."

What then is the purpose of an interim attachment? According to the interpretation put upon it by the learned Chief Justice, it would appear that when once a creditor in a pending suit has obtained an order for interim attachment, and the property taken *in custodia legis*, it ensures for his benefit as soon as judgment is obtained by him to the exclusion of any prior judgment creditor. This is amply borne out when he said in his order rejecting leave for attachment (earlier quoted above) and worth repeating, namely:

"I know of no law by which, in the Gambia, a subsequent judgment creditor to previously instituted suit by another creditor, should be allowed priority to oust the interim attachment of the court under 0rder 11, r1 of the Supreme Court Rules. This would defeat the security gained by the first creditor (the claim in his pending suit is admitted partially to the extent of over £17,000) under his interim attachment. The properties are furthermore *in custodia legis* and can only be attached under 0rder 44, r 13 of the Supreme Court Rules with leave of the court."

Mr Mahoney, counsel for the respondents, argues that property *in custodia legis* could only be attached with the leave of the court. We agree with him, but he has not been able to convince us by argument that such property cannot be reached by a prior judgment-creditor.

Property can only be attached before judgment upon the court being satisfied that the defendant, with intent to obstruct or delay the execution of any decree that may be passed against him, is about to remove any such property from the jurisdiction of the court. Then it shall be lawful for the court to order the defendant within a time to be fixed by the court either to furnish security on such sum as may be specified in the order, the whole or any portion of the property specified in the attachment. The interim attachment is not in execution of a decree but merely an attachment before judgment. The property though taken *in custodia legis* remains the property of the defendant and upon defendant entering into a bond security for the payment of the debt the interim attachment is thereupon discharged.

Learned counsel for the appellants has cited two cases of persuasive authority as to the effect of an interim attachment vis-à-vis the person whose property is to be attached and whose suit is pending and a judgment-creditor who is seeking to attach the property in property *in custodia legis*. Both are Indian cases: *Disheshardas* v *Prasah* Allahabad Series (1915) Vol 37 Cap 575 and *Mohamed* v *Mohamed* Rangoon Series (1930) Vol 8 page 494. The court interpreted similar provisions on interim attachment in the India Code of Civil procedure and came to the conclusion that an attachment decree holder was entitled to bring to sale the attached property and to draw out of the sale proceeds of his decree.

It is to prevent the defendant from stultifying the process of the court and removing property out of the jurisdiction before judgment that the court permits an interim attachment. Such attachment confers no right in the property on the plaintiff who obtains the order. The ownership of the property continues to reside in the defendant. Everything remains as before except that the defendant is unable to dispose of the property attached or remove it out of jurisdiction.

Turning now to the question of priority of execution. Where a sheriff has several writs issued by different creditors against the same debtor, it is his duty to execute the writ which was first delivered to him for execution and when he has sold, to satisfy that writ, he should sell under the next in order, and so on. The first writ would only lose priority if there is request to stay execution by the writ holder. Although Breckwoldt's bill of sale was set aside, yet they proceeded to obtain judgment for their debt on 17 December 1962 and on 27 December they had delivered their writ of *fifa* to the sheriff. On 31 December they argued their motion for discharge of the interim attachment, the respondents being present. Decision on the motion was delivered on 2 January 1963, when the application was refused. On 8 January 1963, the respondents at last obtained judgment and an order for immediate execution was made. These were later in time to the appellant's judgment and writ of execution. An order for immediate execution following an interim attachment does not render it retroactive so as to defeat judgment creditors armed with a prior writ of execution.

I am opinion that the learned Chief Justice was wrong in holding as he did that an interim attachment in a pending suit has priority to a judgment-creditor who seeks the leave of the court to attach the property already *in custodia legis*. I therefore hold that writ of *fifa* of Breckwoldt dated 17 December 1962, and delivered to the sheriff, takes priority to the judgment and order for immediate execution obtained by the respondents Khushal on 8 January 1963.

Mr Mahoney, counsel for the respondents, has raised before us the question of the bona fides of the judgment obtained by Breckwoldt against Hocheimy as a tainted judgment obtained in order to defeat creditors. That the claim

upon which the judgment was founded included the claim of another company, Alster Industries Ltd, which was not mentioned in the appellants' writ. These matters were disclosed at the hearing and this court was entitled to investigate them. Mr Mahoney agreed that fraud was not specifically pleaded and proved at the trial. It is not sufficient merely to allege fraud; it must be proved to the satisfaction of the tribunal. The question of the absence of bona fides was fully raised at the hearing and the learned trial judge did not find fraud.

I would allow the appeal and make the following order:

(i) that the appellants Breckwoldt Ltd be at liberty to attach in execution of the decree granted to them the property of Jamil S Hocheimy held *in custodia legis*; and

(ii) that the sheriff do satisfy the writ of *fieri facias* delivered to him by the applicants-appellants in priority to all writs of *fieri facias* or other orders for execution subsequently delivered to him in respect of the property of Jamil Hocheimy. The respondents to pay the appellants' costs.

AMES P. I agree that this appeal should be allowed. The question which was before the court below, put briefly, was which writ of *fifa* has priority. But before examining that question, what were the facts of the case?

Khushal (as I will call the respondents) in September 1962, obtained an order of interim attachment of property under Order 11 of the Supreme Court Rules in a suit against Hocheimy (as I will call the debtor). Later Breckwoldt (as I will call the appellants) obtained judgment against Hocheimy for £42,436 and on 27 December 1962, a writ of *fifa* to levy that amount was delivered to the sheriff for execution. Subsequently on 8 January 1963, Khushal obtained judgment in their suit against Hocheimy for £23,596 and an order was made for immediate execution and thereafter on a date which I do not know, a writ of *fifa* to levy that amount was delivered to the sheriff for execution.

The question as earlier indicated is: which writ of *fifa* has priority? The sheriff levied execution (I do not know under which writ). The amount realised was about £20,000, not enough to pay either, let alone both and so he wisely paid neither but deposited the money in court. The learned Chief Justice held that Khushal's writ had priority because of the order interim attachment. In his decision of 2 January 1963 (which is not the decision appealed against, but which he "adhered to" and followed in that of 31 January 1963, which is appealed against), he said:

"It would appear to me iniquitous and scandalously unreasonable for a court to attach and preserve property on behalf of each creditor and then

subsequently give it away in preference to another creditor in satisfaction of a judgment debt. The premium for vigilance would have no meaning."

Now does an interim order attachment preserve the property for the plaintiff in the suit in which the order is made? Such an order is made under Order 11 of the Rules of the Supreme Court. That Order, as Mr Davis, pointed out, has the heading: "Interim Proceedings for Preventing Prejudice to Claim."

Rule 5 of Order 11 is the important rule, for the present purpose. I think that its language is directed not towards the plaintiff but against the defendant. It is not directed to preserving the property for the plaintiff, but preserve it against removal or alienation by the defendant and to keep either it or its equivalent in some secured form, in being, "until further order of the Court." After attachment it remains the defendant's property but that part (it may be all) of his property which is for the time being *in custodia legis*. The plaintiff may not win the suit, but if he does, he cannot help himself to the attached property; he needs another order of court or a writ.'

If another plaintiff in another suit gets judgment against the same judgment debtor, before the suit in which the interim attachment was ordered and delivers a writ to the sheriff a writ of *fifa* for execution, he can levy execution against any property of the judgment-debtor including that which is in *in custodia legis* upon obtaining leave of the court.

In the instant case, that leave was sought but refused because, as I have said, of the interim attachment. The learned Chief Justice mentioned the premium of vigilance. With all respect, one may ask, is it not vigilant to obtain judgment as quickly as may be? One cannot know why Khushal's suit "dragged on" and so did not reach judgment till after that of Breckwoldt. One must accept the fact that the latter succeeded in getting a writ to the sheriff for execution before Khushals did.

In this country there is no law of bankruptcy. It is a case of "first come (with a writ for execution), first served" as it was when *Hunt* v *Hooper* (12 Meeson &Welsby 664) (case dealing with execution) was decided. Parke B in that case said: "There is no doubt that the sheriff, as between him and different execution creditors, is bound to execute that writ which is first delivered to him to be executed."

The rule gives the judge a discretion to grant or refuse leave to attach property *in custodia legis*. In the instant case, the learned Chief Justice has the right to exercise discretion unless it is clear that it was exercised on an erroneous basis. With respect, I think that is what happened here, the erroneous basis being the supposition that Order 11 altered the rule of the common law of England, which applies here, by which the dates of delivery of writ for execution determine priority between writs. A rule cannot alter

the substantive law unless there is a clear intention in the statute that it may, and there is no such intention to be seen here.

Mr Mahoney argued, inter alia, that the appellants were wrong to apply by motion, and that they should have acted under Order 44, r 26, that being indicated by rule 5 of Order 11 about interim attachment. I do not agree, with respect. Breckwoldt do not claim the property. Their case is: "It is Hocheimy's property *in custodia legis* and we want to levy execution against it." Nor do Khushals claim the property. Their case is: "It is Hocheimy's property and we want to levy execution against it and we have a better right to do so, because of the interim attachment."

I agree with my brother Marcus-Jones JA that they have no better right to do so. I think that the learned Chief Justice should have granted the prayer of the appellants and I would allow this appeal.

DOVE-EDWIN J A. I also agree that the appeal be allowed.

Appeal allowed.

SYBB

MOMODOU JALLOW v COMMISSIONER OF POLICE

COURT OF APPEAL, BANJUL

6 April 1964

AMES P, JONES CJ (SIERRA LEONE) AND DOVE-EDWIN JA.

Criminal law and procedure-Burden of proof-Guilt-Proof beyond reasonable doubt-Accused proved as having bad record and known burglar-Trial court believing prosecution witness alleging he saw and recognised accused charged with burglary-Evidence of prosecution witness not corroborated-Hearsay evidence admitted against accused-Whether conviction of accused for burglary and stealing safe and proper.

Held, *unanimously allowing the appeal against conviction for burglary and stealing*: even though the appellant is proved to be a person with a bad record and a known burglar, it would be unsafe to allow his conviction and sentence to stand. While it is true that the trial magistrate said he believed the prosecution witness who said he saw and recognised the appellant, his evidence standing alone, without corroboration, was not sufficient to establish the appellant's guilt beyond reasonable doubt. Furthermore the admission of hearsay evidence weighed a good deal in the case against the appellant.

APPEAL against the decision of the High Court, dismissing the appellant's appeal against his conviction and sentence by the trial magistrate for burglary and stealing. The facts are sufficiently stated in the judgment of Dove-Edwin JA.

Appellant in person.

SHA George, Ag Solicitor General for the respondent.

DOVE-EDWIN JA. This appeal was strictly speaking out of time in that the judgment appealed against was delivered on 17 January 1964 and the notice of appeal was dated 27 August 1964, more than the ten days within which an appeal would normally lie to this court. The learned Acting Solicitor General raised the point as a preliminary objection to this appeal; but we decided that, on the facts, we would extend the time to appeal and did so and the learned Ag Solicitor General did not oppose it.

It is convenient at this stage for us to draw the attention of those concerned that it is their duty to assist persons desirous to appeal to fill in the appropriate Forms. Those desirous to appeal and are within time, and those who are out of time; as well as those desirous to appeal against both conviction and sentences and those against sentence only, as most of the

persons are illiterate and should be assisted. The appropriate Forms are clearly set out in the appendix to the to the Rules: see rule 43 (1)-(4) of The Gambia Court of Appeal Rules, Cap 6:02.

The appellant was convicted by the magistrate sitting at Brikama on 15 October 1963 on charges of burglary and stealing contrary to sections 281(1) and 258 of the Criminal Code respectively, each charge to run concurrently. He was also recommended to be deported. It was not denied that he had four previous convictions ranging from burglary and stealing to receiving stolen property.

He appealed against his conviction and sentence to the High Court and his appeal was dismissed by the learned Chief Justice on 17 January 1964; and from that decision, he has again appealed to this court. The appellant is an illiterate and his grounds of appeal were that: (i) he is not guilty of the alleged offence; and (ii) that the sentence is unwarranted.

The facts on which the prosecution relied to prove the charges against the appellant were that on or about 26 September 1963 between the hours of 4 and 5 in the morning, the dwelling house of N'dow Sarr was broken into and several articles enumerated in the charge sheet stolen. It was alleged that the thieves were seen carrying a bundle or possibly two bundles. The thieves threw away a bundle which was recovered and the evidence chiefly against the appellant was that of the third prosecution witness, a man by name Sasddi Touray. He swore on oath to the effect that one of the two men he saw that morning when he flashed his torchlight on them was the appellant who he said he knew before and whose name he said he mentioned. The appellant had a bicycle in his possession and the other man a bundle. This was the only evidence against the appellant. The appellant allegedly abandoned his bicycle and ran away.

Some of the evidence in the case was hearsay but what is peculiar is that no mention was made about the abandoned bicycle the appellant was supposed to have in his possession. It was not produced by the prosecution and proved to be appellant's bicycle. This bit of evidence could have given the evidence of the third prosecution witness valuable corroboration, had the bicycle been produced. The appellant gave evidence and throughout his evidence he was not asked about the bicycle which he was alleged to have abandoned. In his judgment, the learned magistrate said: "I believe the third prosecution witness. I believe in particular that he recognised the accused (appellant now) as one of the two men in the Lamin-Mandinaring Road."

On appeal to the learned Chief Justice, he said in his judgment: "It is true the bicycle was not produced but the appellant was clearly recognised by witnesses that the magistrate believed." In point of fact only one witness said he saw and recognised the appellant and that was the third prosecution witness.

While it is true that the trial magistrate said he believed the prosecution witness who said he saw and recognised the appellant, we feel that his evidence standing alone, without corroboration was not sufficient to establish the appellant's guilt beyond reasonable doubt. We think the admission of hearsay evidence weighed a good deal in the case against the appellant and the absence of the bicycle should have weighed in his favour. We think it would be unsafe to allow his conviction and sentence to stand even though he is proved to be a person with a bad record and a known burglar.

The appeal is allowed and the conviction and sentence passed on the appellant set aside as also the deportation order and a verdict of not guilty and acquitted substituted.

AMES P. I agree.

JONES C J (SIERRA LEONE). I also agree.

Appeal against conviction

and sentence allowed.

SANUSA v **COMMISSIONER OF POLICE**

COURT OF APPEAL, BANJUL

(Criminal Appeal No GCA 2/64)

6 April 1964

AMES P, JONES CJ (SIERRA LEONE) AND DOVE-EDWIN JA

Criminal law and procedure-Accused-Right to call witness-Accused denied opportunity of calling witnesses in his defence-Refusal amounting to denial of justice.

Held, *unanimously allowing the appeal:* the refusal by the magistrate to grant the appellant an opportunity of calling witnesses in his defence, in the case where the law cast the burden on an accused person to satisfy the magistrate as to how he obtained the goods found in his possession, amounted, in the circumstances, to a denial of justice. The appellant's conviction and sentence for unlawful possession would therefore be quashed.

APPEAL against the judgment of the Supreme Court (High Court), dismissing the appellant's appeal against conviction and sentence by the trial magistrate for the offence of unlawful possession of certain articles. The facts are sufficiently stated in the judgment of Jones CJ (Sierra Leone).

Appellant in person.

S H A George, Ag Solicitor General, for the respondent.

JONES CJ (SIERRA LEONE) d*elivered the judgment of the court*: The appellant was charged before the learned magistrate on two counts, firstly, with escaping from lawful custody contrary to section 108 of the Criminal Code, Cap 21 of the Laws of the Gambia; and secondly with unlawful possession of certain articles found in his possession contrary to section 35(1) of the Police Ordinance, Cap 70. To the first count, he pleaded guilty and was sentenced to two years' imprisonment. He, however, pleaded not guilty to the second count but was found guilty and sentenced to three months' imprisonment, both sentences to run consecutively.

On an appeal to the Supreme Court in its appellate jurisdiction, the Chief Justice dismissed the appeal and refused to interfere with the sentences. We think the Chief Justice was right in respect of the first count and so far as that count is concerned, we consider that the appellant's appeal should be dismissed and it is so ordered.

As to the second count, namely, that relating to the offence of unlawful possession, we are not at all satisfied in our minds that the refusal of the learned magistrate to grant the appellant an opportunity of calling witnesses in his defence did not amount, in the circumstances, to a denial of justice. This was a case, it remembered, where the law cast the burden on an accused person to satisfy the magistrate as to how he obtained the goods found in his possession. This fact appears to have been clearly recognised by the learned magistrate himself when in his judgment he stated, inter alia:

"But he could have fortified the reasonableness of his explanation by calling the person in whose custody, he, as he alleged, left the suit case. He could similarly have strengthened the reasonableness of his explanation by calling teacher Fatty."

Although it may be true, as the learned magistrate stated, that the appellant did not formally apply for an adjournment, yet it was palpably clear that he wanted the witnesses referred to in the learned magistrate's judgment called on his behalf, witnesses who could have, according to the learned magistrate "fortified" or "strengthened the reasonableness of his explanation". That opportunity was not given to the appellant; rather he was accused of not calling to his aid these witnesses.

In the circumstances, therefore, we would allow the appeal and quash the conviction and sentence and order that a verdict of acquittal be entered on the record. No order seemed to have been made regarding the articles found with the appellant. No order that these be returned to him.

Appeal allowed. Conviction

and sentence quashed.

IN RE SALMA (DECD); SALMA and Others v **HASHIM**

COURT OF APPEAL, BANJUL

(Civil Appeal No GCA 2/64)

28 September 1964

AMES P, JONES CJ (SIERRA LEONE) AND DOVE-EDWIN JA

Wills-Variation-Agreement by beneficiaries-Application to set aside-Improper to set aside agreement without hearing other parties to agreement or affording them opportunity to argue in support of agreement.

Held, *making an order of non-suit*: since other parties to the family arrangement, ie the agreement varying the testator's wills are not parties to the instant proceedings, it would be against every principle to set aside the agreement without hearing the other parties and giving them an opportunity to appear and put forward argument in support of the agreement. For this reason, the trial High Court was right in refusing to set aside the agreement as claimed by the plaintiffs.

APPEAL against the judgment of the High Court, refusing the claim for an order to set aside an agreement between the defendant and certain beneficiaries of the two wills of the deceased, which sought to vary the terms of the distribution of the estate as stated in the two wills of the deceased. The facts are sufficiently stated in the judgment of Ames P.

Davies for the appellants.

Respondent in person.

AMES P. This is an appeal by the plaintiffs against a judgment of the learned Chief Justice dated 3 February 1964, dismissing their claim. The plaintiffs had sued the respondent (hereafter called the defendant), in his capacity as the executor of the will of Abraham Salma deceased, claiming an order of the court "to set aside a purported agreement made on 18 January 1962, between the defendant and certain beneficiaries of the estate of the said Abraham Salma deceased." The agreement was described as "purported" no doubt because their case was that it was void *ab initio*. It was a deed of family arrangement, to ignore two wills of the deceased and to distribute his estate in the manner set out in the agreement.

It came about like this. Abraham Salma was a wealthy merchant, Lebanese by birth but from the year 1951 a naturalised British subject, domiciled at Bathurst in The Gambia where he died in December 1958. He left real and personal property in The Gambia valued at over £51,000. He also left real

and perhaps other property in the Lebanon and some real property in the Senegal, all of which was outside the jurisdiction of the court below. He was survived by three women and the children born to him by them.

He was a Mohammedan. His first marriage took place in 1932 at Las Palmas with one Angeles Dominigues, a Spanish woman. This marriage was in the Muslim form, although Angeles was a Roman Catholic. The next year in January, he and this same Angeles were married in Freetown, Sierra Leone, in accordance with the Civil Marriage Ordinance of that country and in October 1933, they went through a Roman Catholic form of marriage in Las Palmas. This would appear to be the only valid marriage according to the law of The Gambia, and consequently Angeles Salma, who is still living, would appear to be his lawful widow. He left five children by this marriage. The three plaintiffs are three of them, the first plaintiff being his only son. In August 1944, Angeles Salma obtained an order of judicial separation against the deceased in the Supreme Court of the Gambia. For convenience, I will refer to this marriage as the first marriage and to Angeles as the first wife.

The second marriage was a Mohammedan marriage with one Suad Ismail and took place after the order of judicial separation just mentioned. This marriage ended by the deceased divorcing the second wife in 1952 or 1953. There was one child, a girl, born to them, and his second wife is still living. The third marriage, also a Mohammedan marriage, was with one Mariam Abu Sallah. There were five children of this marriage, all still infants, and this third wife also survived the deceased and is still living.

After Abraham Salma's death, the respondent, ie the defendant found a will dated 19 August 1949, in the deceased's safe in his house at Bathurst. This will was made in August 1949, a few days after the order for judicial separation. The defendant was appointed executor; the first plaintiff was the principal beneficiary; the other children and the mother and sister of the deceased were also beneficiaries. The first wife was given a derisory legacy. This will was proved in December 1958. The defendant lives in Freetown and, no doubt for convenience, he gave the first plaintiff a power of attorney to carry on the deceased's business on his behalf.

In April 1959, the defendant came to Bathurst to see how matters were going. He brought with him a later will of the deceased, which he found in his own safe in Freetown. He explained that until then, he had thought it was a copy of the 1949 will. It is dated 21 July 1951 which was before the divorce of the second wife. It revokes the former will and makes provision for the children of the first and second marriages and the second wife and gives another derisory legacy to Angeles Salma. No steps were taken to obtain probate of this will until June 1960, when the necessary application, affidavits and so on were submitted to the court below.

Neither will made any provision for the third wife or the children of the third marriage, all of whom were living with the deceased at the time of his death. The deceased may have intended to provide for them but if so, he failed to do so before meeting his death. (It may be, as Mr Davis, for the plaintiffs, suggested that these children of the third marriage might, possibly, have come within the phrase "all my children who at my death are in my custody" used in the first will.)

The third wife instituted a suit in the court below against the defendant and the beneficiaries under the two wills, claiming that she was the lawful widow of the deceased and praying the court to declare "both wills invalid and to order that adequate provision be made for her and for her children out of the estate of the said Abraham Khalil Salma deceased." This was Suit No S 55/61 and the writ was dated 30 March 1961. At that date probate of the first will was still extant. It was said that probate was "surrendered" but there is no documentary evidence to show that it was.

Before Suit No 55/1961 was ended, the family (presumably) put their heads together and eventually agreed upon this deed of family arrangement which the plaintiffs now sought to set aside. It might be thought that the parties to this appeal were the only parties to it but that it not so. There were nine parties in all, including the third wife, who was the eighth party, and her five infant children.

In the judgment appealed against, the learned Chief justice said that:

"the defendant and all beneficiaries were made parties to this suit (No 55/61) which finally resulted in a family compromise embedded in an agreement, exhibit C, and filed in the said suit on 18 January 1962. It disposed of the properties and business to the different families in the Gambia, Senegal and the Lebanon."

When the learned Chief Justice says "finally resulted" and "filed in the said suit" it appears that he must have referred to a formal order of the court approving the deed of family arrangement. No copy of that order has been put in evidence but that there was such an order was shown by production of the court record book from which Mr Davies read a note during the argument as to whether we should allow him to add some additional grounds of appeal. There was no appeal against the order approving the agreement. It appears that in May 1963, an application was made to the court to review that order, which the court declined to do. Again there is no documentary evidence of this, but a note from the record book was likewise read to us during the same argument.

The next thing was this instant appeal. In the court below the agreement was attacked on two grounds which I need not set out. The learned Chief Justice held that both failed and dismissed the claim.

Two grounds of appeal were filed with the notice of appeal, and ten additional grounds were allowed to be added before the argument started. It was sought to add still three more, but we declined to allow these. They sought to impugn the order of 1962 approving the agreement, which had not been appealed against and which was not before us and not in evidence.

Because of the opinion which I have come to, I do not find it necessary to set out any of the grounds of appeal in detail. It is sufficient to say that they allege that the learned Chief Justice erred in law in various respects and of course in particular in that he failed to hold that the agreement was *void ab initio.*

In his argument for the plaintiff-appellants, Mr Davies urged upon us many reasons for saying that the agreement was *void ab initio*. The respondent, ie the defendant was not represented by counsel and adopted the arguments put forward for him in the court below.

Some of Mr Davies' reasons appeared to be cogent and of substance. If this court were to hold that they were so cogent and so substantial as to require the court to find that the agreement was, indeed, *void ab initio,* and to allow the appeal and reverse the judgment given in the court below, who would be affected? The answer seems to me to be that all the parties to the agreement would be affected including the third wife and her five children. They had considerable benefit under the agreement; indeed, it was, one must infer, for their benefit that the agreement was made. The third wife signed the agreement and also purported to do so on behalf of the children, whether validly or invalidly entitled to do so. None of them nor the third wife are before the court. In my opinion, it would be against every principle to set aside the agreement, were this court disposed to do so (and I express no opinion as to that), without hearing the other parties (in particular the third wife) or giving them an opportunity to appear and put forward argument in support of the agreement. There is nothing to show that any of them are aware of these proceedings. The third wife herself appears to be in Lebanon. That may make it more difficult to give her notice of these proceedings but it does not make it impossible; and in my view, it is no reason why she should not be made a party or, at least, be given notice of these proceedings.

Mr Davies submitted that a decision setting aside the agreement would make the matter *res judicata* only between the actual parties to the suit and would not affect other parties to the agreement but not parties to the suit, and that these latter would not be barred from coming to court to assert their rights under the agreement. In my opinion, that would create an impossible situation. A *sine qua non* of an agreement of this sort is that all beneficiaries and members of the family should join in it. If the three plaintiffs are to become outside it (and so to look to one or other of the wills) all must be outside it. But not all have been given an opportunity of being heard in support of it.

I agree, although for different reasons, that the learned Chief Justice was right to in refusing to set aside the agreement. I would, however, vary his judgment by directing the entry of a non-suit, instead of the other dismissing the claim.

JONES CJ (SIERRA LEONE). I agree.

DOVE-EDWIN JA I also agree.

Order for entry of non-suit.

MAUREL FRERES SA v N'YANG & SOWE

COURT OF APPEAL, BANJUL

(Civil Appeal No GCA 6/1964)

10 November 1964

AMES P, JONES CJ (SIERRA LEONE) AND DOVE-EDWIN JA

Customary law-Land-Occupation and tenure-Application of English law-Terms used-Reference to English law in relation to occupation, use and tenure of land having no application to occupation of land under customary law.

Customary law-Land-Proof of ownership-Customary law to be proved as a fact-Right to occupy and use property passing from judgment debtor to claimant by virtue of customary law-Property subsequently attached under writ of fifa-Whether attachment should be removed.

The appellants obtained judgment against the judgment-debtor who occupied and used a compound in Soma by virtue of and in accordance with the customary law prevailing in that part of the country. The judgment-debt was not paid, and the appellants obtained a writ of *fifa*. When about six months later, the sheriff attached the compound where the judgment-debtor had lived, the claimant was found in occupation of the compound. He claimed that the right to occupy and use the property under customary law by which such a right could pass from one person to another. Evidence as to the procedure by which one occupier and user of a village compound in Soma would succeed another was given by the chief and uncontradicted in the ensuing interpleader proceedings. The Supreme Court ordered the attachment to be removed. The judgment-creditor brought the instant appeal.

Held, *dismissing the appeal*: (1) English law about occupation, use and tenure of land had no application to occupation of land under customary law; and if terms used in English law were used in reference to customary law relating to land, it did not follow that they had the same meaning, significance or implication as in English law.

(2) Customary law has to be proved as a fact. In the instant case, having regard to the uncontradicted evidence as to the procedure by which one occupier of and user of a village compound would succeed another, it was clear that the claimant had, in fact and in customary law, become the rightful occupier and user before the compound was attached. There was no sufficient evidence that the change was fraudulent and brought about to defeat the appellants in levying execution against the compound. The trial court was therefore right to order the attachment to be removed.

APPEAL against judgment of the trial High Court, ordering the removal from attachment under a writ of *fifa* of the disputed property. The facts are sufficiently stated in the judgment of Ames P.

S A N'jie for judgment-creditor-appellants.

Alhaji A M Drameh for the claimant-respondent.

AMES P. The appellants obtained judgment against one Alieu N'Yang, the judgment-debtor, who occupied and used a "compound" as it was called in Soma in the Protectorate. It had fence around it and buildings on it, and there he lived. He occupied and used it by virtue of and in accordance with the customary law prevailing in that part of the country. English law about occupation, use and tenure of land has no application; and if terms used in English law are used in reference to customary law relating to land (for instance Chief Jarjussey used the terms "lease") it does not follow that they have the same meaning, significance or implication as in English law.

The judgment debt was not paid, and the appellants obtained a writ of *fifa*. When about six months later, the sheriff attached the compound where the judgment debtor had lived, someone else, namely the claimant, was found to be in occupation. That led to the instant proceedings. He claimed that the right to occupy and use the property under customary law had become his by virtue of the customary law by which such a right can pass from one person to another.

Customary law has to be proved as a fact. The courts in Nigeria have held since long ago that proof can be dispensed with when any such law has been so often proved to exist as to be a well established fact; but that could not be applied here because Mr S A N'Jie, counsel for the appellants, said that this was the first time that the points in dispute had been before the Supreme Court.

Evidence as to the procedure by which one occupier and user of a village compound in Soma (and it may be the same elsewhere) succeeds another was given by Chief Jarjussey. It was the only evidence on the point, and it was uncontradicted evidence. Taking it to be the fact, it is clear that the claimant had, in fact and in customary, law become the rightful occupier and user before the compound was attached.

But the appellants argued that the change was fraudulent and brought about to defeat them in levying execution against the compound. In my view, there is no sufficient evidence of that, and the evidence indicates to me that anyhow the claimant became the customary occupier and user with bona fides and without notice of the appellant's "right to levy execution against the compound." Consequently I agree that the learned Chief Justice was right to order the attachment to be removed.

The learned Chief Justice founded his decision on the provision of the Protectorate Lands Ordinance. I put the words "right to levy execution against the compound" in inverted commas. I did so, for the following reasons. Mr S A N'Jie, for the appellants, conceded that the actual land inside the compound and under the buildings, fencing and so on could not be. Customary law in some parts of Nigeria enables it to be done there; but that is another country. Whether or not it can be done here is the point which he said had never been argued before the Supreme Court. The point was not as clearly taken, if taken at all, in the court below as it was before us. It does not fall to be decided because the judgment-debtor had ceased to have the right to occupy and use the compound. My inverted commas were there to emphasize that I express no opinion either way.

Likewise another point mentioned in the argument does not need consideration, ie the effect (if any) of the document which was exhibit A. This is the document which was behind paragraph (2) of the appellants' affidavit in reply: "that … (the judgment debtor) assigned his leasehold interest in the property… to Maurel Freres." This ingenious document appears to be intended to get round the provisions of the Protectorate Lands Ordinance by mortgaging (it is an assignment with an equity of redemption) "the building on the land granted to the trader by the Native Authority…" In it also the trader (the judgment debtor) "attorns and becomes tenant at will to the firm" (the appellants)" during the continuance of this security at a peppercorn rent." Then follows a proviso for re-entry. Well, I wonder what sort of a tenant of the appellants did the judgment-debtor become, and what sort of landlord or "buildings lord" did the appellants become? There may be other documents like this. The question of their effect may have to be considered by this court one day; but (I say if again) it does not arise in this appeal.

JONES C J (SIERRA LEONE). I agree.

DOVE-EDWIN JA. I also agree.

Appeal dismissed.

SYBB

GOMEZ & Others v **ATTORNEY-GENERAL & Others**

COURT OF APPEAL, BANJUL

(Civil Appeal No GCA 7/1964)

10 November 1964

AMES P, JONES CJ (SIERRA LEONE) AND DOVE-EDWIN JA

Practice and procedure-Judgment or order-Possessory title-Order in favour of persons not parties-Whether proper- Rules of the Supreme Court, Sched II, Cap 6:01, Order 47, r 1.

It is provided by the Rules of the Supreme Court, Sched II, Cap 6:01, Order 47, r 1 that:

"Where a person not being a party in a suit obtains an order or has an order made in his favour, he shall be entitled to enforce obedience to such order by the same process as if he were a party in the suit; and any person not being a party in a suit against whom obedience to any decree or order may be enforced, shall be liable to the same process for enforcing obedience to such decree or order as if he were a party to the suit."

The appellants were the unsuccessful plaintiffs in an action against the respondents for exclusive possessory title to a property in Bathurst. The trial judge found that the appellants were not exclusively entitled to the property and proceeded to declare that both the appellants, ie the plaintiffs and the defendants, were jointly entitled to specified proportions of the property. He also apportioned shares to two persons not named in the writ. The appellants appealed.

Held, *unanimously dismissing the appeal*: the court was entitled, under Order 47, r 1 of the Rules of the Supreme Court (High Court), Sched II, Cap 6:01 to apportion the property between the parties and also those who were not parties to the claim in the sense that their names did not appear as parties; particularly as the defendants had pleaded that they were entitled to shares in the property and they did not mind the shares of the persons who were not parties being set out as part of the judgment. **APPEAL** from the judgment of the Supreme Court (High Court), dismissing the plaintiffs' claim for exclusive possessory title to the disputed property. The facts are sufficiently stated in the judgment of Dove-Edwin JA.

Name of counsel for the parties not specified.

DOVE-EDWIN JA. This is an appeal by the unsuccessful plaintiffs against the dismissal of their claim for a declaration of possessory title to No 3

Orange Street, Bathurst. The claim read as follows: "The plaintiffs claim that by virtue both of inheritance and of long possession they have a good title to No 3 Orange Street, Bathurst and seek a declaration thereof as owners thereof as tenants-in-common. The value is £750."

Pleadings were filed and the plaintiffs sought to prove this case by basing their title in Abdoulie N'Jie Penda (deceased) who, they claim, was the legitimate son and only next-of-kin of M'Boro N'Jie (deceased), the original owner of No 3 Orange Street, Bathurst.

Evidence was led by the plaintiffs to show that if the defendants lived at No 3 Orange Street at all or anyone on their behalf, they did do as tenants and that they had paid rents to Abdoulie N'Jie Penda who died in July 1957. It was also suggested by the plaintiffs that No 53B Leman Street had merged with No 3 Orange Street and that both were now one and the same property.

Their claim was resisted by all the defendants except the Attorney General, who, informed the court that he had no interest in No 3 Orange Street and so the issue was fought out by the parties between themselves.

After an exhaustive hearing and well-reasoned judgment, the learned Chief Justice found the facts against the plaintiffs. He found that no rents had been paid by any of the defendants but they all subscribed to the payment of the rates for No 3 Orange Street; that the case between Abdoulie N'Jie and one of the defendants, R S Hall, in 1939 showed clearly that No 53B Leman Street and No 3 Orange Street were separate properties. After these findings of fact, he recorded as follows:

"I have two choices, one is to restrict the judgment and narrow it thus to the rights as claimed and dismiss the claim as the plaintiffs are not entitled to exclusive ownership. I can also make a final declaration order. I propose adopting the latter course because this is an unusual case of possessory title and the defendants are claimants although they did not file the writ."

After making the above observation, the learned judge proceeded to say that the plaintiffs are jointly entitled to a one-fourth share of No 3 Orange Street; the second and third defendants to a one-fourth share; the fourth to ninth defendants also to one fourth share; and two persons not named in the writ, namely Ramatulie Faal and Mousa Fye to one-fourth share as well.

Against the whole of the findings, the plaintiffs have appealed to this court on six grounds. The grounds are all related and deal, in the main, with facts and so learned counsel for the appellants, ie the plaintiffs, had cause to review the whole of the facts.

In my view, the learned Chief Justice came to the correct findings on the facts and the plaintiffs failed utterly in their attempt to prove that they were

the exclusive owners of No 3 Orange Street and as such their claim was quite rightly rejected by the trial court.

Did the court have right at all to apportion the property between the parties and also to give to those who were not parties to the claim, in the sense that their names did not appear as parties, a share in the property? I think so. It is the duty of our courts to bring the matters in controversy between the parties to a final end and if there was a case in which this was necessary, it was this one, with the disputed property valued at only £750. In the statement of defence of the second and third defendants, as also that of the fourth to ninth defendants, they pleaded: "that they were entitled to a share in No 3 Orange Street, Bathurst." So, in my view, the judge was right in saying what that share was. As to the position of the two, Faal and Fye, the defendants do not mind their share being set out as a part of the judgment; both counsel for the defendants say so. Counsel for the plaintiffs objects but he, I think, has no standing in the matter; he has lost his claim for exclusive possessory title.

Order 47, r (1) of the Supreme Court Rules, Sched II, Cap 6:01 contemplates such a position and it reads:

"Where a person not being a party in a suit obtains an order or has an order made in his favour, he shall be entitled to enforce obedience to such order by the same process as if he were a party in the suit; and any person not being a party in a suit against whom obedience to any decree or order may be enforced, shall be liable to the same process for enforcing obedience to such decree or order as if he were a party to the suit."

I would not disturb the judgment of the learned Chief Justice and would dismiss the appeal.

AMES P. I agree.

JONES CJ (SIERRA LEONE). I also agree..

Appeal dismissed.

SYBB

BATCHILLY v KAIRA

COURT OF APPEAL, BANJUL

(Civil Appeal No GCA 11 1964)

13 November 1964

AMES P, JONES CJ (SIERRA LEONE) AND DOVE-EDWIN JA

Landlord and tenant-Disclaimer-Proof-Factors constituting sufficient disclaimer.

Held, *unanimously dismissing the appeal*: in order to make a verbal or written disclaimer sufficient, it must amount to direct repudiation of the relation of landlord and tenant; or to a distinct claim to hold possession of the estate upon a ground wholly inconsistent with the existence of that relation, which by necessary implication is a repudiation of it. In the instant case, the appellant's denial of the respondent's right to control his own property was a disclaimer.

Cases referred to:

Vivian v *Moat* (1881) 16 Ch 730.

Doe v *Stanion* 1 M & W 695.

APPEAL by the defendant from the judgment of the High Court, granting the claim by the plaintiff, the landlord, for possession and mesne profits. The facts are sufficiently stated in the judgment of Ames P.

J S Smythe for the appellant.

M L Saho for the respondent.

AMES P. One Bashiru Jawara was seized in fee simple of No 14 Hagan Street and of another property. There were tenants on both properties, including the defendant-appellant (hereafter called the defendant), who was a monthly tenant on No 14 Hagan Street. On 21 December 1962, Bashiru Jawara gave a power of attorney to the defendant for the management of both properties, which power was made irrevocable for a year. On 1 April 1964, Bashiru Jawara sold and conveyed No 14 Hagan Street to the plaintiff-respondent (hereafter called the plaintiff), and it was agreed between them that the plaintiff should start collecting rents from 1 June 1964 and the defendant was told so.

The statement of claim averred that the plaintiff wrote to the defendant saying that if he wanted to continue as tenant, he should say so before the end of April but the defendant did not reply. It was also averred that "after several attempts to settle the dispute between himself and the defendant, the latter was given notice to quit. There was no evidence to any such attempts and the notice to quit was not put in evidence. That there was notice given of some sort was proved by the defendant's letter of 15 May 1964, which was his riposte to the notice. The plaintiff took it to be a disclaimer of his title, and took action against the defendant, claiming possession and mesne profits. He obtained judgment for both and the defendant brought the instant appeal against that judgment.

The first question to be decided is whether the letter of 15 May was a disclaimer. The learned Chief Justice held that it was. It contained the following paragraph: "I am not claiming the property as my own. I am controlling the whole of the said property and not only the rooms I am using." He also said that he was not prepared to quit, or to pay any rent to anybody in respect of any portion of the property before 31 December 1965, ie nineteen and half months from date of his letter. What he was saying amounted to this:

"You may have bought the property; but I am the one to control it and not you. I have a power of attorney to do so. I won't quit or pay rent till 31 December 1965, because as controller I arranged to pay rent of £100 a year and did pay £150 of it in advance for up to 31 December 1965."

As to another payment of £190, the fact, as found by the learned Chief Justice, was that it had nothing to do with No 14 Hagan Street but with the other property, and the receipt shows that to be so. He also found that the defendant was a monthly tenant, and there was evidence that he was.

In *Vivian* v *Hoat* (188116 Ch 730) Fry J quoted, approved and applied the following statement of Baron Parke in an earlier case of *Doe* v *Stanion* 1 M & W 695:

"In order to make a verbal or written disclaimer sufficient, it must amount to a direct repudiation of the relation of landlord and tenant; or to a distinct claim to hold possession of the estate upon a ground wholly inconsistent with the existence of that relation, which by necessary implication is a repudiation of it."

That is still the law, and I agree that the defendant's denial of the plaintiff's right to control his own property was a disclaimer. That letter was the basis of the ground of appeal which must fail.

Also grounds of appeal based on the nature of the notice to quit, and its date (the writ was issued before it expired) must fail; and so does the argument

about Bashiru Jawara being unable to sell the property unless he first revoked the power of attorney or that Bashiru Jawara had not divested himself of his right to sell, subject to any management within the power of attorney. The defendant's interest in the property was that of a monthly tenant. All these grounds of appeal must fail.

I now come to that on which Mr Smythe mostly relied, and which was:

"(7) That the motion for an order to take the evidence of Bashiru Jawara, the first deponent, was void in that it did not comply with the provisions of rule 22 of Order 25 of the Second Schedule to the Rules of the Supreme Court."

The rule states: "The plaintiff may, by leave of the Court, cause any notice of motion to be served upon any defendant with the writ of summons." It is a fact that the bailiff when he served the writ of summons, also served the notice of motion for an order to take the evidence of Bashiru Jawara before the hearing *de bono esse* (which notice the defendant refused to accept), and there is nothing to show that "leave of the Court", had been sought or given. The plaintiff said that it was by sheer chance that both were taken for service together, and that it was not caused by him.

I think it may well have been the consequence of a practice in force here, which I have before now found to be very inconvenient. In this country, every application in a suit is not treated as a proceeding in the suit, but is glorified and called "Miscellaneous Civil Cause No so and so", and is given a suit file of its own and a suit number of its own. This one was Miscellaneous Civil Cause S 51/64. This does not seem appropriate to me, when one sees the definition of "action", " cause and suit" in section 2 of the Supreme Court Ordinance, (Cap 5); but it is the practice. Documents to stay two actions, two suits or two other original proceedings against one defendant can be served together, and these matters are all "cause,". It does not appear how one is to start a cause which is a suit and one to start a cause (dubbed Miscellaneous Civil) which is not a cause but an application in a cause within Order 25, r 3 of Schedule II to the Rules. Is it surprising if they get served together? I would not hold it against the plaintiff that the taking of the evidence in such circumstances was a nullity. During the hearing of the application, the bailiff gave evidence as follows:

"On 25 May 1964, I served this motion paper on the defendant at No 14 Hagan Street. I also served the writ of summons - of which he accepted service. He refused the motion paper and affidavit."

Service has to be personal service, and Mr Smythe, counsel for the defendant, argued that there was no such service effected. The bailiff was face to face with the defendant to effect personal service of both documents. He refused one of them, which he had no right to do. I do not think that he can now be heard to complain that he was not served.

There was a further argument, allowed to be put forward, although not really within this ground of appeal, that no order was made that the evidence should be taken. But as the learned Chief Justice, at the hearing of this Miscellaneous Civil Cause, did hear the evidence of Bashiru Jawara, can it be doubted but that he made an order? He did not note in the record book "order as prayed" but I think that in all these points raised on this ground of appeal, the doctrine *omnia praesumuntur rite esse* should be applied.

I would dismiss the appeal.

JONES C J (SIERRA LEONE.) I agree.

DOVE-EDWIN JA. I agree.

Appeal dismissed.

SYBB

FYE (CLAIMANTS) v MAURES FRERES SA

COURT OF APPEAL, BANJUL

(Civil Appeal No GCA 9/64)

13 November 1964

AMES P, JONES CJ (SIERRA LEONE) AND DOVE-EDWIN JA

Deeds and documents-Continuing guarantee-Creation-Agreement by guarantor-Agreement to secure the debt of another and all sums of money which may hereinafter become due and or owing -Whether a continuing guarantee.

Practice and procedure-Interpleader summons-Application-When proper-Property claimed belonging to a deceased person-Claimants bringing interpleader proceedings armed with neither letters of administration nor probate-Whether claimants had locus standi.

Held, *unanimously dismissing the appeal*: (1) a continuing guarantee is one which extends to a series of transactions and is not exhausted by nor confined to a single credit or transaction. In the instant case**,** the mortgage deed was a continuing guarantee which secured not only the specific sum mentioned in the deed but also all further amounts of loss and deficiency incurred by the defendant.

(2) Since after the death of the appellants' father in 1960 his estate was not administered and as the appellants came to court not armed with either letters of administration or probate, they had no *locus standi* to institute the interpleader proceedings; their claim must fail on that account.

APPEAL from the judgment of the Supreme Court (High Court), dismissing the appellants' application for interpleader summons, claiming the property attached under a writ of *fifa*. The facts are sufficiently stated in the judgment of Jones CJ (Sierra Leone).

A S B Saho for appellants.

S A N'Jie for respondents.

JONES CJ (SIERRA LEONE). On 8 July 1963 the plaintiffs, Maurel Freres SA, a company carrying on business in Bathurst, issued a writ of summons against the defendant, Momodou Fye, claiming the sum of £3,448.3.7d being an amount due and owing to the plaintiffs by the defendant on account of loss and deficiency arising from his the trading

operations with the plaintiffs. With the writ was attached a statement of account showing how the claim was arrived at.

On 18 July 1963, judgment was obtained for the amount sued with costs, the defendant not appearing at the hearing. The defendant, however, seemed to have submitted to this judgment because on more than one occasion, he caused counsel on his behalf to take out proceedings moving the court to order payment by instalments and also to stay execution. In the first of these proceedings heard on 11 February 1964, counsel for the plaintiffs informed the Court as follows: "Here we have an attachment already. Sale is fixed for March." The court then made the following order: "Sales of property No 1 Spalding Street, Bathurst, to be stayed till 30 April 1964, failing any settlement, sale to proceed thereafter."

As a result of other further proceedings of like nature, the sale was stayed and an interpleader summons was taken out by Ebrima Fye, N'Boneh Fye, Haddy Fye and Abdulai Fye, all brothers of the defendant, claiming that the property ordered by the court to be sold belonged to them and should be delivered to them accordingly. At the hearing of this summons on 29 July 1964, it came out in evidence that one Momodou Fye (deceased), the father of the defendant and of all the other claimants, had on 30 August 1957 mortgaged his property, No 1 Spalding Street, to the plaintiffs to secure the defendant's debt of £549.2.10 payable in two instalments, the last instalment to fall due on 30 April 1959. Momodou Fye (deceased) died in 1960, and the defendant paid the specifically named debt secured by the mortgage deed, some date before 13 July 1962. He, however, continued to be employed by the plaintiffs as trader up to June 1963 and incurred further losses and deficiencies totalling £3,448.3.7d, the subject-matter of the original action; and the plaintiffs, after obtaining judgment for this amount, attached No 1 Spalding Street and we were told that property has now been sold to recover the amount due them.

During the course of the hearing before us, it became evident that the title of the appeal and the notice of appeal had been wrongly worded. Mr Saho stated that he appeared for the interpleader claimants and not for the defendant. Leave to amend was accordingly sought and granted and the title of the appeal now reads:

"MAUREL FRERES SA .. PLAINTIFFS

AND

MOMODOU FYE .. DEFENDANTS

AND

IN THE MATTER OF EBRIMA FYE,

N'DONEH FYE, HADDY

FYE AND ABDULAI FYE .. APPLICANTS- .. APPELLANTS"

There are two grounds of appeal both of which raise substantially the same question, namely, whether on a proper construction of the mortgage deed, there was one continuing guarantee to secure not only the sum of £549.2.10 but also all sums of moneys which, hereafter became due and/or owing on account of the defendant's continued and further employment by the plaintiffs. Clauses 1 and 2 of the mortgage deed are set out *in extenso* as follows:

"(1) WHEREAS the surety is seized in unencumbered fee simple in possession of the freehold hereditaments hereinafter described and hereby conveyed.

2. AND WHEREAS:

(1) The trader is indebted to the mortgagees in the sum of *five hundred and forty-nine pounds, two shillings and ten pence* (£549.2.10).

(2) At the request of the trader and the surety the mortgagees have agreed to employ the trader as their trader during the trade season 1957/1958 and at their discretion during subsequent trade seasons.

(3) The surety has agreed to join in this mortgage and to secure the said sum of five hundred and forty-nine pounds, two shillings and ten pence and of any and all sums of money which may hereinafter become due and/or owing by the trader as trader to the mortgagees on account of the said employment and on any costs and expenses incurred in respect of the premises including the cost of preparing this mortgage the stamp due thereon and the registration fee thereof."

Now a continuing guarantee is one which extends to a series of transactions and is not exhausted by or confined to a single credit or transaction: see *Halsbury's Laws of England* (3rd ed) at p 412. In my view, on a proper construction of this mortgage deed, it secured not only the specific sum of £549.2.10d but also all further amounts of loss and deficiency incurred by the defendant when he chose to continue and, indeed, continued in the employment of the plaintiffs. These further amounts totalled £3,448.3.7d. This being so there can be no substance in the grounds of appeal. They must fail.

The court invited arguments from counsel on a point not taken on appeal, namely, whether the Supreme Court had jurisdiction to entertain the interpleader proceedings instituted by the applicant-appellants on the ground that after the death of their father in 1960, his estate was not administered

and therefore when they came to court, they were not armed with either letters of administration nor probate. Their counsel argued that they moved the court not as personal representatives but as persons interested in the property in question. However, neither Order 44, r 26(1) of the Rules of the Supreme Court, Sched II, Cap 6:01 nor section 15 of the Intestate Estates Ordinance, Cap 33 supported his argument. He cited no other authorities in support of his contention. In my view, then, the applicants-appellants had no *locus standi* in the Supreme Court. They could not sustain any proceedings there without first being legally clothed to do so; nor can they do so in this court. It follows therefore that on this account, their claim must fail and the appeal ought to be dismissed and it is hereby accordingly dismissed.

AMES P. I agree.

DOVE-EDWIN JA. I also agree.

Appeal allowed.

SYBB

ATTORNEY-GENERAL v SILLAH

COURT OF APPEAL, BANJUL

(Civil Appeal No GCA 10/1964)

13 November 1964

AMES P, JONES CJ (SIERRA LEONE) AND DOVE-EDWIN JA

Criminal law and procedure-Autrefois acquit-Plea of-When available.

Administrative law-Public Service-Disciplinary proceedings-Public Servant tried and acquitted on charges of stealing by a person in the public service and fraudulent false accounting-Disciplinary proceedings taken against public servant for failure to pay to the treasury sum higher than but including sums he was charged with stealing and for failure to balance his cash books daily-Whether disciplinary charges raising "substantially the same issue" as the criminal charges -Public Services Commission Regulations, reg 31.

Held, *unanimously allowing the appeal by the Attorney-General*: the test by which to decide whether a plea of *autrefois acquit* is a sufficient bar in any particular case, is whether the evidence necessary to support the second indictment would have been sufficient to procure a legal conviction upon the first. In the instant case, the two charges, the subject-matter of the subsequent disciplinary proceedings brought against the respondent, a public servant, were: (1) contravention of financial regulations by failure to pay to the treasury sums of money totalling £518 collected in the course of his duties; and (ii) contravention of financial regulation by his failure, while on revenue collection, to balance his cash books daily. The issues arising from these two disciplinary charges do not raise substantially the same issues in terms of regulation 31 of the Public Service Commission Regulations, arising from the previously criminal charges for which he had been tried and acquitted, namely, the three counts of omitting with intent to defraud and the three counts of stealing-both charges involving the sum of £5. These criminal charges had nothing to do with the issues of non-payment by the respondent of the £518 into the treasury nor with not balancing his cash books Dictum of Lord Morris in *Connelly* v *Director of Public Prosecutions* [1964] 1 WLR 1145 at 1163 applied.

Case referred to:

Connelly v *Director of Public Prosecutions* [1964] 1 WLR 1145.

APPEAL by the Attorney-General from the judgment of the Supreme Court (High Court), making a declaratory order that the disciplinary charges of

contravening administrative financial regulations raised substantially the same issues as the criminal charges of omitting with intent to defraud and stealing of which the respondent had been acquitted. The facts are sufficiently stated

in the judgment of the court delivered by Ames P.

P F J Cordiff, Crown Counsel, for the appellant.

M L Saho for the respondent.

AMES P *delivered the judgment of the court.* Mahtarr Sillah, a member of the Public Service and a revenue collecting officer, was tried in the Supreme Court (High Court), in July of last year on a charge containing three counts of stealing by a person in the Public Service, contrary to sections 252 and 257 of the Criminal Code and three counts of fraudulent false accounting contrary to section 303 of the Code. Counts 1 and 2 were as follows:

"Count 1:

Statement of Offence

Stealing by a person in the Public Service contrary to sections 252 and 257 of the Criminal Code.

Particulars of Offence

Mahtarr Sillah on or about 15 November 1962, at Bathurst, being a person in the Public Service, stole the sum of £1, the property of Her Majesty.

Count 2:

Statement of Offence

Fraudulent false accounting contrary to section 303 of the Criminal Code.

Particulars of Offence

Mahtarr Sillah on or 15 of November 1962, at Bathurst, being a servant employed by the Gambia Government, with intent to defraud omitted from a cash book a material particular, to wit, the receipt on the said day of £1 from Abdul Aziz Ceesay."

The other counts need not be set out. It is sufficient to say that counts 3 and 4 were a similar pair referring to 17 January 1963 and a sum of £3, and that

counts 5 and 6 were a similar pair referring to 18 January 1963 and a sum of £1.

The respondent was convicted on each count, and sentenced to six concurrent sentences of four months' imprisonment each. He appealed to this court and in August 1963, this court allowed his appeal, and set aside his convictions and ordered an entry of not guilty to be entered instead. So, in the result, he was acquitted on each of the six counts.

It appeared from the evidence at the trial (and both counsel in the argument before us agreed) that the amounts of £1, £3 and £1 were but three items in a shortage which totalled £518 over a period of months. It will be convenient to refer here to an argument urged upon us by Mr L M Saho, counsel for the respondent. He submitted that, were the respondent to be put on trial on similar pairs of counts about any of the instances, which make up the remaining £513, his acquittal in respect of the £1 of 18 January 1963 would enable him to plead *autrefois acquit.* The argument is completely fallacious and we disagree with it entirely.

But let us continue with the narrative of the events, which led up to this appeal. The respondent was not prosecuted in respect of any of the parts in the remaining £513. Instead disciplinary proceedings were taken against him under the Public Services Commission Regulations. Two charges were made against him, and the usual procedure was followed, of informing him of them and asking him to state before a specified date any grounds on which he relied to exculpate himself. The charges were:

"(i) Between 1 January 1961 and 18 February 1963, contravention of Financial Instruction 49 by failure to pay to the treasury sums totalling £518 representing school fees which you had collected in the course of your duties as Senior Assistant Teacher at Crab Island School.

(ii) Between 1 January 1961 and 18 February 1963, contravention of Financial Instruction 225 (b) by your failure while on revenue collection to balance your cash books daily and to record the money in hand at the end of each day's business."

Later on a committee was appointed to enquire into the charges. The respondent was represented by counsel at the enquiry, and he made various submissions to the committee and eventually applied to the Supreme Court "for an order of prohibition to issue against the committee." The application was made by motion on notice and was made (so the last paragraph of the affidavit showed) under the provisions of section 30(1) The Gambia Constitution as amended by The Gambia Constitution (Amendment) Order-in-Council, 1963.

It was argued before us by Mr Cordiff, counsel for the appellant, that the application should have been made by writ of summons. Sub-section (5) of the same section 30 provides for the making of rules of procedure. In the absence of any such, we think that application was properly made.

The applicant's case before the Supreme Court was founded on regulation 31 of the Public Services Commission Regulations. That regulation provides as follows: "31. A public officer acquitted of a criminal charge in any court shall not be dismissed or otherwise punished on any charge upon which he had been acquitted but nothing in this paragraph shall prevent his being dismissed or otherwise punished on any other charges arising out of his conduct in the matter, unless the charges raise substantially the same issues as those on which he has been acquitted."

It was argued that the charges being enquired into raised substantially the same issue as those on which he had been acquitted and that consequently, there was a violation of section 30(1) of the Constitution as amended.

The application came before the learned Chief Justice and ended with his making a declaratory order that the charges did raise substantially the same issues. He said:

"It is clear to me therefore that as the charges raise substantially the same issues, it would be illegal to dismiss this officer. That is the declaratory order I am making now. Under regulation 38, certain punishments are set out and none of these punishments can be inflicted on this officer under regulation 31, which prohibits any other punishment. I do think, however, that under regulation 50 (1) retirement in the public interest would not constitute a punishment and could fairly be considered by the Public Service Commission."

This appeal is against that order. The argument before us was, at first, as to whether or not all documentary evidence necessary to reach a decision was in evidence in the court below, for example, a copy of the charges on which the respondent had been tried. That was not put in evidence, either as an exhibit attached to the affidavit or otherwise, and it certainly should have been. It would have been somewhat a formality (the same court, the same judge and so on) but a necessary formality. Eventually and with some encouragement from us, both counsel agreed that all necessary documents should be put in evidence before us, which was done, and we can now decide the real point of the appeal.

It is, of course, this: did the two charges, or either of them, of contravening the Financial Instructions "raise substantially the same issues as those on which the respondent was acquitted?" What test is to be applied? Mr Cordiff suggested that a passage from *Broom's Legal Maxims* quoted in the speech

of Lord Morris in *Connelly* v *Director of Public Prosecutions* [1964] 1 WLR 1145 at 1163 should be applied. The passage included this sentence:

"… The true test by which to decide whether a plea of *autrefois acquit* is a sufficient bar in any particular case is, whether the evidence necessary to support the second indictment would have been sufficient to procure a legal conviction upon the first."

Mr Saho, counsel for the respondent, stressed the words "substantially the same issues" in regulation 31. We think that we must not adopt too legalistic a test, because the regulation does not say "the same issues" but "substantially the same issues."

We will now consider the first charge, relating to the £518. At the time, the Financial Instruction referred to in the charge was No 49 which read: " In all cases the gross amount due must be collected and paid into or accounted to the Treasury or a Sub-Treasury." (It has since been amended and is now Finacial Instruction 3/25. The words quoted are still the first sentence: but are followed by an explanation of "gross".)

This charge can be considered first as to the £513 and then as to the £5. The respondent has never been put on trial on a charge of anything to do with the £513. In July of last year, the charge was limited to the £1, £3 and £1 because section 116 of the Criminal Procedure Code, as it then was, provided that only three counts of the same offence could be charged at any one time (ie in his case, three of stealing and three of fraudulent false accounting): he could have been charged with three more the day after his conviction and he still could be. The section has been repealed and replaced by the Criminal Procedure Code (Amendment) Ordinance, 1964 and the former limit of three at a time no longer exists: and he could be charged tomorrow with any number of charges arising out of the £513. So there have been no acquittals, concerning the £513, and regulation 31 has no application to the charge so far as £513 is concerned. Mr Saho stressed the words "arising out of his conduct in matter", and argued that "the matter" included the whole £513. We do not agree. It means clearly the matter on which he was acquitted, namely the £1, £3 and £1.

Coming now to the disciplinary charge relating to the £5, does the charge raise substantially the same issues over the £1, £3 and £1? The crucial issue at his trial was, did he steal those amounts? The charge at the enquiry does not concern any taking of the money with *animus furandi* or any taking at all, but with whether the gross amounts due were collected and paid into or accounted for the treasury.

The crucial issue at the enquiry is: did he pay the £5 into the treasury? He may have done so but otherwise than Financial Instrument 49 or any other Financial Instruction anticipates, say, after a long delay. If he did not pay it

in, there may be some bona fide reason, although not in accordance with Financial Instructions say, setting the amount received against some school expenditure or having expected someone else to pay it in. Issues such as these seem to us to be different and not substantially the same as those which arose at the criminal trial and for which he was acquitted.

We now turn to count 2. The Financial Instruction was 25(b); - it is now 9/4 and exactly the same. It provides as follows:

"225(b) Collectors of Revenue and Sub-Accountants, must balance their cash books and count and record the money in hand at the close of each day's business. The money in hand should be counted immediately the office is closed for public business and before the cash book is balanced and the details must be recorded at once in the cash book or other book specially provided for the purpose. When the cash book has balanced any difference between the counted money and the balance as shown in the cash books must be noted and at once reported to a Senior officer."

In our opinion, it is impossible to hold that the charge of failing to balance his cash book daily between 1 January 1961 and 18 February 1963, raise substantially the same issues as the count of omitting with intent to defraud on 15 November 1962, a receipt of £1, and the count of omitting with intent to defraud on 17 January 1963, a receipt of £3, and the count of omitting with intent to defraud on 18 January 1963, a receipt of £1 and the three counts of stealing. What had these to do with not balancing his cash book daily? He could have balanced his cash book nevertheless, on those days and each other day throughout the period, and should have done so.

We would allow the appeal and set aside the declaratory order made in the court below and order that instead there be entered a declaration that the issues raised at the disciplinary proceedings, do not raise substantially the same issues arising from the charges on which the respondent was tried and acquitted.

Appeal allowed.

SYBB

SINGHATEH v R

COURT OF APPEAL, BANJUL

3 November 1966

AMES P, DOVE-EDWIN AND COLE JJA

Criminal law and procedure-Plea of guilty-Appeal from-Duty of court on a plea of guilty-Facts of case analysed by the prosecution suggesting offence other than that charged-Mistake by appellant in pleading guilty to charge-Effect.

Held, *unanimously allowing the appeal against conviction:* before accepting the plea of guilty, a court should satisfy itself that an accused person really means to admit his guilt as to each and all the ingredients of the offence. In the instant case, it was very unlikely that the appellant could have intended to plead guilty to something not fully covered by the outline of the facts or the deposition. Since a mistake was made as to what the appellant meant, the proceedings, from that moment, were a nullity.

APPEAL from the conviction of the appellant by the Supreme Court (High Court), of the offence of attempted murder upon the entry of a plea of guilty. The facts are sufficiently stated in the judgment of the court delivered by Ames P.

AB Saho for the appellant.

SHA George, Solicitor General, for the respondent.

AMES P *delivered the judgment of the court.* The information filed in the court below charged the appellant with "attempted murder" contrary to section 200(1) of the Criminal Code, the particulars being: "Abdoulie Singhateh on 12 May 1966, in the Court Yard Bathurst, the Gambia, unlawfully, attempted to murder one N'Daye Ceesay with a machete." In passing, we notice that these particulars do not follow the wording of the subsection, which is "attempts unlawfully to cause the death of and not unlawfully attempts to murder."

The appellant was convicted upon what the learned Chief Justice took to be a plea of guilty, and was sentenced to three years' imprisonment. This appeal is made upon the ground that the plea was not intended to be, and was not, a plea of guilty of attempted murder and that the learned Chief Justice erred in taking it to be such.

Mr A B Saho, who argued the appeal for the appellant, did not appear for the appellant in the court below; the appellant was thus not there represented by counsel. The plea, as recorded was:

"Charge read and explained: Accused "I took out a machete and I admit she was wounded. I did not intend to kill her-but yes. I accept it and I plead guilty. Entered as guilty."

Before accepting a plea of guilty a court should satisfy itself that an accused person really means to admit his guilt as to each and all of the ingredients of the offence, and no doubt this is the practice in the court below. Nevertheless, in our view, the learned Chief Justice in this particular case, erred and was mistaken in accepting what the appellant had said as a plea of guilty.

The learned Solicitor General, who appeared for the prosecution, in outlining to the court the facts of the case, said:

"On 12 May 1966 N'Daye Ceesay and accused has a case in this court. After the case accused and the woman went down into the Court Yard. The accused took a machete from a suitcase and attacked the woman wounding her severely. He was disarmed and apprehended by Mr Secka and Ibrima Body."

These facts suggest the offence of doing grievous bodily harm contrary to section 215, or of unlawful wounding contrary to section 217, and not the offence charged. This should have put the learned Chief Justice on his guard. Moreover, a perusal of the depositions taken in the magistrates' court does also suggest a charge of wounding and not the offence charged. The medical report, which was put in evidence by one of the deponents shows that there were two lacerated wounds, one of an inch on the head and one of three inches on the palm of a hand. The woman was admitted into hospital on 12 of May and discharged two days later.

We think it very unlikely that the appellant could have intended to plead guilty to something not fully covered by the outline of the facts or the depositions, and that a mistake was made as to what the appellant meant. Consequently from that moment, the proceedings were a nullity, and we direct that the entry of the plea as "guilty" be deleted and the conviction and sentence to set aside, and that the case be sent back to the court below and that plea of not guilty be entered and that trial do proceed from that point.

Appeal allowed. Order

for trial de novo.

SYBB

JACOBS & Another v BIDWELL BRIGHT

COURT OF APPEAL, BANJUL

(Civil Appeal No 6/1966)

10 November 1966

AMES P, DOVE-EDWIN AND COLE JJA

Injunction-Interim injunction-Purpose of-Preservation of matters in status quo pending trial of main suit-When proper for court dispose of main suit by interim injunction.

Held, *unanimously allowing the appeal in part*: the object of an interlocutory or interim injunction is to preserve matters in status quo until the main suit can be tried. Such an injunction is therefore usually so framed as to continue in force only until the hearing of the suit or until further order. Except in very special circumstances, only such restraints are usually imposed as will suffice to stop the mischief and keep things as they are until the hearing. In the instant case, there are no special circumstances warranting the order requiring the appellants before the trial, to remove their things from the disputed premises and to hand over the keys to the respondent. The practical effect of the order is to dispose of the main suit, with the exception of the question of quantum of damages; and it is not the practice of the court to do this in an interlocutory application except by consent, which was lacking in the instant case.

APPEAL against the decision of the Supreme Court (High Court), granting an application for interim order restraining the appellants from using the disputed property and compelling them to return the keys of the property. The facts are sufficiently stated it the judgment of a Cole JA.

M L Saho for appellants.

A S B Saho for respondent.

COLE JA. The appellants were the respondents in a motion dated 26 September 1966, brought by Harriette Bidwell-Bright (the respondent in this appeal) asking the court below for an order restraining the appellants forthwith from using the Ritz Cinema and also for an order compelling them to return the keys of the said cinema wrongfully detained by them.

The motion was originally brought against the first appellant Muffleh Jacobs. When the motion came up for hearing on 3 October 1966, Mr ASB Saho, counsel for Muffleh Jacobs, applied for Laila Diab to be added as a co-defendant in the suit. He rested for his support on Order 25, r 21 of the Rules

of the Supreme Court. The learned Ag Chief Justice ordered Laila Diab to be so added. The motion was then adjourned to 5 October 1966 for further consideration. After listening to arguments from both sides, the learned Ag Chief Justice adjourned the matter to 6 October 1966, when he granted the application and ordered the appellants "to remove their things from the premises. The keys to be handed over on 10 October 1966." The letter part of the order was on 11 October 1966, extended to mid-day 11 October 1966.

The evidence before the court on the motion was by affidavit. The first appellant in his affidavit sworn on 1 October 1966, filed in opposition to the motion, complained that he had not been served with any writ of summons. There was, it would appear, no evidence before the court that a writ of summons had been issued. One would have thought that at least the respondent in this appeal would have produced evidence indicating the pendency of a suit out of which the motion arose. The learned Ag Chief Justice, however, in the course of his judgment said:

"The main suit filed is for a claim for the sum of £600 damages for trespass from 16 September 1966 to 23 September 1966, inclusive, at the rate of £75 per day and for damages at the rate of £75 a day for the period 24 September till defendant gives up possession or is made to do so."

The learned Ag Chief Justice probably looked at the file containing the writ of summons. I have also looked at the of writ summons and found, amongst other things, that in the statement of claim, the respondent also claimed an injunction: "restraining the defendant forthwith from interfering with the said cinema until determination of this suit."

The appellants have appealed to this court against the order of 6 October 1966, on three grounds. But, in my view, only one of them needs to be considered. It reads: "That the Ag Chief Justice was wrong in law in disposing of the main suit in an interlocutory proceeding." The learned Chief Justice in his judgment said, inter alia: "The plaintiff sued in trespass and pending the determination of the suit seeks an order of this court for the defendants to be made to surrender the keys of the premises to her" and later made the order complained of in this appeal.

The object of an interlocutory or interim injunction is to preserve matters in status quo until the main suit can be tried. Such an injunction is therefore usually so framed as to continue in force only until the hearing of the suit or until further order. Except in very special circumstances, only such restraints are usually imposed as will suffice to stop the mischief and keep things as they are until the hearing. With respect, I find no special circumstances here to have warranted the order requiring the appellants before the trial to remove their things from the premises and to hand over the keys to the respondent. The practical effect of the order, in my view, is to dispose of the main suit, with the exception, of course, of the question of the quantum of

damages. It is not the practice of the court to do this in an interlocutory application except by consent. The evidence is that the application before the court below was strongly opposed by the appellants.

I would allow that part of the appeal which relates to the order of the court below requiring the appellants to remove their things from the cinema and also compelling them to hand over to the respondent the keys of the premises. As regards the first part of the order granting the injunction, although personally I would not have made it, yet I would not interfere with it.

AMES P. I agree.

DOVE-EDWIN JA. I also agree.

Appeal allowed in part.

SYBB

EDNEY N'JIE v ATTORNEY-GENERAL

COURT OF APPEAL, BANJUL

(Civil Appeal No 1/67)

29 May 1967

AMES P, DOVE-EDWIN AND MARCUS-JONES JJA

Administrative law-Public officer-Notice of compulsory Retirement-Nature of notice-Notice given with retrospective effect improper-Payment of six months' salary in lieu of notice proper in the circumstances.

Held, *unanimously allowing the appeal in part*: a notice of compulsory retirement from the Public Service must have a commencement and an end analogous to notice required to be given to a tenant. In the instant case, the notice given to the appellant with retrospective effect, is bad and is of no effect. It would perfectly have been within the competence of the government to give the appellant six months' notice commencing with the date of his leave; and as the period was less than six months, it would have ended 52 days after the run of his 131 days leave entitlements. In the circumstances of the case, the only manner in which the position could be rectified is by payment of six months' salary in lieu of notice commencing from the date his leave entitlements expired. This will inevitably extend the date of his retirement with consequential increases in gratuity and pension.

APPEAL from the decision of the Supreme Court (High Court), dismissing the appellant's claim that the notice of compulsory retirement from the Public Service served on him by the government was invalid and contrary to section 9(2) of the Pensions Ordinance, Cap 63. The facts are sufficiently stated in the judgment of Marcus-Jones JA.

Name of counsel for the parties not specified.

MARCUS-JONES JA. The appellant Samuel Edney N'Jie was a Civil Service Officer in the Government of The Gambia. By letter dated 22 February 1961, exhibit A, in the proceedings in the court below, he was informed that the government had ordered his compulsory retirement from the Public Service and he was therefore called upon to proceed on leave as from 28 February 1961 and to retire at the expiration of the period of leave to which he was entitled. The leave earned by the appellant totalled 131 days. The relevant law which enabled the government to call upon a public officer to retire is section 9(2) of the Pensions Act, Cap 63 of the Laws of the Gambia which reads:

"It shall be lawful for the Governor to require an officer to retire from the public service after he attains the age of 45 years subject to six months' notice in writing of such retirement being given to the officer by the Colonial Secretary."

The appellant accordingly proceeded on leave prior to retirement and he agreed that the power to call upon him to retire could not be validly challenged, but that the gravamen of his complaint was that the six months' notice as required by law was not given; or even if notice was given, it did not comply with the law. He therefore on 21 September 1963, raised the question of notice with the government and by a letter dated 6 November 1963 exhibit B, the Establishment Secretary acknowledged his letter and tacitly accepted his contention and attempted to regularise the notice by saying:

"It has been decided that you should be paid salary in respect of that period by which your notice fell short of six months. Notice to retire was given to you by the Civil Secretary, in his letter APF 484/122 dated 22 February 1961. You served six days until 28 February 1961, before proceeding on leave. You then enjoyed 125 days paid leave. Arrangements will now be made to pay you salary for the difference between the 131 days notice for which you have already been paid and 183 days (six months), that is for 52 days. Your date of retirement will therefore be taken as 24 August 1961."

The appellant being dissatisfied with the ruling, instituted proceedings against the Attorney General in the Supreme Court of The Gambia, claiming that the notice in terms of the letter dated 6 November 1963 was invalid and that six months' notice purported to have been given was not in accordance with the Pensions Act. He therefore regarded his retirement as effective as from 6 November, the date of exhibit B and claimed special damages (ie salary) from 24 August 1961 to 5 November 1963 and gratuity for the same period. In short he was saying that because the notice was an invalid notice, he regarded himself to be in the service up to the date of the letter of 6 November. How he arrived at this proposition I do not know; although he was by his own interpretation clearly accepting six months' notice retrospectively, that is one ending on 6 November 1963. He was not prepared, however, to accept one commencing six months from the end of his leave in 1961.

The action was tried by the learned Chief Justice of the Gambia who came to the conclusion that the matter of notice was rectified in November 1963 by a payment to the appellant of the difference between the salary already drawn and full salary for six months. In effect, therefore, the plaintiff had received six months' salary in lieu of notice. In considering the effective date of retirement, the learned Chief Justice said it would be unrealistic to find that he was still in the service till 1963. With this, I agree. But the question now

turns on the validity or otherwise of the notice purported to have been given in 1963 with retrospective effect.

This notice, in my opinion, is bad. A notice to be effective must have a commencement and an end analogous to notice required to be given to tenant. If the notice is bad, it is of no effect. It would perfectly have been within the competence of the government to give the appellant six months' notice commencing with the date of his leave, and as the period was less than six months, it would have ended 52 days after the run of 131 days' leave to which he was entitled. The appellant himself does not quarrel with this. His contention is that six months' notice could not have been given in 1963 when his leave had already run out in 1961.

Some officers in the service had been extremely dilatory in this matter, otherwise this was a matter which could have been properly dealt with at the time his compulsory retirement was communicated to him. The appellant himself was aware of the true position; he waited until 1963 before he raised the matter. It would be unrealistic to regard him as being in the service up to and including 5 November 1963.

The only manner in which the position could be rectified is by payment of six months' salary in lieu of notice. This would mean that the period of six months, 183 days, would be reckoned from the date the 131 days' leave expired, less the amount of salary paid for 52 days. This would inevitably extend the date of his retirement to 2 January 1963 or thereabouts, with consequential increases in gratuity and pension.

The appeal therefore succeeds to this extent and I would so order.

AMES P. I agree.

DOVE-EDWIN JA. I also agree.

Appeal allowed in part.

SYBB

IN RE GOODARD (DECD); MANJANG v NDONGO

COURT OF APPEAL, BANJUL

(Civil Appeal No 5/67)

29 May 1967

AMES P, DOVE-EDWIN AND MARCUS-JONES JJA

Mohammedan Law-Succession-Distribution-Estate of deceased Muslim husband-Extent of entitlements of surviving wife to estate.

Mohammedan law-Succession-Marriage-Conversion to Islam-Effect-Marriage by husband then a Christian to wife after her conversion to Christianity-Husband converting to Islam after marriage and making a Mohammedan marriage with another woman-Whether the first Christian marriage ceased to exist when husband converted to Islam.

Held, *unanimously allowing the appeal*: (1) the court would uphold the decision of the Mohammedan Court-directing, in accordance with Mohammedan Law, that the appellant and the respondent should, after payment of debts and expenses, be each entitled to one eighth share of the estate of the deceased Muslim husband, (a wife's share being a quarter and if more than one wife they share the quarter) and that the remaining three quarters of the deceased's estate be paid into the Treasury or the *Bayt al-mat*. The appellate High Court erred in varying the distribution of the estate and ordering that the estate should be divided between the wives, ie the appellant and the respondent in equal shares.

(2) The Mohammedan Court was right in holding that, in accordance with Mohammedan law, the respondent was not an idolatrous woman; she was a scriptural woman, a term which includes Christian and Jewish women, and a marriage with a scriptural woman before conversion to Islam is not terminated by the husband's conversion and his right to the scriptural wife continues.

APPEAL from the decision of the Supreme Court (High Court), varying on appeal, the order by the Mohammedan Court relating to the distribution of the estate of a deceased Muslim husband, and directing that the estate of the deceased husband be shared equally between the appellant and the respondent, the surviving wives of the deceased. The facts are sufficiently stated in the judgment of Ames P.

ASB Saho as amicus curiae.

Njie for the appellant.

Alhaji Drameh for the respondent.

AMES P. This appeal is against the decision of the Supreme Court given in the exercise of its appellate jurisdiction in three consolidation appeals from the decision of the Mohammedan Court, Bathurst. It concerns the distribution of the estate of one Ebrima Goddard as he was known when he died. I shall call him the deceased. There were three claimants: the appellant, Haddy Manjang; the respondent, Haddy Ndong; and Mary Goddard. The decision of the Mohammedan Court was that the appellant and the respondent were entitled to share a fourth of the estate (ie one eighth each) after payment of debts and expenses; that Mary Goddard was not entitled to anything; and that the balance (the three quarters) should be paid into the Treasury. I think, with respect, that the learned Chief Justice misdirected himself as to the terms of the decision of the Mohammedan Court.

In the appeal to the Supreme Court, the judgment of the learned Chief Justice was that the estate should be divided between the appellant and respondent in equal shares. He had heard the appeal with an assessor, by whose opinion he was not bound and whose opinion was that the only person entitled was the appellant. Mary Goddard did not appeal, but nevertheless Mr A S B Saho kindly addressed the court on her behalf *as amicus curiae*.

The facts were as follows: In 1913 the respondent, then a Mohammedan, was allowed by her father to marry the deceased, then a Christian, provided she should remain a Mohammedan. This marriage was according to the rites of Islam. Mary Goddard was born of this union, being then named Mariama. The Mohammedan Court held, and I think rightly, that this marriage was of no effect and invalid under any law, and Mary, consequently, illegitimate. At puberty Mary become a Christian

After some years, the respondent was converted to Christianity, and she and the deceased, who had remained a Christian, were married in 1933 at the Methodist Church, Bathurst. This was valid marriage. The deceased was then called Nathaniel.

In 1954 the deceased was converted to Islam and made a Mohammedan marriage with the appellant, which was duly registered as such, presumably under the Mohammedan Marriage and Divorce Act, Cap 123. At this time, the respondent was away "at Serrekunda for a long time." She heard of this marriage with the appellant and came to Bathurst and the deceased said it was true. Seven months after that confirmation, she was re-converted to Islam. She said: " the deceased died in my hand for I, a Muslim when I went to Basse, I left him at Bathurst." According to her, she continued to be in touch with the deceased by writing and once by his telephoning to her, until he died. She also said that after the marriage with the appellant she did not sit with or lie with him.

The appellant, on the other hand, said that she had never heard from him of any marriage of the deceased other than that with her, and that "(he) died at Long Street in my presence on his bed; the last water he drank was given to him by me." There was no child of this marriage. The Mohammedan Law followed in this country is that of the Maliki School.

The main argument of Mr N'jie, counsel for the appellant, was that the 1933 marriage ceased to exist when deceased was converted to Islam, and the respondent remained a Christian. He cited as his authority the *Koran*, section 2 of chapter LX "The examined one", verses 10 and 11 which say that marriages between "idolatrous enemies" and Muslims are to be treated as dissolved. He produced for us a copy of the *Koran* with a parallel translation to English and Commentary by Maulvi Mohammed Ali of India. But the respondent was not an idolatrous woman, she was a scriptural woman, a term which includes Christian and Jewish women, and a marriage with a scriptural woman before conversion to Islam is not terminated by the husband's conversion and his right to the scriptural wife continues. This is what the Mohammedan Court held, and the authorities cited by Alhaji Drameh supported them: *First Steps in Muslim Jurisprudence*, consisting of excerpts from Bakurat-al-sa `d of Iba Auza yd translated in parallel and annotated by Russell and Shurawaddy, section 53 thereof. Also the Comments on section 102 of the *Manual of the Law of Marriage* from the Muktasar of Sidi Khalik by the same two authors is to the same effect. There is also a similar statement in *Law in the Middle East* by Majid Khadduri and H J Liewesny. Mr N'Jie's further argument was that after the deceased's marriage to the appellant, the respondent should have reverted to Islam within a month so as to retain her status as a wife and that the seven months interval was too long. But this again refers to a wife who is a pagan. The learned Tamsirs, who constituted the Mohammedan Court, held that the 1933 marriage continued to be of valid effect until the deceased's death for the reasons set out in their judgment. *The Law in the Middle East* (already cited) might also be cited, on this point. The learned authors state that the one month rule only applied to a non-scriptural woman, ie the idolater of the passage from the *Koran*. See page 342 under the heading "Conflicts of law resulting from a change of religion and the subheading "Civil Law". The footnotes show that this is the Maliki School as well as some others.

Mr Saho urged on behalf of Mary Goddard that she was legitimated by the Legitimacy Act, 1926 of England, and the learned Chief Justice seems to have agreed with him because of the amendment of section 19 of the Laws of England (Application) Act, Cap 3 which was made by the Revised Edition of the Laws (Amendment) Act, 1966. Section 19 of chapter 3 is to be seen in the Laws of England (Application) (Amendment) Act, 1964 (No 12 of 1964). It is as follows: 19. "The jurisdiction hereby conferred upon the Supreme Court in probate, divorce and matrimonial causes and proceedings may subject to the provisions of the Courts Ordinance, 1964, and rules of Court, be exercised by the Court in conformity with the law and practice for the time being in force in England."

At that time the Legitimacy Act either was or was not a relevant law in conformity with which the jurisdiction might be exercised. The 1966 Act amended the section to make it read "in conformity with the law and practice in England immediately before the 18th day of February, 1965", (ie the date of Independence). With respect, this does not seem to me to bring within section 19 anything that was not in it before, but merely to freeze (so to speak) the position as at that date and to ensure that whatever may thereafter be made law and practice in England, does not automatically become any part of the law of this country in conformity with which the jurisdiction might be exercised. But the point is of no importance in this case, because it is well settled that a Christian cannot inherit from a Muslim.

Mr Saho's other point was that this latter rule is repugnant to natural justice, equity and good conscience. But this argument cannot be sound because of the provision in item (c) of section 23(4) of the Constitution.

A final matter: the Mohammedan Court gave the appellant and the respondent an eighth share each which is correct, a wife's share being a quarter and if more than one wife they share the quarter: see eg *First Steps in Muslim Jurisprudence*, para 228 and the Comments thereon. That court also ordered the remaining three quarters to be paid into the *Bayt al-mal*. The learned Chief Justice varied that on the ground that there is no such thing in this country and ordered it to be divided between the appellant and the respondent. The *Bayt al-mal* is the public treasury.

In the result, I would set aside the judgment of the learned Chief Justice and restore that of the Mohammedan Court and order the appellant and the respondent to have an eighth share each of the balance in the estate after its administration and that the remaining three quarters be paid into the Treasury. Section 16 of the Intestate Estate Act, Cap 33 makes provision for the disposal of proceeds of intestate estates without heirs or next-of kin. That does not apply to this estate of course because it has not been administered by the Curator, and so the powers given to the court in the section do not apply here. It may be that the parties and Mary Goddard, by analogy, could petition whoever may be the proper person that some ex gratia payment might be made to them.

DOVE-EDWIN, JA. I agree.

MARCUS-JONES, JA. I also agree.

Appeal allowed.

SYBB

NDURE (CLAIMANT) v C F A O

COURT OF APPEAL, BANJUL

4 December 1967

AMES P, DOVE-EDWIN AND LUKE JJA

Practice and procedure-Execution-Claims to attached property-Release from attachment-Alleged fraudulent transaction-Property owned by two brothers as tenants in common-Interest of one brother bought out by family member to pay judgment-debt of the brother-Sale transaction not fraudulent provided fair price paid and money paid to judgment creditors.

Held, *unanimously allowing the appeal and ordering the release from attachment of property under a writ of fifa*: there is, on the evidence, nothing fraudulent (as wrongly held by the trial judge) for two brothers, occupying property as tenants in common with equal shares, arranging for a family member, their mother, a co-occupant, to buy out the share of one of the brothers, a judgment-debtor, provided a fair price was paid and the money paid to the judgment-creditors. Fraud requires a high standard of proof.

Cases referred to:

(1) *Shyben Madi* v *Njie & N'yang*, GCA No 6 of 1965.

(2) *Maurel Freres SA* v *Nyang & Sowe*, GCA No 6 of 1965; reported in [1960-1993] GR 48 *ante*.

APPEAL from the decision of the Supreme Court (High Court), dismissing the application of the appellant, the claimant, that the property attached under a writ of *fifa* issued by the respondents, is her property and that it should be released from attachment . The facts are sufficiently stated in the judgment of Ames P.

M L Saho for the appellant (claimant).

J L Mahoney (with A S B Saho) for the respondents

AMES P. This appeal arises out of attachment of property under a writ of *fifa* by the respondents and the appellant's claim that it is her property. Rule 26 of Order 44 of the Supreme Court Rules, Sched II, Cap 6:01 provides that such a claim shall be investigated by the court as if the claimant had been originally made a party to the suit. The rule is silent as to the onus of proof. The claimant put her case first which is usual, I think. There are three grounds of appeal. I need not set them out. It is sufficient to say that one is that Alieu Senian, the judgment-debtor, had parted with his legal interest in

the property before it was attached. The other two concern the weight of evidence and the learned acting Chief Justice's interpretation of it.

The respondents obtained judgment against Alieu Senian on 6 July 1966, for £9,260. On 12 July 1966, they took out a writ of *fifa*. At that time Alieu Senian and his brother, Alhaji Momodou Sinyan, whom I will call "the brother", were the owners of 11 Lancaster Street, which they held as tenants in common in equal shares. They both lived there; and their mother, the claimant, lived there with them. The three still live there. On or about 5 June 1966, the two brothers sold the property to their mother and on 15 July they executed a deed conveying it to her, for a stated consideration of £1,000.

On 6 June Alieu Senian paid £1,500 to the respondents which, he said in evidence, included the £1,000. The mother gave evidence of providing the £1,000, and the brother said so too. He must have contributed something because he also said that his share of it was a loan to Alieu Senian. Alieu Senian said he added £500 of his own. So between them there was the £1,500.

On 15 of September 1966, the respondents attached 11 Lancaster Street, whereupon the claimant commenced these proceedings. On the face of the deed of conveyance, Alieu Senian had no interest in the property on that date which could have been attached. Mr M L Saho, counsel for the claimant, cited two decisions of this court to that effect: *Shyben Madi* v *N'jie & N'yang*, GCA No 4 of 1965 and *Maurel Freres SA* v *N'yang & Sowe*, GCA No 6 of 1965; reported in [1960-1993] GR 48.

The respondents' answer to the claim, as set out in paragraphs (6)-(8) of their affidavit, was:

"(6) The plaintiffs deny that the alleged sale of 11 Lancaster Street Bathurst is genuine but is used as a device to defeat the plaintiffs' claim…

(7) The plaintiffs further allege that the alleged sale is designed to defraud the defendant's creditors.

(8) The plaintiffs pray this honourable court to set aside the alleged fraudulent sale and that the attachment should continue and a sale under the sheriff ensue."

In the result, the learned Ag Chief Justice found that the sale was fictitious (and "if the sale was fictitious, it was necessarily fraudulent and designed to defeat Alieu Senians' creditors") and dismissed the claim.

The question of the lawful conveyance of the property was left in the air. The deed was registered and is extant. There have been no proceedings to set it aside. The two vendors were witnesses in these proceedings arising out of

the attachment; but neither was a party to them, and one (the brother) was not a party to the suit out of which these proceedings arose.

Was the learned Ag Chief Justice justified on the evidence in finding it to be a fraudulent transaction? Fraud requires a high standard of proof. In this part of the world (and elsewhere) members of a family may all live together, as these do at 11 Lancaster Street. It would be inconvenient and unpleasant to have a stranger settle there because he had bought Alieu Senian's half share (which is all that the sheriff could have attached and sold).

I see nothing fraudulent in the occupants arranging for one of the family to buy out Alieu Senian's share, provided that a fair price was paid and the money paid to the creditors. The brother's evidence was that at the time of the sale, he knew that Alieu Senian was indebted to the respondents, but that he knew of its extent when the writ of summons was issued. The mother's evidence was that Alieu Senian came to her with the brother and told her of his losses. The mother and the brother are traders.

Well now, was £1,000 a fair price? The learned Ag Chief Justice found it to be "not necessarily unreasonable". That means reasonable, and the double negative does not make it any less. It is not clear whether he meant reasonable for the whole property or for the half share. If he meant the whole, I do not see on what evidence he based it. The only evidence as to value, and that of a surveyor, called by the respondents, who said that he valued it at £1,998-12-0. He was referring to the whole. On this basis, Alieu Senian's half share was worth £999-6-0. So if the £1,500 paid to the respondents did in fact include the £1,000 of the sale of the house, the respondents received all that they might have received had they been able to sell Alieu Senian's share.

The learned Ag Chief Justice found the sale to be fictitious, with no money passing. If that were so, the respondents were defrauded because they should then have received both the £1,500 which they did receive and also whatever Alieu Senian's half share might have been sold for. Did £1,000 pass? Practically all the evidence and all the cross-examination was relevant to this question.

Appeals in this court are by way of rehearing. Both Mr M L Saho, counsel for the claimant, and Mr Mahoney, counsel for the respondents, have examined the evidence for us, giving their comments and the conclusions which they suggest should be drawn. Of course there were some inconsistencies in the evidence. Nevertheless the conclusion does seem to me to be that the claimant was a woman of some substance. In 1965 she had £1,800 available. She went to Mecca in March 1965. No evidence as to what that cost. Commonsense says that it could not cost £1,500. (She had been on a former occasion when it cost more.) She was back in (and perhaps before) in June when she drew £700 from the Post Office Savings Bank. That was of

course a year before the sale, but she was trading during the year. There was evidence that the brother contributed to the £1,000, but how much does not appear. I think it shows that £1,000 could have been raised by the mother and brother in June 1966, which is what they said was done. I do not think that there is sufficient evidence to show that it was not done.

I would allow the appeal, and set aside the judgment of the court below and order that the attachment be released.

DOVE-EDWIN JA. I agree.

LUKE JA. I also agree.

Appeal allowed. Order for release

of property from attachment.

SYBB

DANSO v COMMISSIONER OF POLICE

COURT OF APPEAL, BANJUL

(Criminal Appeal No 5/68)

May 1968

DOVE-EDWIN AG P, MARCUS-JONES AND LUKE JJA

Criminal law and procedure-Accomplice-Corroboration-Failure to warn on danger of convicting on uncorroborated evidence of an accomplice-Prosecution witnesses found by magistrate to be unreliable and liars-Whether conviction proper.

Held: *allowing the appeal against conviction and sentence*: the failure of the magistrate to warn himself of the danger of accepting the uncorroborated evidence of the accomplices added to the fact that the magistrate did not believe any of the witnesses for the prosecution and said that they were all liars, entitled the appellant to an acquittal.

APPEAL from the judgment of the High Court, dismissing the appellant's appeal against the decision of the trial magistrate, convicting and sentencing the appellant on three counts of forgery, uttering and stealing. The facts are sufficiently stated in the judgment of the court delivered by Dove-Edwin Ag P.

Appellant in person.

SF N'jie Ag Solicitor-General for the respondent.

DOVE-EDWIN AG P *delivered the judgment of the court*. The appellant was charged before the magistrate court presided over by Mr H M N'jie on 16 September 1957, on three counts of (i) forgery, (ii) uttering and (iii) stealing. The amount involved was £4. He pleaded not guilty to all the charges. The facts on which the prosecution relied were that the appellant, who could sign his name, thumbprinted the voucher for payment for £4 to a man which was fictitious and used the money, the area council thereby losing £4. There were six witnesses for the prosecution and after hearing the submission of counsel, the court held that there was a case for the accused to answer and he gave evidence.

At the close of the case, the magistrate had this to say: "As far as reliability goes, few or any of the major witnesses are reliable. There is, however, no need to go into any great details on that." He went on to say: "This episode as a whole is sordid and the officers of this area council are all so much

flawed from the executive officer to the last employee. Mr Jobarteh came all the way from Nigeria to tell this court a pack of lies…"

Despite this, the appellant was convicted and sentenced to nine months' imprisonment. He was convicted on all three counts. No mention is made on the record as to which of the three counts the nine months' imprisonment refer to.

The appellant appealed to the High Court presided over by the learned Chief Justice who, although he criticised the learned magistrate, said that in his view, no injustice had been done and reduced the nine months' imprisonment with hard labour to six months on each count concurrent.

Against the dismissal of the appeal, the appellant has again appealed to this court. The main point taken in this court was that since all the witnesses were accomplices, the learned magistrate should have warned himself against the danger of convicting on the uncorroborated evidence of accomplices. The learned Chief Justice found that this was so and that the learned magistrate did not warn himself, as shown by his judgment, of the danger of convicting on the uncorroborated evidence of accomplices. However, the learned Chief Justice found that taking the case as a whole and the evidence of the appellant, no injustice had been done and went on to dismiss the appeal against conviction and reduced the sentence to six months' imprisonment on each count concurrent.

At the close of the case for the prosecution, the appellant was entitled to an acquittal as the learned magistrate felt that the witnesses for the prosecution were all liars but instead of this he called upon the appellant to put in his defence. The appellant gave evidence, and in his judgment, on the appeal to the High Court, the learned Chief Justice had this to say: "The defence amounted to a confession of guilt and that this justified the magistrate's conviction independent of any other witness." We think that failure to warn himself of the danger of accepting the uncorroborated evidence of the accomplices added to the fact that the magistrate did not believe any of the witnesses for the prosecution, entitled the appellant to an acquittal and as this was not done, the appeal should be allowed and we allowed it.

Appeal against conviction

and sentence allowed.

SYBB

COMMISSIONER OF POLICE v JOOF

COURT OF APPEAL, BANJUL

(Civil Appeal No 12/68)

9 December 1968

DOVE-EDWIN P, MARCUS-JONES AND FORSTER JJA

Criminal law and procedure-Prosecution-Tax offences-Sanction for prosecution-Prosecution for certain tax offences not to be commenced except at the instance of or with the sanction of Commissioner of Income Tax or the Attorney General under Income Tax Act, s72 Cap 96-Accused charged and convicted for offences under the Income Tax Act-Issue of want of sanction raised at hearing of appeal against conviction and not at commencement of trial before magistrate-Whether want of sanction made whole trial illegal-Proper construction of Cap 96, s72-Income Tax Act, Cap 96, s72.

Held: *allowing the appeal against sentence in part and affirming the conviction for tax offences and stealing*: the effect of section 72 of the Income Tax Act, Cap 96 construed as a whole, is that it is merely directory and not mandatory. Since the want of sanction by the Attorney-General was taken on appeal before the High Court and not at the commencement of the trial, it became at that stage, merely a technicality and the appellate Supreme Court (High Court) ought not have given any weight to it. The trial was therefore not illegal as erroneously held by appellate High Court.

APPEAL by the Commissioner of Police against the decision of the Supreme Court (High Court), allowing the appeal by the respondent (the accused), against his conviction and sentence by the trial magistrate for tax offences under the Income Tax Act, Cap 96 and for stealing. The facts are sufficiently stated in the judgment of the court delivered by Dove-Edwin P.

S H A George, Ag Solicitor-General, for the appellant.

G E Davies and AM Drameh for the respondent.

DOVE-EDWIN P *delivered the judgment of the court.* The respondent was charged before the Magistrate Court in Bathurst on eleven counts. Five under the Income Tax Act and six under the

Criminal Code, Cap 10. The charges under the Income Tax Act charged him with withholding for his own use moneys being the amount of tax collected contrary to section 69(1) (*b*) of the Income Tax Act (now renumbered section 70(1)(*b*)) of Cap 96 Revised Laws of the Gambia 1966. Five of the charges brought against him under the Criminal Code, Cap 10 dealt with stealing the moneys he withheld, contrary to sections 252 and 257 of the Criminal Code. One charge of false information was withdrawn. He was represented by counsel and pleaded not guilty on all counts or charges. He was convicted on all the charges both under the Income Tax Act and the Criminal Code and was sentenced to three years' imprisonment on all to run concurrently.

He appealed to the Supreme Court and his appeal was heard by the Chief Justice who allowed his appeal on the grounds that the trial was illegal by virtue of the fact that no fiat or sanction was produced by the prosecution to show that the Attorney- General had consented to the prosecution brought under the Income Tax Act as required by section 72 of the Act and so the appellant was entitled to be acquitted.

Section 72 of the Income Tax Act reads as follows: "No prosecution in respect of an offence under sections 68, 69, or 70 of the Act may be commenced except at the instance of or with the sanction of either the Commissioner of Income Tax or the Attorney General." The prosecution was not brought solely under the Income Tax Act; it was brought under the Income Tax Act and the Criminal Code and there was no objection by the respondent, the accused or his counsel that he had been embarrassed by the charges. Section 112(1) of the Criminal Procedure Code permits the joinder of two or more offences in one charge.

We think the learned Chief Justice was in error when he said that the trial was illegal. The provision in section 72 of the Income Tax Act does not apply to prosecution under the Criminal Code. It is our opinion, reading the whole of the trial proceedings, that there was a document showing that the sanction of the Attorney General was, indeed, available in court. Quite apart from this, the counsel appearing for the Commissioner of Police was the acting Solicitor General. We do not think it was absolutely necessary to make an exhibit of this document.

To give a true interpretation of section 72 of the Income Tax Act, one should read the whole of the Act to get the intention of the legislature and in doing so we are of the opinion that it is merely directive and not mandatory. The point of want of sanction by the Attorney-General

was taken on appeal and not at the commencement of the trial; at that stage it became merely a technicality and the learned Chief Justice ought not have given any weight to it. It is because of this that we ruled that the trial was not an illegality on 26 November 1968.

As to the trial itself, we are satisfied that there was evidence before the learned magistrate if believed, as indeed believed, it was, that the respondent received moneys for the payment of Income Tax which he withheld for his own use and did not account for and that he was properly convicted on the Income Tax offences. The charges under the Criminal Code are the same moneys involved in the Income Tax offences. According to the proviso under section 2 of the Criminal Code, we think that the respondent should not be punished for the offences under the Income Tax Act and we therefore set aside the punishment of three years' imprisonment passed on the respondent. This leaves the sentences passed under the offences under the Criminal Code. The appeal is allowed and the order of the learned Chief Justice that "the respondent's appeal succeeds in all grounds" is set aside and a verdict of "appeal dismissed" put in its place. The respondent will now have to serve the sentences imposed under the Criminal Code, Cap 10.

Appeal against conviction dismissed

subject to allowing in part

appeal against sentence.

SYBB

SINGHEH v COMMISSIONER OF POLICE

COURT OF APPEAL, BANJUL

(Criminal Appeal No 11/68)

9 December 1968

DOVE-EDWIN P, MARCUS-JONES AND FORSTER JJA

Criminal law and procedure-Obtaining money by false pretences-Charge of-Proof-Need to prove false statement of existing fact coupled with promise to do something in future-Criminal Code, Cap 10, s 288.

The appellant, a Member of the House of Representatives, demanded and obtained from the complainant a sum of £16 for the purpose of procuring a passport for him. He made the demand and promise, even though long before then, the appellant had been told by the Immigration Authorities that they would no longer entertain any declaration form for a passport signed by him because it had been his habit to sign and submit declarations of applicants for passport of whom he had no personal knowledge. The appellant was tried and convicted by the magistrate and sentenced to a term of imprisonment. His appeal to the Supreme Court (High Court) against conviction and sentence was dismissed. On a further appeal to the Gambia Court of Appeal, counsel for the appellant urged that whatever representation the appellant had made at the time he received the money was a promise as to a future conduct which did not amount to false pretence in law.

Held, *unanimously dismissing the appeal*: fraudulent misrepresentation of an existing fact coupled with a promise to do something in the future, constituted false pretence under section 288 of the Criminal Code, Cap 10. The false statement of the existing fact was the representation by the appellant that he was in a position to obtain the passport for the complainant and that he had the power and ability to do so; while the future conduct was that the passport would be obtained and handed over to the complainant. Consequently the conduct of the appellant plainly established his intent to defraud and his intention to repay the money which he had obtained, whether or not it existed, was immaterial to the deception.

Case referred to:

R v *Dent* [1955] 2 KB 590.

APPEAL against the judgment of the Supreme Court (High Court), dismissing the appellant's appeal against the conviction and sentence by the trial magistrate for the offence of obtaining money by false pretences, contrary to section 288 of the Criminal Code, Cap 10. The facts are sufficiently stated in the judgment of the court delivered by Marcus-Jones JA.

A S B Saho for the appellant.

O'Brien Coker for the respondent.

MARCUS-JONES JA *delivered the judgment of the court*. The appellant, a Member of the Gambia House of Representatives, was convicted and sentenced to a term of two years' imprisonment with hard labour by the Senior Police Magistrate of The Gambia on 13 March 1968, on a charge of obtaining money by false pretences contrary to section 288 of the Criminal Code, Cap 10. He appealed to the Supreme Court of The Gambia (High Court) against his conviction and sentence. This was heard by the learned Chief Justice on 22 June 1968. He dismissed the appeal thus upholding the conviction. The appellant has now appealed to this court.

The facts of the case are briefly as follows. One Ousman Tarawally desirous of obtaining a Gambia passport for the purpose of travelling to Freetown, travelled from Jokadu to Bathurst. He lodged in the house of one Lamin N'dow to whom he disclosed his desire to obtain a Gambia passport. The accused demanded of Trawally the sum of £16 for the purpose of procuring the passport of which £14 was then and there paid and he asked Trawally to come in a week's time to collect the same, ie the passport. Tarawally did so but instead of providing him with the passport, the accused further demanded the £2 balance due on the original demand of £16. Having received the balance of £2, he again promised to procure the passport. This he was unable to do, nor was he able to return the sum of £16 which he had obtained on this false representation.

As emerged from the evidence, long before this incident, the appellant had been told by the Immigration Authorities that they would discountenance any declaration form for a passport signed by him because it had been his wont to sign and submit declarations of applicants for passports of whom he had no personal knowledge. With full awareness of this fact, the appellant not only represented that he

was then in a position to procure a passport for the complainant but went as far as to demand the sum of £16 as consideration for doing so.

In order to overcome the difficulties inherent in his inability to obtain the passport, he sought to influence one Hon Mr Kebba Cherno Amadu Kah, Minister of Health of The Gambia, to sign the declaration form, alleging that the complainant was at that material time residing in Kah's Constituency. Kah having taken a dim view of the appellant's machinations declined to help. Whereupon the appellant confessed to Kah that the applicant had given him some money; that he had utilised some of it, and that the balance then remaining was £6 which he thereupon offered Kah as an inducement for Kah to sign the declaration. Kah in evidence said he had told the appellant not to produce the £6 to him and that as soon as the appellant brought out the question of money, he Kah realised the circumstances surrounding the application and he therefore declined to render any assistance in the matter. The appellant pressed him further but he refused.

The appellant in his evidence stated that the sum of £16 had been deposited with him by the complainant to abide the complainant's passage to Freetown, to wit £14, and £2 for the cost of passport. This is palpably untrue.

Learned counsel for the appellant has strenuously urged before this court that whatever representation the appellant made at the time he received the money, was a promise as to future conduct which does not amount to false pretence in law. He relied on the case of R v Dent [1955] 2 KB 590.

In that case Dent, who carried on the business of a pest destructor, entered into contracts with a number of farmers to destroy vermin on their land over a period of a year. He asked for and received payments in advance of half the annual charge but he did no work under the contracts. He was convicted under section 32 of the Larceny Act, 1916 of obtaining money by falsely pretending that he was bona fide entering into contracts for the destruction of pests and that he bona fide intended to perform them and that he was and would be able to do so. It was not suggested at the trial that he had not the means to do the work, had he wished to. He appealed. It was held that Dent's promise was a mere statement of intention which was not enough to make him liable in criminal law, though it might have been otherwise had it been shown that he falsely pretended that he was carrying on a bona fide business.

However, where a person makes a statement partly of a fraudulent misrepresentation of an existing fact and partly of a promise to do something in future that is sufficient false pretence, and an intent to defraud may be inferred from the facts of the case. And a promise to do something in the future may imply that the promisor has the power to do that thing.

The accused being a Member of Parliament made a representation that he was in a position to obtain the passport for the complainant and that he had the power and ability to do so. This was a false statement of an existing fact. It was known to him that the fact of being a Member of Parliament did not entitle him to obtain a passport for anyone even though he came within the category of persons who could sign declarations for application for passports. He knew that the Immigration Authorities had told him in plain and unmistakable terms that any declaration signed by him would be ineffective.

A statement of intention of future conduct coupled with false statement of an existing fact brings the appellant within the ambit of the Criminal Code. The future conduct being that the passport would be obtained and handed over to the complainant; and it is well settled that a false pretence as to existing fact coupled with a promise to do something in the future is sufficient.

The conduct of the accused plainly establishes his intent to defraud. As if the £14 paid to him in the first instance was not enough, he went on to demand the balance of £2 a week after, and at a time when it was apparent to him he was not in a position to implement his promise. He offered £6 of this amount to the Hon Mr Amadi Kah, the Minister of Health; and even at this late stage he went on to appropriate the balance to his own use. His intention to repay the money whether or not it existed was immaterial to the deception.

For the reasons we have given, we find the conduct of the appellant did not amount to a mere promise of a future conduct but a false pretence as to an existing fact coupled with a promise to do something in the future.

We therefore hold that the appellant's appeal was rightly dismissed by the learned Chief Justice and we would also dismiss the appeal to this court, and affirm the conviction and sentence of the appellant.

Appeal against conviction

and sentence dismissed.

SYBB

JONES v JONES

COURT OF APPEAL, BANJUL

(Civil Appeal No 6/68)

9 December 1968.

DOVE-EDWIN P, MARCUS-JONES AND FORSTER JJA

Land law and conveyancing-Possessory title-Proof-Property occupied with owner's consent-Owner of property inviting another person to occupy portion of property rent free his convenience-Person repairing and reconstructing portion of property and remaining in occupation for twelve years-Whether person acquiring possessory title to premises.

Held, *allowing the appeal*: if a person invites another to occupy a room in his house, rent free and for his convenience, and also allows him to reconstruct and repair that room or set of rooms, the person so invited, cannot, after twelve years' occupation, claim to have a good possessory title thereto.

APPEAL against the judgment of the High Court, dismissing the plaintiff's claim for possessory title to the disputed property. The facts are sufficiently stated in the judgment of Forster JA.

E D N'jie for the appellant.

A S B Saho for the respondent.

FOSTER JA. The appellant and the respondent were the plaintiff and defendant respectively in a Civil Suit No S7/68 in the court below. The plaintiff there issued a writ of summons against the defendant on 11 January 1968 claiming:

"(i) possession of rooms occupied by the defendant in the property known as 14 Allen Street, Bathurst;

(ii) injunction to restrain the defendant from continuing to trespass on and to damage parts of the said property; and

(iii) mesne profits."

This suit was heard by the learned Chief Justice who gave judgment as follows:

"The defendant is declared to have a good possessory title to the adjoining building he erected and that portion of land on which it stands known as No 14 Allen Street. The plaintiff's suit for possession of the whole of No 14 Allen Street is dismissed with costs. The plaintiff is declared to have a good title to the main building of blocks and that portion of land on which it stands known as No 14 Allen Street. Both parties are at liberty to apply for an equitable portion of No 14 Allen Street without the necessity of a fresh suit."

In his reasons for the foregoing decision, the learned Chief Justice had this to say:

"The plaintiff's action is for possession of the rooms on No 14 Allen Street occupied by the defendant and an injunction to restrain the defendant from trespass. The defence is that the defendant rebuilt an adjoining building on No 14 Allen Street and has exercised rights of ownership over the statutory period of twelve years as alleged, the defendant seeks a declaration of good possessory title to the adjoining building and land."

It was made clear at the outset of the trial that there was no dispute as to the plaintiff's title to the main building, built of blocks. A number of conveyances were admitted as exhibits. The last owner, per documents, was T B Jones (deceased). On his demise, the Curator, with letters of administration, transferred No 14 Allen Street to the plaintiff, widow of T B Jones (deceased). The defendant, brother of the deceased, was unaware till all transactions were complete. Subsequently the parties had some disagreement and quarrels ensued. Hence the present action.

The plaintiff relies solely on her documentary title to No 14 Allen Street, but has no personal knowledge of the history of the adjoining building. Her husband and she did not reside on the premises for some considerable time due to the nature of his work and constant travel out of Bathurst. I am satisfied that the defendant's evidence and that of his witness is true and correct. In effect, the defendant demolished and rebuilt the adjoining building of six rooms in 1954. There is the evidence of Crispin Jones that the deceased T B Jones had admitted that his brother, the defendant, was rebuilding the adjoining building at the time-an admissible statement of a deceased person against his own interest. There is further evidence that the defendant has resided

at No 14 Allen Street since childhood and has never paid rent to anyone. It is also perfectly clear that the defendant from time to time lived in some or all of his six rooms. In all these circumstances, the defendant contended that he has a good claim of right to possession of the adjoining building and portion of land of No 14 Allen Street and the plaintiff's claim to "the whole of No 14 Allen Street is defeated."

Both parties are in agreement that the premises known as No 14 Allen Street, hereinafter referred to as `the premises', belong to the late T B Jones Senior, who died in 1959 and that prior to his said death, his two sons, T B Jones Junior (who died in 1963) and the defendant-respondent, lived on the premises with his permission, for many years before the death of said T B Jones Senior.

According to exhibit F1, an indenture of conveyance made on 22 June 1931 between the United Africa Co Ltd as mortgagees, the late TB Jones Senior as vendor and one John N'dow as purchaser, the late T B Jones Senior has mortgaged the premises of which he was then seised in unencumbered fee simple in possession to the said company on 31 December 1921 to secure certain sums due from him to the said company. Having made default in settlement of the said debt, he, with the concurrence of the said company sold the premises to John N'dow aforesaid in fee simple. By exhibit F, a further indenture of conveyance made on 26 August 1931, the said John N'dow as beneficial owner sold the premises to the company, in fee simple in possession, free from encumbrances. Exhibit A, yet a third indenture of conveyance dated 7 May 1957 was made between the said company and the Gambia Oilseeds Marketing Board, whereby the premises were conveyed by the company aforesaid as beneficial owners to the said board their successors and assigns absolutely. A fourth indenture of conveyance, exhibit B, was made on 22 January 1960 between the said board, as beneficial owners and Theophilus Jones (that is T B Jones Junior, (deceased), whereby the premises were conveyed to the late T B Jones Junior his and assigns absolutely. And finally exhibit C, the conveyance made on 30 September 1965 by the Curator of Intestate Estates of The Gambia with the plaintiff-appellant, after he had administered the estate of the late T B Jones Junior who had died intestate on 13 October 1963. By this said conveyance, the premises and the buildings thereon were conveyed by the said curator as personal representative of the late T B Jones Junior unto and to the use of the plaintiff-appellant and the three children of her deceased husband, T B Jones Junior aforesaid in certain undivided shares.

The appellant, the plaintiff, appealed to this court seeking to have the decision of the learned Chief Justice set aside and for judgment to be entered that she and her children are entitled to the premises. Her counsel's main ground of argument was that the statutory periods of twelve years' adverse possession had not run in favour of the defendant-respondent; in any event to on 11 January 1968, the date of the issue of her writ in the court below.

In reply, the defendant's counsel urged on behalf of his client that, indeed, the statutory period of 12 years had run in favour of the defendant, as from 1954, if not earlier. The defendant admitted before the court that the adjoining building he claims had been on the premises many years before his late father's death; that he had permission from his late father to demolish the former building which by 1954 had become dilapidated and which he rebuilt into a six-roomed adjoining. The defendant also said that he occupied one of these rooms and let out the remaining rooms thereof collecting the rents therefrom which he used for his personal benefit without let or hindrance from anyone whatsoever.

In the first place, the defendant cannot be heard to say that this statutory period of twelve years ran from 1954, some five years before his late father's death. The defendant attempted to justify this claim by adverting to the fact that his late father had lost the premises since 1931, over-looking his requesting permission from his said late father, to demolish the dilapidated building in order to rebuild it into the adjoining he now claims as his. Further to this argument, the respondent failed to take cognisance of the legal effect of exhibit B, the conveyance the premises to his late brother T B Jones junior and the subsequent exhibit C, the conveyance by the curator aforesaid to the plaintiff-appellant and her children by his late brother aforesaid.

In passing, I must remark on the defendant's astounding proposition that if I invite a person to occupy a room in my house, rent free and, for his conveyance, allow him to reconstruct and repair that room-or even set of rooms, he can after twelve years' occupation claim to have a good possessory title thereto. Such a proposition is completely untenable in law and its practical application would be a most detrimental revolution in the law of property.

I would allow the appeal, order that the judgment of the learned Chief Justice be set aside and substitute therefor judgment for the plaintiff-appellant that the premises at No 14 Allen Street, Bathurst, is owned by her and her three children in terms of exhibit C absolutely and

intact, as on this date hereof. The defendant-respondent is also ordered to refrain from trespassing on and from doing any damage to the premises or the building and appurtenance thereon.

With regard to the claim for mesne profits, I can only assess this on evidence of exhibit G1, the letter from the plaintiff-appellant's solicitor to the defendant-respondent dated 21 December 1967, and this I assess at £2 for ten months, ie from 1 February 1968 to 30 November 1968, a total of £20 which sum the defendant-respondent is ordered to pay the plaintiff-appellant.

The respondent will pay the appellant's taxed cost in the court below. Counsel will address on costs in this court.

DOVE-EDWIN P. I agree.

MARCUS-JONES JA. I also agree.

Appeal allowed.

SYBB

N'JIE v BARROW

COURT OF APPEAL, BANJUL

(Civil Appeal No 15/69)

15 December 1969

DOVE-EDWIN P, MARCUS-JONES AND BETTS JJA

Execution-Attachment-Judgment-creditors-Property-Holder of prior equitable mortgage having priority over judgment-creditor.

Held, *unanimously allowing the appeal*: if the case were one of two competing judgment-creditors only who had levied execution on the properties, then the first in time would prevail; but where one of the judgment-creditors is already in possession of an equitable mortgage by deposit of the title deeds and he has done nothing to affect his priority, for example, by returning the title deeds to the mortgagor, his right as a secured creditor to a first charge on the properties is not lost and he will be preferred to the other judgment creditor who is not so placed. Consequently, the appellant, as an equitable mortgagee, had the prior claim to the net proceeds of sale of the property attached and sold in execution.

APPEAL against the judgment of the Supreme Court (High Court), ordering that the net proceeds of the sale of two properties of a judgment-debtor be paid to the execution creditor, the respondent. The facts are sufficiently stated in the judgment of Marcus-Jones JA.

Gerald Davies for the appellant.

S F N'jie for the respondent.

MACUS-JONES JA. This is an appeal against the judgment of the learned Ag Chief Justice in which he ordered that the net proceeds of the sale of two properties of a judgment-debtor, Ajaratou Amie N'dure, be paid to the execution creditor, the respondent herein.

It transpired that the appellant herein, who was also a judgment-creditor of the same debtor, had taken out a *fifa* for the recovery of the judgment debt. In addition to the judgment, the appellant was also a secured creditor, he having obtained an equitable mortgage by the

deposit of two title deeds in respect of two real properties owned by the common debtor.

When the appeal came for hearing before us, it was observed that references had been made in the judgment of the learned Ag Chief Justice to Suit Nos 93/ 68 and 151/68 which were not before us. Learned counsel for both the appellant and the respondent therefore submitted that it would be in the interest of both parties if an agreed statement of facts is submitted to us in order that the appeal may be finally disposed of and an order made as to who was entitled to the net proceeds of sale. This they have done and the agreed statement of facts is as follows:

"(i) In or about the month of July 1960, a judgment-debtor deposited the deeds of the properties with the appellant, MMN, who as guarantor, discharged a debt due by the judgment-debtor to a third party.

(ii) Shortly thereafter, MMN commenced a civil action (No 93/68) against the judgment-debtor to recover the sum paid by him as guarantor to the third party.

(iii) On 17 July 1968, an order was made in Suit 93/68 for interim attachment of the properties.

(iv) Shortly thereafter, the plaintiff in the claim against the judgment debtor, collected the deeds of the properties from MMN and delivered them to the sheriff. In evidence in Suit No 93/68, the plaintiff said: "I normally asked for deeds on an interim attachment."

(v) 1 November 1968, the respondent (AB) commenced an action Suit No 151/68 against the judgment-debtor, seeking to recover a debt owed to him.

(vi) 19 November 1966, the judgment-debtor submitted to judgment in Suit No 151/68.

(vii) Shortly thereafter AB filed a writ of *fifa*.

(viii) 9 November 1968, AB applied in Suit No 151/68 to have interim attachment lifted. The Chief Justice, of his own motion, ordered the joinder of MMN as the second defendant in the suit.

(ix) 8 May 1969, MMN obtained judgment for his claim in Suit No 93/60. The proceedings in this action are annexed hereafter.

(x) 8 May 1969, an order was made in Suit No 151/1968 lifting the interim attachment.

(xi) Shortly thereafter MMN filed writs of *fifa*.

(xii) 12 May 1969, both writs of *fifa* were delivered to the sheriff.

*(*xiii) 21 August 1969, properties sold by the sheriff, realising £6,500 gross. This sum is less than the sum recoverable in either Suit No 93/1968 or Suit No 151/1968.

(xiv) 22 August 1969, gross proceeds paid to the registrar.

(xv) 23 August 1969, MMN applied to the registrar and was paid the net proceeds of sale.

(xvi) 27 August 1969, AB applied in Suit No 151/68 for an order that the net proceeds of sale be paid out to him. Judgment given by the Ag Chief Justice. (The motion was designated "Misc Civil Cause 119/1969.)

(xvii) 11 September 1969, application by MMN for "stay of execution". Order by Ag Chief Justice for net proceeds of sale to be repaid to the registrar pending determination of this appeal. This order was complied with.

(xviii) October 1969, notice of appeal from the judgment of the Ag Chief Justice dated 27 August 1969.

Question for determination

As between MMN and AB, who has the prior claim to the net proceeds of sale?

Order sought

"(a) payment out of the net proceeds of sale to such person as may be found entitled thereto, and (b) costs."

From the agreed facts, it is quite clear that the appellant was a secured creditor at the time the respondent instituted his action for the

recovery of his debt. At the date of his judgment, the properties in question were subject to the equitable mortgage and if they become liable to execution, the appellant would in all the circumstances of the case have a first charge on the properties.

Learned counsel for the respondent submitted that the appellant was negligent in not calling for the execution of the legal mortgage and consequently he ought to be postponed to the respondent. With respect, he was not bound to call for the execution of the legal mortgage. He was in no way negligent. He continued to have the title deeds in his possession and when he commenced his action for the recovery of the debt in Suit No 93/1968 in addition to the equitable mortgage, he took steps to place the properties under interim attachment. At the time, when the plaintiff demanded the title deeds to the property, they were surrendered, not by the debtor but by the appellant and it was no wonder therefore that when the application was made for the payment of the net proceedings of sale, the registrar paid it to the appellant as the person duly entitled to it.

If this were a case of two competing judgment creditors only who had levied execution on the properties, then the first in time would prevail, but where one of the judgment creditors is already in possession of an equitable mortgage by deposit of the title deeds and he has done nothing to affect his priority, for example, by returning the title deeds to the mortgagor, his right as a secured creditor to a first charge on the properties is not lost and he will be preferred to the other judgment-creditor who is not so placed.

I therefore answer the question posed that as between the appellant and the respondent, the appellant has the prior claim to the net proceeds of sale.

I would therefore allow the appeal and order that the net proceeds of sale now in the hands of the registrar be paid to the appellant. I would make no order as costs.

DOVE-EDWIN P. I agree.

BETTS JA. I also agree.

Appeal allowed.

SYB B

DANSO v WALLY & Others

COURT OF APPEAL, BANJUL

(Civil Appeal No 2/69)

26 May 1969

DOVE-EDWIN P, MARCUS-JONES AND BETTS JJA

Courts-District Tribunals-Liability of members and officers-Abuse of power-Members and officers of tribunal liable in damages for assault for abuse of power-No protection under Cap 52, s28-District Tribunals Act, Cap 52, ss 5 and 28.

It is provided by the District Tribunals Act, Cap 52, s 28 that:

"No person shall be liable to be sued in any court for any act done or ordered to be done by him in the exercise of jurisdiction conferred by this Act, whether or not within the limits of his jurisdiction:

Provided that at the time of such act or order he believed in good faith that he had jurisdiction to such act or to make such order; and no officer of any District Tribunal or other person bound to execute lawful warrants or orders issued or made in the exercise of the jurisdiction conferred by this Act shall be liable to be sued in any court for the execution of any warrant or order which he would be bound to execute, if the person issuing the same had been acting in the exercise of lawful authority."

The appellant, head of a large family in the Wuli District of the Upper River Division of The Gambia, was the plaintiff in a civil suit before the district tribunal set up under the District Tribunals Act, Cap 52. Whilst that action was pending, the first respondent, the head chief of the district, whilst sitting and presiding over a session of the district tribunal, ordered the appellant to appear before the district tribunal. In pursuance of the order, the first respondent further ordered the badgemen and housemen, equal to court messengers or policemen, to forcibly bring the appellant before the tribunal. He was thrown on the ground before the tribunal with someone's foot on his neck as if he were some animal to be slaughtered. The appellant, alleging that he had been unlawfully assaulted and disgraced by the first respondent and his badgemen, sued in the Supreme Court (High Court) for damages for assault. The trial judge dismissed the claim on the ground

that the respondent had behaved properly and that he and the badgemen were protected and could not be sued by virtue of section 28 of the District Tribunals Act, Cap 52. In the instant appeal from the dismissal of the claim,

Held, *unanimously allowing the appeal and awarding the appellant damages for assault*: apart from the proviso, the important words in section 28 of the District Tribunals Act, Cap 52 were "for any act done or ordered to be done…in the exercise of jurisdiction conferred by the Act." On the facts of the case, the behaviour of the first respondent was plainly one of abuse of power under section 5 of the Act. If the appellant was contemptuous, he, the first respondent, had the power to deal with him as for contempt. If he felt that the appellant had refused to obey his lawful order, he could well have dealt with him as for contempt. To order his badgemen to go and fetch him willy-nilly and for them to disgrace him by bringing him and laying him down at his feet, was an abuse of power under section 5 of the Act; and section 28 thereof would afford them no protection. The trial court had erred in holding otherwise.

APPEAL from the judgment of the Supreme Court (High Court), dismissing the appellant's claim for damages for assault. The facts are sufficiently stated in the judgment of Dove-Edwin P.

ED N'jie for the appellant.

O'Brien Coker, Crown Counsel, the for respondents.

DOVE-EDWIN P. The plaintiff in this case sued the defendants for damages and trespass. The plaintiff is a farmer and head of a large family in the Wuli District of the Upper River Division of The Gambia. The first defendant, Madi Wally, is the Seyfo of the Wuli District aforesaid; in other words the Head Chief of Wuli District.

The case of the plaintiff was that his daughter's goods, namely groundnuts seed, cooking utensils, etc had been seized by one Ousubi Camara whom she refused to marry after her husband had died. The plaintiff caused a summons to be issued against Ousubi Camara for the return of the goods.

In June 1968, the plaintiff appeared before the first defendant. The learned Chief Justice found that the first defendant was sitting and presiding at the session of the district tribunal set up under the District Tribunals Act, Cap 25 of the Laws of The Gambia, 1966.

It is the complaint of the plaintiff that he was unlawfully assaulted and disgraced by the first defendant who ordered his badgemen (equal to court messengers or policemen) to assault him by bringing him forcefully before him. He was not only assaulted but thrown to the ground and placed in a position as if he were some animal to be slaughtered. The judgment found that the plaintiff found himself on the ground with someone's foot on his neck.

The question now for us to decide is: was the learned Chief Justice correct in dismissing the plaintiff's claim? Was he correct in saying that, not only first defendant, the chief and his badgemen, but also others, ie his housemen, who took part in the assault or scuffle as the learned Chief Justice's found, were covered by section 28 of Cap 52 of the Laws of the Gambia, 1966?

The judgment found as a fact that the respondents were ignorant; the word ignorant, *mang kulung*, was the expression used and he went on to give its real meaning. He also found that the chief, the first defendant, asked his badgemen to bring plaintiff along and agrees that the plaintiff ended on the ground with someone's foot on his neck; that the chief's housemen and the plaintiff's people all joined in this fracas. He, however, found that the chief was sitting in judgment and as such behaved properly and that he and his badgemen and housemen were protected under section 28 of the District Tribunals Act, Cap 52. The said section 28 of Cap 52 reads as follows:

"No person shall be liable to be sued in any court for any act done or ordered to be done by him in the exercise of jurisdiction conferred by this Act, whether or not within the limits of his jurisdiction:

Provided that at the time of such act or order he believed in good faith that he had jurisdiction to do such act or to make such order; and no officer of any District Tribunal or other person bound to execute lawful warrants or orders issued or made in the exercise of the jurisdiction conferred by this Act shall be liable to be sued in any court for the execution of any warrant or order which he would be bound to execute, if the person issuing the same had been acting in the exercise of lawful authority."

The important words in this section, in my opinion, are "*for any act done or ordered to be done by him in the exercise of jurisdiction conferred by this Act.*" (The emphasis is mine.) There is also the proviso. Sections 3-11 deal with the jurisdiction of the tribunal. Section 5 of the same statute (Cap 52) deals with removal of members

of a district tribunal for "abuse of power or to be incapable of exercising same justly."

I think that the behaviour of the first defendant was plainly one of abuse of power under section 5 of the Act. If the plaintiff was contemptuous, he had power to deal with him as for contempt. If he felt the plaintiff had refused to obey his lawful order, he could well have dealt with him as for contempt. To order his badgemen to go and fetch him willy-nilly and for them to disgrace him by bringing him and laying him down at his feet was an abuse of power and section 28 cannot protect him. His action could have brought a most serious situation.

I think the plaintiff ought to have succeeded in his case and I would set aside the judgment and award the plaintiff damages for assault. The assault, in my opinion, was caused by the first defendant, the chief, who ordered his men to bring the plaintiff to him. I would assess the damages against the first defendant,

Chief Madi Wally, at £100 and against each of the other seven defendants at £5.

The appeal is allowed; the judgment of the Chief Justice is set aside and judgment for the plaintiff entered instead. Costs against the defendants jointly and severally assessed at £26.50.

MARCUS-JONES JA. I agree

BETTS JA. I also agree

Appeal allowed.

GAYE v ATTORNEY-GENERAL & Others

COURT OF APPEAL, BANJUL

(Civil Appeal No 7/69)

15 December 1969

DOVE-EDWIN P, MARCUS-JONES AND BETTS JJA

Execution-Land-Sale-Statutory consent-Non compliance-Sale of landed property subject to section 26 of Cap102-No evidence of approval of purchase by the minister-Sale to be set aside-Cap 102, s 26.

Held, *unanimously allowing the appeal*: since there was no evidence that the minister concerned was aware of the sale by the bailiff in execution of the judgment-debt or that he gave his consent to the sale as required by section 26 of Cap 102, it must be set aside.

APPEAL against the judgment of the Supreme Court (High Court), refusing to rescind the sale of the disputed property in execution of a judgment debt. The facts are sufficiently stated in the judgment of Dove-Edwin P.

S A N'jie for the appellant.

S H A George for Attorney General

S J B Mahoney for second respondent.

Alhaji A M Drameh for fourth respondent.

DOVE-EDWIN P. The appeal in this case concerns property at Serrekunda Kombo St Mary Division. The plaintiff alleges she is the owner of the property and relies on her lease marked exhibit B in the case. She now alleges that her property was sold by the bailiff under an execution taken out by her husband's creditor, the third defendant, for judgment debt owing by him. The property was sold for £300. There was no interpleader summons taken out by the plaintiff; instead she issued a writ for the rescission of the sale.

The learned Chief Justice who heard this case, went thoroughly into the transaction between the plaintiff, her husband, the fourth

defendant, and the creditor, the second defendant. The third defendant, Karafa Sanneh, was the purchaser of the property at the sale. The learned judge felt that the whole transaction between husband and wife was tainted and dismissed the claim.

Against the dismissal, the plaintiff has now appealed to this court on six grounds. A point of law going into the whole sale of the premises which was not taken before the Chief Justice was taken in this court and it went to the validity of the sale itself. Section 26 of Cap 102 of the Laws of the Gambia prohibits the court or sheriff to sell land such as the one claimed by the plaintiff. The relevant law reads as follows:

"No lease under this Act or under any Ordinance repealed by this Act which contains a covenant, whether express or implied, by the lessee not to assign without the consent of the minister shall be sold by or under the orders of any court in execution of a decree or otherwise however, except to a purchaser approved by the Minister."

This section was Cap 126 before but is now Cap 102. The wording is the same. There was no evidence that the Minister concerned was aware of the sale or that he gave his consent. The learned Solicitor General could not resist this submission.

In view of this, it is my opinion that it would be idle to go into the merits of the appeal. Had the point been taken before the learned Chief Justice he would have decided on it. In the circumstance, the appeal must be allowed. The judgment of the learned Chief Justice is set aside; the sale is also set aside and judgment given for the plaintiff.

MARCUS-JONES JA. I agree.

BETTS JA. I also agree.

Sale set aside.

SYBB

CEESAY v COMMISSIONER OF POLICE

COURT OF APPEAL, BANJUL

(Criminal Appeal No 14/69)

15 December 1969

DOVE-EDWIN P, MARCUS-JONES AND BETTS JJA

Criminal law and procedure-Offence-Mens rea-Burden of proof-Statutory offence with guilty knowledge placed on accused-Extent of burden of proof on prosecution-Duty of court in the circumstances-Cooperative Societies Act, Cap 33, s 58(2) (b)-Cooperative Societies Act, 1968 (No 10 of 1968).

Criminal Law and procedure-Submission of no case-Ruling on-Purposes and effect of rule on submission of no case.

The appellant was tried, convicted and sentenced by the trial magistrate on two counts of purchasing groundnuts from persons whom he knew to be members of a cooperative society and who were under contract to sell their nuts to the society. By section 58(2)(*b*) of the Cooperative Societies Act, Cap 33 as amended by the Cooperative Societies Act, 1968, the onus of proving that a person charged with an offence under this section did not know of the existence of a contract or that the vendor from whom such person purchased produce or products was a member of a cooperative society shall at all times be upon the person charged. It was not denied by the appellant that the men from whom he was alleged to have bought groundnuts were members of a cooperative society. He resisted a warning not to buy groundnuts which were designated nuts belonging to the cooperative society. His appeal from the decision of the magistrate was dismissed by the Supreme Court (High Court). On a further appeal from the decision of the Supreme Court, the provision of the Act shifting the burden of negativing guilty knowledge on the accused was subjected to severe criticism by counsel for the appellant. He contended that under section 58(2)(*b*) of the Act, the burden of establishing a contract between the society and its members remained throughout on the prosecution. It was also argued that at the close of the prosecution case, no prima facie case had been made out against the appellant and that magistrate had erred in refusing to dismiss the prosecution case.

Held, *unanimously dismissing the appeal*: (1) under section 58(2)(*b*) of the Cooperative Societies Act, Cap 33 as amended by the 1968 Cooperative Societies Act, the burden of proving guilty knowledge of membership of a cooperative society and the existence of a contract between the cooperative society had been shifted and placed on the appellant. The court must, therefore, give expression to the law with a view to suppressing the mischief and advancing the remedy. And the appellant had failed, on a balance of probabilities, to discharge the burden cast on him and the magistrate was right in convicting him.

Per curiam. Mens rea is still an essential ingredient of the offence but what the amendment does is that when once the actus reus is provided, the prosecution has only to make out a prima facie case which will impute knowledge on the part of the accused that the groundnuts were cooperative society nuts. The general principle of law places the burden of persuasion on the prosecution but when in the case of guilty knowledge, Parliament has placed the "proof" of the stated fact upon the accused, it did this because the accused alone knew what lawful excuse, if any, he possessed. The prosecution is not expected to negative in advance every conceivable excuse.

(2) The effect of a successful submission of no case was to protect the accused from going into the witness box where he might be compelled to make damaging admissions; it might also prevent the prosecution from making good deficiencies in its own evidence by cross-examining the other witnesses for the defence. And a submission of no case could only be justified if the case for the prosecution had obviously collapsed when it would be a waste of time of the court to hear it further. A submission of no case was also a powerful reinforcement of the right of the accused to silence conferred upon him by law. In the instant case, there was ample evidence of prima facie case made out against the appellant at the close of the prosecution's case and the trial magistrate had rightly called upon the appellant for his defence.

APPEAL from the judgment of the Supreme Court (High Court), dismissing the appeal from the decision of the trial magistrate, convicting and sentencing the appellant on two counts of purchasing groundnuts contrary to section 58(2)(*b*) of the Cooperative Societies Act, Cap 33 as amended. The facts are sufficiently stated in the judgment of the court delivered by Marcus-Jones JA.

Gerald Davis (with him *Solomon N'jie*) for the appellant.

Sam George, Solicitor General (with him *O Opene)* for the respondent.

MARCUS-JONES JA *delivered the judgment of the court.* This is an appeal against the decision of the learned Chief Justice, upholding the conviction and sentence of the appellant by the learned trial magistrate sitting at Mansakonko.

The appellant was convicted and sentenced on two counts of purchasing groundnuts from persons whom he knew to be Members of the Tandaba Cooperative Society and who were under contract to sell their nuts to the society.

The appellant, ie the accused, was a buying agent for Messrs UAC Ltd. He purchased groundnuts from Sarjo Darbo and Bakary Darbo members of a cooperative society with full knowledge that they were members. It is not denied by the appellant that these men were members of a cooperative society. He resisted a warning not to buy groundnuts which were designated nuts belonging to the cooperative society. He countered by saying that he too had advanced money and would therefore buy the nuts.

Consequent upon his defiance and purchase of those nuts, he was charged under section 58*(b)* of the Cooperative Societies Act, Cap 33 of the Laws of The Gambia, on two counts of purchasing: in the one case eleven bags of groundnuts from Sarjo Darbo, a member of Tandaba Cooperative Society; and in the other of purchasing 23 bags of groundnuts from Bakari Darbo, another member of the same cooperative society. He was duly convicted and sentenced to a fine in each case.

He appealed to the Supreme Court presided over by the learned Chief Justice against both conviction and sentence. His appeal was dismissed; and he has now appealed to this court. Section 58 of Cap 33 under which he was charged reads as follows:

"Any person who

(a) knowing of the existence of a contract between a Cooperative Society and any member thereof induces or solicits that member to act in breach of that contract; or

(b) purchase, other than for his own use, from a person known to him to be, or whom he has reason to believe is a member of a Cooperative

Society registered under this Act, any agricultural produce or product of a handicraft man which the member is contractually bound to sell to the society;

is guilty of an offence against this Act and on summary conviction liable to a fine not exceeding one hundred pounds or to imprisonment for a term not exceeding one year or to both such fine and imprisonment."

Along with the Act were also published the rules made thereunder.

In 1968 an Act to amend the Cooperative Societies Act, (No 10 of 1968), was passed and it came into operation on 9 September 1968. This Act amended various sections of the Principal Act among which was section 58. It reads as follows:

"Section 58 of the Principal Act is hereby amended:

(a) by re-numbering the section as sub-section (1); and

(b) by inserting immediately thereafter the following now sub-section:

(2) The onus of proving that a person charged with an offence under this section did not know of the existence of a contract contemplated in paragraph (a) of the preceding sub-section or that the vendor from whom such person purchased produce or products as contemplated in paragraph (b) of the preceding sub-section was a member of a Cooperative Society shall at all times be upon the person charged."

This amendment shifted the burden of proving guilty knowledge which had hitherto been cast upon the prosecution, onto the defendant. This amendment has been the subject of strong criticism by counsel for the appellant. Indeed, strong objection has been expressed from time to time to legislation of this type. It has been described as a "pernicious method of proof to introduce into the criminal law and also that it is opposed to every principle of what is right and just." But be that as it may, the legislature has so decreed and courts of law must give expression to it with a view to suppressing the mischief and advancing the remedy, and with respect, this court cannot usurp the functions of Parliament.

The Cooperative Societies Act, Cap 33 was passed in 1951 and came into operation on 21 July 1951. It is an Act to make provision for the establishment and registration of cooperative societies. To this end a

Registrar of Cooperative Societies for The Gambia was created whose office is a public office. And subject to the provisions of the Act, a society which has as its object the promotion of the economic interests of its members in accordance with cooperative principles or a society established with the object of facilitating the operations of such a society may be registered under the Act with or without limited liability. It also enacts that the word "cooperative" or its vernacular equivalent shall form part of the name of every society registered under the Act and that the word "limited" or its vernacular equivalent shall be the last word in the name of every society with limited liability registered under the Act. The application for registration of any society under the Act shall be accompanied by copies of the proposed by-laws of the society. On being satisfied that the requirements of the Act have been fulfilled, the registrar may register in the register and shall forward to the society, free of charge: (a) a certificate of registration; (b) a copy of the by-laws of the society as approved by him; and (c) a copy of the Act and of rules in English. Any member of the public shall be permitted for any lawful purpose to inspect free of charge: (a) the register of registered societies; and (b) the registered by-laws of a society and on payment of two shillings and six pence for each occasion of inspection; he can also inspect the registration certificate of a society, or an order cancelling the registration of a society and the annual statement of a society. Certified copies of any public documents which any person has under rule 76 of the Cooperative Societies Rules, a right to inspect shall be provided at the following rates: (a) for any document, a sum calculated at the rate of one shilling for each seventy-two words of the copy or extract.

Section 13 of Cap 33 also enacts as follows:

"13 (1) A registered society which has one of its objects the disposal any article produced or obtained by the work or industry of its members, whether the produce of agricultural animal husbandry, forestry, fisheries, handcrafts or otherwise contract with its members:

(a) that every member who produces any such article shall dispose of the whole or any specified amount, proportion of description thereof to or through the society; and

(b) that any member who is proved or adjudged, in such manner as may be prescribed by the rules, to be guilty of a breach of the by-laws or contract shall pay to the society as liquidated damages a sum

ascertained or assessed in such manner as may be prescribed by the rules.

(2) No contract entered into under the provisions of this rule shall be contested in any court on the ground only that it constitutes a contract in restraint of trade."

A cooperative society is empowered to make loans to its members and the terms of repayment. Rules 42-46 govern the procedure for granting loans and for the purposes of this case, I shall set out in full rule 46:

"When a loan sanctioned by the committee, a notice shall be sent to the borrower to that effect, and, before the amount is advanced, the borrower and his sureties shall execute an instrument in writing setting out the terms of repayment of the loan and containing such other terms and conditions as the committee may consider necessary."

I have done this because learned counsel for appellant has argued that the terms of the loan and conditions have not been proved by the prosecution. This is not necessary because the evidence is that the loan had been fully repaid and it was not a term of the loan that the entire product should be sold to the society. In so far as the contract of the members with their society is concerned affecting the sale of produce to the society, this ought to be found from the by-laws, and it is a term which every member of the society knows. No doubt the society can vary its by-laws. The evidence is that the two Darboes were required to sell the whole of their crops to the society. The rules would not govern the substantive provision of the Act for the rules are made under the act and cannot contravene the provisions of the Act.

Criticism has also been levelled on that portion of the judgment of the learned trial judge which reads:

"The elements of the offence of this case are that the appellant knew or had reason to believe that the two persons from whom he bought groundnuts were members of a society; that he in fact bought the groundnuts themselves were in fact nuts which the members were bound to sell to their society. The appellant admits that he knew the vendors to be cooperative members and admits buying nuts. The question is therefore whether they were nuts which the two vendors were bound to sell to their society (whether the appellant knew that they were or were not such nuts is irrelevant in my view)."

The above statement contained in brackets would lead to the conclusion that mens rea was an essential ingredient of the offence. If this was the true meaning to be gleaned, then I would agree with learned counsel that this statement is wrong. Mens rea is still an essential ingredient of the offence but what the amendment does is that when once the actus reus is provided, the prosecution has only to make out a prima facie case which will impute knowledge on the part of the accused that the groundnuts were cooperative society nuts. The general principle of law places the burden of persuasion on the prosecution but when in the case of guilty knowledge, Parliament has placed the "proof" of the stated fact upon the accused, it did this because the accused alone knew what lawful excuse, if any, he possessed. The prosecution is not expected to negative in advance every conceivable excuse.

Mr Davies contends that the amendment to section 58(2)(*b*) of the Principal Act places the onus of proof of the existence of a contract between a member of the society and any purchaser on the prosecution. In my view, this does seem untenable. One only had to read both sections 13 and 58 of the Principal Act and the amendments thereto to reach this conclusion. A contract between a cooperative society and any of its members could arise without a loan of money having been made to a member. Membership of a society creates obligation between the member and his society may require the member selling his entire crop to the society. Where this is so, any breach, for example, selling nuts, which the member was bound to sell to the society, to someone also for purposes other than the buyer's own personal use, could involve the buyer in criminal process, unless he is able to prove lack of knowledge both of the vendor's membership and his contract to sell his products to the society. If every member could dispose of his products at will, then the whole purpose of the Act becomes meaningless. The amendment was clearly designed and enacted to prevent the sale of groundnuts or other products by cooperative members in disregard of their obligation to their society and to deter would-be purchaser's personal use.

Mr Davies has urged that the only burden cast upon a purchaser by the amendment is that of proving absence of knowledge that the purchaser was buying from a member of cooperative society, after which the burden of establishing the contract between the society and its member remained throughout on the prosecution. This submission cannot be sustained. The burden of proving both knowledge of membership and the existence of the contract has been shifted to the purchaser. Academically of course, we can see the argument but we

must look at it from a practical point of view. The whole amendment must be read and when this is done it would read as follows: "that the onus of proving that the person charged did not know that the vendor was member of a cooperative society contractually bound to sell his products to the society, shall at all times be on the person charged." If the amendment meant proof of lack of knowledge of membership only, then this would lead to absurdity and make nonsense of the amendment.

Mr Davies has also argued that the learned Chief Justice erred in law in that he failed to find: (a) that at the close of the case of the prosecution no prima facie case had been made out against the accused; (b) that the learned magistrate ought to have so held and dismissed the charges upon the submission then made to him; and (c) that in any event, there was no sufficient evidence upon which the learned magistrate, directing himself in law, could have convicted.

As it is said, the significant feature of the submission of "no case" is that it enables the defendant to defeat a prosecution when the Crown is relying in important measure on admissions that may be extracted from the defence. Not only does a successful application protect the defendant from going into the witness box where he might be compelled to make damaging admissions, but it also prevents the prosecution from making good deficiencies on its own evidence by cross-examining the other witnesses for the defence. As Abbott CJ puts it:

"No person is to be required to explain or contradict until enough has been prove to warrant a reasonable and just conclusion against him in the absence of explanation or contradiction."

The trial judge may withdraw the case from the jury at any time during trial, even after the defendant's evidence has been heard; but before he could do so he must consider whether the defendant has not himself through his admissions supplied sufficient evidence for a conviction to be upheld. The trial judge in ruling on the submission must put himself in the position of an appellate court hearing an appeal against conviction. The submission can only be justified if the case for the prosecution has obviously collapsed when it would be a waste of time of the court to hear it further. For a criminal court has the right to decide that the prosecution is so obviously mistaken that it should not be proceeded with if only to save time and further expense.

The second aspect of this rule is that it is a powerful reinforcement of the right of the defendant to silence conferred upon him by law. The evidence may involve him in great suspicion and it may be likely that if only he could be got into the witness box the case can be established against him.

Having said so, it becomes our duty to consider whether at the close of the prosecution's case there was made out a prima facie case against the appellant. We would, however, like to point out at this stage that these points were not taken and argued before the learned Chief Justice. In fact the only ground of appeal before him was that the judgment could not be supported having regard to the evidence adduced.

At the close of the case for the prosecution the following facts were proved:

(i) that the two Darboes were members of the Tandaba Cooperative Society;

(ii) that the society was a duly registered society. This was proved by Alhaji Sowe, Assistant Registrar of the Cooperative Society;

(iii) that the two Darboes were bound to sell their entire produce of groundnuts to the society;

(iv) that this fact had been brought home to the appellant by Kawsu Yarbo, the President of the Tandaba Cooperative Society;

(v) that the accused, despite the warning given, insisted on buying the nuts, justifying his conduct on the ground that Jango Darbo, father of the two members, was indebted to him and that he was entitled to buy the nuts;

(vi) that the appellant knew that the nuts were owned by the two members and that they did not belong to their father;

(vii) that he purchased eleven bags of groundnuts from Sajo Darbo and 23 bags from Bakary Darbo; and

(viii) that after liquidating the alleged debt, the appellant paid the balance of the purchase price to Sarjo Darbo who pocketed it.

Although the two Darboes gave evidence for the prosecution and said they had been permitted to sell the balance of their produce, this fact was denied by the President and Secretary of the Tandaba Cooperative Society. In the circumstances in which the Darboes were placed, it is not surprising that they should proffer this excuse. It is not such material conflict that should destroy the evidence of the prosecution, and the learned trial magistrate was right in rejecting their explanation. There was ample evidence of prima facie case against the appellant which warranted the learned trial magistrate calling upon him for his defence.

The appellant did not rest his case on the submission but gave evidence and called witnesses. His story was different from that told to Kawsu Yarbo. Whereas he had told Yarbo that he had given a loan to the two Darboes and that if they wanted to sell their nuts to him he would buy them, in his evidence in-chief, he said Janko Darboe, father of the two vendors, had sent his Jankos nuts by his sons to settle an outstanding debt. He went on to say he did not know the nuts he was buying were cooperative nuts otherwise he would not have bought them.

Janko Darbo also gave evidence claiming that the nuts were his nuts which he had sent his sons to sell to the appellant. In cross-examination, his untruth was exposed. The magistrate did not believe the story of the defence. No one reading the evidence could have believed the appellant and his witnesses. He failed, on a balance of probabilities, to discharge the burden cast upon him. If anything his evidence helped confirm the case of the prosecution and the learned Chief Justice was right in upholding the conviction and sentence.

For these reasons, we would dismiss the appeal.

Appeal against conviction and sentence dismissed.

SYBB

MILKY v MAKWAR

COURT OF APPEAL, BANJUL

(Civil Appeal No 19/69)

23 January 1970.

DOVE-EDWIN P, MARCUS-JONES AND BETTS JJA

Landlord and tenant-Yearly tenancy-Expiration-Presumption of new tenancy-Tenant ignoring notice to quit and paying rent at old rate-Whether payment constituting evidence of new yearly tenancy.

On 31 December 1966, a notice to quit was sent by the appellant (the landlord) to the respondent (the tenant) giving him one year's notice to commence on 1 January 1967 and to expire on 31 December 1967. The respondent did not quit the shop which was the subject-matter of the tenancy but continued to pay rent of £450, disregarding the demand of increased rent to £1200 per annum. Rents for 1968 and 1969 were paid into the appellants' bank account and were not returned by the appellants. In August 1968 the appellant claimed possession of the shop. The Supreme Court (High Court) refused to eject the respondent, the trial judge concluding that by the payment of rent, the yearly tenancy was revived. In the instant appeal by the appellant,

Held, *unanimously allowing the appeal*: to pay rents after the end of the yearly tenancy, was not of itself evidence that a new tenancy has been agreed upon by the parties. On the contrary, the facts in the case showed clearly that there was no intention by the landlord to create a further yearly tenancy with the respondent and the judge was wrong in holding that by receiving rents the presumption that no new tenancy was created was rebutted. Dictum of Verity CJ in *Hatah* v *K Chellarams & Sons*, WACA Selected Judgments 1955/60 applied.

Cases referred to:

Hatah v *K Chellarams & Sons*, WACA Selected Judgments 1955/60.

APPEAL from the judgment of the Supreme Court (High Court), refusing the landlord's claim for possession of the disputed premises after the expiration of the yearly tenancy. The facts are sufficiently stated in the judgment of Dove-Edwin P.

DOVE-EDWIN P. The appellant in this case is the landlord of the respondent. The respondent occupied a shop at No 1 Russell Street, Bathurst, for which he was paying a yearly rent of £450. There is no dispute over the tenancy. It was one from year to year, rent to be paid yearly in advance.

There does not seem to be any dispute about the tenancy till 1965 when the appellant, who was plaintiff, wrote a letter to the defendant (respondent) marked exhibit A. This letter dated 23 August 1966 refers to a previous latter dated 27 April 1965, giving respondent notice to quit the shop by 30 April 1966. The letter of 27 April 1965 was ignored and the respondent continued in occupation and refused to pay the increased rent of £1200 a year although in the letter exhibit A, a demand was made for £400 rent based on £1200 a year for the months May to August 1966 inclusive. The notice referred to exhibit A is marked exhibit B in the case.

On 31 December 1966, a notice to quit marked exhibit C was sent to the respondent giving him one year's notice to commence on 1 January 1967 and to expire on 31 December 1967. The respondent did not leave the shop but continued to pay the rent of £450, disregarding the demand of increased rent to £1200 per annum. No other notice to quit was served and it appears from the evidence and the findings of the judge that, rents of 1968 were paid into the appellant's account in the Bank of West Africa, Bathurst.

On 8 August 1968, the plaintiff issued out a writ of summons, claiming possession of the shop. The case was concluded and judgment delivered by the Ag Chief Justice on 2 September 1969, refusing to eject the respondent.

Against this decision, the appellant has appealed to this court on two grounds:

"(i) that the learned Ag Chief Justice was wrong in law to hold that the presumption that it was never intended to create a new tenancy was rebutted because the plaintiff continued to receive rent in 1968 and 1969; and

(ii) that the learned Ag Chief Justice was wrong to hold that the notice dated 31 December 1966 (exhibit C) may be considered bad."

The letter exhibit D demanded rents for 1967, the year the respondent's tenancy was to be at an end.

The learned Ag Chief Justice seemed to be impressed by the fact that 1968 and 1969 rents were both paid into the appellant's account and were not returned by the appellant and says further that appellant did not do anything till 8 August 1968 and he continued to receive rents in 1969. He appears to conclude from this that the yearly tenancy was therefore revived or that this acted as a waiver.

In my view, to pay rents after the yearly tenancy is ended, is not of itself evidence that a new tenancy is agreed upon by the parties. I think the point was clearly stated by Verity CJ (Sir John Verity), one time Chief Justice of Nigeria, in the case *Hatah* v *K Chellarams & Sons*, Waca Selected Judgments 1955/60 & Sons when he said:

"It is not be assumed that from a mere holding over and acceptance of rent a tenancy from year to year is to be implied. It is in each case a question of fact as to whether in the particular circumstances it is shown to have been the intention of the parties to create such a tenancy or whether the facts go to show that there was no such intention. It is of course upon the party setting up the tenancy to prove its creation; if it is to be inferred from the conduct of the landlord that there was no intention to create such a tenancy then no such tenancy is to be implied."

The facts in this case show clearly that there was no intention by the landlord to create a further yearly tenancy with the respondent. In fact since 23 August 1966, the respondent was asked to quit the shop for another tenant. He did not do so. No attempt was made by the respondent to set up a new tenancy. He seemed to rely on the fact that by paying £450 into the appellant's account at the bank and the fact that this was not returned, a new tenancy was created. The judge appears to have accepted this.

I think the learned Ag Chief Justice was wrong in holding that by receiving rents the presumption that no new tenancy was created is rebutted.

Again I think the notice exhibit C which the respondent said he received on the 5 of April 1967, dated 31 December 1966 to take effect as from 1 of January 1967 and the expiring on 31 December 1967, was good notice and effective and the respondent should have left the premises on 31 December 1967. He knew the rent had been increased since 1965 and he continued to stay on at his own risk.

It is unfortunate that the matter has been so long delayed. I would allow the appeal and order immediate ejectment of the respondent from the premises. Notice suggested by the Ag Chief Justice is therefore unnecessary and is set aside.

The respondent is given to 31 March 1970 to quit the shop. The appeal is allowed with costs to the appellant such costs to be taxed.

MARCUS-JONES JA. I agree.

BETTS JA. I also agree.

Appeal allowed.

SYBB

CONTEH v ATTORNEY-GENERAL

COURT OF APPEAL, BANJUL

(Civil Appeal No 9/69)

3 June 1970

DOVE-EDWIN P, MARCUS-JONES AND TAMBIAH JJA

State proceedings-Certiorari-Application-When available-Report of medical board placed before Public Services Commission (PSC)-Decision of PSC to retire nurse from government service after considering report-Whether PSC bound to accept report-Whether order of certiorari lies to quash report of medical board and decision of PSC.

Held, *unanimously dismissing the appeal*: the writ of certiorari is an extraordinary remedy available to quash the proceedings of a court or tribunal which acts without jurisdiction or in excess of it; or where such a tribunal makes a decision which affects the rights of a citizen without observing the principles of natural justice. Order of certiorari is also available against statutory tribunals or persons authorised by law to make decisions detrimental to a person. In the instant case, the report sent by the medical board was merely an opinion of the members who examined the appellant; and the Public Services Commission which is a competent authority to act on the report under section 7 of the Pensions Act, Cap 137 is not bound to accept the report. Consequently certiorari does not lie to quash the opinion expressed by the members of the medical board which had no power to retire the appellant. And the decision of the Public Services Commission to retire the appellant from government service cannot also be quashed order of certiorari. *Kanda* v *Government of Malaya* [1962] AC 322, PC and *Ridge* v *Baldwin* [1964] AC 40, HL applied.

Cases referred to:

Kanda v *Government of Malaya* [1962] AC 322, PC.

Ridge v *Baldwin* [1964] AC 40; [1963] 2 All ER 66, HL.

Terrell v *Secretary of State for the Colonies* [1953] All ER 390.

APPEAL from the decision of the High Court (Forster J), refusing an application for leave to apply for an order of certiorari under Order 45, r 3 of the Rules of the Supreme Court (High Court). The facts are sufficiently stated in the judgment Tambiah JA.

A M Drameh for the appellant.

S H A George, Director of Public Prosecutions, for Attorney-General

TAMBIAH JA. This is an appeal from the order of Forster J, refusing an application for leave to apply for an order of certiorari in pursuance of Order 54, r 3 of the Rules of the Supreme Court of the Gambia.

The order was sought for the purpose of removing the proceedings before a medical board, appointed by the Director of Medical Services, into the court for the purpose of having it quashed. The grounds which were set out in the petition are as follows:

(a) that the findings of the board cannot be supported having regard to the evidence;

(b) the applicant was not notified that a medical board was to be held on her;

(c) that the applicant was not invited to the sittings of the board neither was she examined by the members of the board;

(d) that the findings of the board were not communicated to her;

(e) that as a result of the findings of the board, she was prematurely retired;

(f) that the applicant was only 40 years of age and entitled to a further fifteen years' service; and

(g) that the conduct of the medical board was contrary to law and that the board exceeded its jurisdiction in making a finding on the applicant's health without first examining her.

The appellant was a nurse employed by the Government of The Gambia. On a report sent by the head of the department, the Director of Medical Services appointed a medical board to examine her and report on her fitness to continue in public service. The medical board was appointed in November 1967, but the appellant objected to some

of the members of the board on the ground that they were biased against her. By letter, dated 6 November 1967, exhibit C, she was informed by the Director of Medical Services that she would have to appear before another board on 7 December 1967. She failed to appear before this board. She was later requested by the Director of Medical Services to attend a meeting of the board which was to be held on 11 December 1967. She appeared before this board and from her own petition, a copy of which was produced before this court, it is clear that there were several sittings of the board.

In this petition which was sent by her to the Director of Medical Services, she has not made any of the allegations which she has made now in her application for the writ of certiorari. She only complained that she was not physically examined. It transpired during the course of the hearing of this appeal, that the Government of The Gambia gave her all opportunities to cure her of her drug habit. In 1963 she was sent at the expense of the government to the United Kingdom for treating a report sent by the specialist who attended on her when she was in hospital in the United Kingdom. In this report, it is stated that she is not addicted to the narcotic drug, pethidine; and she was cured of her asthma. After she came back, it became clear from the documents 108 and 84A that her physical condition was unsatisfactory on several occasions. She was found unconscious in the hospital premises and a hypodermic syringe was found in the bathroom close to the place where she was lying.

The board which sat on 11 December 1967, perused her personal file and also examined the Register of Dangerous Drugs. It was found that there were several fictitious entries in the handwriting of the appellant showing that pethidine had been administered to patients who were not in the hospital, or to patients to whom it was never prescribed. It is true that the board did not examine her physically; but, as the learned Director of Public Prosecutions rightly pointed out, a physical examination would not have revealed anything. The board appears to have carefully perused the documents which were placed before them and observed her behaviour pattern in arriving at their conclusions. They excluded acute alcoholic intoxication and brain injury and came to the conclusion that the fits of coma she had were due to a drug, pethidine. It may well be that when she was in the hospital in the United Kingdom, she had no access to the drug and therefore the doctor, who was in charge of her, came to the conclusion that she was not addicted to this drug. The board in their report said:

"We consider that Sister Conteh's pattern of behaviour from time to time has been such that would endanger the lives of patients in her charge whether or not these "abnormal" patterns of behaviour have been brought by self-administration of pethidine. We conclude, therefore, that in our opinion Miss Conteh is unfit to continue in her present appointment as a nursing sister in the service of the Government of the Gambia."

The learned judge, who heard this application, held that the appellant was duly examined and was given several opportunities of putting her case before it. Having heard the counsel on both sides and having read the documents which were in the applicant's personal file, as well as the petition sent by her to the Director of Medical Services, I am of the view that the learned judge came to the correct conclusion on the facts. Even if the writ of certiorari is available, I would not have disturbed the findings of fact of the learned judge.

The learned Director of Public Prosecutions submitted that the writ of certiorari does not lie in law to quash the report of a medical board and also that the writ does not lie when a public servant is retired by a competent authority on the grounds of unfitness. The writ of certiorari is an extraordinary remedy available to quash the proceedings of a court or tribunal which acts either without jurisdiction or in excess of it. Where such a tribunal makes a decision which affects the rights of a citizen without jurisdiction or in excess of it; or where such a tribunal makes a decision which affects the rights of a citizen without observing the principles of natural justice, this writ is available. In *Kanda* v *Government of Malaya* [1962] AC 322, P C Lord Denning, who delivered the opinion of the Judicial Committee of the Privy Council, succinctly laid down the principles of natural justice as follows:

"In the opinion of your Lordships, however, the proper approach is somewhat different. The rule against bias is one thing. The right to be heard is another. These two rules are the essential characteristics of what is often called Natural Justice. These are the twin pillars supporting it. The Romans put them in the two maxima "*Nemo judex in cause sua"* and *audi alteram partem*."

These principles are expected to be observed by statutory tribunals or persons who have the authority under the law to make decisions to the detriment of a person.

The report sent by the board is merely an opinion of the members who examined the appellant, and the Public Services Commission, which is a competent authority to act under section 7 of the Pensions Act, Cap 137, is not bound to accept this report. The decision to retire the appellant from government service was made by the Public Services Commission. It was conceded by the counsel for the appellant that the writ of certiorari does not lie against the Public Services Commission: see section 105(12) of the Constitution, Cap 95.

In *Ridge* v *Baldwin* [1964] AC 40, the House of Lords reviewed all the previous decisions which dealt with the availability of this writ and held that it does not lie in the case of dismissal by a master of his servant and also from a decision of competent authority determining the services of a public servant. The House of Lords cited with approval the case of *Terrell* v *Secretary of States for the Colonies* [1953] All E R 390. Lord Reid delivering the judgment of the court said:

"There are many cases where a man holds an office at pleasure. Apart from judges and others whose tenure of office is governed by statute, all servants and officers of the Crown hold office at pleasure, and this has been held, even to apply to a colonial judge. It was always been held, I think rightly, that such as officer has no right to be heard before he is dismissed, and the reason is clear. As the person having the power of dismissal need not have anything against the officer, he need not give any reason."

For this additional reason, the writ of certiorari does lie to quash the decision of the Public Service Commission. A certiorari does not lie to quash the opinion expressed by the members of the medical board which had no power to retire the appellant.

DOVE-EDWIN P. I agree.

MARCUS-JONES JA. I also agree.

Appeal dismissed.

SYBB

DARBOE (No 2) v COMMISSIONER OF POLICE (No 2)

COURT OF APPEAL, BANJUL

(Criminal Appeal No 2/70)

2 June 1970

DOVE-EDWIN P, MARCUS-JONES AND TAMBIAH JJA

Criminal law and procedure-Sentencing-Plea of guilty-Co-accused pleading guilty to charge but accused pleading not guilty-Prosecution outlining facts for purpose of sentencing co-accused-Duty of trial magistrate in the circumstances-Whether foreknowledge of facts prejudicial to accused.

Criminal law and procedure-Conspiracy charge-Mode of laying charge-Appellant charged with conspiracy to obtain passport for non-Gambian citizens contrary to section 37(1) of the Criminal Code-Whether charge should have been laid under the Immigration Act-Criminal Code, Cap 10 s 37(1)-Immigration Act, Cap 16:02.

Held, *unanimously dismissing the appeal*: (1) it was the duty of the magistrate to hear the facts relating to the charge against the second accused for the purpose of imposing on him proper punishment. This did not prejudice the appellant in any way, as the duty of the magistrate was to decide the case, as regards the appellant, on only the evidence which had been adduced before him by both the prosecution and the defence.

(2) To cause a passport to be issued to one who is not a Gambian citizen, with full knowledge that such representation is false (as the appellant did in the instant case), does tend to defeat the purposes of the Immigration Act and a conspiracy to defeat that Act is a conspiracy which could be laid under section 37(1) of the Criminal Code.

Cases referred to:

R v *Grant* [1944] 2 All ER 311.

R v *Pipe* 51 Cr App R 17.

APPEAL from the decision of the Supreme Court (High Court), dismissing the appeal of the appellant against his conviction by the trial magistrate but varying the sentence of two years' imprisonment for the offence of conspiracy to obtain a Gambian passport for two non-Gambian citizens. The facts are sufficiently stated in the judgment of the court delivered by Marcus-Jones JA.

ED N'jie for the appellant.

S K O'Brien Coker for the respondent.

MARCUS-JONES JA *delivered the judgment of the court*. The appellant, who is a member of The Gambia Parliament, was charged on two counts each of conspiracy contrary to section 37(1) of the Criminal Code, in that he, the said appellant, on 27 August 1969 in the City of Bathurst, conspired with one Summah M'Ballow who was also charged with him to obtain Gambian passport No 10318 for the said Summah M' Ballow, a non-Gambian citizen; and also for conspiring together to obtain Gambian passport No10319 for one Mohammed Camara who, to their knowledge, is not a Gambian citizen.

Both accused were arraigned before the trial magistrate sitting at the Bathurst Magistrates' Court. The second accused Summah M'Ballow pleaded guilty to both charges and was sentenced to a term of two years' imprisonment with hard labour, both sentences to run concurrently. The trial then proceeded against the appellant who had pleaded not guilty and the second accused was used as a prosecution witness.

At the conclusion of the trial, the learned trial magistrate found the appellant guilty of both charges and sentenced him to two years' imprisonment with hard labour, in each case the sentences to run concurrently.

The facts are briefly as follows: The appellant, who was a Member of The Gambia Parliament, sought and obtained two Gambian passports for Summah M'Ballow and Mohammed Camara respectively on representation to the passport officer that they were citizens of The Gambia, well knowing the same to be false. His consideration for obtaining these passports was 35000 francs each which were paid to him. There was abundant evidence from the record that he received those amounts.

He appealed to the Supreme Court of The Gambia in respect of this conviction and sentence and the appeal was heard by the learned Chief Justice of The Gambia. He affirmed the conviction of the learned trial magistrate, but reduced the sentence to one of eighteen months' imprisonment, each sentence to run concurrently. He had now appealed to this court on the following grounds:

(1) the conviction is bad because the learned magistrate admitted the evidence of Musa Keita and Amadou Kebbeh who were concerned in the conspiracy charge;

(2) the conviction is bad because the charge is wrongly laid under inappropriate section of the Code; that on the evidence, the case did not disclose the commission of the offence charged;

(3) the conviction is bad because the learned trial magistrate refused to hear further material evidence tendered by the appellant in support of his case, having stopped the witness, Sedad Jobe, in the course of giving his evidence; and

(4) the trial magistrate having had foreknowledge of the case was wrong to try the same.

In arguing ground (1), learned counsel for the appellant, urged that the second prosecution witness, Musa Keita, and the third prosecution witness, Amadou Kebbeh, were accomplices who had been charged on another charge sheet with conspiracy touching this same offence. He referred us to the case of *R* v *Grant* [1944] 2 All ER 311. In this case, five persons were charged with various offences. In the first count, they were charged with offence of conspiring to commit the offence of stealing, a joint charge concerning all of them. They were all called to give evidence for the prosecution on the charge in which they themselves were concerned. It was contended that in these circumstances, the committal by the justices was unlawful and that the indictment based on that committal should be quashed. In the second indictment, there was no joint charge but three persons who had been charged with stealing were called to give evidence in respect of the charge of receiving. The court held that: (i) it was not competent for the prosecution to call as witnesses, persons who were themselves concerned in the charge. The committal of all the persons charged was, therefore, unlawful and the first indictment must be quashed; (ii) it was not in accordance with the fair administration of the criminal law that a man who had been charged with an offence but not yet

tried, should be called as against another man to give evidence of that offence. The second indictment was therefore, also quashed.

In *R* v *Pipe* 51 Cr App R 17 the prosecution called at the trial of the appellant an accomplice against whom proceedings had been brought, but had not been concluded. It was held that it was the duty of the prosecution if they were still minded to call the accomplice as a witness, to let it be known that in no event would proceedings against him be continued; and as this had not been done, there had been a departure from the established rule of practice set out in paragraphs 1297 of *Archbold's Criminal Pleadings and Practice* (37th ed); and the conviction must be quashed.

In this case, there is nothing on the face of the record to indicate that Musa Keita and Amadou Kebbeh had at any time been charged jointly with the appellant and M'Ballow; nor is there any admission by them in examination-in-chief, in cross-examination or re-examination that they were facing similar charges. It was not until the matter came before the learned Chief Justice on appeal, that Mr Njie, counsel for the appellant, on the evidence of the Commissioner of Police, revealed that two witnesses Musa Keita and Amadou Kebbeh had been charged with Numukunda Darboe and remanded in custody and that after Darboe's conviction they were released. The relevant charge sheet was not produced and it is not clear to this court whether they were charged on the same facts; and that it showed that Numukunda and the two witnesses had at one time been charged on a conspiracy count. Not that the appellant was at any time included in this charge so it would appear that the conspiracy charge involving the appellant and Summah M'Ballow were not the same as the conspiracy charge involving the two witnesses and Darboe. However, it seems clear to us that even if it could be said that Musa Keita and Amadou Kebbeh were on a conspiracy charge with Nmukunda Darboe, the police did not proceed with the charge, as stated by Mr Coker, before the learned Chief Justice; and consequently, their evidence could not be regarded as a departure from the established rule of practice as set out in paragraph 1297 of *Archbold's Criminal Pleadings and Practice* (37th ed). And since they have not been charged with Numukunda Darboe and M'Ballow, it could not be said that the principle laid down in *R* v *Grant* (supra) had been violated so as to vitiate the trial. For these reasons ground (1) must fail.

So far as ground (2) is concerned, learned counsel argued that the charge should have been laid under the Immigration Act as it was in

offence against that Act and not under section 37(1) of the Criminal Code, Cap 37 which reads:

"Any person who conspires with another to affect any of the purposes following that is to say

(1) To prevent or defeat the execution of enforcement of any act…

To cause a passport to be issued to one who is not a Gambian citizen with full knowledge that such representation is false, does tend to defeat the purposes of the Immigration Act and a conspiracy to defeat this Act, is a conspiracy which could be laid under section 37(1) of the Criminal Code. We see no substance in this contention and this ground also fails.

As regards ground (3), ie the refusal of the magistrate to hear further evidence in support of appellant's case, we see from the record the following:

"The second defendant witness being sworn on Koran states that my name is Sedad Jobe. I live at Bansang. I am a pensioner. I know the accused, I know Amadou Kebbeh. On 8 September I was at Odeon Cinema when I saw Amadou Kebbeh crossing Imam Omar Sowe Avenue. I shouted at him to come and when he came, I told him that I was made to understand that Numukunda Darboe was arrested regarding passport. I told him that I was the one who took the people to the accused and I wanted to know what happened." At this stage Coker objected to what witness had got to say. The objection was sustained. Mr N'jie decided not to proceed with witness. "This is my case." The learned magistrate had not stated the grounds of the objection apart from the statement "the objection was sustained"; nor did counsel for the appellant do anything further apart from his decision not to proceed with the witness. If he decided not to proceed with the witness, we cannot divine his reasons for doing so. He relies, however, on the ruling of the magistrate as resulting in finality. To all intents and purposes, Sedat Jobe was interfering unnecessarily with a matter with which he was not concerned. Mr N'jie contented himself with bringing his case to a close. Whilst we criticize the paucity of the note and the failure of the magistrate to record the content of the objection and his reason for sustaining it, we feel that no miscarriage of justice has been engendered thereby.

The complaint in ground (4) is that the second accused having pleaded guilty and the prosecution having outlined the facts to the magistrate

in order to enable him to assess the quantum of punishment, he, the magistrate, ought not to have continued the hearing of the case but should have had it transferred to another magistrate. It was the duty of the magistrate to hear the facts relating to the charge of the second accused for the purpose of imposing proper punishment. This did not prejudice the appellant in any way, as the duty of the magistrate to decide the case on evidence, and only on the evidence which had been adduced before him by both the prosecution and the defence, and to arrive at a verdict on the totality of such evidence. This the learned trial magistrate did and even warned himself of the evidence of such accomplice as was before him. He came to a verdict of guilty in respect of the appellant.

We think he is entitled, on the evidence, to come to such a finding. This has also been supported by the learned Chief Justice and we see no reason to differ from that conclusion. We would therefore uphold the conviction and affirm the reduction of sentence imposed by the learned Chef Justice. We would therefore dismiss the appeal.

Appeal against conviction and

sentence as varied dismissed.

SYBB

NJIE v CEESAY

COURT OF APPEAL

(Civil Appeal No GCA 3/75)

18 November 1977

FORSTER, LUKE AND AGEGE JJA

Trusts-Constructive trust-Presumption-Joint acquisition of property-Land purchased by husband and wife with equal contribution towards purchase price-Deed of conveyance in name of husband-Constructive trust or equitable interest in favour of wife imposed on legal estate vested in husband-Object of constructive trust.

Land law and conveyancing-Bona fide purchaser for value without notice-Application of-Legal estate of property jointly acquired by husband and wife but in name of husband vested in husband-Land purchased by third party by conveyance executed by husband for value without notice of equitable interest vested in wife-Whether property validly and effectively conveyed to purchaser.

Trusts-Constructive trust-Presumption-Joint acquisition of property-Land purchased by husband and wife with equal contribution towards purchase price-Deed of conveyance in name of husband-Subsequent deed of gift of property by husband to appellant subject to life interest of husband as donor-Appellant acquiring no beneficial interest in property during lifetime of donor-Appellant acquiring after death of donor equitable interest in land in capacity as volunteer for want of valuable consideration for deed of gift - appellant's equitable interest - subject to wife equitable interest.

In 1937, a couple, husband and wife, jointly and with equal contribution bought a piece of landed property situate in Banjul in the name of the husband. In January 1967, however, the husband sold a portion of the land to one Soli at the purchase price of 300 pounds sterling. In March of the same year, the husband conveyed by deed of gift, subject to his life interest, the remaining portion of the land to another woman, one Njie, in consideration of "natural love and affection" for her. In 1969, the husband died survived by the wife. Subsequently Njie attempted to enter into possession of the land gifted to her by the husband. The wife, who was then in possession of the land, refused to give up possession of the land. Njie sued in the High

Court for an order of possession and ejectment. The trial High Court dismissed the action. The appellant brought the instant appeal from the judgment of the High Court.

Held, *unanimously allowing the appeal*: (1) having regard to the fact that the husband and wife made equal contribution towards the purchase of the disputed property conveyed in the name of the husband, a constructive trust was imposed on the legal estate vested in the husband in favour of the wife as to one half undivided share. In other words, the wife had an equitable interest in a share in the property. Since the husband and wife had contributed equally to the purchase price, there was a strong presumption based on the equitable maxim "equality is equity" that the parties should share the beneficial interest in the property equally. Dictum of Lord Denning MR in *Hussey* v *Palmer* [1972] 1 WLR 1286 at 1289 - 1290 CA; and of Lord Diplock in *Gissing* v *Gissing* [1970] 2 All ER 780 at 789-799, HL applied.

Per curiam. A constructive trust is a creature or devise of equity imposed on the holder of a legal estate. Its object is to satisfy the demands of justice and good conscience. It is applied so that the legal owner of property cannot retain the whole beneficial interest in the property if he cannot in justice and in good conscience hold it to the exclusion of another person.

(2) Since the legal estate of the disputed property was vested in the husband, he could properly and effectively convey title to the property to the purchaser who had purchased the property for value without notice of the equitable interest of the wife.

(3) The effect of the conveyance by deed of gift of the remaining portion of the disputed property by the husband to the appellant subject to a life interest of the husband, was that the legal estate was effectively and validly conveyed to the appellant but she acquired no beneficial interest in the land conveyed during the lifetime of the husband. The said legal estate became vested in the appellant, who did not give valuable consideration for the conveyance, and was thus a volunteer, subject to the equitable interest of the wife in the land. After the death of the husband, the appellant held the legal estate in the land in trust for the wife and herself in equal shares. And after the wife's death, the appellant held the legal estate in the land in trust for herself and the estate of the wife in equal shares.

Cases referred to:

(1) Hussey v *Palmer* [1972] WLR 1286, CA

(2) Gissing v *Gissing* [1971] AC 886; [1970] 3 WLR 255; [1970] 2 All ER 780, HL.

APPEAL from the judgment of the High Court, dismissing the appellant's claim for an order of possession and ejectment.

PCO Secka for the appellant

S F Njie for the respondent.

LUKE J A *delivered the judgment of the court*. This case has a long history. Ebrima Njie and Mariama Fatty were husband and wife living in Bathurst (now Banjul), The Gambia. We shall hereafter refer to them as the husband and wife respectively. During the subsistence of the marriage, the husband purchased the freehold of a piece of landed property situated at No 19 Haddington Street, Bathurst. The said property was converted to the husband by deed of conveyance dated 23 August 1937 and duly registered in the office of the Registrar General, The Gambia. By deed of conveyance dated 26 January 1967 and expressed to be made between Ebrima Njie (ie the husband) of the one part and Abdoulie Soli of the other part, in consideration of the sum of 300 pounds sterling, the husband conveyed part of the said property to the said Abdoulie Soli in fee simple. By deed of gift dated 31 March 1967 and expressed to be made between Ebrima Njie (ie the husband) of the one part and Fa Gaye Njie, in consideration of "natural love and affection" the husband conveyed the remaining portion of the said property to the said Fa Gaye Njie in fee simple subject to a life interest in himself, ie the husband.

The husband died on 18 April 1969 survived by the wife. Thereafter Fa Gaye Njie attempted to enter into possession of the portion of the property conveyed to her, but her attempts were resisted by the wife and her relatives. Whereupon Fa Gaye Njie (hereafter referred to as the appellant) instituted proceedings in the Supreme Court on 21 March 1972 against Mariama Fatty (ie the wife) for possession or ejectment. Pleadings were ordered and filed and in due course the action proceeded to trial.

The trial was before the learned Chief Justice Sir Philips Bridges. The appellant gave evidence and called two witnesses. The wife also gave evidence. In the course of her evidence the wife deposed, inter alia: "My husband and I bought the property. I negotiated for the property

and we bought it jointly … We bought it for 20 pounds sterling. I paid 10 pounds sterling." The learned Chief Justice delivered judgment on 5 November 1974, dismissing the appellant's claim with costs. In the course of his judgment, the learned Chief Justice said, inter alia:

"The purchase price of the property was 20 pounds sterling and the defendant says that she contributed 10 pounds towards it. It was put into her husband's name alone so that he could pledge the property to finance his up-river fishing business … I consider her an entirely truthful and honest witness whose evidence I accept … I believe and also find that Ebrima did intend to give some property to Mariama to whom he was married for 38 years up to his death and who provided half the original purchase price when Ebrima executed the deed of gift (which was not read to him). I believe he thought he was making a gift of the half that remained after the sale to Abdoulie Soli - that is to say half of No 19 as it was at the time of the deed of gift and in respect of which the recital declared the desire to give "part or portion" only. I find that the deed of gift does not fulfil the intention of the donor and requires rectification. … I cannot, however, in the absence of a claim for partition make a definitive order for such. Equally I cannot make an order for ejectment of the defendant. She is entitled to one divided half of moiety on No 19. The plaintiff is entitled to the other divided moiety but on the face of the evidence before me I cannot say which physical part."

It is against that judgment that the appellant has appealed to this court. The appeal first came before this court in May 1975 but before it could be heard the wife died. The hearing of this appeal was therefore adjourned until steps were taken to substitute a party for the wife. Many grounds of appeal were filed but during the argument, the main issue that emerged was: What is the legal effect of the three deeds previously referred to having regard to the finding of the learned Chief Justice as to how the purchase price was contributed between the husband and the wife when the property was originally bought in 1937?

With regard to the deed of 23 August 1937, it is pertinent to recall that the property was conveyed to the husband alone in fee simple. So in law he was the sole owner in fee simple of the property. But the wife gave evidence to the effect that she contributed half of the purchase price and that the property was bought jointly by herself and her husband and that it was as a result of a family arrangement between herself and her husband that the property was conveyed solely to her husband. The learned Chief Justice believed the wife's evidence and

specifically found that she has contributed one-half of the purchase price of the property.

It seems to us that having regard to the finding of the learned Chief Justice, a constructive trust was imposed on the legal estate vested in the husband in favour of the wife as to one half undivided share. A constructive trust is a creature or devise of equity imposed on the holder of a legal estate. Its object is to satisfy the demands of justice and good conscience. It is applied so that the legal owner of property cannot retain the whole beneficial interest in the property if he cannot in justice and in good conscience hold it to the exclusion of another person. In this connection the words of Lord Denning MR in *Hussey* v *Palmer* [1972] 1 WLR 1286 are apt. He said at pages 1289-1290, CA:

"By whatever name it is described, it is a trust imposed by law whenever justice and good conscience require it. It is a liberal process, founded upon large principles of equity, to be applied in cases where the legal owner cannot conscientiously keep the property for himself alone, but ought to allow another to have the property or the benefit of it or a share in it. The trust may arise at the outset when the property is acquired, or later on, as the circumstances may require. It is an equitable remedy by which the court can enable an aggrieved party to obtain restitution."

Having regard to the finding of the learned Chief Justice and the principles just stated, it follows therefore that, in our judgment, the husband did not hold the whole of the property for his own benefit but held part of it in constructive trust for his wife. What this means, in effect, is that the whole of the legal estate in the property was vested in the husband but he held part of it in trust for his wife. In other words, the wife had an equitable interest in a share in the property. In this connection, we respectfully quote the words of Lord Denning MR in *Hussey* v *Palmer* (supra) at page 1290. He said, inter alia:

"Thus we have repeatedly held that, when one person contributes towards the purchase price of a house, the owner holds it on a constructive trust for him, proportionate to his contribution, even though there is no agreement between them, and no declaration of trust to be found, and no evidence of any intention to create a trust … In all those cases it would have been quite inequitable for the legal owner to take the property for himself and exclude the other from it. So the law imputed or imposed a trust for his or her benefit."

The question then arises, what was the quantum of the wife's equitable share in the property? It is now well settled that in determining the respective shares of the parties in the beneficial interest in the property, the paramount consideration is the intention of the parties. The court should, of course, have regard to all the circumstances of the case including the contribution of the parties and their conduct at the material time in determining their intentions. Whatever the relationship of the parties to the transaction, the court should endeavour to ascertain their intention at the material time and implement it. So in a clear case, the court should have no difficulty in determining what shares the parties should have in the beneficial interest in the property. In cases which are not so clear, the court should, as far as possible, determine the intentions of the parties at the material time having regard to all the circumstances. And the fact that the parties to the transaction are spouses should not be allowed to prejudice the determination one way or the other. The court should still carry out its function of determining the intention of the parties. But where the parties have contributed equally to the purchase price, there is a strong presumption based on the equitable maxim "equality is equity" that the parties share the beneficial interest in the property equally.

The speeches of the learned Law Lords in *Gissing* v *Gissing* [1970] 2 All ER 780 are instructive on this subject and we would quote part of the speech of Lord Diplock. He said, inter alia, at 789-790, HL:

"Any claim to a beneficial interest in land by a person, whether spouse or stranger, in whom the legal estate in the land is not vested must be based upon the proposition that the person in whom the legal estate is vested holds it as trustee on trust to give effect to the beneficial interest of the claimant as cestui que trust. The legal principles applicable to the claim are those of English Law of trusts and in particular, in the kind of dispute between spouses that comes before the courts, the law relating to the creation and operation of resulting, implied or constructive trust…

A resulting, implied or constructive trust - and it is unnecessary for present purposes to distinguish between these three classes of trust - is created by a transaction between the trustee and the cestui que trust in connection with the acquisition by the trustee of a legal estate in land, whenever the trustee has so conducted himself that it would be inequitable to allow him to deny to the cestui que trust a beneficial interest in the land acquired. And he will be held so to have conducted himself if by his words or conduct he has induced the cestui que trust

to act to his own detriment in the reasonable belief that by so acting he was acquiring a beneficial interest in the land … What the court gives effect to is the trust resulting or implied from the common intention expressed in the oral agreement between the spouses that if each acts in the manner provided for in the agreement the beneficial interests in the matrimonial home shall be held as they have agreed."

In our judgment, therefore, having regard to the fact that the husband and the wife contributed the purchase equally and that they bought it "jointly", it was clearly their intention that their beneficial interest in the property was equal, ie half and half. Therefore from the date of the execution of the deed of 1937 the husband held the legal estate as to one-half beneficial interest in trust for the wife.

We turn now to the deed of conveyance dated 26 January 1967. This deed conveyed a portion of the land originally conveyed by the deed of 1937. The portion conveyed by this deed is described in the parcels as number 19A Haddington Street, Bathurst and the dimensions and boundaries are stated therein. A plan is also attached to this deed in which the portion conveyed is delineated and edged pink and marked 19A and in which the remaining portion is also delineated and marked 19. So the portion of the property conveyed was quite certain and there could be no doubt as to what remained after the sale.

What then is the legal effect of this deed? In our opinion, since the legal estate was vested in the husband, he could properly and effectively convey the legal estate in the land and the purchaser would acquire a good title if he was a purchaser for value without notice of the equitable interest of the wife (ie the trust). As learned counsel for the respondent rightly pointed out, the purchaser gave valuable consideration for the sale to him. And there is no evidence that he had notice of the trust. Indeed, both in her defence and her evidence, the wife appears to have adopted that sale, and in all probability benefited from it. After the sale, the wife's interest in the portion of the land sold was transferred to the proceeds of sale in the hands of the husband. In our judgment, therefore, the purchaser under the deed of 26 January 1967 acquired a good title to the portion of the land conveyed to him unaffected by the equitable interest of the wife.

We shall now deal with the deed of gift dated 31 March 1967. We think that it is necessary to state at the outset that learned counsel for the responded stated before us that he was no longer challenging or questioning the validity of the deed of gift. So we shall proceed on the basis that the deed of gift was validly executed. The portion of the

property conveyed by this deed was described in the parcels and the dimensions and boundaries were stated and in the plan attached the portion was delineated and edged pink and numbered 19. So the land that was conveyed by that deed was quite certain.

As we stated earlier, the conveyance to the appellant was subject to a life interest for the husband. In our opinion, the effect of the conveyance was that the legal estate was effectively and validly conveyed to the appellant but she acquired no beneficial interest in the land conveyed during the lifetime of the husband. The appellant did not give valuable consideration for the conveyance, so she was a volunteer. The rule in equity is that a volunteer always takes subject to any equitable rights or interests attached to the property at the time the legal interest is transferred to him or her. So when the husband conveyed the land to the appellant, she held the legal estate subject to the equitable interest of the wife in the land (ie the trust). It follows therefore that after the execution of the deed and during the lifetime of the husband the appellant held the legal estate in the land conveyed to her in trust for the husband and the wife in equal shares. After the death of the husband, the appellant held the legal estate in the land in trust for the wife and herself in equal shares. And after the wife's death, the appellant held the legal estate in the land in trust for herself and the estate of the wife in equal shares.

The learned Chief Justice found that when the husband executed the deed of gift, he thought he was making a gift of half the remaining land to the wife and that the deed did not therefore fulfil his intention and held that the deed required rectification. The learned Chief Justice went further to state the effect of the rectification he considered necessary. He said: "She [the appellant] is entitled to one divided half or moiety of No 19. The plaintiff is entitled to the other divided moiety but on the face of the evidence before me I cannot say which physical part."

Learned counsel for the appellant submitted that the learned Chief Justice was wrong in holding that the deed required rectification. He maintained that a deed or other agreement could only be rectified in case where there was a common intention between the parties and that by a mistake the executed deed or agreement was not in accordance with that prior agreement. He pointed out that there was no evidence of any prior agreement between the husband and the wife for the conveyance of one half share of the remaining portion of the property to her. With respect, in our opinion, rectification does not arise in the circumstances of this case.

It is important to state that when the property was conveyed to the husband, he held the whole of it as to one half undivided share for himself and as to one half undivided share in trust for the wife. After he sold the portion by the conveyance of 26 January 1967, he held the remaining portion as to one half undivided share for himself and as to one half undivided share in trust for the wife. He could not unilaterally partition the property and thereby convert it from undivided shares in the whole of the property to divided shares between himself and his wife. Therefore, if it was indeed his intention to convey one half divided share to the wife and the other one half divided share to the appellant such an intention was of no effect. So when he conveyed the remaining property to the appellant, the only interest he could have conveyed was the whole of that portion as to one half undivided share to the appellant and as to one half undivided share in trust for the wife. In our judgment, therefore, the learned Chief Justice erred when he held that the appellant and the wife were entitled to one half divided share each in the remaining property. The wife having died, the present position is that the appellant holds one half undivided share of the property conveyed to her in trust for the wife's estate.

As we stated at the beginning of this judgment, the appellant attempted to enter into possession of the property after the death of the husband but her attempts were resisted. She has claimed for possession. But the learned Chief Justice dismissed her suit. In our judgment, as the holder of the legal estate of the property as well as the beneficial owner of one half undivided share she has a better right to possession of the property as against whoever is now standing in the shoes of the wife. In the circumstances, we would order possession in favour of the appellant.

For the forgoing reasons, we would allow the appeal.

Appeal allowed.

SYBB

IN RE JALLOW (DECD); JALLOW v JALLOW

COURT OF APPEAL, BANJUL

(Civil Appeal No 8/77)

16 May 1978

MORGAN P, FORSTER AND LUKE JJA

Wills-Probate-Grant-Refusal by trial judge-Original copy of will exhibit C signed by testator and one of attesting witnesses-Duplicate copies of will exhibit A and B duly signed by testator and attested by two witnesses-All three documents exhibits A, B and C made in one typing operation and contemporaneously with each other-Trial judge refusing to admit probate duplicate copy exhibit A because original copy not lost and accounted for-Whether duplicate copy exhibit A valid and admissible to probate.

The plaintiff-appellants (hereafter called the plaintiffs) sued in the Supreme Court (High Court) for a declaration that the duplicate will of the deceased testator filed with the summons, " taken together with its original deposited in court" was a valid will of the deceased. The trial judge found on the evidence, that the duplicate copy of the will, exhibit A, together with two other copies of the will, exhibits B and C, were made by typing in one single operation; that exhibit C was the top copy and exhibits A and B, were the two additional copies made in that single operation; that the top copy, exhibit C, was signed by the testator and one of the attesting witnesses, while the second and third copies, exhibits A and B, were signed by the testator and both attesting witnesses. The trial judge, in dismissing the plaintiff's claim, held that the duplicate copy of the will, exhibit A, could not be read with the original, exhibit C as claimed by the plaintiffs because the original was not a valid will and that the duplicate, exhibit A, though duly attested could not be admitted to probate because the original was not lost and could be accounted for. In the instant appeal by the plaintiffs against that decision,

Held, *unanimously allowing the appeal (per Morgan P, Forster and Luke JJA concurring*): if a number of documents were made by a uniform process such as printing, photocopying and photography, from a common original, each would be primary evidence of the contents of the rest but only secondary evidence of the common original. But if all the copies were made in one single operation, such

as typing and thus contemporaneously and in the same operation with the top copy, and, ipso facto, of the same impression, they would be primary evidence of one another as well as of the top copy. Consequently, since in the instant case, exhibits A, B and C had been made by typing and each copy had been made in one operation and contemporaneously with the others, each was primary evidence of the others. Therefore exhibits A, B and C were primary evidence of their contents. And since on the evidence, both exhibits A and B were duly signed by the testator and duly attested by two witnesses, exhibit A was valid and could be admitted to probate. The trial judge had erred in holding otherwise. *R* v *Watson* 2 Stark 129 and *Hodin* v *Murray* 3 Comp 228 cited.

Cases referred to:

(1) *R* v *Watson* 2 Stark 129.

(2) *Hodin* v *Murray* 3 Comp 228.

APPEAL from refusal of the High Court for grant of probate of the duplicate copy of the testator's will taken together with its original copy deposited in court. The facts are sufficiently stated in the judgment of the court delivered by Morgan P.

S B S Janneh for the appellants.

S H A George for the respondents.

MORGAN P. This is an appeal from the judgment of O'Brien Coker Ag J (as he then was), given on 10 June 1977. The claim in the court below read thus:

"The plaintiffs' claim is for (1) a declaration that the duplicate will, a copy of which is annexed hereto of the said Ebrima Baboucar Jallow, is a valid will taken together with its original deposited in this court; (2) an order that the plaintiffs may apply for probate of the said will taken together with its original deposited in this court."

At the hearing of the case in the court below, counsel for the plaintiffs-appellants, Mr Janneh, submitted that the issue before the court was whether "the duplicate with the original is a valid will." Evidence was taken and two documents were tendered in evidence and

marked exhibits A and B. Exhibit A was the document filed with the summons. Later a third document was tendered in evidence. It was admitted and marked exhibit C. It was the document deposited in court by the testator. An examination of the three documents exhibits A, B, and C shows that it is a document in triplicate and that the three copies were made by typing in one single operation. Exhibit C is the top copy and exhibits A and B are the two additional copies made in that single operation by the use of carbon papers inserted over them.

It appears from the evidence that the documents were signed in the following order: first the testator, then Mr Richards and finally Mr Jagne. The top copy, exhibit C, was signed by the testator and one of the attesting witnesses; while the second and third copies, exhibits A and B were signed by the testator and both attesting witnesses. It is not disputed that the testator and both attesting witnesses signed exhibits A and B. According to the evidence of the fourth witness for the plaintiff, Mr Wilfred J Richards: "Mr Jagne (the person who did not sign exhibit C) signed in my presence. We both signed in the presence of the testator … I signed the original." Under cross-examination he said: "The testator signed before me and then Mr Jagne. Mr Jagne did not sign the original. I cannot explain why the original was not signed by Mr Jagne. After I signed, I left and went away."

At the conclusion of the evidence of the plaintiffs' witnesses, Mr George, counsel for the defendants-respondents, indicated that he was calling no witnesses. He submitted that the original copy of the will - exhibit C - was signed by the testator and only one attesting witness and therefore that the will is invalid. He further submitted that probate of the duplicate and triplicate copies can only be granted if the original copy had been lost; and that this is not a case to which the rule of incorporation by reference is applicable. Mr Janneh's own submission was also quite brief and was put in the form of a question, thus: "Are the duplicate and triplicate validly executed? If they are validly executed do they form a valid will?"

The learned trial judge decided that:

"The duplicate (exhibit A) cannot be read with the original (exhibit C) because the original is not a valid will … *The duplicate though duly attested* cannot be admitted to probate because the original is not lost and can be accounted for."

He thereupon dismissed the plaintiff's claim with costs.

It is clear that the original copy of the will, which is the top copy, was signed by the testator and only one witness. It therefore cannot be proved in its present form. It is also agreed that this is not a case to which the principle of incorporation by reference applies. But I am of the view that these do not conclude the case. What about the document, exhibit A?

As has been stated above, the will was made by typing contemporaneously in one single operation, with a top copy and two other copies using carbon paper between the top copy and the second copy and between the second and the third. The question then arises: Are all the three copies primary evidence of their contents and therefore each can be admitted to probate? Or each of the second and third copies is secondary evidence of the top copy and therefore not the best evidence and cannot be admitted to probate? In my judgment, the principle governing the case may be stated thus: If a number of documents are made by a uniform process such as printing, photocopying and photography, from a common original, each is primary evidence of the contents of the rest but only secondary evidence of the common original. But if all the copies are made in one single operation, such as typing, and thus contemporaneously, the second and subsequent copies thus made contemporaneously and in the same operation with the top copy, and, ipso facto, of the same impression are primary evidence of one another as well as of the top copy. See *R* v *Watson*, 2 Stark 129; and *Hodin* v *Murray* 3 Comp 228.

For the foregoing reasons, I am of the view that the documents, exhibits A, B and C having been made by typing and each copy having been made in one operation and contemporaneously with the others, are each primary evidence of the others. Therefore exhibits A, B and C are primary evidence of their contents. And since it is not disputed that both exhibits A and B were duly signed by the testator and duly attested by two witnesses, I am of the opinion that exhibit A is a valid will as it stands and can be admitted to probate.

I would therefore allow the appeal and set aside the judgment of the court below as well as the order for costs. I declare that exhibit A is a valid will and that the appellant is entitled to apply for probate of the said will and also to a grant of probate of the will.

FORSTER JA. I agree.

LUKE JA. I also agree

Appeal allowed.

SYBB

ALLEN v BAH & Others

COURT OF APPEAL, BANJUL

(Civil Appeal No 11/77)

8 May 1978

FORSTER AND LUKE JJA AND AGEGE J

Land law and conveyancing-Property-Partition-Claim for-Matters to be considered by trial judge in determining claim for partition-Need to determine persons interested in property and nature of interests-Consideration of whether more beneficial to have property sold and proceeds distributed-English Partition Acts, 1868 and 1876, ss 3 and 9 applicable in The Gambia as Acts of General Application-Law of England (Application) Act, Cap 5, s 2.

Held, *unanimously allowing the appeal (per Luke JA, Forster JA and Agege J concurring)*: the trial judge erred in ordering partition of the disputed property complained of by the appellant without first directing inquiries to be taken to determine the persons interested in the property and the nature of their interests and whether they were all parties to the action as required by sections 3 and 9 of the Partition Acts 1868 and 1876 being Acts of General Application in force in England on 1 November 1888 and which are applicable in The Gambia by virtue of section 2 of the Law of England (Application) Act, Cap 5. In the instant case, the trial judge ordered partition of the disputed property without considering whether it would be more beneficial for the parties interested to have the property sold and the proceeds thereof distributed. In making the order of partition, the trial judge should have had regard to the nature of the disputed property which, on the evidence, consists of a single house of a few rooms and also regard to the number of parties interested in the property. On the evidence, at least seven persons were interested in the property. *Hawkins* v *Herbert* (1889) 60 LT 142 cited.

Cases referred to:

(1) *R* v *Roberts* (1878) LT 690.

(2) *Hawkins* v *Herbert* (1889) 60 LT 142.

(3) *Turner* v *Morgan* (1803) 8 Ves 143.

Appeal from the decision of the High Court, ordering partition of the disputed property. The factors are sufficiently stated in the judgment of Luke JA.

Applicant in person.

S B Janneh for the respondents.

LUKE JA. On 13 August 1969, Haddy Bah, Sally Bah, Boury Bahoum, N'Goneh John, M'Berry Bahoum (hereinafter referred to as the first, second, third, fourth, and fifth respondents respectively) and M B Fye as the personal representative of Alieu Sanneh (deceased) (hereinafter referred to as the sixth respondent), issued a writ of summons against Kumba Fye and Kumba Bahoum (hereinafter referred to as the first and second defendants respectively), for partition or sale of property situated and known as 14, Rankin Street, Bathurst (now Banjul) in The Gambia. On the application of N H Allen (hereinafter referred to as the appellant), an order was made on 23 March 1971 that he be joined as a co-defendant. After several interlocutory applications, an abortive trial and several adjournments, the trial eventually commenced before O'Brien Coker Ag J on 3 February 1977. In the meantime, Kumba Fye (the first defendant), had died in April 1970.

According to the evidence, the property originally belonged to Neneh Conteh who died on 14 May 1963 intestate without issue. Letters of administration of Neneh Conteh's estate were granted by the Supreme Court to Alhaji Said Bun Othman on 3 August 1964. By deed of assent dated 13 November 1964, Alhaji Said Bun Othman vested the property in Kumba Fye for life and then Haddy Bah, Sally Bah, Alieu Sanneh, Kumba Bahoum, N'Goneh John, Boury Bahoum and M'Berry Bahoum in fee simple as tenants in common. By a document dated 15 June 1966 expressed to be a deed but, in fact, not under seal and expressed to be made between Kumba Fye of the one part and Haddy Bah, Sally Bah, Alieu Sanneh, Kumba Bahoum, N'Goneh John, Bourry Bahoum and M'Berry Bahoum of the other part, the shares and interests of the parties in the property were re-defined as follows: one-eighth share to Kumba Fye and one-eighth share each to Haddy Bah, Sally Bah, Alieu Sanneh, Kumba Bahoum, N'Goneh John, Boury Bahoum and M'Berry Bahoum as tenants in common.

The respondents and Kumba Bahoum base their respective claims on this document. In addition, according to the evidence, the respondents and Kumba Bahoum all claim to be related by blood to Neneh Conteh

(hereinafter referred to as the deceased) through her sister Neneh Elliot. On the other hand, the appellant claimed that the deceased was his aunt and contended that neither Kumba Fye nor Kumba Bahoum nor any of the respondents was related to the deceased.

The learned trial judge delivered judgment on 7 June 1977, striking out the appellant from the case and ordering that the property be partitioned "according to the wishes of the plaintiffs and defendants [ie the respondents, Kumba Fye and Kumba Bahoum]."

The appellant, the co-defendant at the court below, has appealed to this court on several grounds but in my opinion only four of them merit consideration, namely:

(a) that the plaintiffs-respondents are in law without any legal or equitable title to the whole or any part of the real estate (14, Rankin Street) of Neneh Conteh (deceased) intestate;

(b) that in law no letters of Administration in the estate of Neneh Conteh (deceased), Kumba Fye (deceased) and Alieu Sanneh (deceased) exist;

(c) that in law and under the 1970 Gambian Republican Constitution, the court below is without legitimate jurisdiction, constitutional and judicial power to act, sit or function as a legitimate judicial and constitutional Supreme Court (High Court) of the Republic of The Gambia; and

(d) that in law the appellant and others named in the appellant's affidavit of 1 March 1971 are entitled to the whole real estate of Neneh Conteh (deceased) intestate as the next of kin."

I shall deal with ground (c) which may be aptly termed the constitutional point, first. The appellant argued this ground with much force referring to sections of the Constitution of The Gambia 1965, and the Constitution of the Republic of The Gambia (No 1 of 1970). He submitted that the learned trial judge was not qualified to be appointed as a judge of the Supreme Court because he did not possess the qualifications laid down in section 90(3) of the 1970 Constitution for appointment to that office; and therefore the learned judge's appointment was unconstitutional.

Section 90(3) of the 1970 Constitution reads:

"(3)(a) A person shall not be qualified to be appointed as a Justice of Appeal or as a Judge of the Supreme Court unless-

(i) he holds or has held office as a judge of a court having unlimited jurisdiction, in civil and criminal matters in some part of the Commonwealth in any country outside the Commonwealth that may be prescribed by Parliament or a court having jurisdiction in appeals from such a court; or

(ii) he holds one of the specified qualifications and has held one or other of those qualifications for a total period of not less than seven years.

(b) In this subsection "the specified qualifications" means the professional qualifications specified under the Courts Act (or by or under any law amending or replacing that Act) one of which must be held by any person before he may apply under that Act (or under any such law) to be admitted to practise as a legal practitioner in The Gambia."

The professional qualifications specified under the Courts Act, Cap 36 are contained in the Rules of the Supreme Court which are scheduled to the Courts Act. Order 9 of Schedule I prescribes the qualifications an applicant for admission and enrolment to practise as a barrister and solicitor of the Supreme Court of The Gambia must possess. In brief, they are, entitlement to practise as a barrister in England, Northern Ireland or the Republic of Ireland or as an advocate in Scotland or admission as a solicitor in England, Northern Ireland or the Republic of Ireland or as a writer to the signet or law agent in Scotland.

The appellant submitted that to be qualified for appointment as a Justice of the Supreme Court (High Court), a person must possess the qualifications specified in section 90(3*)(a)(*i) and (ii) of the 1970 Constitution. In other words, such a person must not only have possessed the "specified qualification" for seven years but he must also hold or have held office as a judge of a court having unlimited jurisdiction in civil and criminal matters in some part of the Commonwealth, etc.

In my opinion, it is not necessary to determine the soundness or otherwise of this submission. No evidence was adduced before the court below or before this court that the learned judge did not possess both of the qualifications specified in section 90(3*)(a)(*i) and (ii). The undisputed fact is that the learned judge acted as a Judge of the

Supreme Court and discharged the duties of a judge of that court in the proceedings, the subject-matter of this appeal. In those circumstances, we must presume, on the strength of the presumption of law which is expressed in the maxim *omnia praesumuntur esse rite et solemniter acta donec probetur in contrarium,* that he was regularly appointed. In *R* v *Roberts* (1878) LT 690, which related to the appointment of a deputy judge of the county court, Lord Coleridge CJ, who sat with four other judges (all of whom concurred with him) in the Court of Crown Cases Reserved said, inter alia, at page 691:

"One of the best recognised principles of law *omnia praesumuntur esse rite et solemniter acta donec probetur in contrarium,* is applicable to public officers acting in discharge of public duties. The mere acting in a public capacity is sufficient prima facie proof of the proper appointment."

It is beyond question that that principle of law is part of the laws of The Gambia. In my opinion that principle is applicable to the facts of this case. In my judgment therefore the constitutional point fails.

I propose to deal with grounds (a), (b) and (d) together. Arguing ground (a), the appellant submitted that the respondents, ie the plaintiffs in the trial court and the first and second defendants, were not the persons entitled to the property. Arguing ground (d), he submitted that he and other persons named in his affidavit sworn on 1 March 1971 were the persons entitled to the property. Arguing ground (b), he submitted that the letters of administration of Neneh Conteh, Kumba Fye (deceased) the first defendant and Alieu Sanneh (deceased) were not produced at the trial.

These grounds have not been elegantly formulated. This is not surprising, since they were drafted by the appellant himself. But in my opinion, what these complaints amount to, is that the court did not take the proper steps to determine who were the persons beneficially interested in the property and to ensure that all interested persons were either parties to the action or had notice of the proceedings before the final order for partition was made. I think that there is merit in these complaints.

In the first place, it is obvious from the records that not all interested parties were before the court. Take the case of Kumba Fye. She was originally joined in the action as the first defendant. She died in April 1970. By Motion dated 22 January 1971, an application was made to substitute certain named persons for Kumba Fye. Yet up to the date

judgment was delivered on 7 June 1977, no order had been made under Order 28, r 7 of the Supreme Court Rules, Sched II to join anyone as the "legal representative" of Kumba Fye. Furthermore, the affidavit of the appellant sworn on 1 March 1971 disclosed possible interests of certain other persons in the property. Yet the learned judge took no steps to order an inquiry to determine the persons beneficially interested in the property. In my judgment, the learned judge erred in ordering a partition without first directing inquiries to be taken to determine the persons interested in the property and the nature of their interests and whether they were all parties to the action. I think that the learned judge fell into error because he failed to advert his mind to the provisions of two important statutes relevant to the case before him. I refer to the Partition Act 1868 and the Partition Act 1876. These two Acts of the United Kingdom Parliament, being Acts of General Application in force in England on 1 November 1888, are applicable in The Gambia by virtue of section 2 of the Laws of England (Application) Act, Cap 5 of the Laws of The Gambia.

I think that it will be useful to refer to some of the main provisions of the Partition Acts. Prior to the passing of the Partition Act, 1868, partition was a matter of right and the court had no discretion to refuse partition or to order sale in lieu thereof. The Partition Acts 1868 and 1876 conferred wide powers on the court to order a sale in lieu of partition where the nature of the property or the interest of the parties makes that more convenient. Section 3 of the Partition Act, 1868 provides as follows:

"3 In a suit for Partition, where, if this Act had not been passed, a Decree for Partition might have been made, then if it appears to the Court that, by reason of the nature of the property to which the suit relates, or of the number of the persons interested or presumably interested therein, or of the absence or disability of some of those parties, or of any other circumstance a sale of the property and a distribution of the proceeds would be more beneficial for the parties interested than a division of the property between or among them, the Court may, if it thinks fit, on the request of any of the parties interested and notwithstanding the dissent or disability of any other of them, direct a sale of the property accordingly, and may give all necessary or proper consequential directions."

And section 9 of the Partition Act, 1868 also provides, inter alia:

"…and at the hearing of the cause the Court may direct such inquiries as to the nature of the property and the persons interested therein, and

other matters, as it thinks necessary or proper with a view to an order for partition or sale being made on further consideration; but all persons who, if this Act had not been passed, would have been necessary parties to the suit, shall be served with notice of the decree or order on the hearing and all such persons may have liberty to attend the proceedings; and any such person may within a time limited by General Orders apply to the Court to add to the decree or order."

The usual judgment for partition or sale in lieu of partition, directs the account to be taken and inquiries made to ascertain the persons interested, the nature of their interest and whether they are parties to the action. This inquiry is dispensed with only in exceptional circumstances, and rarely if the order is for partition. And it has been held that where an action is brought claiming partition or sale of real estate, the title should not be proved in court in the first instance, unless the property is small and its title simple. Otherwise the court should make the usual order for inquiries etc: see *Hawkins* v *Herbert* (1889) 60 LT 142.

In the instant case, the learned judge ordered partition without apparently considering whether it would be more beneficial for the parties interested to have the property sold and the proceeds thereof distributed. In making his order, the learned judge should in accordance with section 3 of the Partition Act, 1868 have had regard to the nature of the property to which the action relates. In this case, only one house, the dimensions of which were not adduced in evidence was involved. All that the evidence discloses is that the property consists of a single house of a few rooms. The learned judge should also have had regard to the number of parties interested or presumably interested therein. The evidence discloses that at least seven persons were interested in the property. It is difficult to imagine how one house consisting of a few rooms could be conveniently partitioned among seven or more persons. The absurd situation might be created where partition walls might have to be built through the house to effect the partition ordered by the judge. One is reminded of the case of *Turner* v *Morgan* (1803) 8 ves 143, where Lord Eldon LC is reported to have decreed partition of a single house, and where counsel in argument cited a case of a house which was partitioned by actually building a wall up the middle. It was precisely to eliminate those types of inconveniences and absurdities that the Partition Acts, 1868 and 1876 were passed.

Finally the judge should have ensured that all the parties interested in the property were before the court. And this is all the more reason why he should have ordered an inquiry.

In my judgment, therefore, the judge was wrong having regard to all the circumstances to make the order appealed against. In the circumstances, I would allow the appeal, set aside the order of the court below and order the retrial of the action by another judge.

FORSTER JA. I agree.

AGEGE J. I also agree.

Appeal allowed. Order for partition

of disputed disposed property set aside.

Order for trial de novo.

SYBB

SABALLY & Others v BOJANG

COURT OF APPEAL, BANJUL

(Civil Appeals No 15/77 and 2/78)

18 May 1978

MORGAN P, FORSTER AND LUKE JJA

Damages-Quantum-Personal injuries-Appeal against-Personal injuries sustained by plaintiff-Damages assessed by trial judge-Appeal against assessment-Circumstances entitling appellate court to interfere with trial judges' award-Factors to be taken into account in assessing general damages for personal injuries-General damages must be fair and reasonable compensation.

The plaintiff, aged 38 years, sustained serious personal injuries in a motor accident due to the negligence of the driver. He therefore sued the owner of the car and the driver in the High Court for special and general damages for negligence. On the evidence, the plaintiff suffered severe shock on the day of the accident. He was hospitalised for several months. The doctor's findings after the final medical examination were that the fractures sustained by the plaintiff had malunited in the various positions with a consequential shortening of both legs; there was also residual stiffness of the left knee and left ankle and deep healing scar on the dorsum of the left foot. In assessing the claim for general damages, the trial judge took into account: (i) the plaintiff's estimated permanent disability of 75 per cent; (ii) the doctor's opinion that statistically, the rate of disability could have been fatal; and (iii) the alleged sexual incapacity of the plaintiff. However, the trial judge failed to take into account the fact that the plaintiff was still in Civil Service employment two years after the accident and had not suffered any reduction in salary. He also ignored the evidence that sixteen months after discharge from hospital, the plaintiff was back on his feet walking without the aid of crutches. The trial judge awarded the plaintiff D50,000 as general damages. In the instant appeal by the defendants against the award,

Held, *allowing the appeal (per Luke JA, Morgan P and Forster JA concurring*): the Court of Appeal would not review an award of damages for personal injuries unless satisfied that the trial judge had acted upon some wrong principle of law or that the amount awarded was so extremely high or so very small as to make it, in the judgment

of the court, an entirely erroneous estimate of the damages to which the plaintiff was entitled. In the instant case, the trial judge had erred in his assessment of the general damages because on the evidence,

the matters taken into account ought to have been ignored; whilst the matters ignored by him ought to have been considered before arriving at his award. Consequently the award of D50,000 was not only erroneous but was also too high and would be varied. Taking all the circumstances into account, an award of D20,000 as general damages, would be a fair and reasonable compensation. *Flint v Lovell* [1935] 1KB 354 at 360, CA and dictum of Lord Pearce in *H West & Son Ltd v Shepherd* [1964] AC 326 at 369, HL cited.

Per Luke JA. With regard to the percentage of permanent disability, taken into account by the trial judge, I think that such matters are more relevant to claims under the Workmen's Compensation Act, Cap 196 than to claims for negligence at common law. With regard to the trial judge's acceptance of the medical opinion that the plaintiff's disability could have been fatal, I think that it is important to state that what a judge should concern himself with in assessing general damages is not what could have resulted, but what in fact resulted from the injuries initially sustained by the claimant.

Cases referred to:

(1) *Flint* v *Lovell* [1935] 1 KB 354, CA.

(2) *Owen* v *Sykes* [1936] 1KB 192, CA.

(3) *Fletcher* v *Autocar & Transporters Ltd* [1968] 2 WLR 743, CA.

(4) *H West & Sons Ltd* v *Shepherd* [1964] AC 326, HL.

APPEAL from the judgment of the High Court (Agege J), giving judgment for the plaintiff and awarding him general damages assessed at D50,000 for personal injuries, which were sustained in a car accident, caused by the negligence of the driver of the car owned by the second defendant. The facts are sufficiently stated in the judgment of Luke JA.

SBS Janneh for the first and second appellants.

PCO Secka for the third appellant.

Alhaji A M Drameh for the respondent.

LUKE JA. On 25 February 1974, the plaintiff-respondent (hereafter referred to as the plaintiff), while driving his car with Registration No GA 9068 along the Banjul-Brikama Road, was involved in a collision with car Registration No GA 7493 driven by Silla Sabally and owned by Alhaji Sajo Suso, who were the defendants in the court below (hereafter referred to as the defendants). As a result of the accident, the plaintiff sustained personal injuries and was admitted in hospital on the same day. He was detained in hospital for several months undergoing treatment.

On 27 June 1975, the plaintiff issued a writ of summons against the defendants claiming damages for personal injuries as a result of their negligence. In due course, the action came on for trial before Agege J who, on 18 November 1977, gave judgment in favour of the plaintiff and awarded the sum of D2,400 as special damages and the sum of D50,000 as general damages.

The defendants have appealed against that judgment mainly on the ground that the general damages awarded were excessive. Two other grounds of appeal were filed, one relating to the failure to give particulars of negligence in the statement of claim, and the other on insufficiency of evidence. But in my opinion, those other grounds do not merit consideration. Indeed, learned counsel for the defendants did not seriously press them. The plaintiff has also cross-appealed on the ground that the general damages awarded were too low. By order of the Honourable Chief Justice made on 14 February 1978, on the application of the Motor Union Assurance Co Ltd, that company (hereafter referred to as the insurance company), were joined as the co-appellants.

The only issue in this appeal is whether the general damages awarded by the learned trial judge were too high or too low. Mr Janneh, learned counsel for the defendants, submitted that having regard to the personal injuries sustained by the plaintiff and the other circumstances, the learned judge's assessment of the general damages was too high. He was supported in this submission by Mr Secka, learned counsel for the insurance company. On the other hand, Alhaji Drameh, learned counsel for the plaintiff, submitted that the learned judge's assessment of the general damages was too low.

But before determining this issue, I think that it is necessary to consider whether this court has any power to review awards of general

damages by a judge sitting without a jury, and if so, in what circumstances. I think that it should be stated at the outset that by virtue of rule 12 (1) of The Gambia Court of Appeal Rules, Cap 6:02 an appeal against an award of damages, like appeals generally, is by way of rehearing and therefore this court has power to review an award of damages. But it is well settled that an appellate court will not review damages unless satisfied that the judge acted upon some wrong principle of law or that the amount awarded was so high or so low as to make it an entirely erroneous estimate of the damages.

This rule was authoritatively stated by Greer LJ in *Flint* v *Lovell* [1935] 1 KB 354, CA. He said, inter alia, at page 36:

"… I think it right to say that this Court will be disinclined to reverse the finding of a trial judge as to the amount of damages merely because they think that if they had tried the case in the first instance, they would have given a lesser sum. In order to justify reversing the trial judge on the question of the amount of damages it will generally be necessary that this Court should be convinced either that the judge acted upon some wrong principle of law or that the amount awarded was so extremely high or so very small as to make it, in the judgment of this court, an entirely erroneous estimate of the damages to which the plaintiff is entitled."

In *Owen* v *Sykes* [1936] 1 KB 192, CA, Greer LJ again adverted to the rule and stated at page 198 that:

"It has been laid down in *Flint* v *Lovell* that this Court does not readily interfere with the estimate of damages made by a learned judge at the trial. An assessment of damages is necessarily an estimate, and an estimate is necessarily a matter of degree, and it seems to me that, unless we come to the conclusion that the learned judge took an erroneous view of the evidence as to the damage suffered by the plaintiff, or made some mistake in giving weight to evidence that ought not to have affected his mind, or in leaving out of consideration something that ought to have affected his mind, we ought not to interfere."

Having stated the circumstances in which this court may interfere with an award of damages, I shall now proceed to consider briefly some of the factors taken into consideration by the courts in assessing general damages for personal injuries. The most important factor to bear in mind is that general damages must be fair and reasonable compensation and that perfect compensation is not possible nor

permissible. The judge must do his best to arrive at a fair and reasonable estimate and for this purpose he may use certain aids by considering the award of damages under various heads. The accepted heads are: (i) pain and suffering; (ii) loss of amenities of life; and (iii) loss of expectation of life. But at the end of the day, the judge must satisfy himself that the total award under these various heads is fair and reasonable. In this connection, the statement of Lord Denning MR in *Fletcher* v *Autocar and Transporters Ltd* [1968] 2 WLR 743 at pages 748 and 749, CA are instructive. He said, inter alia, at page 748:

"In the first place, I think he has attempted to give a perfect compensation in money, whereas the law says that he should not make that attempt. It is an impossible task. He should give a fair compensation."

And he continued at page 749:

"In the second place, I think that the judge was wrong to take each of the items as a separate head of compensation. They are only aids to arriving at a fair and reasonable compensation … There is, to my mind, a considerable risk of error in just adding up the items. It is the risk of overlapping."

The warning given by Lord Morris of Borth-Y-Gest in *H West & Sons Ltd* v *Shepherd* [1964] AC 326, HL should also be heeded by judges in assessing general damages for personal injuries. He said at page 346:

"Money may be awarded so that something tangible may be procured to replace something else of like nature which has been destroyed or lost. But money cannot renew a physical frame that has been battered and shattered. All that judges and courts can do is to award sums which must be regarded as giving reasonable compensation. In the process there must be the endeavour to secure some uniformity in the general method of approach. By common assent, awards must be reasonable and must be assessed with moderation."

What then were the personal injuries suffered by the plaintiff and how did the learned trial judge arrive at the figure of D50,000? According to the evidence, the plaintiff was aged 38 years at the time of the trial. At the time of the accident, he was an Assistant Technical Officer in the Veterinary Department of the Government of The Gambia. He was earning a salary of D3500 per annum. According to the medical evidence, when the plaintiff was taken to the hospital on the day of the

accident, he was in severe shock and had several injuries involving both lower limbs, chest and the forehead. The details of the injuries are as follows:

(i) compound comminuted fracture of right femur;

(ii) shattered lower end of left femur;

(iii) multiple fractures of ribs of left chest;

(iv) comminuted fracture of left ankle and left foot, and

(v) multiple abrasions on forehead and left forearm due to broken glass.

The plaintiff was treated for shock with blood transfusion; his left leg was in plaster of paris for ten weeks; pin traction was put on his left leg for eight weeks and he underwent mobilization and rehabilitation procedures. He was discharged from hospital after ten weeks; and he had to use two crutches. He lost two to three inches in height and had stiffness in the left knee and left ankle. When the doctor examined the plaintiff again in March 1975, he said that his findings were that:

"(i) both fractures malunited in the various position with a consequential shortening of both legs;

(ii) residual stiffness of left knee and left ankle; and

(iii) deep healing scar on the dorsum of the left foot."

The doctor expressed the opinion that the plaintiff would find it difficult to follow any occupation that requires a lot of activity; that he would "get into trouble" with his joint as this will increase as he gets older; and that this is a painful condition and would get worse as he gets older. He said that his estimate of the plaintiff's rate of permanent disability was 75 per cent and added that statistically 75 per cent is an injury that could have been fatal.

This is how the learned trial judge approached the problem of assessment of general damages. He said:

"The doctor rated the plaintiff's disability at 75 per cent which statistically could have been fatal. The injury suffered by the plaintiff has been enormous, his pain and suffering considerable. Aged 38

years, he is now incapable, according to him, of sexual intercourse. What, let me ask, other pleasures the world now holds for him? He has been described as a "living dead." Hyperbole perhaps, but he is very near the description. He has claimed D250,750 as general damages. I confess I have been unable to lay hands on a case of the like nature in this jurisdiction that could serve as a guide. I will attempt to award what I consider a fair estimate of general damages in the circumstances of this case. I assess this at D50,000."

It seems to me obvious from the above quoted passage that the learned trial judge took into consideration in assessing general damages the following factors:

(i) the plaintiff's estimated permanent disability of 75 per cent;

(ii) the opinion of the doctor that "statistically" that rate of disability could have been fatal; and

(iii) the alleged sexual incapacity of the plaintiff.

With respect to the learned trial judge, very little or no importance should have been attached to any of those factors. With regard to the percentage of permanent disability, taken into account by the trial judge, I think that such matters are more relevant to claims under the Workmen's Compensation Act, Cap 196 than to claim for negligence at common law. With regard to the trial judge's acceptance of the medical opinion that the plaintiff disability could have been fatal, I think that it is important to state that what a judge should concern himself with in assessing general damages is not what could have resulted, but what in fact resulted from the injuries initially sustained by the claimant. A victim of an accident may at some stage after the accident be at the point of death, yet he may afterwards make sufficient recovery to be almost normal. Indeed, the doctor said that the plaintiff had made remarkable recovery. With regard to the question of sexual impotence, I am of the view that the learned judge should not have considered it at all. In the first place, it seems to have been an afterthought by the plaintiff. Secondly, apart from the plaintiff's word uttered very late in the day, there was no proof of it; and thirdly even if there was proof of it, there was no evidence medical or otherwise that it occurred as a result of the accident.

There are also matters which the learned judge should, in my opinion, have taken into consideration in assessing general damages but which he seems to have ignored. There was undisputed evidence that two

years after the accident the plaintiff was still employed in the Civil Service of The Gambia in the same capacity as at the time of the accident and had not suffered any reduction of salary. Evidence was also led that at the time of the trial in February 1977, ie sixteen months after discharge from hospital, the plaintiff was walking on his two legs and did not need the aid of crutches.

In my opinion, having regard to what I have just said, the learned judge erred not only in giving weight to evidence that ought not to have affected his mind, but also in not considering matters that ought to have affected his mind. In this connection, let me quote the words of Lord Pearce in *H West & Son Ltd* v *Shepherd* (supra) and I make no apologies for doing so, for I consider them apt. He said, inter alia, at pages 368 to 369: "It would be lamentable if the trial of personal injury claim put a premium on protestations of misery and if a long face was the only safe passport to a large award."

In my judgment, the learned judge's assessment of the general damages was, with respect, not only erroneous but too high. Taking all the circumstances into consideration, I consider that a fair and reasonable compensation in respect of general damages should be D20,000, and that I consider to be a generous estimate. I would therefore reduce the general damages to D20,000.

I would therefore allow the appeal and reduce the general damages to D20,000. It follows that the cross-appeal is dismissed.

MORGAN P. I agree.

FORSTER JA. I also agree.

Appeal allowed. SYBB

KORA v SIDIBEH

COURT OF APPEAL, BANJUL

(Civil Appeal No GCA 4/78)

16 May 1978

MORGAN P, FORSTER AND LUKE JJA

Moneylending-Loan transaction-Security by way of mortgage of property-Conditional sale or mortgage-Guidelines for determining whether a transaction constituting conditional sale or mortgage.

Mortgage-Land-Mortgagor-Right of-Failure of mortgagor to make repayment of loan on agreed date-Equity of redemption-Mortgagor having equitable right to redeem mortgaged property on payment of loan within reasonable time-Provision in loan agreement preventing redemption constituting clog or fetter on right of redemption.

On 18 September 1976, the plaintiff granted the defendant the sum of D1,350 as a loan . The defendant promised to repay the loan latest by 15 January 1977. The loan transaction was evidenced by a written agreement, part of which stated as follows. "If I [the defendant] fail to pay him (the plaintiff) on the date given…let him [the plaintiff] take over my yard (compound)." The defendant failed to repay the loan on the agreed date. However, he tendered the amount borrowed before the end of January 1977. The plaintiff refused payment on the ground that the defendant had failed to make repayment on the agreed date. The plaintiff claimed that he was entitled to the defendant's compound by virtue of the loan agreement which, to him, constituted a conditional sale of the defendant's compound. The defendant resisted the claim. The plaintiff therefore sued in the High Court for an order of specific performance. The High Court dismissed the claim. The plaintiff brought the instant appeal against the decision of the trial High Court.

Held, *dismissing the appeal (per Luke JA, Morgan P and Forster JA concurring)*: (1) on the facts, the transaction between the parties was a mortgage, which was a disposition of property as a security for debt. No sale of the disputed property, conditional or otherwise was contemplated by the parties. To determine whether the transaction was a conditional sale or mortgage, regard must be had to the substance of the transaction, the real intention of the parties and all the

circumstances of the transaction. *Quarrell* v *Beckford* (1816) 1 Medd 269 at 278; and *Kreglinger* v *New Patagonia* Meat & *Cold Storage Co Ltd* [1914] AC 25 at 47 cited.

(2) The equitable rule was that a mortgagor, such as the defendant in the instant case, must be allowed to redeem his property despite his failure to make repayment on the date agreed upon. Time was not of essence. Thus although the mortgagor would lose his legal (or contractual) right to redeem by failing to make repayment on agreed date, he would, nevertheless, be entitled to exercise his equitable right, ie the equity of redemption, to redeem the mortgaged property on payment within a reasonable time of the principal, interests and costs. Any provision inserted in the mortgage agreement to prevent redemption on payment of the debt or performance of the obligation for which the security was given, would constitute a clog or fetter on the equity of redemption and was void. On the facts of the instant case, the defendant was entitled to exercise his equitable right of redemption and the plaintiff was wrong in refusing payment. He was therefore not entitled to the claim for specific performance. *Santley* v *Wilde* (1899) 2 Ch 474 at 474-475 cited.

Cases referred to:

(1) *Kreglinger* v *New Patagonia Meat & Cold Storage Co Ltd* [1914] AC 25.

(2) *Manchester, Sheffield & Lincolnshire Rly Co* v *North Central Wagon Co* (1888) 13 App Cas 554.

(3) *Quarrell* v *Beckford* (1816) 1 Medd 269.

(4) *Santley* v *Wilde* (1899) 2 Ch 474.

APPEAL against the refusal of the High Court to grant a claim for specific performance of a contract under a loan transaction. The facts are sufficiently stated in the judgment delivered by Luke JA.

Alhaji AM Drameh for the appellant.

B M Joof for the respondent.

LUKE JA. By his writ of summons dated 13 May 1977, the appellant (hereafter referred to as the plaintiff), claimed specific performance of

a contract dated 18 September 1976. In his statement of claim the plaintiff averred, inter alia:

"(2) that the plaintiff entered into an agreement with the defendant dated 18 September 1976 in which the defendant received D1,350 cash from the plaintiff promising to repay it without fail on 15 January 1977, failing which the plaintiff will take the defendant's yard (compound) situated at Basse Santo-Su, Upper River Division, The Gambia.

(3) the defendant failed to repay the said D1,350 on 15 January 1977 but refused to hand over the said compound as agreed." The respondent in this appeal (hereafter referred to as the defendant), in his defence to the plaintiff's claim, stated that the plaintiff was not entitled to the relief claimed.

The agreement dated 18 September 1976, pleaded in paragraph (2) of the statement of claim and which was the basis of the plaintiff's claim, was tendered in evidence and it is in the following terms:

"I Musa Sidibeh of Basse Santo-Su hereby received a sum of D1,350 one thousand three hundred and fifty dalasis from Alhaji Darba Kora of Basse Santo-Su and promises to pay him on 15 January 1977 without fail. If I fail to pay him on the date given above, let him take over my yard bounded by M O N'Dow at the North and the main road at the South."

The plaintiff's evidence, which was not disputed, was that the defendant failed to repay the loan on 15 January 1977 and that the defendant tendered the amount of the loan before the end of January 1977 but that the plaintiff refused to accept it on the ground that the date for repayment had passed. In those circumstances, the plaintiff claimed that he was entitled to the defendant's yard. Indeed, the plaintiff took steps to have the property transferred to him but this was resisted by the defendant. The learned trial judge's judgment was short and I shall set it out in full. He said:

"I will award the plaintiff D2,350 being the amount loaned to the defendant. I will not award D75 claimed as rents from February 1977 because the defendant attempted to repay the plaintiff after the expiration of the time stipulated in the agreement but he refused to accept. The plaintiff all along was after the defendant's property. There is no order as to costs."

It is against that judgment that the plaintiff has appealed to this court. The grounds of appeal are as follows:

"(i) that the learned Puisne Judge erred in law in not granting the appellant (the plaintiff) either specific performance or damages having found that the respondent (defendant) breached the agreement, the subject-matter of the proceedings;

(ii) the learned Puisne Judge erred in law in not granting the appellant his costs having found that the respondent breached the agreement the subject-matter of the proceedings; and

(iii) the learned Puisne Judge's failure to grant either specific performance or damages and costs is not supported having regard to the evidence."

Alhaji Drameh, learned counsel for the plaintiff, submitted that the agreement was a conditional sale and that the defendant having failed to comply with the condition stipulated in the agreement by repaying the loan on 15 January 1977, the plaintiff was entitled to the property. Mr Joof, learned counsel for the defendant, on the other hand, submitted that the transaction was a mortgage and as such the plaintiff was not entitled to the property or to specific performance of the agreement.

What then was the nature of the transaction between the plaintiff and the defendant? Was it a conditional sale or was it a mortgage? To determine this question regard has to be had to the substance of the transaction, the real intention of the parties and all the circumstances of the transaction. The reason for this is that equity looks at the substance of the transaction and not merely at the form. Thus Lord Parker of Waddington said, inter alia, in *Kreglinger* v *New Patagonia Meat & Cold Storage Co Ltd* [1914] AC 25 at 47:

"In order to determine whether it is or is not a mortgage, equity has always looked to the real intention of the parties, to be gathered not only from the terms of the particular instrument but from all the circumstances of the transaction, and has always admitted parol evidence in cases where the real intention was in doubt."

See also *Manchester, Sheffield & Lincolnshire Rly Co* v *North Central Wagon Co* (1888) 13 App Cas 554.

The evidence as to how the agreement came to be signed was given by the plaintiff himself. He said, inter alia:

"The defendant signed it [ie the agreement]. In 1976 I went to Basse during the rains. While I was in my compound, the defendant came to me and asked me for some money. He said he would pledge his yard and if he failed to pay me, I should take the compound. We then went together and he showed me his compound. I then went to the area council and it was confirmed that he is the owner of the compound. The Alkalo also confirmed to me that he is the owner. We then went to my compound and I asked him how much he wanted and he said D1,350. He said he would pay me before 15 January 1977."

In my opinion, this piece of evidence taken together with the agreement, shows quite clearly that the transaction between the parties was a pledge by the defendant of his yard to the plaintiff in consideration of a loan of D1,350 to be repaid on 15 January 1977. No sale of the yard, conditional or otherwise was contemplated by the parties. The yard was merely given as a security for the repayment of the loan. In my opinion, the transaction possessed all the elements of a mortgage which, generally speaking, is a disposition of property as a security for a debt. In *Quarrell* v *Beckford* (1816) 1 Medd 269, Plumer VC said, inter alia, at 278:

"What is a mortgage? Everybody knows, it consists of two things: it is a personal contract for a debt, secured by an estate, and, in equity, the estate is no more than a pledge or security for the debt; the debt is the principal-the estate is the accident. Whether the mortgagee is, or is not in possession of the pledge, his right is precisely the same, with the difference, indeed, that he has never any right, in equity to the estate, except as a *fund* to pay him his debt, for every other purpose, the estate is the estate of the mortgagor, and when the debt is paid, all the mortgagee's rights and interest in the estate cease."

According to the evidence, the defendant tendered the amount of the loan to the plaintiff after the stipulated date but the plaintiff refused to accept it. This is what the plaintiff himself said in evidence:

"After this date (ie 15 January 1977), I went to the area council and told them that defendant has failed to repay me and they told me that I could take the compound. After the expiration of the time he sent Ebrima Dampha to tell me that he wanted to repay me but I refused to accept…About the end of January Ebrima came with the money. He later sent two people to come and beg me to receive the money. I

refused because the time had expired and I had already registered my name."

Learned counsel for the plaintiff submitted that the plaintiff was entitled to refuse payment of the loan tendered after the stipulated date and to insist on a transfer of the property to him. Indeed, this was the position at common law in its earliest days. But the submission ignores centuries of development by equity. In *Kreglinger* v *New Patagonia Meat & Cold Storage Company Ltd* (supra), Viscount Haldane LC said, inter alia, at page 35:

"The case of common law mortgage of land was indeed a gross one. The land was conveyed to the creditor upon condition that if the money has had advanced to the feoffor was repaid on a date and at a place named, the fee simple should revest in the letter, but that if the condition was not strictly and literally fulfilled he should lose the land for ever."

Fortunately equity stepped in at an early date to relieve the rigours of the common law by compelling the mortgagee to use the property pledged as a mere security. The rule ultimately established by courts of equity was that a mortgagor must be allowed to redeem his fee simple estate despite his failure to make repayment on the appointed day. Time was not to be of essence. Thus although the mortgagor lost his legal (or contractual) right to redeem by failing to make repayment on the appointed date, he nevertheless had an equitable right to redeem on payment within a reasonable time of the principal, interests and costs. This latter right is what is known as the equity of redemption. Any provision inserted in the mortgage agreement to prevent redemption on payment of the debt or performance of the obligation for which the security was given, is termed a clog or fetter on the equity of redemption and is void. This rule is expressed in the maxim "once a mortgage always a mortgage." In *Santley* v *Wilde* (1899) 2 Ch 474, Lord Lindley MR stated the principle thus at pages 474-475:

"The principle is this: a mortgage is a conveyance of land or an assignment of chattels as a security for the payment of a debt or the discharge of some other obligation for which it is given. This is the idea of a mortgage; and the security is redeemable on the payment or discharge of such debt or obligation, any provision to the contrary notwithstanding. That, in my opinion, is the law. Any provision inserted to prevent redemption on payment or performance of the debt or obligation for which the security was given is what is meant by a clog or fetter on the equity of redemption and is therefore void. It

follows from this, that "once a mortgage always a mortgage…" A `clog' or `fetter' is something which is inconsistent with the idea of "security", a clog or fetter is in the nature of a repugnant condition."

To return to the facts of this case, there is no doubt that the defendant lost his legal right to redeem on 15 January 1977 when he failed to repay the loan. But on the principles stated above his equitable right to redeem arose immediately thereafter entitling him to redeem his property by paying the principal, interests and costs within a reasonable time. The plaintiff himself admitted that the defendant tendered the amount of the loan before the end of January 1977 (ie within sixteen days on the outside) but that he refused to accept it . In my opinion, the defendant was entitled to exercise his equitable right of redemption and the appellant was wrong to have insisted on his "legal right" by refusing payment and claiming the defendant's property.

The plaintiff has sought to enforce his "legal right" by an action for specific performance. As indicated earlier, the plaintiff has no such "legal right" and his claim for specific performance was doomed to failure. All that the plaintiff was entitled to was the loan of D1,350 plus interests (if any) plus costs (if any). He has already obtained judgment for D1,350.

On the question of interest, it should be observed that no provision was made in the agreement for payment of interest. So in my opinion no interest was due on the loan up to 15 January 1977. I concede that the plaintiff might have claimed reasonable interest from date of default up to date of payment. Even if we decide to be generous to the plaintiff and allow him interest at the rate of ten per centum per annum the interest on D1,350 for half-month (15 January to end of January 1977 would amount to about But the appellant did not claim interest and therefore I would not award him any amount by way of interest.

The learned trial judge refused the plaintiff costs. In my judgment taking all the circumstances into consideration, the learned judge exercised his discretion properly in refusing the plaintiff his costs.

For these reasons, I would dismiss the appeal with costs.

MORGAN JA. I agree.

FORSTER JA. I also agree.

Appeal dismissed with costs.

SYBB

INTERNATIONAL BANK FOR

COMMERCE & INDUSTRY v SECKA

COURT OF APPEAL, BANJUL

(Civil Appeal No 7/80)

20 November 1980

FORSTER, LUKE AND ANIN JJA

Practice and procedure-Costs-Party to party costs-Payment-Nature of-"Party to party costs" connotes costs as to parties to action (successful and unsuccessful party) and not as between solicitors to the parties or as between solicitor and his client or opposite party-Object of "party to party costs"-Party to party costs paid to solicitor of party not belonging to him as of right-Money paid to court as costs by judgment debtor-Money paid to solicitor of judgment creditor on court order to be paid back into court until determination of pending appeal by judgment debtor.

Practice and procedure-Costs-Party to party costs-Receipt by solicitor on behalf of party (his client)-Duty of solicitor in relation to money received as party to party costs-Party to party costs belonging to client and not solicitor-Solicitor merely entitled to exercise lien on party to party costs for services rendered to party.

On 6 September 1979, the High Court, per the Ag Chief Justice, ordered that the sum of D88,869.42, as taxed by the Tax Master, being "party to party costs" paid into court by the judgment-debtors in a previous action between them and the judgment creditors, the plaintiff-appellants in the present action (hereafter called the bank), should be paid forthwith to one Mr PCO Secka, who had acted as solicitor and counsel to the bank in that previous action. A few weeks later, the judgment-debtors in the previous action, appealed to the Court of Appeal against certain costs allowed by the Taxing Master as part of the "party to party costs." The bank, fearing that if the appeal by the judgment-debtors were to succeed, they would be required to refund the costs previously paid into court and now in the hands of their solicitor, demanded that the money should be paid back into court. Their solicitor, Mr Secka, refused, contending that he was entitled to keep the money paid to him as payment for his services rendered as the solicitor of the bank in that previous action. The bank

therefore brought the instant action in the High Court against Mr Secka, their solicitor in the previous action for, inter alia, determination of the question whether the sum of D88,869.42 being "party to party costs' paid to the defendant should be paid back into court pending the determination of the judgment-debtors'appeal in the previous action. The trial High Court held that the defendant was entitled to keep the money in that "as between party to party, Mr Secka has been paid in full." The bank brought the instant appeal against that decision.

Held, *allowing the appeal (per Luke JA, Forster and Anin JJA concurring)*: the words "party to party costs" connoted that the costs were as to the parties to the action, between the successful and unsuccessful party. It was not between the solicitors to the parties or between the solicitor and his client or the opposite party. And more importantly, the object of party to party costs was to give the successful party an indemnity against costs reasonably incurred in prosecuting or defending the action. The indemnity was the party's indemnity, not his solicitor's indemnity. Therefore the costs allowed were the party's costs and not the solicitor's who might receive or recover the costs on behalf of the party (his client) as an agent for his client, the party. On the facts of the instant case, the party to party costs paid to the defendant, the solicitor of the plaintiff, in the previous action, did not belong to him as of right. The money should be paid back into court pending the disposal of the appeal in the previous action so as to ensure that the money paid by the judgment-debtors would be available to the plaintiffs if they were ordered to make a refund at the conclusion of the appeal. *Lydney* & *Wigpool Iron Ore Co* v *Bird* 33 Ch D 96; and *Henry Hollier Hood Barrs* v *Crossman* & *Prichard* [1897] AC 172, HL distinguished.

Per Luke JA. (i) The solicitor who receives party to party costs…is at liberty to take appropriate action to pursue any claim against his client. In certain circumstances, a solicitor has lien against his client. In lieu of that lien, he may in a proper case, retain party to party costs or part thereof in his possession. For he may exercise his lien for unpaid fees or other legitimate charges and entitlements. But to say that in such circumstances, a solicitor has a lien on party to party costs in his hands does not mean that he thereby becomes the owner thereof. The costs still belong to the party, his client.

(ii) Certain distinguishing features must be borne in mind in approaching cases…[as in he instant appeal] …A very important factor is that the present claim is not by some third party against a

solicitor. It is an action by the party who would be liable to repay the money if the appeal in the main suit succeeds. It is against their own solicitor who received the money as their agent and is holding on to it. There is not only a contractual relationship between the plaintiffs and the defendant in this case but also a fiduciary relationship. That relationship imposes important legal obligations on the solicitor…[who] …like other agents, is under an obligation to pay over, or account for, all moneys received on the principal's behalf, to the principal upon request. A solicitor, like any other individual, is liable for the wrongful acts including action for deceit, negligence, money had and received and conversion. *Fenton Textile Association* v *Thomas & Clarke* (1928) 14 TLR 264, CA cited.

Cases referred to:

(1) *Lydney & Wigpool Iron Ore Co* v *Bird* 33 Ch D 96.

(2) *Henry Hollier Hood Barrs* v *Crossman & Prichard* [1897] AC 172, HC.

(3) *Fenton Textile Association* v *Thomas & Clarke* (1928) 14 TLR 264, CA.

(4) *Nocton* v *Lord Ashburton* [1914] AC 932, HL.

(5) *Van Laun, In re*; Ex parte *Chatterton* [1907] 23 KB 29, CA.

APPEAL by the plaintiff bank against the decision by the High Court, dismissing the plaintiff's action against the defendant, their solicitor, for the determination, inter alia, of the question whether the sum of over D88,000 being party to party costs paid to the solicitor, pursuant to a court order, be paid back into court pending the determination of an appeal between the judgments-debtors and the plaintiffs as the judgment creditors. The facts are sufficiently stated in the judgment of Luke JA.

S F Njie for the appellants.

Respondent in person.

LUKE JA. By order dated 6 September 1979, the Ag Chief Justice ordered that the sum of D88,869.42, which had been paid into court by the judgment debtors in an action (hereinafter referred to as the main suit) between the present appellants and the judgment-debtors be paid

forthwith to the counsel for the IBCI (the present appellants hereinafter referred to as the bank). The counsel referred to in the order was Mr PCO Secka, who acted as solicitor and counsel for the bank in the main suit.

A few weeks later, an appeal was lodged to The Gambia Court of Appeal by the judgment-debtors in the main suit against certain costs allowed by the Taxing Master. The bank feared that if the appeal of the judgment-debtors were to succeed, they would be required to refund the costs previously paid into court although they had not received any part of it. I think that it was as a result of that fear that the bank instituted proceedings in March 1980 against Mr PCO Secka, their solicitor in the main suit for, inter alia, determination of the question whether the sum of D88,869.42 paid pursuant to the court order of 6 September 1979, be paid back into court. Mr Secka's reaction to the claim is aptly summarized in paragraph (11) of his affidavit sworn on 23 April 1980 to the effect that:

"That I verily believe that the money I received was neither a deposit nor a loan; it was money received for services rendered to the plaintiff and is not returnable under any circumstances."

That was the stance taken by Mr Secka before the Supreme Court [High Court] and at the initial stages of his argument before us. Indeed, that stand seems to have received the blessing of the Supreme Court for in the course of his judgment, the trial judge (the Ag Chief Justice) said, inter alia:

"He (Mr Secka) prepared a bill as between party to party which was taxed at D88,869.42 and this was paid by the other party. In other words, as between party to party, Mr Secka has had been paid in full."

I think that what has caused a simple issue like this to reach this court and thereby increase costs unnecessarily is the complete misconception on all sides of the meaning and effect of "party to party costs." As the words imply "party to party costs" connotes that the costs are as to the parties to the action, between the successful and unsuccessful party. It is not between the solicitors to the parties or between the solicitor and his client or the opposite party. Similarly and more importantly, the object of party to party costs is to give the successful party an indemnity against costs reasonably incurred in prosecuting or defending the action. The indemnity is the party's indemnity, not his solicitor's indemnity. Therefore the costs allowed is the party's costs and not the solicitor's. But that does not mean that the

solicitor may not receive or recover the costs on behalf of the party (his client). In those circumstances, he receives it as an agent for his client or the party: see *Lydney* & *Wigpool Iron Ore Co* v *Bird* 33 Ch D 96.

The foregoing should not be interpreted to mean that the solicitor who receives party to party costs has no remedy. He is at liberty to take appropriate action to pursue any claim against his client. In certain circumstances, a solicitor has a lien against his client. In lieu of that lien, he may in a proper case retain party to party costs or part thereof in his possession. For he may exercise his lien for unpaid fees or other legitimate charges and entitlements. But to say that in such circumstances, a solicitor has a lien on party to party costs in his hands does not mean that he thereby becomes the owner thereof. The costs still belong to the party, his client.

In the instant case, Mr Secka did not base his claim for the whole of the taxed cost on lien. His claim simply and bluntly is that he is entitled to the whole amount as party to party costs as of right and that "it is not returnable under any circumstances." In my opinion, that is patently untenable and has no basis in law. I think that the bank's anxiety over Mr Secka retaining the costs was understandable. I suppose they must have been advised that if the Court of Appeal had heard the appeal in the main suit and had ordered the costs or part thereof to be refunded, the costs would have been recoverable against them and not against Mr Secka, the solicitor. In *Lydney & Wigpool Iron Ore Co* v *Bird* (supra), the Court of Appeal reversed the judgment of the judge who had dismissed the action with costs, and the taxed costs of the defendant Bird had been paid to his solicitors. The plaintiffs asked for an order against the defendants' solicitors for repayment by them. The question that arose in that appeal was whether the court should order the defendants, who had been ultimately unsuccessful, to repay the costs to the plaintiffs, or whether they should order the solicitors to repay them. It was held, inter alia, that the court had no jurisdiction on the appeal to order the defendants' solicitors to refund the money, the solicitors not being before the court on the appeal. On the question whether the money should be refunded by the defendants, this is what the Learned Lord Justices said (per Cotton LJ) at p 97: "The solicitors received the money; not as principals, but as Bird's agent, and he is the person to refund it." Lindley LJ also said, inter alia, on the same page:

"If an order is made to pay money to a person and it is in fact paid to his agent, the person to whom it is ordered to be paid is responsible for

the money, just as if he had executed a power of attorney to the agent to receive it."

And Lopes LJ said, inter alia, on the same page:

"But I agree in thinking that the money was ordered to be paid to the solicitors on behalf of James Bird, and James Bird is therefore alone liable to repay it."

According to the English authorities, that is the unenviable position of a party whose party to party costs have been paid to his solicitor, unless the solicitor had given an undertaking to repay the costs if the appellate court should reverse the order for their repayment. The rule is succinctly stated in the headnote to *Henry Hollier Hood Barrs* v *Crossman & Prichard* [1897] AC 172, HL. It reads:

"A solicitor who has demanded and received payment of costs payable to his client under an order of Court, with knowledge that an appeal against that order was pending, cannot on its reversal be ordered personally to repay the costs so paid to him where there had been no misconduct and no undertaking to repay."

I think that it is important to emphasize that an important distinguishing feature of the case just cited as well as *Lydney & Wigpool Iron Ore Co* v *Bird* (supra), is that the claimant in each case against the solicitor for the refund of the costs was not the solicitor's client but the third party who had paid the costs to the solicitor in the first place. In the former case, the claimant was the party (the appellant) who had paid the costs to the solicitor of the successful party. On appeal it was ordered, inter alia, that the successful party in the lower court should repay to the appellant all such costs as he had already paid her (the successful party). The claimant then instead of moving against the solicitor's client for the recovery of the costs already paid, moved against the solicitor personally. As stated earlier, it was held that in the absence of an undertaking to repay, the claim should fail. It should be noted that the claim was by a third party against the solicitor and not by the client against his solicitor. In the latter case (ie Bird's case), the claimant was the plaintiff who was not the solicitor's client, and the solicitor was not even before the court. Again it should be noted that the application was by a third party, and not by the client against his solicitor.

In my opinion, these are the important distinguishing features to bear in mind in approaching this case. The necessity for this action might

not have arisen if the solicitor (Mr Secka) had given a personal undertaking to repay the costs if the appeal against the taxation were to be allowed. It is pertinent to note that an appeal against the taxation had not been lodged on the date of the order. So the learned judge could not have ordered the solicitor to give a personal undertaking to refund the costs. Pursuant to the order, the money was paid to Mr Secka and he is not only retaining it, but he is also claiming to be the rightful owner of it. So if an order is made for its refund, the appellants in the main suit would be entitled on the authority of *Lydney & Wigpool Iron Ore Co* v *Bird* (supra) and *Barrs* v *Crossman & Prichard* (supra) to proceed for recovery directly against the bank, although they (the bank) have not received a single butut of the costs. And according to the argument of Mr Secka, the bank would not be entitled to any indemnity or reimbursement from him as solicitor.

As I said earlier, certain distinguishing features must be borne in mind in approaching cases of this nature. I think that a very important factor is that the present claim is not by some third party against a solicitor. It is an action by the party who would be liable to repay the money if the appeal in the main suit succeeds. It is against their own solicitor who received the money as their agent and is holding on to it. It is an action by principals against their agent. There is not only a contractual relationship between the plaintiffs and the defendant in this case but also a fiduciary relationship. That relationship imposes important legal obligations on the solicitor. In my opinion, a solicitor like other agents, is under an obligation to pay over, or account for all moneys received on the principal's behalf, to the principal upon request. A solicitor, like any other individual, is liable for his wrongful acts including action for deceit, negligence, money had and received and conversion: see *Fenton Textile Association* v *Thomas & Clarke* (1928) 14 TLR 264, CA. The courts have always expected high standards from solicitors in their dealings with their clients and would not allow solicitors to take unfair advantage of their clients or unjustly enrich themselves at the expense of their clients. This policy has been pronounced upon by judges on innumerable occasions over the years.

In *Nocton* v *Lord Ashburton* [1914] AC 932, HL, Viscount Haldane LC said, inter alia, at p 956:

"The solicitor contracts with his client to be skilful and careful. For failure to perform this obligation he may be made liable at law in contract or even in tort, for negligence in breach of a duty imposed upon him."

Again, in *re Van Laun; Ex parte Chatterton* [1907] 23 KB 29, CA, Cozen-Hardy MR said, inter alia, at p 29:

"In the view which I take of this case, there are special circumstances which must primarily be had regard to. In the first place, there was the relation between the parties of solicitor and client, which, of course, is one of the most important fiduciary relations known to our law…"

There is no reason why the Courts of Gambia should detract from that policy. In my view, this court should not only restate the policy, but should reinforce and support it with all the authority and power at its command.

Returning to the facts of this case, there is no doubt that the plaintiff bank are entitled to protect and secure their interest by ensuring that the money paid by the judgment debtors would be available if a refund were to be ordered. Mr Secka, on the other hand, has quite wrongly asserted that the money belongs to him as of right. Faced with such a situation, it would be the height of folly to allow Mr Secka to retain the money until the appeal in the main suit is disposed of. In the circumstances, the most secure place for the money to be kept is where it was paid originally, and that is the court. That was why we ordered on 20 June 1980 that Mr Secka pay back into court the money paid to him pursuant to the order of 6 September 1979.

I would allow the appeal with costs assessed at D500.

FORSTER JA. I concur.

ANIN JA. I also concur.

Appeal allowed.

SYBB

SHYBEN A MADI & SONS LTD & Another v CARAYOL

JUDICIAL COMMITTEE OF THE PRIVY COUNCIL

(Civil Appeal No 12/1979 from The Gambia Court of Appeal)

17 February 1981

LORD FRASER OF TULLYBELTON, LORD SCARMAN AND LORD BRIDGE OF HARWICH

Courts-Appeal-Findings of fact-Appellate court treatment of findings of fact by trial court-Circumstances in which appellate court may interfere with findings by trial court.

Evidence-Fresh evidence-Appellate court-Application for leave to adduce fresh evidence-Application to be refused where due diligence would have uncovered documentary evidence before trial in lower court-Crucial documentary evidence inadmissible as fresh evidence where respondent on appeal having no opportunity to explain circumstances leading to writing of document.

Held, *unanimously dismissing the appeal*: (1) the principles on which an appellate court should act in reviewing the decision of a judge of first instance on question of fact are: (i) where a question of fact has been tried by a judge without a jury, and there is no question of misdirection of himself by the judge, an appellate court which is disposed to come to a different conclusion on the printed evidence, should not do so unless it is satisfied that any advantage enjoyed by the trial judge by reason of having seen and heard the witnesses, could not be sufficient to explain or justify the trial judge's conclusion; (ii) the appellate court may take the view that, without having seen and heard the witnesses, it is not in a position to come to any satisfactory conclusion on the printed evidence; and (iii) the appellate court, either because the reasons given by the trial judge are not satisfactory, or because it unmistakably so appears from the evidence, may be satisfied that he has not taken proper advantage of his having seen and heard the witnesses, and the matter will then become at large for the appellate court. The mere absence of any observations by the judge as to the credibility of the witnesses is no reason for departing from these principles. The judgment of a judge who has heard and seen witnesses and has reached a conclusion or drawn an inference as to the weight of their evidence is entitled to great respect, whether or not he comments on their credibility or says expressly that he prefers one to another.

In the instant case, the trial High Court judge heard and saw the witnesses but made no observations upon their credibility as he is entitled to. However, the reasons given by the trial judge for concluding that the parties agreed on fixed fees for the work done by the defendant were demonstrably unsatisfactory; the reasons also reveal a failure by the trial judge to understand the nature of the defendant's case. The trial judge failed to isolate or identify the true issue between the parties and thus failed to appreciate the true nature of the defendant's counterclaim which was founded on *quantum meruit* for work done for the plaintiffs. The failure led the trial judge to treat as conclusive two documents which were, in truth inconclusive, on the evidence. Since the reasons given by the trial judge for his conclusion are not satisfactory, the matter then became at large for the appellate Gambian Court of Appeal to set aside the trial judge's finding that the parties had agreed on specific fees. *Watt or Thomas* v *Thomas* [1947] AC 484 at 487; *Powell v Streatham Manor Nursing Home* [1935] AC 243 at 249 and 250; and *Chow Yee Wah* v *Choo Ah Pat* [1978] 2 MLJ 41, PC cited.

(2) Their Lordships would justify their refusal to allow the plaintiff-appellant's leave to introduce as fresh evidence at the hearing, a letter said to have been misfiled and to have been discovered by accident after the trial in the High Court on the ground that due diligence should surely have uncovered before the trial the letter, which at all times was in the appellant's possession. Their Lordships, did, however, read the letter in order to determine whether, if admitted, it was likely to be of critical importance. It proved to have no such importance. Even if the terms of the letter had appeared to be decisive in favour of the appellants, it could not in justice have been admitted without giving the respondent an opportunity of explaining in evidence the circumstances in which he came to write it.

Cases referred to:

(1) Watt or Thomas v *Thomas* [1947] AC 484.

(2) Chow Yee Wah v *Choo Ah Pat* [1978] 2 MLJ 41, PC.

(3) Powell v *Streatham Manor Nursing Home* [1935] AC 243.

APPEAL from the judgment of the Gambia Court of Appeal, which allowed an appeal from the judgment of the Supreme Court (High Court) per Bridges CJ, wherein he gave judgment for the plaintiffs on their claim for the delivery up of their account books and other

documents in the custody of the defendant and also dismissed the defendants's counterclaim for professional fees as income tax consultant and accountant founded on *quantum meruit* basis. The facts are sufficiently stated in the judgment of the Privy Council delivered by Lord Scarman.

LORD SCARMAN *delivered the judgment of the court*. In this appeal from The Gambia Court of Appeal, two questions have emerged as being of decisive importance:

(i) was the Court of Appeal entitled, or, as their Lordships would prefer to put it, obliged to set aside the crucial finding of fact by the trial judge, and thereafter to deal with the case at large? The answer to the question depends upon the correct application of the principles governing the intervention of an appellate court in matters of fact which were stated by Lord Thankerton in *Watt or Thomas* v *Thomas* [1947] AC 484 at 487;

(ii) if the Court of Appeal was right to set aside the trial judge's crucial finding of fact, was it able, on the evidence available, to reach a decision as to the value to be put upon the respondent's services upon the basis of a *quantum* meruit?

The appeal is from the judgment and order of The Gambia Court of Appeal dated 1 December 1978, which allowed an appeal from the judgment of the Supreme Court (High Court) (Bridges CJ) dated 30 June 1977. The appellants' (hereafter called the plaintiffs) claim was for delivery up of their account books, papers and other documents in the custody of the respondent (hereafter called the defendant). His defence was that he had a lien on them for unpaid fees earned by him as their income tax consultant and accountant. He counterclaimed for fees due to him which he assessed on a *quantum meruit* basis as D102,443.75 from the first plaintiff and D9,225 from the second plaintiff. He based his counterclaim on his averment that he had worked 2,763 hours for the first plaintiff and 293 hours for the second plaintiff.

The Chief Justice gave judgment for the plaintiffs on their claim and dismissed the counterclaim. On appeal, the Court of Appeal allowed the defendant's appeal on claim and counterclaim, and awarded him on his counterclaim D70,000 against the first plaintiff and D5,000 against the second plaintiff. He was ordered to deliver up the documents in his custody upon payment of these sums.

The plaintiffs' case was that they had paid in full the fees which they had agreed with the plaintiff. They pleaded three agreements all of them oral:

(i) in paragraph (6) of the defence to counterclaim, for preparing for the first plaintiff balance sheets and goods trading and profit and loss accounts covering the years 1967, 1968 and 1969, a fee of D2,500;

(ii) in paragraph (8) of the defence to counterclaim, for preparing and submitting the first plaintiffs' accounts to the tax authorities for the years 1971, 1972 and 1973, a fee of D1,000 for each;

(iii) in paragraph (9) of the defence to counterclaim, a fee of D1500 for preparing the accounts of the second plaintiffs trading for the period of sixteen months from 1 January 1974 to the 30 April 1975. The total fees payable to the defendant, therefore, according to the plaintiffs' pleaded case, were D7,000 of which D5,500 were payable by the first plaintiff and D1,500 by the second plaintiff. In evidence, these figures were modified, the fee for the accounts of the year 1971, 1972, 1973 being said by the plaintiffs to be not D1,000 but D1,250 per annum. This would make the total payable D7,750. The plaintiffs further alleged that these fees had been paid. They admitted in evidence that they had, in fact, overpaid the defendant. It was accepted on both sides that they had paid him more than D10,000.

The defendant's case was that no fixed fee was agreed. He said that there was an agreement, but not for a fixed sum or sums. It was oral, and he put it thus in his evidence:

"We came to an agreement as to fees. In September 1971 I was retained principally to reconstruct the accounts for Shyben [the first plaintiff] for years 1967, 1968, 1969. I could not know the volume of work but would be paid in relation to the size of the reduction in tax achieved. In the meantime I was to make drawings against such fees."

He further said that there was a ceiling for drawings pegged at D2,000 for any given year and that there was no agreement on the way his bill would be complied though he was, of course, expecting a settlement in relation to the tax reduction achieved and ready to deduct drawings from whatever fee was ultimately agreed.

The issue was, therefore, one of fact. Who was to be believed? Indeed, the plaintiffs in their written case (paragraph (45) concede that a *quantum meruit* award to the defendant would be appropriate if it

should be determined that the Chief Justice was wrong in finding there was an agreement for a fixed remuneration and it is held that the defendant did, in fact, work the hours he said he did.

It would be convenient to refer at this stage to the law. As Lord Fraser of Tullybelton said when delivering the judgment of the Board in *Chow Yee Wah* v *Choo Ah Pat* [1978] 2 MLJ 41, the principles on which an appellate court should act in reviewing the decision of a judge of first instance on a question of fact have been stated frequently in the House of Lords and in this committee. In *Watt or Thomas* v *Thomas* (supra) at p 487, Lord Thankerton said:

"I. Where a question of fact has been tried by a judge without a jury, and there is no question of misdirection of himself by the judge, an appellate court which is disposed to come to a different conclusion on the printed evidence, should not do so unless it is satisfied that any advantage enjoyed by the trial judge by reason of having seen and heard the witnesses, could not be sufficient to explain or justify the trial judge's conclusion;

II. The appellate court may take the view that, without having seen or heard the witnesses, it is not a position to come to any satisfactory conclusion on the printed evidence;

III. The appellate court, either because the reasons given by the trial judge are not satisfactory, or because it unmistakably so appears from the evidence, may be satisfied that he has not taken proper advantage of his having seen and heard the witnesses, and the matter will then become at large for the appellate court."

The mere absence of any observations by the judge as to the credibility of the witness is no reason for departing from these principles. The judgment of a judge who has heard and seen witnesses and has reached a conclusion or drawn an inference as to the weight of their evidence is entitled to great respect whether or not he comments on their credibility or says expressly that he prefers one to another: see Lord Sankey LC in *Powell* v *Streatham Manor Nursing Home* [1935] AC 243 at pp 249 and 250.

In the present case the Chief Justice heard and saw the witnesses, but made no observations upon their credibility. However, he concluded, and found as a fact, that the parties agreed on a fixed fee (or fees, for three agreements were alleged). Unless, therefore, this case falls within the scope of the third of Lord Thankerton's principles, the

Court of Appeal, though disposed, as they clearly were, to come to a different conclusion, would not be justified in setting aside his finding.

The defendant's submission, which succeeded before the Court of Appeal and is now renewed in the face of the plaintiffs' challenge before this Board, is that the reasons given by the Chief Justice were not satisfactory and that this unmistakably so appears from the evidence. Notwithstanding the very able argument of counsel for the plaintiffs, their Lordships accept this submission. Not only were the reasons given by the Chief Justice demonstrably unsatisfactory: but they reveal also a failure by the Chief Justice to understand the nature of the defendant's case.

The Chief Justice had to consider a situation in which, despite many confusions and obscurities, much was clear. The first plaintiff Shyben Madi had been in business as a trader and moneylender for many years. He was joined in his later years by his son, George. In 1971 he was faced with a tax investigation. He enlisted the professional services of the defendant, Mr Carayol, who after his retirement from the post of Commissioner of Income Tax had established himself as an income tax consultant in Banjul. Mr Madi initially instructed Mr Carayol to reconstruct his accounts for the years 1967-1969. He later requested him to prepare accounts for the years 1971-1973 for submission to the tax authorities. This work involved Mr Carayol in negotiations with the accountants appointed by the tax authority to investigate Mr Madi's affairs. The Chief Justice found, without doubt correctly: "that Mr Madi's tax affairs involved Mr Carayol in a great deal of work - and moreover work not normally required to be carried out by accountants." Final accounts were, however, never completed by Mr Carayol either for the years 1967-1969 or for the years 1971-1973, or for the period January 1974 to the end of April 1975 when the second plaintiff, Shyben A Madi & Sons Ltd, had taken over the first plaintiff's business. The reason for this failure was a subject of dispute; the plaintiffs alleged that the reason was the defendant's refusal to continue the work unless he was paid more money, while the defendant claimed, and it would seem that the Chief Justice accepted, that the reason was that the plaintiffs were dissatisfied with the profit figure revealed by the defendant's draft accounts. Whatever the reason, the first plaintiff withdrew their instructions in October or November 1975 before the defendant had completed his work or was in a position to calculate his fee which, according to him, was to be settled having regard to the tax reduction achieved.

The termination of his instructions was followed almost at once by legal action. The plaintiffs consulted solicitors in November or December 1975 and issued their writ on 29 January 1976. The defendant's counsel said, with some justification, that his client was catapulted into litigation. Since, as he saw it, no fee had been agreed because of the premature withdrawal of instructions, he had no option, if his view of the matter was correct, but to counterclaim upon a *quantum meruit*.

There are clearly inherent improbabilities in the plaintiffs' case that a fee or fees, were agreed in fixed sums before the scale or the duration of the work to be done was known. "I could not know the volume of work" the defendant said in evidence. And it is to be observed that, even on the plaintiffs' evidence, he was paid more than what, according to them, had been agreed. But their Lordships accept that such improbabilities are not sufficient in themselves to displace the trial judge's finding of fact after hearing and seeing the witnesses. More has to be shown. Can his finding be shown by a study of the evidence or of the reasoning developed in his judgment to be unsatisfactory?

Their Lordships bear in mind that the record of the evidence is not the full evidence in print, eg a transcript, but the judge's notes of the evidence. If, therefore the judgment is criticised solely on the ground that the judge was wrong to prefer the Madis' evidence to that of Mr Carayol, it would not suffice to set aside his finding. But this is not the criticism which is made. The Chief Justice never said in so many words that he found Mr Shyben Madi and his son George credible witnesses, and Mr Carayol not credible. His approach was to emphasise the scarcity of contemporary written evidence which could assist him to reach a decision. Clearly he was reluctant to decide the case merely on a preference for one set of witnesses over the other, an understandable reluctance in the circumstances of the case. He gave his reasons for preferring the evidence of the plaintiffs in the following critical passage of his judgment:

"No written agreement in respect of fees was entered into and very little in writing is in evidence on the matter, but on 14 January 1974 Mr Carayol wrote on a Shyben Madi delivery note in his own handwriting the following words and signed them:

`CL Carayol Fees 1973

Balance due Mr CL Carayol as at 14 January 1974

D250 (Two hundred and fifty Dalasis)

(Sgd) CL Carayol

14.1.74.'

This paper writing is in evidence as exhibit C and when learned counsel put this to him in cross-examination Mr Carayol said:

Exhibit C can only mean that I had given them a chit for any fees for 1973 and this is what was left to come."

The cheque paid to Mr Carayol on this date was for D480 No 002855) and the counterfoil reads:

CL Carayol Fees for 1973

Accounting

D480.00

Bal. D250.'

The inescapable conclusion it seems to me is that all fees outstanding up to the end of 1973 were satisfied with this payment of D250; and if that is so the basis of the contract with Shyben was a straightforward matter of payment in accordance with a verbal agreement and that this was for a fixed sum or sums and not on a time basis. Fees above the original agreement were paid but this did not affect, in my view, the nature of the agreement."

The passage, however, contains two major defects, which undermine the reasoning. First, on the evidence, it was not an inescapable conclusion from the terms of the note (exhibit C) and the cheque counterfoil that the balance of D250 must be the balance of an agreed fee (or fees). It could equally well have been the balance of the permitted or agreed annual drawings on account of fees as yet unascertained. In other words, the two notes were as consistent with the defendant's evidence of agreed drawings as with the plaintiffs' evidence of agreed fees. The notes, therefore, afforded no help in determining who was to be believed: and they certainly were no foundation for an "inescapable conclusion" that fees were fixed by agreement in advance of the work being done.

Secondly, the Chief Justice would seem not to have had in mind the defendant's case. Or, if he did have it in mind, he misunderstood it. He appears to have thought that the conflict was between an agreement for fixed fees and an agreement, express or implied, for the defendant to be remunerated " on a time basis". He commented in his judgment shortly after the passage already quoted: "Nothing in the documentation would lead one to suppose that fees were to be charged on a time basis."

But the defendant did not suggest that this was the agreement. He claimed a *quantum meruit* only because the withdrawal of his instructions before he had completed his work deprived him of the opportunity of negotiating a fee in relation to the tax reduction he achieved. In truth, neither party suggested that they had agreed a remuneration on a time basis: the defendant claimed it only because he was prevented, as he saw it, from completing his task.

Their Lordships consider, therefore, that counsel for the defendant was justified in his submission that the Chief Justice failed to isolate, or identify, the true issue between the parties, and that he failed to appreciate the true nature of the counterclaim. This failure led him to treat as conclusive two documents which were, in truth, inconclusive for they were as consistent with the defendant's case of agreed drawings as they were with the plaintiffs' case of fixed fees.

The plaintiffs sought to support their case by seeking leave to introduce at the hearing before the Board fresh evidence. They claimed to have found in the files of the second plaintiff a letter dated 17 February 1973 addressed to "Messrs Shyben Madi" for the attention of Mr George Madi and signed by the defendant. The letter was said to have been misfiled and to have been discovered by accident. Their Lordships refused to admit the letter. Due diligence should surely have uncovered before trial the letter, which at all times was in the plaintiffs' possession. Their Lordships did, however, read the letter in order to determine whether, if admitted, it was likely to be of critical importance. It proved to have no such importance; it carried the matter no further than exhibit C and the cheque counterfoil. It was as consistent with agreed drawings pending a final settlement (the defendant's case) as with an agreed fixed fee, or fees (the plaintiffs' case). Their Lordships would add this comment. The letter, even if its terms had appeared to be decisive in favour of the plaintiffs, could not in justice have been admitted without giving the defendant an opportunity of explaining in evidence the circumstances in which he came to write it.

In their Lordships' view, therefore, the judgment of the Chief Justice was fatally flawed, and its reasoning in its decisive phase unsound and unsatisfactory. Its defects emerged clearly not only from the state of the evidence which it was his duty to consider but from the pleaded cases of the parties and the internal reasoning of the judgment itself. Perplexed, understandably, by the conflict of evidence and reluctant, also understandably, to decide who was telling the truth in the absence of some confirmation from contemporary documents, he founded his judgment on documents, the effect of which he misunderstood because of his failure to appreciate the nature of the case which by evidence and in argument the defendant was seeking to make. This is a case, therefore, in which "the reasons given by the trial judge are not satisfactory" (Lord Thankerton, *supra*). The matter then became at large for the appellate court. Their Lordships, therefore, answer the first of the two decisive questions in the affirmative. The Court of appeal was right to set aside the Chief Justice's finding that the parties had agreed specific fees.

Subject to one point, to which their Lordships will later briefly refer, it is conceded that, if the Chief Justice's finding is to be set aside, a *quantum meruit* award on the counterclaim is appropriate. The defendant's claim of D102,443.75 against the first plaintiff was based on 2,763 hours worked at D37.50 per hour: his claim against the second plaintiffs was based on 293 hours worked at D40 per hour. He had to give credit for D10,450. In their Lordships' view there was evidence upon which the Court of Appeal could reach a decision. The court's award of D70,000 against the first plaintiff and D5,000 against the second plaintiff was a reasonable assessment in the light of the evidence and of the finding by the Chief Justice that the defendant did a great deal of work. Their Lordships, having concluded that the Court of appeal acted correctly in treating the case as at large because of the errors of the trial judge, would not disturb the court's finding, even if, which they are not, they were disposed themselves to take a different view. The answer to the second of the two questions is, therefore, also an affirmative.

Lastly, the plaintiffs did submit that an agreement to remunerate a tax consultant on the basis of the tax reductions he might achieve was illegal. The point does not appear to have made any headway with the Court of Appeal; nor was it pressed at all strongly before the Board. Their Lordships reject it.

For these reasons this appeal would be dismissed with costs.

Appeal dismissed.

SYBB

JOBE (No 1) v **ATTORNEY-GENERAL (No 1)**

COURT OF APPEAL, BANJUL

(Civil Appeal (No 12/80)

11 May 1981

FORSTER AG P, LUKE AND ANIN JJA

Constitutional law - Constitution-Enforcement and Interpretation-Approach to Interpretation-Better approach is to give due regard to rationale as opposed to literal interpretation or textual comparisons of impugned legislation and constitutional provision - Constitution, 1970, ss 13-27-Special Criminal Court Act, 1979 (No 10 of 1979), ss 6-8 and 10-12.

Constitutional Law-Constitution-Enforcement and interpretation-Inconsistent and contravening enactment-Provision in Special Criminal Court Act, 1979, s6 (2) and (3) requiring trial court to dispense with technicality relating to law of evidence and defect or irregularity on face of criminal charge-Section 6(4) of Act also requiring trial court to dispense with giving reasons for ruling on submission of no case - Whether Act contravening provision in section 13 of 1970 Constitution guaranteeing fundamental rights and freedoms- Constitution, 1970, s 13-Special Criminal Court Act, 1979 (No 10 of 1979), s 6 (2)-(4).

Constitutional law-Constitution-Enforcement and Interpretation-Inconsistent and contravening enactment -Restrictions on grant of bail pending trial-Constitutional right under Constitution, 1970, ss 15(5) and 20 (2)(a) and (c) to pre-trial release where trial not proceeded with within reasonable time-Section 7 of Special Criminal Court Act, 1979 imposing restrictions on bail to "special circumstances only in discretion of magistrate and upon basis of harsh, burdensome and excessive conditions-Whether section 7 of Act void for being inconsistent with provisions in sections 15(5) and 20(2) (a) and (c) of Constitution-1970 Constitution, ss 15(5) and 20 (2) (a) and (c)-Special Criminal Court Act, 1979, s7.

Constitutional law - Constitution-Enforcement and interpretation-Inconsistent and contravening enactment-Confiscation of property and freezing of bank accounts of suspect before his trial and conviction of criminal offence under Special Criminal Court Act,

1979, ss 8 (1) and (2) and 10 (1)-Whether sections 8 (1) and (2) and 10(1) of Act contravening section 18 (2) (a) (vii) of Constitution-Constitution, 1970, s 18(2) (a) (vii)-Special Criminal Court Act, 1979, ss 8 (1), (2) and (3), 9 and 10 (1).

Constitutional law-Constitution-Enforcement and Interpretation-Inconsistent and contravening enactment-Section 8(5) of Special Criminal Court Act, 1979 providing that a party's refusal to come forward to assert on oath acquisition of seized property constituting forfeiture of liberty and imprisonment for minimum period of five years- Section 8(5) repugnant and inconsistent with Constitution-Constitution, 1970, s 20(7)-Special Criminal Court Act, 1979, s 8 (5).

It is respectively provided by the Special Criminal Court Act, 1979 (No 10 1979), ss 6, 7, 8, 10 and 12 that:

"6. (1) Subject to subsection (2), (3) and (4) of this section the Court shall ordinarily apply the provisions of the Criminal Procedure Code (Cap 39).

(2) Notwithstanding the provisions of the Criminal Procedure Code (Cap 39) the Court shall dispense with any technicality relating to the law of evidence unless the Court is of the opinion that by so doing there may be a miscarriage of justice.

(3) The proceedings of any trial under this Act shall not be adversely affected by such defect as duplicity or any other irregularity on the face of the charge.

(4) Where in any trial under this Act there is a submission of no case the Court shall forthwith give a ruling on the matter without necessarily assigning any reason therefor."

"7 (1) Any person who is brought to trial before the Court shall not be granted bail unless the Magistrate is satisfied that there are special circumstances warranting the grant of bail.

(2) Before bail is granted under this Act the accused shall be ordered:

(a) to pay into court an amount equal to one third of the total amount of money alleged to be the subject matter of the charge or pledge properties of equivalent amount as guarantee;

(b) to find at least two sureties who shall pay into court an amount alleged to be the subject matter of the charge or pledge properties of equivalent amount as guarantee.

(3) Any money or property paid into court or pledged under this Act shall be forfeited to the State in the event of the accused jumping bail."

"8. (1) Where a complaint is lodged to the Police to investigate any person suspected of having committed an offence in respect of which public fund or public property is affected, the Police shall immediately apply to a Magistrate for an order to be made freezing any accounts operated in the name of the person being investigated or in any other name or an account of which he is a signatory.

(2) The Police may also apply to a Magistrate to freeze the account of any other person suspected of operating an account on behalf of the person being investigated.

(3) The Police may also seize any property of the suspect or any other property held by any person on his behalf.

(4) Any property seized by the Police under this section shall be returned to any claimant who satisfies the Court that he acquired that property lawfully.

(5) Any person -

(*a*) who fails to come forward to prove that a property seized from him was acquired lawfully; or

(c) who fails to satisfy the Court that he acquired the property seized from him lawfully,

commits an offence and is liable on summary conviction to a term of imprisonment of not more than seven years and of not less than five years."

"10. (1) Where any account is frozen under this section, no bank shall pay out any moneys from that account unless the Inspector General of Police by writing under his hand approves any such payment.

(2) No person shall pay any money owed to any person whose account has been frozen under this section except through the bank.

(3) Any person who contravenes the provisions of this section commits an offence and is liable on summary conviction to a fine not exceeding D10,000.00 or to a term of imprisonment not exceeding five years or to both."

"12. (1) In addition to the punishment imposed under section 11 of this Act the Magistrate shall order the person to pay to the Accountant General the total sum of moneys for which he was found guilty of having stolen or return the stolen property to the appropriate body.

(2) Where a person ordered to pay any sum or return any property under this section fails to do so within one month of such an order the Court shall order that -

(a) any property he owns shall be sold and the proceeds paid to the Accountant General;

(b) any moneys kept in any bank in The Gambia shall be paid to the Accountant General.

(3) Where after making the orders prescribed in section 12 there is still some amount outstanding in respect of the properties or moneys affected by the conviction, the Court shall make a further order that any person, holding any money such as gratuities, awards, pensions or other similar moneys to which the person is entitled to, shall pay such moneys to the Accountant General."

It is also respectively provided by the Constitution, 1970, ss 13, 15 (5), 18 and 20 (2) (*a*) and (7) that:

"13. Whereas every person in The Gambia is entitled to the fundamental rights and freedoms, that is to say, the right, whatever his race, place or origin, political opinions, colour, creed or sex, but subject to respect for the rights and freedoms of others and for the public interest, to each and all of the following, namely:-

(a) life, liberty, security of the person and the protection of the law:

(b) freedom of conscience, of expression and of assembly and association; and

(c) protection for the privacy of his home and other property and from deprivation of property without compensation, the provisions of this Chapter shall have effect for the purpose of affording protection to

those rights and freedoms subject to such limitations of that protection as are contained in those provisions, being limitations designed to ensure that the enjoyment of the said rights and freedoms by any person does not prejudice the rights and freedoms of others or the public interest."

"15. (5) If any person arrested or detained as mentioned in subsection 3 (*b*) of this section is not tried within a reasonable time, then, without prejudice to any further proceedings that may be brought against him, he shall be released either unconditionally or upon reasonable conditions, including in particular such conditions as are reasonably necessary to ensure that he appears at a later date for trial or for proceedings preliminary to trial".

"18. No property of any description shall be taken possession of compulsorily and no right over or interest in any such property shall be acquired compulsorily in any part of The Gambia except by or

under the provisions of a law that:

(a) requires the payment of adequate compensation therefor; and

(b) gives to any person claiming such compensation a right of access, for the determination of his interest in the property and the amount of compensation to the Supreme Court.

(2) Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of subsection (1) of this section-

(*b*) to the extent that the law in question makes provision for the taking of possession or acquisition of any property, interest or right-

(vii) for so long only as may be necessary for the purpose of any examination, investigation, trial or inquiry or, in the case of land, for the purposes of the carrying out thereon of work of soil conservation or the conservation of other natural resources of work relating to agricultural development or improvement (being work relating to such development that the owner or occupier of the land has been required and without reasonable excuse refused or failed to carry out), and except so far as that provision or as the case may be, the thing done under the authority thereof is shown not to be reasonably justifiable in a democratic society …"

"20. (2) Every person who is charged with a criminal offence -

(a) shall be presumed to be innocent until he is proved or has pleaded guilty."

(7) No person who is tried for a criminal offence shall be compelled to give evidence at the trial."

On 9 August 1979, the appellant was arraigned before the Special Criminal Court established under the Special Criminal Court Act, 1979 (No 10 of 1979), on two charges: one of stealing by a clerk or servant the sum of over D595,000, the property of his employer, a public bank contrary to sections 252 and 258 of the Criminal Code; and the other of fraudulent false accounting. He was remanded in custody without the option of bail pending trial. During the pendency of the criminal trial, he filed a civil action in the Supreme Court (High Court) on 23 November 1979, against the Attorney-General to enforce his fundamental rights and freedoms guaranteed under chapter 3 of the 1970 Gambia Constitution. He claimed that the Special Criminal Court Act had contravened his constitutional right and should be declared ultra vires and void. The High Court, after hearing the argument of counsel for the parties, dismissed the claim on the ground that the Act was not inconsistent with any section of the Constitution.

The appellant brought the instant appeal against the decision of the High Court. His counsel contended, inter alia, that: section 6 of the Act had contravened section 13 of the 1970 Constitution because section 6(2) and (3) had the effect of depriving him of the benefit of any technicality relating to the law of evidence and such defect as duplicity or irregularity on the face of the charge; whilst section 6(4) was contrary to the requirement of natural justice in that it had provided that a trial court could give a ruling on a submission of no case without giving any reason in support of the ruling: (ii) section 7 of the Act, by imposing onerous and excessive conditions for the grant of bail by the magistrate had contravened sections 15(5) and 20 (2) (*a*) and (*c*) of the Constitution; and (iii) sections 8-10 of the Act by providing for confiscation of property and freezing of bank accounts of a suspect even before his trial had also contravened section 18 of the Constitution.

Held, *allowing the appeal in part (per Anin JA, Forster Ag P and Luke JA concurring*): (1) the constitutional issues raised in the instant appeal could not be satisfactorily determined by a literal interpretation or textual comparisons of the impugned sections 6-8 and 10-12 of the

Special Criminal Court Act, 1979 (No 10 of 1979), and the provisions on fundamental rights and freedoms contained in sections 13-27 of the 1970 Constitution of The Gambia. A better approach would be to have due regard to the rationale of both enactments. Thus the rationale of the Special Criminal Court Act, 1979 (as contained in its permeable,) was to provide an effective and expeditious machinery for combating offences involving misappropriation and theft of public funds and public property considered by Parliament to be detrimental to the economic interest of the Gambia. The rationale and the objectives of the Act were in consonance with and not inconsistent with the important riders or limitations, namely, "subject to respect for the rights and freedoms of others for the public interest" tagged on to section 13 of the Constitution entrenching fundamental rights and freedoms.

(2) Section 6 of the Special Criminal Court Act, 1979 (No 10 of 1979), did not infringe section 13 of the 1970 Constitution providing for fundamental rights and freedoms and would be upheld as valid because its subsections (2) and (3) requiring the trial court to dispense with any technicality relating to the law of evidence and such defect as duplicity or any irregularity on the face of the change, and subsection (4) which also dispensed with the trial court giving reasons in support of a decision on a submission of no case, were designed to expedite trials. The subsection also conformed to the modern common law practice of setting a premium on substantial justice and playing down technicalities and procedural irregularities which had not occasioned miscarriage of justice. And the effect of section 6(4) was that the trial was to proceed after the magistrate had decided the issue whether or not there was a case for the accused to answer without his necessarily assigning reasons there and then. In any case there was no principle of national justice that reasons should be given for decisions. *R* v *Gaming Board for Great Britain*: *Ex parte Banaim* [1970] 2 All ER 528 at 534-535 per Denning Mr cited.

(3) The provisions in section 15(5) and 20 (2) (*a*) and (*c)* of the 1990 Constitution were designed to protect personal liberty and secure the protection of law for an accused person and afford him the privilege of a fair hearing within a reasonable time. Section 15 (5) provided for mandatory release of the accused if there was no prospect of his trial taking place within a reasonable time and he should be released either unconditionally or upon reasonable conditions, including in particular such conditions as were reasonably necessary to ensure that he appeared at the date named for his trial." In effect, bail was not to be denied the suspect either as a punishment or from consideration of any

extraneous matters, eg his guilt or innocence since section 20 (2) (*a*) of the Constitution presumed his innocence until he was proved or had pleaded guilty. And under section 20 (2) (*c*), a person charged with a criminal offence should be given adequate time and facilities for the preparation of his defence. In comparison, section 7 of the Special Criminal Court Act, 1979, with its restriction of bail to "special circumstances" only within the discretion of the magistrate and upon the basis of harsh, burdensome and excessive conditions, was clearly inconsistent with the accused constitutional right to pre-trial release, where, as in the instant case, his trial was not proceeded with within a reasonable time. Section 7 was therefore ultra vires section 15 (5) and 20 (2) (*a)* and (*c*) and would therefore be declared unconstitutional and void.

(4) Sections 8 (1) and (2) and 10 (1) of the Special Criminal Court Act, 1979 which authorised confiscation of property and freezing of bank accounts of a suspect *before* his trial and conviction of a criminal offence were ultra vires and inconsistent with section 18 (2) (*a*) (vii) of the 1970 Constitution and would thus be declared unconstitutional and void because first: as required by section 18 (2) (*a*) (vii) the law in question should authorise acquisition of property only to the extent, ie " for so long as *only* may be necessary for the purposes of any examination, investigations, trial on inquiry." The phrase "for the purposes of "would be construed as meaning "for purposes exclusively referable to or connected with." The effect was that the acquisition of property was permissible only to the extent that it might be necessary for purposes connected with or exclusively referable to any examination, investigation, trial or inquiry. The acquisition was for a limited purpose and duration and was aimed at assisting an examination, investigation trial or inquiry. However, under section 8 (3) of the Special Criminal Court Act, 1979, the seizure was not limited in its purpose, duration and scope. Second, the law in question or legislation, making provision for the acquisition of property, must be shown "to be reasonably justifiable in a democratic society". Sections 8 (1) and (2)(a) and 10 (1) of the Act infringed section 18 (2)(a) (vii) because they empowered the police to seize properties and freeze accounts and then empowered the Inspector General of Police to allow subsequent disbursements from the frozen accounts at his unfettered discretion; and section 9 also authorised him to publish in the *Gazette* the names of all persons whose accounts had been frozen. Such a state of affairs was alien to a liberal democracy with constitutionally entrenched fundamental rights and freedoms and the rule of law.

(5) Section 8(5) of the Special Criminal Court Act, 1979 was also repugnant to and was wholly inconsistent with section 20 (7) of the 1970 Constitution which had entrenched the privilege against self-incrimination and would be declared unconstitutional and void because under the section if a party refused to come forward to assert on oath his acquisition of the seized property and elected to remain silent, he forfeited, without more, his liberty by being imprisoned for a minimum period of five years.

Editorial Note. The appeal by the Attorney-General from the decision of the Court of Appeal to the Judicial Committee of the Privy Council was allowed in part. See *Attorney*-General (No 2) v *Jobe* (No 2) decision given on 26 March 1984 and reported in this volume post at page 208.

Cases referred to;

(1) R v *Furlong* 34 Crim App R 79.

(2) R v *McVittie* [1960] 2 QB 483.

(3) R v *Gaming Board for Great Britain*; *Ex Parte Banaim* [1970] 2 All ER 528.

(4) *Atunde* v *Commissioner of Police* [1952] 14 WACA 171.

(5) *Capital & Suburban Properties Ltd* v *Swycher* [1976] 1 All ER 861.

(6) *R* v *Rose* (1898) 67 LJQB 289.

(7) *R* v *Scaife* (1841) 9 Dowl 553.

(8) *Robinson, In re* 23 LJQB 286.

(9) *Thomas, Ex parte* (1956) Crim LR 119.

(10) *Stack* v *Boyle* (1951) 341 US 2.

(11) *Minister of Home Affairs* v *Fisher* [1979] 3 All ER 21, PC.

(12) *Woolmington* v *Director of Public Prosecutions* [1935] AC 462.

(13*) Sodeman* v *R* [1936] 2 All ER 1138, PC.

(14) *R* v *Carr - Briant* [1943] 1 KB 607.

(15) *R* v *Banin* 12 WACA 8

APPEAL from the decision of the Supreme Court (High Court Per Bridges CJ), dismissing the appellant's civil action (pending his criminal trial before the Special Criminal Court) that the Special Criminal Court Act, 1979 (No 10 of 1979), had contravened his constitutional rights under the 1970 Constitution of The Gambia. The facts are sufficiently stated in the judgment of Anin JA.

SK O"Brien Coker for the appellant.

Hassan B Jallow (with him *M A Harding* and

Mariam Jack (Miss) for the respondent.

ANIN JA. The appellant has been remanded in custody without the option of bail since 9 August 1979 when he appeared before the Special Criminal Court on one charge of stealing by a clerk or servant the sum of D595,791.34 the property of the Gambia Commercial and Development Bank, his employer, contrary to sections 252 and 258 of the Criminal Code, and on one charge of fraudulent false accounting contrary to section 303 (c) of the same Code.

During the pendency of the criminal case, he commenced a civil action in the Supreme Court (High Court) to enforce his fundamental rights and freedoms guaranteed under chapter 3 of the Constitution of the Republic of The Gambia (No 1 of 1970), hereinafter referred to simply as the Constitution.

In the writ of summons issued on 23 November 1979, he claims that "the special criminal Court Act (Act No 10 of 1979) - hereinafter called simply the Act - violates his constitutional rights and is ultra vires the Constitution of the Republic of The Gambia.

After hearing legal argument from counsel for both parties, the learned Chief Justice in a judgment dated 29 July 1980, dismissed the plaintiff's claim and entered judgment for the defendant with costs on the main ground that the Act is not inconsistent with any relevant section of the Constitution.

Being dissatisfied and aggrieved with that judgment, the appellant has appealed to this court, and has through learned counsel renewed his

attack on the Act for having contravened his fundamental rights and freedoms enshrined in sections 13 to 27 (inclusive) of the 1970 Constitution. Since both learned counsel in their full and interesting legal arguments have traversed virtually the same ground as they covered in the court below, I would not overburden this judgment with a recapitulation of their earlier arguments and the learned judge's detailed reasons, save where necessary. I would rather concentrate on the arguments actually canvassed before us at the hearing of this appeal.

First ground: section 6 of the Act violates section 13 of the Constitution.

The first ground of appeal argued by Mr Coker, learned counsel for the appellant, was that the learned Chief Justice erred in law when he held that section 6 of the Act did not contravene section 13 of the Constitution. For the sake of clarity and ease of reference, I reproduce both enactments verbatim:

The Special criminal court Act (No 10) of 1979

"6. (1) Subject to subsection (2), (3) and (4) of this section the Court shall ordinarily apply the provisions of the Criminal Procedure Code (Cap 39).

(2) Notwithstanding the provisions of the Criminal Procedure Code (Cap 39) the Court shall dispense with any technicality relating to the law of evidence unless the Court is of the opinion that by so doing there may be a miscarriage of justice.

(3) The proceedings of any trial under this Act shall not be adversely affected by such defect as duplicity or any other irregularity on the face of the charge.

(4) Where in any trial under this Act there is a submission of no case the Court shall forthwith give a ruling on the matter without necessarily assigning any reason therefor."

The Constitution, 1970

"13. Whereas every person in The Gambia is entitled to the fundamental rights and freedoms, that is to say, the right, whatever his race, place or origin, political opinions, colour, creed or sex, but

subject to respect for the rights and freedoms of others and for the public interest, to each and all of the following, namely:-

(d) Life, liberty, security of the person and the protection of the law:

(e) Freedom of conscience, of expression and of assembly and association; and

(f) Protection for the privacy of his home and other property and from deprivation of property without compensation,

The provisions of this Chapter shall have effect for the purpose of affording protection to those rights and freedoms subject to such limitations of that protection as are contained in those provisions, being limitations designed to ensure that the enjoyment of the said rights and freedoms by any person does not prejudice the rights and freedoms of others or the public interest".

In support of his first ground, Mr Coker conceded the power of Parliament under the Constitution to legislate; but he stressed that any law passed by Parliament must conform to the Constitution; otherwise, it must be struck down as null and void for its contravention of the Supreme law of the land. In his contention, the Act herein ought to be impugned as a nullity for having violated the citizen's constitutionally protected fundamental rights and freedoms. Comparing the two enactments, he first submitted that the section 6 (2) and (3) of the Act deprive an accused person like his client of the benefit of any technicality relating to the law of evidence and of such defect as duplicity or any other irregularity in the charge in his criminal trial, while section 6 (4), dispenses with reasons being given in support of a ruling on a submission of no case to answer during the trial. In his submission, it is a mandatory requirement of natural justice that reasons shall be given for any ruling, order or judgment made in a criminal trial. The statutory exceptions made by sections 6 (2) and (3) of the Act favour the prosecution and militate against the interest of the accused person. They violate the citizen's fundamental right to life, liberty, security of the person and erode the protection of the law under section 13 (*a*) of the 1970 Constitution and were accordingly illegal, null and void.

In reply, Mr Jallow, learned counsel for the respondent, submitted that section 13 of the Constitution contained only a recital of the various fundamental rights and freedoms created by sections 14 to 27 inclusive. Since section 13 of the Constitution did not itself create

those rights and freedoms, it is wrong to state that section 6 of the Act contravenes section 13 of the Constitution. In any event, Mr Jallow continued, the ensuing sections 14 to 27 of the Constitution conferring the said fundamental rights and freedoms had not in fact been violated by section 6 of the Act. In particular, section 6 (2) and (3) have not created any new powers not already possessed by the courts in this jurisdiction. For example, sections 6 (2) of the Act and 291 of the Criminal Procedure Code (Cap 39). The said section 279 (1) of Cap 39, it will be recalled, empowers the Supreme Court on any appeal against conviction to allow the appeal if in its view the judgment appealed from is unreasonable or cannot be supported having regard to the evidence or that it should be quashed if it is wrong in law and if such decision has not in fact caused a miscarriage of justice; with the proviso that notwithstanding the fact that the point raised in the appeal might be decided in favour of the appellant, the court shall dismiss the appeal if it considers that no substantial miscarriage of justice has actually occurred. And section 291 of Cap 39 enacts that no finding, sentence or order passed by a court of competent jurisdiction shall be reversed or altered on appeal or review on account:

(a) of any error, omission or irregularity in the complaint, summons, warrant, charge, proclamation, order, judgment or other proceedings before or during the trial or in any inquiry or other proceedings under the Code; or

(b) of the omission to reverse any list of assessors or jurors; or

(c) of any misdirection, unless such error, omission, irregularity or misdirection has in fact occasioned a failure of justice …

The policy of the said subsection to section 6 of the Act was, in Mr Jallow's submission, not different from the above quoted sections of the Criminal Procedure Code. Both enactments emphasise the need for substantial justice to be done unimpeded by mere technicalities and procedural irregularities.

With respect to section 6 (4), Mr Jallow stressed that the sub-section did not entirely dispense with reasons being embodied in the final judgment. It merely gave the trial magistrate a discretion to reserve his reasons for the interlocutory no case ruling until later at the end of the evidence when writing the final judgment. The operative word in the subsection was "necessarily", the no case ruling need not `necessarily' be given but it may of course be supported with reasons.

Incidentally, the learned Chief Justice also rejected Mr Coker's objection to section 6 of the Act by referring to section 279 (1) of the Criminal Procedure Code and observing that the section of the Act is no more offensive than the proviso to section 279 (1).

In my opinion, the constitutional issues raised in this appeal cannot be satisfactorily determined by a literal interpretation or by textual comparison of both enactments only. A better approach would be to have due regard to the rationale of both enactments.

The raison d'etre of the Special Criminal Court Act (No 10 of 1979), is contained in the long title and preamble:

"An Act to establish a Special Criminal Court to deal with offences involving misappropriation and theft of public funds and public property.

WHEREAS by subsection (1) of section 94 of the Constitution Parliament may establish courts subordinate to the Supreme court;

AND WHEREAS in the opinion of Parliament it is expedient to establish such a subordinate court to deal effectively and expeditiously with certain offences considered detrimental to the economic interest of the Republic of The Gambia..."

The Act was passed for the express purpose of providing an effective and expeditious machinery for combating offences involving misappropriation and theft of public funds and public property considered by Parliament to be detrimental to the economic interest of The Gambia. The felt social need animating the Act was the concern of Parliament for the alarming upsurge in offences involving theft of public funds and public property, which was depleting the national exchequer and imperilling the national economy and well-being of the Republic. An effective and quick check to these rampant social evils could, in Parliament's view, be attained through the instrumentality of a specialist court, not bogged down by arid legal technicalities and procedures, striving for substantial justice and eschewing miscarriages of justice. Freed from other less important cases such a court could dispose of these theft cases quickly.

Can it be fairly said that the aims and objectives of the Act are not in consonance with the riders to the provisions in the sections 13 to 27 of the Constitution entrenching fundamental rights and liberties? In my considered judgment, the aims and rationale of the Act are not

inconsistent with the important riders, subject to respect for the rights and freedoms of others and for the public interest" tagged on to the constitutional freedoms and rights as indispensable safeguards and conditions for the enjoyment by the individual of his fundamental rights and freedoms. If his liberty is not to degenerate into licence, he must not trample over the rights and freedoms of his neighbour and he must not steal or misappropriate public funds and property to the prejudice of his tax-paying neighbours and the Republic at large. The Constitution has entrusted to the courts the awesome responsibility of protecting and enforcing the fundamental rights and freedoms, not only from violation by individuals but also from possible abuse by executive power and also from any unconstitutional excesses by the legislature itself. Just as it is necessary to protect the community at large against crime, so it is necessary to protect the individual citizen in a democratic state against abuse of executive or legislative power.

I do not agree with Mr Coker that the procedure outlined in section 6 of the Act constitutes a violation of section 13 of the Constitution. Apart from exceptions made in 6 (2), (3) and (4), the Special Criminal Court is mandated to apply ordinarily the Criminal Procedure Code (Cap 39), in its entirety. See section 6 (1). As Mr Jallow rightly points out, sections 279 and 291 of Cap 39 contains virtually the same rules as those in sub-sections (2) and (3) of section 6 of the Act; and both aim at achieving substantial justice in practice. I would add that an undue obsession with dry technicalities may in practice lead to a miscarriage of justice. Again, the developing common law, even in the field of criminal law, discountenances mere technicalities and procedural irregularities in favour of substantial justice. Even where, on appeal a legal ground founded on a mere technicality or irregularity not occasioning a miscarriage of justice is established, the courts have consistently shown a readiness to apply the proviso and dismiss the appeal notwithstanding the correctness of the legal ground canvassed. In this context a substantial miscarriage of justice within the meaning of proviso occurs where by reason of the mistake, technicality or irregularity complained of in the trial, the appellant has lost a chance of acquittal which was fairly open to him.

In *R* v *Furlong* 34 Criminal Appeal R 79 for example, it was held that every irregularity is not necessarily a ground for quashing a conviction; and that the court must consider whether or not is an irregularity which goes to the root of the case. Reference may also be made to *R* v *Mc Vittie* [1960] 2 QB 483, where the appellant was convicted on an indictment which was not bad in law, but was defective in that it described a known offence with incomplete

particulars, and the appellant had not been embarrassed or prejudiced by the technical irregularity, the appellate court held that it was not prevented from applying the proviso and dismissing the appeal.

Turning to section 6 (4) of the Act, it is clear that it is designed to expedite the trial. The trial is to proceed after the magistrate has decided the issue whether or not there is a case for the accused to answer without his necessarily assigning reasons there and then. Of course, he may do so if he wishes, but he is not debarred from reserving and incorporating those reasons in his final judgment. Here again, I would remark that this practice is fairly common in most Commonwealth jurisdictions and it is not peculiar to the Special Criminal Court under the Act.

Mr Coker sought to base his insistence on the indispensability of reasons for every judicial ruling or judgment on natural justice. However, as Lord Denning MR observed in *R* v *Gaming Board for Great Britain; Ex parte Banaim* [1970] 2 All ER 528 at 534-535a, it has never been a principle of natural justice that reasons should be given for decisions.

Furthermore, that great tribunal of fact, the jury, does not as a rule give reasons for its findings, even in murder cases. Admittedly, it is desirable for reasons to be given for decisions by a magistrate or judge except where the reason for a decision is quite obvious, eg in interlocutory matters: see *Atunde* v *Commissioner of Police* (1952) 14 WACA 171 at 173 for an obiter dictum along the same lines when the court was examining an enactment which permitted the transmission of reasons with the copy of the proceedings when there is an appeal. Reference may also be made to the following relevant observation of Buckley LJ in *Capital & Suburban Properties Ltd* v *Swycher* [1976] 1 All ER 861 at 884:

"there are some sorts of interlocutory applications mainly of a procedural kind, on which a judge exercising his discretion on some such question as whether a matter should be expedited or adjourned or extra time should be allowed for a party to take some procedural step should have been granted or refused, can properly make an order without giving reasons. This being an application involving questions of law is in my opinion clearly not such a case. Litigants are entitled to know on what grounds their cases are decided. It is of importance that the legal profession should know on what ground cases are decided, particularly when questions of law are involved. And this court is

entitled to the assistance of the judge of first instance by an explicit statement of his reasons for deciding as he did."

Nobody would quarrel with this salutary restatement of the general rule concerning the desirability for reasoned decisions. However, as Denning MR reminded us in the *Benaim* case earlier quoted, there is no general natural justice requirement for reasons in support of decisions of magistrates. In any event section 6(4) of the Act does not dispense altogether with reasons: it merely gives the magistrate an option, at his discretion, either to state his reasons when he rules on a no case submission or to defer and incorporate them in his final judgment. I can see no valid objection either in legal theory or practice to that statutory provision.

To sum up, I do not find that the procedure contained in section 6 of the Act infringes either the letter or spirit of the Constitution. The three amendments it introduces into the Criminal procedure Code (Cap 39), were designed to expedite trials. They virtually reproduce existing law in Cap 39 (sections 279 and 291); and they conform to the modern common law practice of setting a premium on substantial justice and playing down technicalities and procedural irregularities provided these do not occasion miscarriage of justice. I would accordingly uphold section 6 of the Act as being not inconsistent with the Constitution.

Second ground - section 7 of the Act violates sections 15 (5) and 20 of the Constitution

Entirely different considerations, however, apply to the revolutionary changes introduced into the existing law and practice as to bail by section 7 of the Act. This new enactment is reproduced fully as follows:

"7. (1) Any person who is brought to trial before the Court shall not be granted bail unless the Magistrate is satisfied that there are special circumstances warranting the grant of bail.

(2) Before bail is granted under this Act the accused shall be ordered:

(a) to pay into court an amount equal to one third of the total amount of moneys alleged to be the subject matter of the charge or pledge properties of equivalent amount as guarantee;

(b) to find at least two sureties who shall pay into court an amount alleged to be the subject matter of the charge or pledge properties of equivalent amount as guarantee.

(3) Any money or property paid into court or pledged under this Act shall be forfeited to the State in the event of the accused jumping bail."

Section 20 of the Constitution, made up of thirteen subsections, contain important provisions to secure protection of law for persons charged with criminal offences. The entire section has been reproduced in the judgment of the court below; and I would only here set out a few of the more relevant subsection for our present purpose:

"20. (1) If any person is charged with a criminal offence, then unless the charge is withdrawn, the case shall be afforded a fair hearing within reasonable time by an independent and impartial court established by law.

(2) Every person who is charged with a criminal offence -

(a) shall be presumed to be innocent until he is proved or has pleaded guilty;

(c) shall be given adequate time and facilities for the preparation of his defence; …

(4) No person shall be held to be guilty of a criminal offence on account of any act or omission that did not, at the time it took place, constitute such an offence, and no penalty shall be imposed for any criminal offence that is severer in degree or description than the maximum penalty that might have been imposed for that offence at the time when it was committed.

(7) No person who is tried for a criminal offence shall be compelled to give evidence at the trial.

(11) Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of: (a) subsection (2) (*a*) of this section to the extent that the law in question imposes upon any person charged with a criminal offence the burden of proving particular facts;

(13) In this section `criminal offence' means a criminal offence under the law of The Gambia."

I would additionally reproduce the all-important section 15 (1) (e), (3),(4) and (5) of the Constitution which protect the individual's right to personal liberty and regulate the arrest and detention of an accused person; his expeditious arraignment before a court; and his release either unconditionally or upon reasonable condition if he is not tried within a reasonable time:

"15. (1) No person shall be deprived of his personal liberty save as may be authorized by law in any of the following cases, that is to say:

(*e*) upon reasonable suspicion of his having committed, or being about to commit, a criminal offence under the law of The Gambia;

(3) Any person who is arrested or detained -

(a) for the purpose of bringing him before a court in execution of the order of a court; or

(b) upon reasonable suspicion of his having committed, or being about to commit, a criminal offence under the law of The Gambia: and who is not released, shall be brought without undue delay before a court.

(4) Where any person is brought before a court in execution of the order of a court in any proceedings or upon suspicion of his having committed or being about to commit an offence, he shall not be thereafter further held in custody in connection with those proceedings or that offence save upon the order of a court.

(5) If any person arrested or detained as mentioned in subsection 3 (*b*) of this section is not tried within a reasonable time, then, without prejudice to any further proceedings that may be brought against him, he shall be released either unconditionally or upon reasonable conditions, including in particular such conditions as are reasonably necessary to ensure that he appears at a later date for trial or for proceedings preliminary to trial."

In support of ground (2), Mr Coker contended that section 7 of the Act imposed onerous and excessive conditions for the grant of bail by the magistrate. It was a clear violation of section 99 (2) of Cap 39 which provides that: "The amount of bail shall be fixed with due regard to the circumstances of the case and shall not be excessive." Section 7 of

the Act was also in flagrant contravention of section 15 (5) of the Constitution which empowers the release of an arrested or detained person "either unconditionally or upon *reasonable* conditions, including in particular such condition as are reasonably necessary to ensure that he appears at a later date for trial or for proceedings preliminary to trial." Furthermore, he submitted that, the continued detention of the appellant since 13 September 1979 rebuts the constitutional presumption of innocence under section 20 (2) (*a*). There can be no doubt, he added, that section 7 of the Act completely erodes constitutionally protected right of the appellant to liberty; and his right to a fair hearing predicated upon his presumed innocence. It is punitive in effect and detrimental to his inalienable rights and freedoms.

In reply, Mr Jallow first pointed out that section 15 of the Constitution does not prescribe conditions for bail; and that those conditions are rather contained in section 99 of Cap 39. Section 7 of the Act merely restricts section 99 in so far as persons accused of stealing under the Act are concerned. There was in fact no conflict between the Act and the Constitution. The Gambia Parliament was no longer fettered by the Colonial Laws Validity Act 1865 and its Acts cannot be held, like a colonial law, to be in any respect repugnant to an Act of the Imperial Parliament and ipso facto null and void. He disagreed that the continued detention of the appellant displaces the presumption of innocence guaranteed by the Constitution. On the contrary, he argued, the Constitution itself (section 15 (1) (*e*) authorizes the detention of any person upon *reasonable* suspicion of his having committed a crime.

The right to bail pending trial

By way of an introduction to our evaluation of the rival arguments under ground (2), I would first touch on the existing rules governing bail in an ordinary criminal trial under Cap 39 and then consider the relevant canons for the construction of the sections of the Gambian Constitution now under consideration.

Bail or bailors are sureties taken by a person duly authorised, who bind themselves by a pecuniary penalty for the appearance of an accused person at a certain day and place, to answer and be justified by law. The condition of the recognisance, as respects the sureties is performed by the appearance of the accused person in court. The prisoner leaves the custody of the law and is placed in the custody of his bail. The bail or bailor may re-seize him if they suspect he will bolt

away, and bring him before a magistrate who will commit him in discharge of the bail. It is then competent for the prisoner to find new sureties: see generally *Archbold's Criminal Practice* (36th ed) page 71.

When a judicial officer admits a prisoner to bail during the trial, he exercises a judicial discretion. The fundamental principle is that bail is not to be withheld merely as a punishment and the requirements as to bail are merely to secure the attendance of the prisoner at the trial: *R* v *Rose* (1898) 67 LJQB 289 and *R* v *Scaife* (1841) 9 Dowl 553 which also laid down the principle that the grant of bail is founded on the probability of his appearing to take his trial and not on his supposed guilt or innocence. In deciding whether or not to grant bail in a particular case, the following matters are usually taken into consideration: the nature of the accusation; the nature of the evidence in support; the severity of the punishment attracted by the offence; and the fact whether the sureties are independent or indemnified by the accused person: see *Re Robinson* 23 LJQB 286.

Section 99 (2) of Cap 39 provides that the amount of bail shall not be excessive. In an English case, for instance, it was held by the Divisional Court that if the amount fixed by the justices is so excessive that the prisoner cannot avail himself of it, application may be made for a writ of *habeas corpus* on the ground that the imposition of such excessive bail amounts to a grant of no bail and contravenes the Bill of Rights 1689, and thus makes the applicant's imprisonment unlawful: see *Ex parte Thomas* (1956) Crim LR 119.

It is against this background of the common law as to bail that the local enactments should be viewed. Sections 100 to 109 of Cap 39 contain elaborate provisions as to recognisances; but the grant of bail by courts is covered by section 99 which states:

"99 (1) When any person, other than a person accused of an offence punishable with death, appears or is brought before any court on any process or after being arrested without a warrant, and is prepared at any time or at any stage of the proceedings to give bail, such person may in the discretion of the Court be released upon his entering in the manner hereinafter provided into a recognisance, with or without a surety or sureties, conditioned for his appearance before such court at the time and place mentioned in the recognisance.

(2) The amount of bail shall be fixed with due regard to the circumstances of the case and shall not be excessive.

(3) Notwithstanding anything contained in this section or in section 22 the Supreme court may in any case direct that any person be admitted to bail or that the bail required by a subordinate court or police officer be reduced."

At this juncture, I would like, for my part, to correct an unfortunate error in the judgment of the court below where it is stated that Parliament has denied bail "absolutely" in the case of a person accused of an offence punishable by death. That statement, with respect, is only true of section 99 (1); but it is incorrect when section 99 (1) is read, as it must, in conjunction with section 99 (3). The true legal position, in my respectful view, *reading the two subsections together* is that a court subordinate to the Supreme Court (High Court) is incompetent to grant bail to a person accused of an offence punishable with death. However, it is open to such a person to apply instead to the Supreme court to admit him to bail, *no matter the offence with which he is charged, whether it carries the death penalty or not*. And the Supreme Court exercises its discretion to either admit him to bail or order a reduction in the bail being independent or indemnified by the accused person: see *Re Robinson* 23 LJQB 286.

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The basic rule that bail shall not be withheld as a means of punishment has received its stalwart defenders in the United States of America. The Founding Fathers inherited bail rules from England and entrenched the Bill of Rights 1689 proviso that excessive bail shall not be required in the Eighth Amendment to their Constitution, which became effective on 3 November 1791. The attitude of United States Courts to the denial of pre-trial release of a prisoner as a form of punishment can be seen in the judgment of Jackson J (with whom Frankfurter J concurred) in *Stack* v *Boyle* (1951) 341 US 2 at pp 7-8 coram: the United States Court of Appeal for the Ninth Circuit:

"The practice of admission to bail, as it has evolved in Anglo-American law, is not a devise for keeping persons in jail upon mere accusation until it is found convenient to give them a trial. On the contrary, the spirit of the procedure is to enable them to stay out of jail until a trial has found them guilty. Without this conditional privilege,

even those wrongfully accused are punished by a period of imprisonment while awaiting trial and are handicapped in consulting counsel, searching for evidence and witnesses and preparing a defence."

Vinson CJ at page 44 was equally forthright:

"Federal law has unequivocally provided that a person arrested for non-capital offence shall be admitted to bail. This traditional right to freedom before conviction permits the unhampered preparation of a defence, and serves to prevent the infliction of punishment prior to conviction: see *Hudson* v *Parker* 156 US 277 … Unless this right to bail before trial is preserved, the presumption of innocence, secured only after centuries of struggle, would lose its meaning … the fixing of bail for any individual defendant must be based upon standards relevant to the purpose of assuring the presence of that defendant."

I now turn my attention to some pertinent dicta of the Privy Council in its recent decision in *Minister of Home Affairs* v *Fisher* [1979] 3 All ER 21, where their Lordships construed a Bermudan enactment and held that an illegitimate child was a child of a person possessing Bermudan status and deemed "to belong to Bermuda". In delivering the opinion of the Board, Lord Wilberforce made important general pronouncements on the relevant canons for the construction of fundamental rights and freedoms entrenched in a written constitution. Those will be found in full at pages 25 to 26; but the headnote at page 21 contains an adequate summary for our purpose. It was held (as stated in the headnote) that:

"(1) A constitutional instrument was a document *sui generis*, to be interpreted according to principles suitable to its particular character and not necessarily according to the ordinary rules and presumptions of statutory interpretation.

(2) Provisions in a constitutional instrument dealing with individual rights were therefore to be interpreted according to the language used and the traditions and usages which had influenced that language. Having regard to the broad and ample style of chapter 1 of the Constitution of Bermuda which laid down principles of width and generality in regard to the protection of fundamental rights and freedoms of the individual, and to the fact that the constitution was influenced by both the United Nations Universal Declaration of Human Rights and the European Convention for the Protection of Human Rights and Freedoms, the provisions in chapter 1, including

section 11, were to be generously interpreted to give full recognition and effect to the fundamental rights and freedoms referred to.

(3) Accordingly, the question whether the children were each a child, which was deemed to belong to Bermuda, notwithstanding that they were illegitimate, was to be approached with an open mind unfettered by presumptions as to legitimacy arising in ordinary legislation dealing with property, succession or citizenship."

Summary

In construing the relevant words of both enactments, I would bear in mind the need for a generous construction; remembering also the common law traditions and usages behind them; the broad scheme of section 15 of the Constitution in particular, and of chapter 3, in general, which are both intended to protect the right to personal liberty; and the fundamental rights and freedoms respectively and have their origins in the United Nations Universal Declaration of Human Rights which has been ratified by The Gambia.

In the first place, Parliament's legislative power to establish the Special Criminal Court as subordinate to the Supreme Court is enshrined in section 94 (1) of the Constitution. However, it is therein coupled with an important qualification: "any such (Subordinate) court shall, subject to the provisions of this Constitution, *have such jurisdiction and powers as may be conferred on it by any law."* (The emphasis is mine). It is therefore ultra vires Parliament to confer on a subordinate court like the Special Criminal Court any jurisdiction and powers which contravenes any provision of the Constitution. If any such unconstitutional jurisdiction or powers are in fact conferred on the subordinate court, they are null and void notwithstanding the fact they are contained in an Act of Parliament.

In the second place, section 15 (1) (*c*) of the Constitution clearly provides that

"no person shall be deprived of his personal liberty save as may be authorised by law in any of the following cases, that is to say .. (*c*), Upon reasonable suspicion of his having committed or being about to commit a criminal offence under the law of The Gambia."

Then subsection 15 (3) (*b*) enjoins that "Any person who is arrested or detained upon reasonable suspicion of his having committed or being about to commit, a criminal offence under the law of The Gambia, and

who is not released, shall be brought without undue delay before a court." When he is duly "brought before a court … upon suspicion of his having committed or being about to commit an offence; section 15 (4) stipulates that: "he shall not be thereafter held in custody in connection with those proceedings or that offence save upon the order of a court." In other words, after the suspect's arrest or detention and first appearance in court, he *shall* not - note the mandatory terms - I repeat, he shall not be further incarcerated unless the court makes a specific order that he shall be remanded in custody. Even then, section 15 (5) comes to the rescue of the accused; for if he is not tried within a reasonable time, then without prejudice to any further proceedings that may be brought against him, he shall be released. Note section 15 (5) orders his mandatory release if there is no prospect of his trial taking place within a reasonable time. And he shall be released "either unconditionally or upon reasonable conditions, including in particular such conditions as are reasonably necessary to ensure that he appears at the date named for his trial." It is noteworthy that the conditions for his pre-trial release are to be reasonable - surely, an abbreviation for "not excessive" - and only necessary to ensure his appearance in court on the adjourned date. In other words, bail is not to be denied the suspect either as a punishment or from consideration of any extraneous matters, eg his guilt or innocence, since section 20 (2) (*a*) of the Constitution presumes his innocence until he is proved or has pleaded guilty. The fact should also not be overlooked that the Constitution states that a person charged with a criminal offence shall be given adequate time and facilities for the preparation of his defence: see section 20 (2) (*c*). The accused person's pre-trial release under section 15 (5) assists him to prepare his defence in compliance with section 20 (2) (*c*).

If we compare these generous constitutional provisions, designed to protect personal liberty and secure the protection of law for an accused person and afford him the privilege of a fair hearing within reasonable time, with section 7 of the Act we find that the Act, with its restriction of bail to special circumstances only within the discretion of the magistrate and upon the basis of harsh, burdensome and excessive conditions contained in section 7 (2), clearly derogates from, and is inconsistent with, the accused's constitutional-right to pretrial release, where as in this case, his trial is not proceeded with within a reasonable time. Section 7 of the Act, in my judgment, offends against the Constitution both in letter and spirit and is clearly inconsistent with it. The inescapable conclusion is that section 7 of the Act in its entirety is ultra vires the Constitution and I would accordingly declare it null and void and strike it down as unconstitutional and a nullity.

It is a matter for regret that the appellant has been in custody since 9 August 1979 and that his trial is still uncompleted. His continued detention in custody is indefensible and amounts to a violation of section 15 (5) of the Constitution.

Ground (3) - sections 8, 10 and 12 of the Special Criminal Court Act, 1979 contravene sections 17 and 18 of the Constitution.

Mr Coker's final ground of appeal alleges that the learned Chief Justice erred in law when he held that sections 8, 10 and 12 of the Act do not violate sections 17 and 18 of the Constitution. Sections 8, 10, and 12 of the Special Criminal Court Act respectively stated as follows:

"8. (1) Where a complaint is lodged to the Police to investigate any person suspected of having committed an offence in respect of which public fund or public property is affected, the Police shall immediately apply to a Magistrate for an order to be made freezing any accounts operated in the name of the person being investigated or in any other name of an account of which he is a signatory.

(2) The Police may also apply to a Magistrate to freeze the account of any other person suspected of operating on account on behalf of the person being investigated.

(3) The Police may also seize any property of the suspect or any other property held by any person on his behalf.

(4) Any property seized by the Police under this section shall be returned to any claimant who satisfies the court that he acquired that property lawfully.

(5) Any person -

(a) who fails to come forward to prove that a property seized from him was acquired lawfully; or

(b) who fails to satisfy the Court that he acquired the property seized from him lawfully,

commits an offence and is liable on summary conviction to a term of imprisonment of not more than seven years and of not less than five years."

10. (1) Where any account is frozen under this section no bank shall pay out any moneys from that account unless the Inspector General of Police by writing under his hand approves any such payment.

(2) No person shall pay any money owed to any person whose account has been frozen under this section except through the bank.

(3) Any person who contravenes the provisions of this section commits an offence and is liable on summary conviction to a fine not exceeding D10,000.00 or to a term of imprisonment not exceeding five years or to both.

12. (1) In addition to the punishment imposed under section 11 of this Act the Magistrate shall order the person to pay to the Accountant General the total sum of moneys for which he was found guilty of having stolen or return the stolen property to the appropriate body.

(2) Where a person ordered to pay any sum or return any property under this section fails to do so within one month of such an order the Court shall order that -

(a) any property he owns shall be sold and the proceeds paid to the Accountant General;

(b) any money kept in any bank in The Gambia shall be paid to the Accountant General.

(3) Where after making the orders prescribed in section 18 there is still some amount outstanding in respect of the properties or moneys affected by the conviction, the Court shall make a further order that any person, holding any moneys such as gratuities, awards, pensions or other similar moneys to which the person is entitled to, shall pay such moneys to the Accountant General."

And sections 18 of the 1970 Constitution also respectively stated that:

"17. (1) No person shall be subjected to torture or inhuman or degrading punishment or other treatment.

(2) Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this section to the extent that the law in question authorises the infliction of any description of punishment that was lawful in The Gambia on 23 April, 1970."

"18. No property of any description shall be taken possession of compulsorily and no right over or interest in any such property shall be acquired compulsorily in any part of The Gambia except by or under the provisions of a law that:

(a) requires the payment of adequate compensation therefor; and

(b) gives to any person claiming such compensation a right of access, for the determination of his interest in the property and the amount of compensation to the Supreme Court.

(2) Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of subsection (1) of this section-

(a) to the extent that the law in question makes provision for the taking of possession or acquisition of any property, interest or right-

(vii) for so long only as may be necessary for the purpose of any examination, investigation, trial or inquiry or, in the case of land, for the purposes of the carrying out thereon of work of soil conservation or the conservation of other natural resources of work relating to agricultural development or improvement (being work relating to such development that the owner or occupier of the land has been required and without reasonable excuse refused or failed to carry out), and except so far as that provision or as the case may be, the thing done under the authority thereof is shown not to be reasonably justifiable in a democratic society …"

The gravamen of Mr Coker's argument was that it is unreasonable, inhuman and even unconstitutional to confiscate the property and freeze the accounts of a suspect *before* his trial and conviction of a criminal offence. These excessive powers given to the police to seize properties of the suspect and to freeze his accounts derogate from, and even cancel out, the constitutional provisions in section 18 for the protection from deprivation of property save in exceptional cases. The exceptions therein were inapplicable to the appellant.

For the respondent, Mr Jallow relied heavily on the exceptions contained in section 18(2) (*a*) (vii) (supra) as a constitutional justification for such confiscation and deprivation of the individual's property for so long as may be necessary for the purpose of any examination, investigation, trial or inquiry. He pointed that under section 8 (4) of the Act, any property seized by the police is returnable

to any claimant who satisfied the court that he had acquired the property lawfully. The seizure is therefore only temporary. Furthermore it conforms to the provisions in section 13 of the Constitution that protection for the individual's property and the general prohibition of confiscation of property without compensation are subject to the rights and freedoms of others or the public interest; and the Act is designed to protect the economic interest and well-being of the Republic

Among the reasons given in the judgment of the court below for the rejection of Mr Coker's argument under this ground is that the "so-called freezing of accounts" is no more stringent than an order of interim attachment in a civil action; "Section 20 (1l) (*a*) of the Constitution gives validity to the casting of the onus of proof against an accused"; that section 8 (5) of the Act does not fetter the magistrate's discretion to decide the issue (of ownership of the confiscated property); and that section 18 (2) (*a*) (vii) of the Constitution makes legal the impounding seizure of the property under section 8 (5) of the Act.

With respect, I do not find any of the above reasons of the court below to be either an answer to the constitutional objections raised to section 8 of the Act or even tenable. In the first place, interlocutory proceedings in civil actions between two parties contesting a civil action on equal footing are a far cry from the peremptory seizure of property and freezing of accounts of a suspect at the behest of the prosecutor or his agent, the police, *before* the start of the criminal trial, when the Constitution itself under-section 20 (2) (*a*) presumes the accused person's innocence until he is proved or has pleaded guilty. Such arbitrary confiscation of property whether it be temporary or permanent, and the indiscriminate freezing of accounts in practice destroy the accused's presumed innocence and amount to infliction of punishment on him prior to conviction.

Secondly, the fundamental criminal rule - or golden thread discernible throughout the web of the English (and of course The Gambian) criminal laws - is that the prosecution must prove the guilt of the prisoner and no attempt to whittle it down can be entertained: see per Sankey LC in *Woolmington v Director of Public Prosecutions* [1935] AC 462 at 481 and 482. The onus of proving the general issue of guilt to the charge laid rests with the prosecutor; while the onus of proving particular defences such as insanity and certain facts under specific enactments are cast on the accused. However, the general burden of proof rests on the prosecution throughout the criminal trial and never

shifts to the accused; and it is discharged by proof beyond reasonable doubt; whereas the onus of proof of particular defences and facts incumbent on the accused is light and is discharge by only the civil standard of proof, ie on the balance of probabilities: see *Sodeman* v *R* [1936] 2 All ER 1138 at p 1140, PC (per Lord Hailsham LC; *R* v *Carr-Briant* [1843] 1 KB 607 and *R* v *Banin* 12 WACA 8. It is therefore erroneous to hold, as was done inferentially in the court below, that the onus cast on the accused by section 20 (11) (*a*) of the Constitution is the onus of proof of the general issue of guilt. That constitutional provision rather deals with the exception to the general rule where a statute casts on the accused the onus of proving particular facts and is in accord with the common law just restated.

In the third place, section 8 (5) (*a*) of the Act destroys at a stroke the accused's constitutional privilege of remaining silent. Section 20 (7) of the Constitution states unequivocally: "no person who is tried for a criminal offence shall be compelled to give evidence at the trial." And yet the Act creates in section 8 (5) an offence punishable on summary conviction to a five to seven years term of imprisonment for any person "who either fails to come forward to prove that a property seized from him was acquired lawfully." In other words, the inaction or silence of a person in suffering the arbitrary confiscation of his property or in failing to prove to the satisfaction of the court his lawful acquisition of the said property makes him automatically liable to a serious criminal offence. And this penalty is incurred by him even before his main trial for stealing or misappropriation under section 5 of the Act. By contrast, in a civil case in this jurisdiction, when an *ex parte* interim preservation order is made *pendente lite* with respect to the disputed property, the aggrieved party is entitled to apply for a review of the order or even appeal therefrom.

The accused person's constitutional right to "a fair hearing within reasonable time by an independent and impartial court" under section 20 (1) of the Constitution, has been eroded by the Act to all intents and purposes if regard is had to the draconian powers conferred on the police, ie the prosecutor's agent under sections 8 and 10. For instance, in section 10 (1) the Inspector General of Police takes over completely from the magistrate as the sole arbiter of when and what disbursement may be made from a frozen account, even though the original freezing order is made by a magistrate upon police application. Section 10 (1) of the Act clearly amounts to usurpation by the Inspector General of Police of judicial power. It may perhaps be charitable but poor comfort no doubt, to comment in passing that the subsection mirrors the all too familiar arrangement in vogue in a military-cum-police

state after a coup d'etat and that it is wholly alien to a democratic, non-totalitarian Republic like The Gambia blessed with a liberal Constitution guaranteeing to every person in the land fundamental rights and freedoms.

Fourthly, it is contended by learned counsel for the respondent - and the judgment of the court below also states - that section 18 (2) (*a*) (vii) of the Constitution makes legal the impounding and seizure of property under section 8 (3) of the Act. But does it? With respect, I think not. Paragraph (vii) (supra) contains two important riders or conditions precedent for the coming into being of the exception to the constitutional rule against arbitrary deprivation of property: In the first place, the legislation should authorise acquisition of property only to the extent, ie "for so long as *only* as may be *necessary* "for the purposes" of any examination, investigation, trial or inquiry." I construe the phrase "for the purpose of" to mean "for the purposes exclusively referable to or connected with." The acquisition of property is permissible only to the extent that it may be *necessary* for purpose connected with or exclusively referable to any examination, investigation, trial or inquiry. The acquisition is for a limited purpose and duration and is aimed at assisting an examination, investigation, trial or inquiry. Under section 8 (3), however, the seizure is not limited in its purpose, duration or scope. It is true section 8 (4) orders the seized property to be returned to the owner if he satisfied the court of his lawful acquisition of same. However, if he refuses to be a party to the inquisitorial trial prescribed under section 8 (5) by refusing to come forward to assert on oath his acquisition of the seized property and elects to remain silent, he forfeits, without more, his liberty by being imprisoned for a minimum period of five years and he suffers additionally forfeiture of the disputed property. Thus by a stroke of the pen, section 8 (4) replaces our traditional accusatorial system, in which the accused is constitutionally presumed innocent until proved guilty or he himself pleads guilty, with the inquisitorial system reminiscent of the old discredited Star Chamber of early Stuart England in which the accused is coerced into taking the oath and is presumed guilty until he shoulders the general onus probandi; and is able to establish his innocence. Undoubtedly, section 8 (5) is repugnant to, and is wholly inconsistent with, section 20 (7) of the Constitution which entrenches the privilege against self-incrimination. For that reason, it is unconstitutional, null and void.

The fact should incidentally not be overlooked that the Criminal Code contains elaborate provisions for the offence of theft, stealing by a clerk or servant, and for dealing with persons suspected of having in

their possession property suspected to have been stolen or misappropriated: see chapters XXVI to XXX and XXXII of the Code.

In this connection, attention may be drawn to section 5(1) of the Special Criminal Court Act, 1979 which confers jurisdiction on the Special Criminal Court to hear and determine "offences specified in chapters 26 - 30 and 32 of the Criminal Code (Cap 37) which affect any public funds or public property." There is consequently no possibility of these serious offences going unpunished by default if section 8 (5) of the Special Criminal Court Act, 1979 is jettisoned for being unconstitutional.

The second additional rider or condition for the validity of any legislation authorities acquisition or seizure of property under section 18 (2) (*a*) (vii) of the Constitution is that the provision or act done thereunder must be shown "to be reasonably justifiable in a democratic society." While this political phrase may be incapable of exact legal definition, nevertheless to me it connotes the absence of tyranny or a police state. In my view, this second condition is infringed if a law empowers the police to seize properties and freeze accounts and then empowers the Inspector-General of Police to allow subsequent disbursements from the frozen accounts at his unfettered discretion; and to publish in the *Gazette* the names of all persons whose accounts have been frozen at his instance (see section 9 of the Act). Such a state of affairs is alien to a liberal democracy with constitutionally entrenched fundamental rights and freedoms and the rule of law - at any rate in the absence of a state of public emergency.

Applying the dual constitutional test in section 18 (2) (*a*) (vii) to sections 8 to 10 of the Act, I hold that the said provisions of the Act violate the constitutional provisions already discussed in this part of the judgment for reasons already stated. I would accordingly declare the said sections of the Act unconstitutional and strike them down as a nullity.

Sections 12 and 13 of the Special Criminal Court Act, 1979

Finally, I come to sections 12 and 13 of the Act. I can see nothing unconstitutional or wrong about either of them. They impose additional penalties by way of restitution of a stolen property to its owner after conviction. It will be noticed that section 12 of the Act commences with the words "in addition to the punishment imposed under Section 11 …" Section 11 is the main penalty section; and it prescribes a term of five to seven years imprisonment for any person

convicted of a crime under section 5. As a matter of fact, section 12 conforms to section 18 (2) (a) (ii) of the Constitution, which preserves any penalty imposed for breach of law whether under civil process or *after* conviction of a criminal offence under the law of The Gambia. I would accordingly uphold both sections 12 and 13 of the Act. There can be surely no objection to such a deterrent penalty which incidentally advances the laudable aims and objectives of the Act in checking the rampant theft of public property and funds. Besides, the restitution orders are invoked only after conviction following a fair hearing. In this way, the entrenched fundamental rights and freedoms are not violated; and the inherent rights of innocent citizens are duly protected.

Speaking for myself, the penalty described under section 11 of the Act would seem to be an insufficient deterrent. It represents no change from section 258 of Cap 37, which prescribes seven years imprisonment for stealing by a clerk. A longer prison term for a convict of say ten to fifteen years, coupled of course with the restitution order under section 12 and 13 may be a more potent and effective deterrent than temporary, unconstitutional and arbitrary seizures of property and freezing of accounts. In the meantime, the accused person should be afforded his constitutional rights to a fair trial; pre-trial release; adequate time and facilities for the preparation of his defence, etc. But once convicted after a fair hearing, he must be made to face the full penalty of the law. In that way, the message will be conveyed to the rest of society that crime does not pay and that public property and funds are not for grabbing and looting.

Conclusion

In conclusion, I would reiterate that for the reasons already stated, sections 7, 8, 9 and 10 (inclusive) of The Special Criminal Court Act, 1979 are unconstitutional. They are hereby declared null and void. I would accordingly strike them down as unconstitutional, null and void and of no legal effect whatsoever. I would, however, uphold sections 6, 12 and 13 of the said Act as valid and not unconstitutional. For the reasons already given, I would without any hesitation admit the appellant to bail and release him from custody forthwith upon his entering into a recognisance for the sum of D50,000 with two sureties each in like sum to be justified by the Senior Registrar of this court, such sureties to be owners of freehold property of like value within the City of Banjul or the Kombo Saint Mary Division conditioned for his appearance before the Special Criminal Court for the continued hearing of the said pending criminal case brought under the said Act at

a time and place to be specified in the recognisance. As a condition for bail, he shall forthwith surrender and deposit any passport or travel document in his possession to the Immigration Authorities pending the trial and disposal of the said criminal case. A second condition for bail is that the appellant must report at the nearest police station once daily; and it is hereby so ordered.

FORSTER AG P. I concur.

LUKE JA. I also concur

Appeal allowed.

SYBB

ATTORNEY-GENERAL (No 2) v JOBE (No 2)

JUDICIAL COMMITTEE OF THE PRIVY COUNCIL

(Civil Appeal No 37/1982 or appeal from the Court of Appeal of The Gambia)

26 March 1984

LORD DIPLOCK, LORD ELWYN-JONES, LORD KEITH OF KINKEL, LORD SCARMAN AND LORD BRIGHTMAN

Constitutional law-Constitution-Fundamental human rights and freedoms-Interpretation-Need for generous and purposive construction-Proper construction to be placed on word "property" in section 18(1) of Gambia Constitution, 1970-Constitution, 1970, s 18(1).

Constitutional law-Constitution-Enforcement and interpretation-Inconsistent and contravening enactment-Restrictions on grant of bail pending trial-Person reasonably suspected of committing criminal offence to be granted bail where not tried within reasonable time under section 15(5) of Constitution-What constitutes reasonable time depending upon circumstances of each case-Section 7(1) of Special Criminal Court Act prohibiting bail unless trial magistrate satisfied of existence of special circumstances warranting grant of bail-Section 7(2) determining amount and form of granting bail by magistrate-Whether section 7 of Act contravening section 15(5) of Constitution-Constitution,1970, s 15(5)-Special Criminal Court Act, s 7(1) and (2)-Criminal Procedure Code, Cap 39.

Criminal law and procedure-Constitution-Enforcement and interpretation-Inconsistent and contravening enactment-Confiscation of property and freezing of bank account of suspect before his trial and conviction of criminal offence under Special Criminal Court Act,1979, ss 8(1) and (2) and 10(1)-Magistrate having wide discretion in making freezing order-Freezing order made by magistrate analogous to Mareva injunction-Need to read section 10(1) as integral part of section 8-Whether sections 8(1) and (2) and 10(1) contravening section 18(2)(a) (vii) of Constitution-Constitution, 1970, s 18(2)(a) (vii)-Special Criminal Court Act, 1979, ss 8(1) and (2) and 10(1).

Constitutional law-Constitution-Enforcement and interpretation-Inconsistent and contravening enactment-Section 8(5) of Special Criminal Court Act, 1979 providing that a party's refusal to come forward to assert on oath acquisition of seized property constituting forfeiture of liberty and imprisonment for minimum period of five years-Section 8(5) repugnant and inconsistent with Constitution-Constitution 1970, s 20(2)(a)-Special Criminal Court Act, 1979, 8(5).

Constitutional law-Constitution-Enforcement and interpretation-Inconsistent and contravening enactment-Severability test-Application of-Special Criminal Court Act, 1979, s 8(5) declared unconstitutional and void for contravening section 20(2)(a) of Constitution-Section 8(5) declared void to be severed from remaining valid provisions of Act-Constitution 1970, s 20(2)(a)-Special Criminal Court Act, 1979, s 8(5).

It is respectively provided by the Constitution, 1970, ss 15, 18(1) and (2) and 20(2) (a) that:

"15 (1) No person shall be deprived of his personal liberty save as may be authorised by law in any of the following cases, that is to say:

(*e*) upon reasonable suspicion of his having committed, or being about to commit, a criminal offence under the law of The Gambia;

(3) Any person who is arrested or detained…

(*b*) upon reasonable suspicion of his having committed, or being about to commit, a criminal offence under the law of The Gambia; and who is not released, shall be brought without undue delay before a court.

(4) Where any person is brought before a court in execution of the order of a court in any proceedings or upon suspicion of his having committed or being about to commit an offence, he shall not be thereafter further held in custody in connection with those proceedings or that offence save upon the order of a court.

(5) If any person arrested or detained as mentioned in subsection 3(b) of this section is not tried within a reasonable time, then, without prejudice to any further proceedings that may be brought against him, he shall be released either unconditionally or upon reasonable conditions, including in particular such conditions as are reasonably necessary to ensure that he appears at a later date for trial or for proceedings preliminary to trial."

"18 (1) No property of any description shall be taken possession of compulsorily and no right over or interest in any such property shall be acquired compulsorily in any part of The Gambia except by or under the provisions of a law that-

(a) requires the payment of adequate compensation therefor; and

(b) gives to any person claiming such compensation a right of access, for the determination of his interest in the property and the amount of compensation to the Supreme Court."

(2) Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in conservation of subsection (1) of this section-

(a) to the extent that the law in question makes provision for the taking of possession or acquisition of any property, interest or right- …

(vii) for so long only as may be necessary for the purposes of any examination, investigation, trial or inquiry or, in the case of land, for the purposes of the carrying out thereon of work of soil conservation or the conservation of other natural resources or work relating to agricultural development or improvement (being work relating to such development or improvement that the owner or occupier of the land has been required and has without reasonable excuse refused or failed to carry out), and except so far as that provision or as the case may be, the thing done under the authority thereof is shown not to be reasonably justifiable in a democratic society;…"

"20 (2) Every person who is charged with a criminal offence-

(a) shall be presumed to be innocent until he is proved or has pleaded guilty."

It is also respectively provided by the Special Criminal Court Act, 1979 (No 10 of 1979), ss 7(1) and (2) and 8(1)-(5) that:

"7. (1) Any person who is brought to trial before the Court shall not be granted bail unless the Magistrate is satisfied that there are special circumstances warranting the grant of bail.

(2) Before bail is granted under this Act the accused shall be ordered-

(a) to pay into court an amount equal to one third of the total amount of moneys alleged to be the subject matter of the charge or pledge properties of equivalent amount as guarantee: and

(b) to find at least two sureties who shall pay into court an amount equal to one third of the total amount alleged to be the subject matter of the charge or pledge properties of equivalent amount as guarantee "8. (1) Where a complaint is lodged to the police to investigate any person suspected of having committed an offence in respect of which public fund or public property is affected, the police shall immediately apply to a magistrate for an order to be made freezing any accounts operated in the name of the person being investigated or in any other name or an account of which he is a signatory.

(2) The police may also apply to a magistrate to freeze the account of any other person suspected of operating an account on behalf of the person being investigated.

(3) The police may also seize any property of the suspect or any other property held by any person on his behalf.

(4) Any property seized by the police under this section hall be returned to any claimant who satisfies the Court that he acquired that property lawfully.

(5) Any person-

(a) who fails to come forward to prove that a property seized from him was acquired lawfully; or

(b) who fails to satisfy the court that he acquired the property seized from him lawfully commits an offence and is liable on summary conviction to a term of imprisonment of not more than seven years and of not less than five years."

The accused Mr Jobe, was arraigned before the Special Criminal Court established under the Special Criminal Court Act, 1979 (No 10 of 1979), on two charges: one of stealing the huge sum of over D595,000, the property of his employer, a public bank; and the other fraudulent false accounting. Whilst the criminal action against him was pending, he filed a civil action in the Supreme Court [High Court] against the Attorney-General to enforce his fundamental rights and freedoms guaranteed under chapter 3 of the 1970 Gambia Constitution. He claimed that sections 6-8 and 10-12 of the Act

contravened the Constitution and were thus ultra vires and void. The claim was dismissed by the High Court. He appealed from that decision to the Gambia Court of Appeal which unanimously upheld the claim in part, holding, inter alia, that sections 7(1) and (2), 8(1), (2) and (5) and 10 were ultra vires the Constitution, ss 15(5), 18(1) and (2)*(a)* (vii) and 20(2)*(a)* and *(c)* and therefore void. In the instant appeal by the Attorney-General from the decision of the Court of Appeal,

Held, *unanimously allowing the appeal in part*: (1) a constitution, and in particular that part of it, protecting and entrenching fundamental rights and freedoms to which all persons in the State were to be entitled, was to be given a generous and purposive construction. Therefore "property" in section 18(1) of The Gambia Constitution was to be read in a wide sense. It would include choses in action such as a debt owed by a banker to his customer. The customer's contractual right against his banker to draw on his account, was embraced in the expression "right over or interest in" the debt, while "compulsory acquisition" of any right over or interest in property included (as was evident from section 18(2)*(a)* (vii)) temporary as well as permanent requisition. To confer upon a member of the public service, in the exercise of the executive powers of the State, a power at his own executive discretion to prevent the bank's customer from exercising his contractual right against the bank to draw on his account on demand, would amount to compulsory acquisition of a right over or interest in the customer's property in the debt payable to him by his banker. A law which provided for the exercise of such an executive discretion would contravene section 18 of the Constitution. It would be ultra vires and therefore void.

(2) There was nothing in the 1970 Gambian Constitution which invalidated a law imposing a total prohibition on the release on bail of a person reasonably suspected of having committed a criminal offence, provided he was brought to trial within a reasonable time after he had been arrested and detained. And section 15(5) of the Constitution did not come into operation unless the person who had been arrested upon reasonable suspicion was not tried within a reasonable time. What was a reasonable time between arrest and trial must depend upon the circumstances of each case. On construction, section 7(1) of the Special Criminal Court Act did not contravene any provision of the Constitution. Section 7(1) prohibited release on bail, not totally but subject to an exception if the trial magistrate was satisfied that there were special circumstances warranting the grant of bail; whilst section 7(2) determined the amount and form in which bail

must be ordered as a condition of release pending trial where the magistrate was satisfied of the existence of exceptional circumstances. Those conditions were likely to be difficult to satisfy where, as in the instant case, the amount involved in the charges was large but the evident policy, underlying the requirement for at least two sureties to provide in cash or pledge of property a sum equal to one-third of the amount which was the subject of the charge against the accused, was to ensure that in a very small country like The Gambia, there should be two persons who would have a strong financial interest in making sure that the accused did not flee the country to avoid trial.

Per curiam. The Gambia Court of Appeal took the view that section 7(2) of the Act was contrary to section 99(2) of the Criminal Procedure Code, Cap 39 which provides that the amount of bail should not be excessive…The Criminal Procedure Code does not form part of the Constitution of the Republic of The Gambia. Parliament can validly amend the Criminal Procedure Code by an ordinary law, making specific provision for the amount of bail which may be ordered in particular cases. This it has effectively done by section 7(2) of the Act.

(3) Sections 8(1) and (2) and 10 of the Special Criminal Court Act, which authorised freezing of bank accounts, did not contravene section 18(2)*(a)* (vii)of the 1970 Constitution, which provided as an exception, a law that made provision for the taking of possession of property so long as might be necessary for the purposes of a trial.

(4) The functions of the magistrate under section 8(1) and (2) were purely judicial. The magistrate had a wide discretion in making a freezing order. He had discretion to refuse the police application for a freezing order or to grant it upon such terms and subject to such conditions as he thought just and appropriate; and he might vary it from time to time upon application by any party affected by the order. Freezing orders in the form of what had now become known in England as a Mareva injunction or in civil law countries as *saisie conservatoire* were common practice in civil litigation in a democratic society.

(5) Section 10(1) of the Act could not be read in isolation but as if it were an integral part of section 8 as suggested by the words in section 10(1), namely, " is frozen under this section". Although section 10(1) had the consequence that, if a magistrate made an order freezing an account which provided for any payments out of the account, he must incorporate in the order a provision that every such payment out shall

be vouched for by the written approval of the Inspector General of Police, that did not alter the essentially judicial nature of the freezing order. It was for the magistrate in the exercise of his discretion to direct, either in the initial freezing order or subsequently upon application, what payments out of the account, if any, were to be authorised and it was then the duty of the Inspector General of Police to give or withhold his written approval to the payment out in accordance with such directions.

(6) Section 8(5) of the Special Criminal Court Act, 1979 contravened the Constitution; it was rightly held by the Court of Appeal as ultra vires and void because the section was a plain and flagrant infringement of section 20(2)*(a)* of the Constitution, providing that a person charged with a criminal offence should be presumed innocent until he was proved or had pleaded guilty. Section 8(5) being void, would be severed from the remaining valid provisions of the Act on the assumption that the legislature would have enacted the remainder of the Act without enacting section 8(5). *Attorney-General for Alberta* v *Attorney-General for Canada* [1947] AC 503 at 518 applied.

Per curiam. What section 8(5) does is to create a separate and brand new criminal offence which can be committed not only by the principal suspect himself but also by any other person whose property has been seized by the police in purported exercise of the power conferred on them under subsection (3)…

While the wording of subsection (5) is inapt to cover the case of a principal suspect who has already been brought before the court, since he can hardly be described as failing to "come forward", it would apply to a principal suspect whose tangible moveable property the police had managed to seize although they had not been able to find him…to arrest him. This would have the arbitrary and unjust consequence that by seizing the principal suspect's property but making no effort to arrest him, the police could avoid the onus of proof which would otherwise lie upon them of proving that the principal suspect had been guilty of dishonesty which affected public property.

Decision of The Gambia Court of Appeal in *Jobe* (No 1) v *Attorney-General (No 1)* see page 178 *ante*) *reversed in part*.

Case referred to:

Attorney-General for Alberta v *Attorney-General for Canada* [1947] AC 503, PC.

APPEAL by the Attorney-General from the decision of the Court of Appeal (see *Jobe* (No 1) v *Attorney-General* (No 1) at page 178 *ante*) allowing in part in relation to sections 7, 8, 9 and 10 of the Special Criminal Court Act 1979, an appeal by the respondent, Jobe, from the judgment of the Supreme Court [High Court] per Bridges CJ, dismissing the respondent's claim that some specified sections of the 1979 Act had contravened his fundamental rights under the 1970 Constitution of The Gambia. The facts are sufficiently stated in the judgment of the Judicial Committee of the Privy Council court delivered by Lord Diplock.

G Newman QC, *Fafa M'bai*, Attorney-General of The Gambia, *H B Jallow* Solicitor-General and *J Harvie* for the appellant.

No appearance nor representation by the respondent.

LORD DIPLOCK *delivered the judgment of Judicial Committee of the Privy Council.* This is an appeal against the judgment of the Court of Appeal of The Gambia (see *Jobe (No 1)* v *Attorney-General (No 1)* at page 178 *ante*), declaring sections 7, 8, 9 and 10 of the Special Criminal Court Act, 1979 (the Act) to be null and void.

The purpose of the Act, as its long title states, is: "to establish a Special Criminal Court to deal with offences involving misappropriation and theft of public funds and public property."

The enacting sections of the Act are preceded by two recitals. The first of these refers to section 94(1) of the 1970 Constitution of The Republic of The Gambia, which empowers Parliament to establish courts subordinate to the Supreme Court with such jurisdiction and powers as may be conferred on them by any law. As a subordinate court the Special Criminal Court is subject to the supervision of the Supreme Court under section 94(2) of the Constitution which, so far as is relevant to this appeal provides:

"(2) The Supreme Court shall have jurisdiction to supervise any…criminal proceedings before any subordinate court…and may make such orders, issue such writs and give such directions as it may consider appropriate for the purpose of ensuring that justice is duly administered by any such court…"

The second recital to the Act itself is also worth setting out in full:

"And WHEREAS in the opinion of Parliament it is expedient to establish such a subordinate court to deal effectively and expeditiously with certain offences considered detrimental to the economic interest of the Republic of The Gambia."

Speed in bringing offenders to trial is thus one of the stated purposes of the Act.

The Act does not make criminal any conduct that was not already a criminal offence before the Act was passed. Broadly speaking, what it does is: (i) to provide that offences of dishonesty which affect public funds or public property (expressions to which wide definitions are given by the Act) are to be punished by a mandatory sentence of imprisonment for a maximum of seven and a minimum of five years; and (ii) to establish the Special Criminal Court presided over by a magistrate assigned to it by the Chief Justice, with jurisdiction to hear and determine all charges of such offences.

The respondent to the Attorney-General's appeal to the Judicial Committee, Momodou Jobe, has not appeared at the hearing by their Lordships. Since the judgment of the Court of Appeal delivered on 11 May 1981, Jobe has been tried and convicted in the Special Criminal Court on two charges, one of stealing public funds in the sum of D595,791,34 and the other of false accounting. For these offences he is currently serving a sentence of imprisonment; and against his conviction there is no appeal before their Lordships. The only matters in issue in this appeal are the constitutionality of certain pre-trial procedures for which the Act provides. These were applied against Jobe.

Jobe was arrested on 9 August 1979 on suspicion of having committed the offences of which he has since been convicted. On 18 August he appeared before the magistrate assigned to preside over the Special Criminal Court and was remanded in custody. On 12 September 1979 Jobe applied to the Supreme Court under section 28 of the Constitution for redress for breach of his constitutional rights under sections 15(1) (e), 18, 20 and 25 of the 1970 Constitution. He claimed that sections 6, 7, 8, 10, 12, 13 and 17 of the Act conflicted with one or other of the above-mentioned provisions of Chapter III of the Constitution and accordingly were ultra vires and void.

After a number of procedural vicissitudes into which it is unnecessary to enter, this application was converted into an action commenced by writ issued on 23 November 1979 claiming a declaration that the Act has violated the constitutional rights of Jobe and was ultra vires of the Constitution of the Republic of The Gambia. At the hearing of the action, however, the attack on the constitutionality of the Act was confined to the seven sections which had been the subject of challenge from the outset; and in the Court of Appeal the attack on section 17 was not persisted in; so what were left at issue were sections 6, 7, 8, 10, 12 and 13 of the Act.

While this civil action was pending before Bridges CJ, the criminal trial of Jobe was proceeding in the Special Criminal Court. The same constitutional questions as were the subject of the civil action were raised on behalf of Jobe in the criminal trial, and on 6 March 1980, the magistrate acting under the powers conferred upon him by section 93(1) of the Constitution referred them to the Supreme Court. It was ordered by the Chief Justice that this reference should abide the result of the civil action.

Although the hearing of the civil action took place early in March 1980, the judgment of the Chief Justice was not delivered until 29 July. He upheld the validity of all of the impugned sections of the Act and dismissed Jobe's action.

From the Chief Justice's judgment Jobe appealed to The Gambia Court of Appeal by notice dated 1 August 1980. The judgment of the Court of Appeal (Forster Ag P, Luke and Anin JJA) was delivered on 11 May 1981. The appeal was allowed as respects sections 7, 8, 9 and 10 of the Act which were held to be ultra vires the Constitution and void. Sections 6, 12 and 13 were held to be constitutional.

For the purposes of the Attorney-General's appeal to the Judicial Committee, it is sufficient to summarise the effect of those sections of the Act that were not struck down by the judgment of the Court of Appeal. Section 1 to 5 establish the Special Criminal Court and confer on it the jurisdiction mentioned earlier in this judgment. Section 6 deals with matters of procedure; it provides that the Special Criminal Court shall ordinarily apply the provisions of the Criminal Procedure Code, but liberates the court from the more technical shackles of the rules of evidence and of criminal procedure as respects irregularities on the face of the charge and submissions of no case. The constitutionality of these provisions was, correctly in their Lordships' view, upheld by the Court of Appeal.

Section 7 which deals with bail needs to be set out verbatim:

"7. (1) Any person who is brought to trial before the Court shall not be granted bail unless the Magistrate is satisfied that there are special circumstances warranting the grant of bail.

(2) Before bail is granted under this Act the accused shall be ordered-

(a) to pay into court an amount equal to one third of the total amount of moneys alleged to be the subject matter of the charge or pledge properties of equivalent amount as guarantee: and

(b) to find at least two sureties who shall pay into court an amount equal to one third of the total amount alleged to be the subject matter of the charge or pledge properties of equivalent amount as guarantee.

(3) Any money or property paid into court or pledged under this Act shall be forfeited to the State in the event of the accused jumping bail."

The relevant provisions of the Constitution relating to remand in custody and release on bail are to be found in section 15 of the Constitution and they are as follows:

"15 (1) No person shall be deprived of his personal liberty save as may be authorised by law in any of the following cases, that is to say:

(e) upon reasonable suspicion of his having committed, or being about to commit, a criminal offence under the law of The Gambia;

(3) Any person who is arrested or detained…

(b) upon reasonable suspicion of his having committed, or being about to commit, a criminal offence under the law of The Gambia; and who is not released, shall be brought without undue delay before a court.

(4) Where any person is brought before a court in execution of the order of a court in any proceedings or upon suspicion of his having committed or being about to commit an offence, he shall not be thereafter further held in custody in connection with those proceedings or that offence save upon the order of a court.

(5) If any person arrested or detained as mentioned in subsection 3(b) of this section is not tried within a reasonable time, then, without

prejudice to any further proceedings that may be brought against him, he shall be released either unconditionally or upon reasonable conditions, including in particular such conditions as are reasonably necessary to ensure that he appears at a later date for trial or for proceedings preliminary to trial." There is thus nothing in the Constitution which invalidates a law imposing a total prohibition on the release on bail of a person reasonably suspected of having committed a criminal offence, provided that he is brought to trial within a reasonable time after he has been arrested and detained. Section 7(1) of the Act which prohibits release on bail, not totally but subject to an exception if the magistrate is satisfied that there are special circumstances warranting the grant of bail, cannot in their Lordships' view be said to be in conflict with any provision of the Constitution.

Section 7(2) of the Act determines the amount and form in which bail must be ordered as a condition of release pending trial where the magistrate is satisfied that exceptional circumstances exist. These conditions are likely to be difficult to satisfy where, as in the instant case, the amount involved in the charges is large, but the evident policy, which underlies the requirement for at least two sureties to provide in cash or pledge of property a sum equal to one-third of the amount which is the subject of the charge against the accused, is to ensure that in a country of the geographical shape of The Gambia, where everyone lives within 15 miles of the nearest frontier, there shall be two persons who will have a strong financial interest in making sure that the accused does not flee the country to avoid trial.

The Gambia Court of Appeal took the view that section 7(2) of the Act was contrary to section 99(2) of the Criminal Procedure Code, Cap 39 which provides that the amount of bail shall not be excessive. This may well be so. The Gambia Court of Appeal are in a batter position than the Judicial Committee to judge what bail would be excessive in the circumstances as they exist in The Gambia. This, however, is beside the point. The Criminal Procedure Code does not from part of the Constitution of the Republic of The Gambia. Parliament can validly amend the Criminal Procedure Code by an ordinary law, making specific provision for the amount of bail which may be ordered in particular cases. This it has effectively done by section 7(2) of the Act.

Section 15(5) of the Constitution does not come into operation unless the person who has been arrested upon reasonable suspicion is not tried within a reasonable time. There is nothing in the Act which

authorises unreasonable delay in bringing a suspected person to trial. On the contrary, the second recital makes plain the parliamentary intention that offences made triable by the Special Criminal Court shall be dealt with expeditiously. To permit unreasonable delay in bringing an accused to trial before the Special Criminal Court would be a breach of the magistrate's judicial duty under the Act and the supervisory power of the Supreme Court under section 94(2) of the Constitution is available in reserve to ensure that the magistrate performs his official duty. For the purpose of determining the constitutionality of the Act itself it must be presumed that judicial officers will do what the Act requires them to do; if in a particular case they fail to do so the person aggrieved has a remedy in the form of an application for redress under section 28 of the Constitution.

What is a reasonable time between arrest and trial must depend upon the circumstances of each case. In the instant case by the time the Court of Appeal came to deliver their judgment on 11 May 1981 some 21 months had elapsed since Jobe's arrest on 9 August 1979; but there was no suggestion that the trial in the Special Criminal Court was not begun within a reasonable time. It was the civil proceedings initiated by Jobe himself on 12 September 1979 followed by the magistrate's reference of the constitutional questions made under section 93(3) of the Constitution in the course of the trial on 6 March 1980 together with the long intervals between hearing and judgment in both the Supreme Court and The Gambia Court of Appeal that were the main causes of delay.

The actual delay that occurred in a particular case, however, cannot have any effect on the constitutionality of section 7 of the Act itself. In their Lordships' view this section of the Act does not conflict with any provision of the Constitution. It is a valid law made by Parliament in the exercise of the legislative power of the Republic vested in it by section 56 of the Constitution; and their Lordships would allow the appeal as respects section 7 of the Act.

Their Lordships now turn to section 8 of the Act in conjunction with section 10 which is consequential on subsections (1) and (2) of section 8. The provisions of these two sections are:

"8. (1) Where a complaint is lodged to the police to investigate any person suspected of having committed an offence in respect of which public fund or public property is affected, the police shall immediately apply to a magistrate for an order to be made freezing any accounts

operated in the name of the person being investigated or in any other name or an account of which he is a signatory.

(2) The police may also apply to a magistrate to freeze the account of any other person suspected of operating an account on behalf of the person being investigated.

(3) The police may also seize any property of the suspect or any other property held by any person on his behalf.

(4) Any property seized by the police under this section shall be returned to any claimant who satisfies the Court that he acquired that property lawfully.

(5) Any person-

(*a*) who fails to come forward to prove that a property seized from him was acquired lawfully; or

(*b*) who fails to satisfy the court that he acquired the property seized from him lawfully commits an offence and is liable on summary conviction to a term of imprisonment of not more than seven years and of not less than five years.

"10 (1) Where any account is frozen under this section, no bank shall pay out any moneys from that account unless the Inspector General of Police by writing under his hand approves any such payment.

(2) No person shall pay any money owed to any person whose account has been frozen under this section except through the bank.

(3) Any person who contravenes the provisions of this section commits an offence and is liable on summary conviction to a fine not exceeding D10,000 or to a term of imprisonment not exceeding five years or to both."

It is convenient to dispose first with the constitutionality of the freezing of bank accounts for which section 8(1) and (2) and section 10 provide. It was submitted on behalf of Jobe and so held by the Court of Appeal that this was contrary to the general prohibition on the compulsory taking possession of or acquisition of any right or interest in property which section 18(1) of the Constitution imposes in the following terms:

"18 (1) No property of any description shall be taken possession of compulsorily and no right over or interest in any such property shall be acquired compulsorily in any part of The Gambia except by or under the provisions of a law that-

(a) requires the payment of adequate compensation therefor; and

(b) gives to any person claiming such compensation a right of access, for the determination of his interest in the property and the amount of compensation to the Supreme Court."

The Attorney-General contends that the provisions of the Act which deal with freezing of bank accounts fall within the exception for which subsection (2)*(a)*(vii) of section 18 of the Constitution provides. The words of this subsection on which he relies are:

"18 (2) Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of subsection (1) of this section-

(a) to the extent that the law in question makes provision for the taking of possession or acquisition of any property, interest or right-

(vii) for so long only as may be necessary for the purposes of any examination, investigation, *trial* or inquiry or in the case of land, for the purposes of the carrying out thereon of work of soil conservation or the conservation of other natural resources or work relating to agricultural development or improvement (being work relating to such development or improvement that the owner or occupier of the land has been required and has without reasonable excuse refused or failed to carry out), and except so far as that provision or as the case may be, the thing done under the authority thereof is shown not to be reasonably justifiable in a democratic society;…" (The emphasis is ours).

The functions of a magistrate under the Act are purely judicial. In making a freezing order the magistrate is exercising a judicial discretion. He has discretion to refuse the police application for such an order or to grant it upon such terms and subject to such conditions as he thinks just and appropriate; and he may vary it from time to time upon application by any party affected by the order. All this, in their Lordships' view, is implicit in the judicial nature of the power which is clearly recognised also by the provision in section 16 of the Act empowering the Rules Committee established under section 54 of the

Courts Act to make rules prescribing the procedure and other matters for giving full effect to the purposes of the Act. Their Lordships have been informed that this power has not so far been exercised. This may well be because the validity of important pre-trial procedural sections of the Act has remained uncertain since the attack upon them in the instant case was first launched soon after the Act had been passed. With the judgment of the Judicial Committee in the instant appeal the uncertainty will be removed; and their Lordships regard it as most desirable that the power to make rules dealing, inter alia, with the procedure to be followed in relation to the making, variation and discharge of freezing orders, should be exercised without any further delay.

The absence of rules prescribing such procedure does not, however, deprive the magistrate of the wide discretion to which their Lordships have referred. In the absence of express rules made by the Rules Committee, he must adopt whatever procedure he, or the Supreme Court in the exercise of the supervisory jurisdiction over him conferred upon it by section 94(2) of the Constitution, "may consider appropriate for the purpose of ensuring that justice is duly administered by (the Special Criminal) Court."

Freezing orders in the form of what has now become known in England as a Mareva injunction, or in civil law countries as *saisie conservatoire,* are common practice in civil litigation in democratic society. In their Lordships' view they do not fall within the exception to section 18(2)*(a)*(vii) for which the final words of that sub-paragraph provide.

Section 10(1) of the Act, if it were to be read in isolation, might be construed as conferring upon the Inspector General of Police an executive discretion to decide what payments out of a frozen bank account should be permitted. If upon its true construction, this were its effect, it would, in their Lordships' view, involve a contravention of section 18 of the Constitution.

A Constitution, and in particular that part of it which protects and entrenches fundamental rights and freedoms to which persons in the State are to be entitled, is to be given a generous and purposive construction. "Property" in section 18(1) is to be read in a wide sense. It includes choses in action such as a debt owed by a banker to his customer. The customer's contractual right against his banker to draw on his account (ie to claim repayment of the debt or any part of it on demand) is embraced in the expression "right over or interest in" the

debt; while compulsory "acquisition" of any right over or interest in property includes (as is evident from section 18(2)*(a)(*vii) temporary as well as permanent requisition. To confer upon a member of the public service, in the exercise of the executive powers of the State, a power at his own executive discretion to prevent the bank's customer from exercising his contractual right against the bank to draw on his account on demand would, in their Lordships' view, amount to a compulsory acquisition of a right over or interest in the customer's property in the debt payable to him by his banker, and a law which provided for the exercise of such an executive discretion would contravene section 18 of the Constitution. It would be ultra vires and therefore void.

Section 10(1) of the Act, however, cannot be read in isolation, but as if it were an integral part of section 8. Indeed, the survival in section 10(1) of the words "is frozen *under this section*" suggests that it formed part of section 8 in an earlier draft of the Act. Although section 10(1) has the consequence that, if a magistrate makes an order freezing an account which provides for any payments out of the account, he must incorporate in the order a provision that every such payment out shall be vouched for by the written approval of the Inspector General of Police, this does not alter the essentially judicial nature of the freezing order. It is for the magistrate in the exercise of this discretion to direct, either in the initial freezing order or subsequently upon application, what payments out of the account, if any, are to be authorised and it is then the duty of the Inspector General of Police to give or withhold his written approval to the payment out in accordance with such directions.

Similar considerations apply to section 8 subsections (3) and (4) of the Act which deal with the seizure by the police of property of the suspect whether held by him or by some other person on his behalf. "Seize" in relation to property is a verb that is appropriately applied only to tangible movable property, particularly in a context which provides for the property to be "returned" to a claimant in specified circumstances. To "seize" property means to take possession of it compulsorily and thus prima facie falls within the ambit of section 18 of the Constitution. Seizure of tangible moveable property by the police may precede the bringing of the suspect for the first time before a magistrate assigned to preside over a Special Criminal Court and, unlike a freezing order, it does not need to be authorised by a prior order by the magistrate. Section 8(4) of the Act, however, plainly confers upon the Special Criminal Court jurisdiction to hear and determine claims to the return of property seized by the police on the

ground that the person making the claim had acquired that property lawfully and since the expression "any claimant" in the subsection is wide enough to include the suspect himself, their Lordships would so construe it. So retention of possession of tangible moveable property by the police without the consent of the person claiming to be entitled to have it returned to him is subject to judicial process. It is for the magistrate in the exercise of his judicial functions to determine whether the continued retention of possession of the property by the police is necessary for any of the purposes referred to in the words of section 18(2*)(a)*(vii) of the Constitution that have been cited earlier in this judgment.

The draftsmanship of those provisions of section 8 and 10 of the Act, which their Lordships have just been examining, is characterised by an unusual degree of ellipsis that has made it necessary to spell out explicitly a great deal that is omitted from the actual words appearing in the sections and has to be derived by implication from them. In doing so their Lordships have applied to a law passed by the Parliament in which , by the Constitution itself, the legislative power of the Republic is exclusively vested, a presumption of constitutionality. This presumption is but a particular application of the canon of construction embodied in the Latin maxim *magis est ut res valeat quam pereat* which is an aid to the resolution of any ambiguities or obscurities in the actual words used in any document that is manifestly intended by its makers to create legal rights or obligations.

In passing the Act by the procedure appropriate for making an ordinary law for the order and good government of The Gambia without the formalities required for a law that amended Chapter III of the Constitution, the intention of parliament cannot have been to engage in the futile exercise of passing legislation that contravened provisions of Chapter III of the Constitution and was thus incapable of creating the legal obligation for which it purported to provide. Where, as in the instant case, omissions by the draftsman of the law to state in express words what, from the subject-matter of the law and the legal nature of the processes or institutions with which it deals, can be inferred to have been Parliament's intention, a court charged with the judicial duty of giving effect to Parliament is intention, as that intention has been stated in the law that Parliament has passed, ought to construe the law as incorporating, by necessary implication, words which would give effect to such inferred intention, wherever to do so does not contradict the words actually set out in the law itself and to

fail to do so would defeat Parliament's intention by depriving the law of all legal effect.

With the notable exception of section 8(5) their Lordships have found no difficulty in construing sections 8 and 10 of the Act as incorporating by necessary implication provisions which prevent these portions of the Act from contravening any of the provisions of Chapter III of the Constitution. They would therefore allow the appeal so far as section 8(1) to (4) and section 10 are concerned. Section 9, being merely incidental to section 8(1) and (2), calls for no special mention, It too is valid.

Section 8(5), however, stands on a different footing from the four earlier subsections. In the first place, it does not deal with the pre-trial procedure in the prosecution of a person charged with an offence of dishonesty affecting public funds or public property. (In dealing with section 8(5) it is convenient to call such a person "the principal subject"). In the second place, and more importantly, what it does is to create a separate and brand new criminal offence which can be committed not only by the principal suspect himself but also by any other person whose property has been seized by the police in purported exercise of the power conferred on them under subsection (3). The offence so created attracts the same mandatory sentence of imprisonment, for a maximum of seven and a minimum of five years, as that imposed by section 11 of the Act upon the principal subject if he is convicted of the offence of dishonesty affecting public funds or public property.

The subsection creates two offences, one under paragraph (a), the other under paragraph (b). Their Lordships will deal first with the case of a person, other than the principal suspect, who has had property seized from him by the police. He commits an offence under paragraph (a) if he "fails to come forward to prove" that the property that has been seized was acquired lawfully. In the context of paragraph (b) this must mean if he fails to appear before the Special Criminal Court upon his own initiative; while if he does so, or if he is arrested and brought before the court on a charge of having committed an offence under paragraph (a), paragraph (b) places upon him the onus of proving his innocence.

In their Lordships' view this is a plain and flagrant infringement of section 20(2)*(a)* of the Constitution, viz: "20 (2) Every person who is charged with a criminal offence-(a) shall be presumed to be innocent until he is proved or has pleaded guilty." While the wording of

subsection (5) is inapt to cover the case of a principal suspect who has already been brought before the court, since he can hardly be described as failing to "come forward", it would apply to a principal suspect whose tangible moveable property the police had managed to seize although they had not been able to find him inside the frontiers of The Gambia in order to arrest him. This would have the arbitrary and unjust consequence that by seizing the principal suspect's property but making no effort to arrest him, the police could avoid the onus of proof which would otherwise lie upon them of proving that the principal suspect had been guilty of dishonesty which affected public property.

Section 8(5) of the Act contravenes the Constitution; it is ultra vires and therefore void. It is, however, in their Lordships' view severable from the remaining provision of the Act. It complies with the test of severability laid down in *Attorney-General for Alberta* v *Attorney-General for Canada* [1947] AC 503 at 518 namely:

"The real question is whether what remains is so inextricably bound up with the part declared invalid that what remains cannot independently survive or, as it has sometimes been put, whether on a fair review of the whole matter it can be assumed that the legislature would have enacted what survives without enacting the part that is ultra vires at all."

Section 8(5) of the Act is odd man out both in the section itself and in the Act as a whole. It can, in their Lordships' view be confidently assumed that the Parliament of The Gambia would have enacted the remainder of the Act without enacting section 8(5) at all.

For these reasons their Lordships would allow this appeal against the judgment of The Gambia Court of Appeal except in so far as it declared section 8(5) of the Special Criminal Court Act ultra vires and void.

Appeal against the decision of The Gambia

Court of Appeal allowed in part.

SYBB

BIDWELL v ELLIOT & Another

COURT OF APPEAL, BANJUL

(Civil Appeal No 1/88)

14 June 1988

ANIN, DAVIES AND OLATAWURA JJA.

Land law and conveyancing-State lands-Grant-Re-entry on breach of covenant-Power of minister- Breach of laid down procedure in Cap 57:02, s 19-No valid lease founded on breach-Lands (Banjul and Kombo Saint Mary) Act, Cap 57:62, s 19.

It is provided by the Lands (Banjul and Kombo Saint Mary) Act Cap, 57:02, s 19(1) that:

"19(1) If there shall be any breach or non-observance by the grantee or by any person deriving any interest in the premises through or under the grantee of any of the covenants or conditions, whether express or implied, contained in any grant under this Act, the Minister may at any time after such breach or non-observance re-enter into and upon the premises or any part thereof in the name of the whole, and have again, repossess, hold and enjoy the same as in his former estate:

Provided that the power of re-entry authorized by his subsection shall not be exercisable in respect of the breach or non-observance of any covenant or condition express or implied which is capable of immediate remedy (other than a covenant for payment of rent or a covenant against assigning or sub-letting) unless and until the Minister shall have caused to be served upon the lessee a notice specifying the particular breach or non-observance of which complaint is made and requiring the lessee to remedy such breach or non-observance, and, at the discretion of the Minister, to make reasonable compensation in money therefor, and the lessee has failed to remedy such breach or non-observance and to pay such compensation as aforesaid to the Minister. Such notice shall:

(a) be served personally upon the lessee; or

(b) be sent to him by registered post to his last known address; or

(c) be published in the *Gazette* and a copy thereof be affixed to the premises.

Held, *allowing the appeal (per Olatawura JA, Anin and Davies JJA concurring*): the purported determination of the plaintiff appellant's lease by the Minister for Local Government and Lands, not in accordance with the laid down procedure in section 19 of the Lands (Banjul and Kombo Saint Mary) Act, Cap 102 (now Cap 57:02 of the Laws of The Gambia, 1990), was illegal. The minister could not therefore grant any valid lease of the land earlier granted to the plaintiff-appellant, based on such illegal act.

Cases referred to:

(1) Arase v *Arase* (1981) 5 SC 33.

(2) George v *Dominion Flour Mills Ltd* [1963] 1 All NLR 71.

(3) Emogokwe v *Okadigbo* [1973] 4SC 113.

(4) Awoyegbe v *Ogbeide* (1988) 1 NWLR 695.

APPEAL for the judgment of the Supreme Court (High Court), dismissing the plaintiff's claim for a declaration that he is still the rightful lessee of the disputed State land and an injunction against the second defendant. The facts are sufficiently stated in the judgment of Olatawura JA.

George for the appellant.

Fowlis (Miss) State Counsel, for the respondent.

Semaga Janneh for the second respondent.

OLATAWURA JA. The appellant, who was the plaintiff in the lower court, sued the defendants who are now the respondents in this court for:

"(1) For an injunction against the second defendant, his servant, agents and workmen whatsoever preventing all or any of them from entering, building or doing anything whatsoever on the place or parcel of land situate at Fajara Booster Station, which said property was leased to the plaintiff by the Minister for Local Government and Lands and bearing Serial Registration No K176/1973.

(2) For a declaration that the plaintiff is still the rightful lessee of the said premises at Booster Staton, Fajara bearing Serial Registration No K176/1973."

Pleadings were filed and exchanged. The case presented before the lower court was that the plaintiff-appellant (hereafter called the plaintiff), was granted a lease in respect of a plot of land at Booster Station Fajara, the Gambia by the Minister for Local Government and Lands. The lease was registered as No K176/1973. The lease was admitted in advance as exhibit A. The plaintiff fenced the plot and was paying her land rent and rates. It would appear that the irregular payment of the rent was one of the reasons why the lease was purportedly determined. However, the second respondent, (hereafter called the second defendant), before the purported determination of the lease, deposited "a heap of sand and a heap of stones" on the plot with a view to commencing building operations. It was some time in 1985 that the plaintiff's attention was drawn to a publication in the official *Gazette* that her lease has been determined. The *Gazette No 28,* of 28 May 1985, was admitted in evidence as exhibit C. The publication therein was GN 147/85 of the same date. Consequently, she instructed her solicitor to write to the Director of Lands protesting against the determination. The letter dated 14 June 1985 addressed to the Director of Lands was admitted in evidence as exhibit D. The exhibit shows that a copy of the said letter was sent to both the Permanent Secretary, Ministry of Local Government and Lands, the Solicitor-General and Legal Secretary. Another letter of 12 July 1985 written by the plaintiff's solicitor to the Director of Lands was admitted as exhibit E. Copies of this letter were sent to the Permanent Secretary, Ministry of Local Government and the Solicitor General. There was no reply to both letters, ie exhibits D and E. The second defendant was written to by the plaintiff's solicitor on 19 August 1985. The letter was admitted in evidence as exhibit F. The second defendant replied and the reply was admitted in evidence as exhibit DEF 2.

It is pertinent to point out that before the trial commenced on 12 February 1987, the Attorney-General, the first respondent (hereafter called the first defendant), through his counsel, one Mr Joof, sought leave to withdraw from the case on the ground that the Ministry of Local Government did not send the files pertaining to the land to the Attorney-General in spite of the letters from the Attorney General's Office. The learned trial judge refused the application. The first defendant did not file pleadings and hence called no evidence.

The second defendant gave evidence and relied on a "lease" dated 29 October 1985 and registered as K240/1985 marked exhibit DEF 1. According to him, he had already built the boys quarters on the land. By the time he received exhibit F, he had already completed the building of the boys' quarters. He had expended the sum of D75,000 on the land. He was still in possession and that his "lease" has not been withdrawn by the State. He called an official in the Registrar General's Chambers to so to say and re-tender a lease exhibit DEF 1 which was already in evidence.

Counsel on both sides addressed the court and after a review of the evidence and a brief reference to the addresses of learned counsel, the learned trial judge dismissed the claims against the second defendant and awarded the sum of D10,000 as damages against the first defendant with costs assessed at D500,000 favour of the plaintiff.

It is against this decision that the plaintiff has now appealed to this court on these grounds:

"(a) That the learned judge misdirected himself when, after he had found as a fact that the Minister responsible for the Administration of Lands was in breach of the law by re-entering the appellant's leasehold property situate at Booster Station Fajara bearing serial registration number K176/73, the said judge did not order the lease of the same premises to the second respondent bearing serial registration number K240/85(which was granted by the said Minister *after* action had commenced), to be cancelled or declared void.

(b) That the learned judge failed to follow up his finding of fact that the said minister was in breach of the law, by not declaring the appellant the rightful lessee of the said premises.

(c) That the judgment is against the weight of the evidence."

Mr George, the learned counsel for the plaintiff, submitted in respect of these grounds that since the learned judge had found that the minister, who purportedly determined the lease of the plaintiff, was in clear breach of section 19 of the Lands (Banjul and Kombo Saint Mary) Act, Cap 102 (hereinafter referred to as the Lands Act), he should have given judgment in favour of the plaintiff for the reliefs sought in the lower court as the act of the minister was illegal. With regard to the amount expended, learned counsel for the plaintiff pointed out that no receipt was tendered in support of the amount of D75,000 allegedly spent by the second defendant. He finally urged

that the appeal be allowed, set aside the payment of D10,000 in favour of the plaintiff and to grant the reliefs sought.

Miss Fowlis, the learned State Counsel who appeared for the first respondent, said that the first defendant would abide by the judgment of this court.

In his own reply, Mr Semega Janneh, the learned counsel for the second defendant, agreed that the lease of the plaintiff and the purported lease of the second defendant in respect of the same land cannot co-exist. Learned counsel, rightly, in my view, conceded that the second defendant has not a valid lease as a result of the act of the minister in determining the plaintiff's lease.

The issue raised by this appeal appears to me simple. It is this: if the lease of the plaintiff has not been validly determined, can the minister allocate the same plot of land to another person? In determining the lease, the minister purportedly acted under section 19 of the Lands Act. The name of the plaintiff was published in an Extraordinary *Gazette* No 28, Volume 102 of 28 May 1985. The *Gazette* Notice No 147/85 gave the reason for the re-entry to be a breach of the covenant. It reads:

"The following Notice is published for general information:

LIST OF PLOTS TO BE RE-ENTERED AS A RESULT OF ABREACH OF LEASE COVENANT BY THE ALLOTEES

It is hereby published for general information that plots allocated to the sub-mentioned persons have been re-entered with immediate effect by the Honourable Minister IN COMPLIANCE with the provisions of the Lands (Banjul and Kombo St Mary) Act." (The emphasis is mine).

Since the second defendant's counsel has conceded that the second defendant has not got a valid lease and since the learned trial judge has also found that "the Minister for Local Government was in clear breach of law when he re-entered" it is no longer necessary to set out the provisions of section 19 of the Lands Act. However, it is the law that once a condition precedent for the performance of a lawful act has not been complied with, the subsequent performance of that act becomes illegal. Consequently once the learned trial judge has rightly found that the act of the minister was illegal, any subsequent act carried out in pursuance of that act has been tainted with illegality and therefore unenforceable. It follows that the purported determination of

the plaintiff's lease by the Minister of Lands, not in accordance with the laid down provisions of section 19 (1) of the Lands (Banjul and Kombo Saint Mary) Act, Cap 102 was illegal. The minister could not therefore grant any valid lease based on an illegal act.

I do not see how, in view of the evidence before the court, the learned trial judge could have awarded the sum of D10,000 as damages against the first defendant, the Attorney-General. It would appear that the Minister of Local Government treated with levity the request made by the Ministry of Justice asking for the files in respect of the plot of land. If the Ministries appreciate the constitutional position of the Attorney-General as the Chief Legal Adviser to the Government, then his advice must always be sought in respect of legal matters. As at the time the plaintiffs' solicitor sent his letters exhibits D and F to the Director of Lands and copied the same to the Permanent Secretary, Ministry of Local Government and Lands, it was the bounden duty of the Minister in charge of Lands to seek legal advice. Paragraph (2) of exhibit D shows that an interpretation of the law will be involved. It reads:

"(2) For your information, my client had received no notice of any breach she might have committed nor was she in arrears with the land rent. On 9 November 1984 my client paid to the Treasury under receipt number 907187 the land rent for 1983 to 1985. *I do not see how the minister can re-enter without giving my client notice in accordance with the law."* (The emphasis is mine.)

Exhibit D was dated 14 June 1985 and the summons was issued on 2 October 1985. The refusal of the minister to follow the procedure laid down under section 19 (1) of the Lands Act and when his attention was drawn to it through exhibit E, shows he deliberately set out on a collision course with the law; the inevitable result was the breach of that law. This has placed the Attorney-General in an unenviable position not only in the court below but also in this court where in the face of the overwhelming evidence about the illegal act of the minister, the Attorney-General chose to sit on the fence.

The reasons for refusing the declaration sought are stated by the learned trial judge. I quote part of his judgment on the point:

"The matter does not end there. The plot was demised to the second defendant who developed and spent about D75,000 on the said plot.

The plaintiff, on the other hand did not do anything except erecting the walls and piling heaps of sand and stones.

It would cause great hardship to the second defendant if I should make the declaration sought by the plaintiff. I would therefore not grant the injunction or make the declaration sought."

At best the second defendant relied on a letter dated 31 May addressed to him but with the notice that the land was "formerly Neneh Bidwell SR No 170/1973." His purported lease was dated 29 October 1985 and registered as K240/1985. With this, he had actual notice of the interest of the plaintiff. Did he make any further enquiry as to the proper determination of the plaintiff's lease? The answer to this can be found in exhibit DEF 2 which was a reply to exhibit F. He just could not be bothered. Paragraph (3) of exhibit DEF 2 is clear: "The land in Fajara, Kombo Saint Mary on which my client is building on was *given* to him by the relevant state authority who *assured* him that the said land was *properly re-entered by the State*." As at that stage, a prudent man would not have proceeded with any further building operations. The second defendant knew as far back as 20 August 1985 that his "title" would be challenged: In evidence he said:

"A lease was issued to me. This is the lease. Tendered and marked exhibit DEF 1. It is dated 29 October 1985. It is registered under K24J/1985 when I received the lease, I installed a stand pipe and built boys quarters consisting of two rooms, toilet and verandah."

Why did he start building operations before he had a lease in his possession? Assuming the second defendant has also title to the disputed land, the question then will be in the case of competing title to the same land: who has made a good title? See *Arase* v *Arase* (1981) 5 SC 33. His action in going further with the building operation was foolhardy. The plaintiff averred in paragraphs (2)- (7) of her statement of claim as follows:

"(2) On 24 August 1973, the plaintiff was granted Lease No K176/1973 in respect of a plot of Land at Booster Station by the Minister for Local Government and Lands.

(3) That the plaintiff has continued to pay her rents regularly.

(4) The Minister for local Government and Lands caused a notice of re-entry of the plaintiff's leasehold land to be published in The Gambia *Gazette* No 28 dated May 1985.

(5) That the Minister for Local Government and Lands did this in breach of section 19(1) of the Lands (Banjul and Kombo Saint Mary) Act; in that the plaintiff was not notified of the particular breach or non-observance alleged to have been committed by the plaintiff nor was the plaintiff given any notice requiring her to remedy any breach or non-observance.

(6) That the Minister of Local Government and Lands has granted a lease of the plaintiff's said premises at Booster Station to the second defendant.

(7) That the second defendant has commenced building a boys' quarters on the said premises."

The second defendant in his statement of defence averred as follows:

"(2) The second defendant neither denies nor does he admit paragraphs (2), (3) and (5) of the statement of claim and puts the plaintiff to prove his assertions.

(3) The second defendant denies paragraph (6) of the statement of claim and avers that the land granted to him is State land and that it was properly granted to him.

(4) The second defendant denies paragraph (7) of the plaintiff statement of claim and avers that the outhouse/boys quarters has already been built and completed. The second defendant further avers that the main building had been commenced.

(6) The second defendant avers that he has expended a great deal of money in developing the said land and premises and further states that even if the plaintiff is entitled to the said land and premises (which is denied) the alleged breach can be remedied by adequate damages by way of financial award. The plaintiff did nothing while the second defendant was building upon the said land."

Since paragraph (3) of the statement of defence averred that the land granted to him was "properly granted" the onus is on the second defendant/respondent to prove this. This he has failed to do. He did not even plead the lease; exhibit DEF 1 was wrongly admitted in law as evidence led in respect of matters not pleaded goes to no issue and should be discountenanced: see *George* v *Dominion Flour Mills Ltd* [1963] 1 All NLR 71 at 78; *Emegokwe* v *Okadigbo* (1973) 4 SC 113 at 117; and *Awoyegbe* v *Ogbeide* (1988) 1 NWLR 695. The second

defendant did not claim lack of knowledge of proper grant. Mr Janneh in his address in the lower court, while making a case in respect of the amount spent by the second defendant, said: "The plaintiff did not spend much money on the land except building two sides of the wall." Having rightly conceded that the second defendant has not got a valid lease, any loss sustained by him cannot be traced to the plaintiff. He should know where his remedy lies.

The appeal is allowed. The judgment of Coker J dated 10 December 1987, together with the consequential orders made, is hereby set aside. There will be judgment for the plaintiff as follows:

(1) a declaration that lease No K176/1973 in respect of the plot of land at Booster Station, Fajara is valid and is still subsisting; and

(2) the second defendant, his servants, agents and workmen are hereby restrained from entering the said land or continuing with any building operation on the said plot of land covered by the above named subsisting and valid lease No K176/1973.

The plaintiff will be entitled to nominal costs as against the first defendant: D100 this court and D100 in court below. The plaintiff will be further entitled as against second defendant to costs agreed at D1,000, in this court and D500 in the court below.

ANIN JA. I agree.

DAVIES J I also agree.

Appeal allowed.

SYBB

MANJANG v GAMBIA NATIONAL INSURANCE CORPORATION

SUPREME COURT (HIGH COURT), BANJUL

(Civil Suit No 119/87 M No 63)

1 March 1989

AYOOLA CJ

Agency-Principal and agent-Liability of principal-Acts done by agent-Test of liability is authority, actual or ostensible.

Agency-Fraud-Liability of principal-Fraudulent act of agent-Agent of insurance company defrauding customer-Insurance agent authorised to solicit applications for insurance and to collect and receive premiums due to insurance company-Agent defrauding illiterate customer of insurance company of huge amount of money endorsed on cheque as insurance premium signed by illiterate customer-Whether insurance company liable for fraud committed by agent.

Held, *dismissing the plaintiff claim*: where an act done by an agent is not within the scope of the agent's express or implied authority, or falls outside the apparent scope of his authority, the principal is not bound by, or liable for that act, even if the opportunity to do so arose out of the agency. Where the agent obtains the money or property of a third person by means of any act beyond the actual, or apparent scope of his authority, the principal is not responsible unless the money or property or the proceeds thereof have been received by him or have been applied for his benefit, in which case he becomes liable to the extent of the benefit received. In the instant case, the defendant insurance company is not vicariously liable for the fraudulent act of its agent who was merely authorised to solicit applications for insurance and to collect and receive premiums due to the insurance company and pay over the same as directed by the company.

ACTION by the plaintiff against the defendant insurance company to recover the sum of D14,000 fraudulently obtained from him by the insurance agent of the defendant. The facts are sufficiently stated in judgment.

SBS Janneh for the plaintiff.

M Bittaye for the defendant.

AYOOLA CJ. The plaintiff, who was not literate in English, was insured with the defendant in 1986 and 1987. The premium payable on his insurance in 1986 was D841 while the premium payable in 1987 was D1,155. One Fansu Ndong, an agent of the defendant, wrote out the two cheques with which this case is concerned for the plaintiff to sign in order to pay for those premiums. In 1986 Fansu Ndong wrote D6,841.50 on the said cheque (as exhibit G showed) but D841.50 (the correct amount of the premium) on the cheque stump and paid the cheque into his savings account with the Gambia Commercial and Development Bank. He withdrew therefrom the equivalent of the amount of the cheque. In 1987 he wrote D9,155 on the cheque (exhibit K) but inserted the correct amount of the premium payable (D1155) on the cheque stump (exhibit B). In both cases, he paid the correct premium payable to the defendant and pocketed the balance, a total of D14,000.

This action by the plaintiff, Alhaji Bora Manjang, against the defendant, Gambia National Insurance Corporation, is to recover the sum of D14,000 which, he was cheated of by the defendant's agent.

It is indisputable that Fansu Ndong was the defendant's agent. The only question is whether the defendant should be vicariously liable for the fraud he perpetrated on the plaintiff. The principal is not liable for the act of his agent committed beyond the actual or apparent scope of authority of the agent. The law, I think, has been well put in *Halsbury's Law's of England* (4th ed), Vol 1, para 820 as follows:

"Where an act done by an agent is not within the scope of the agent's express or implied authority, or falls outside the apparent scope of his authority, the principal is not bound by, or liable for, that act, even if the opportunity to do it arose out of the agency … Where the agent obtains the money or property of a third person by means of any act beyond the actual, or apparent scope of his authority, the principal is not responsible unless the money or property or the proceeds thereof have been received by him or have been applied for his benefit, in which case he becomes liable to the extent of the benefit received."

The test of liability is authority, actual or ostensible. (See *Clerk & Lindsell on Tort* (14th ed), para 274.)

In this case the plaintiff's case on the pleadings is that at all material times Fansu Ndong was an agent of the defendant charged with the

duty of helping illiterate customers of the defendant to, inter alia, fill forms and cheques used for the payment of premiums to the defendant by its customers. However, there is no evidence that Fansu Ndong was charged with any such duty as was averred in the statement of claim. Indeed, the defendant's only witness said that it was prohibited for the defendant's agents to wrote out cheques or fill forms for customers even though such prohibition was not embodied in the agency agreement or in writing. The agency contract between the defendant and Fansu Ndong (exhibit L) shows that the agent was authorised "to solicit, procure and transmit to the corporation applications for insurance and to collect and receive premiums due to the corporation and to pay over the same as directed by the corporation, all subject to the terms and regulations and limitations set forth in (the) agreement."

It seems clear to me from the tenor of the agreement (exhibit L), that Fansu Ndong had no express authority to write out cheques for customers. That should be enough to dispose of the case since the plaintiff's case was built on actual, rather than ostensible, authority. However, there is a faint suggestion made in the course of counsel's address that reliance might be placed on an ostensible authority. It was said that by appointing Fansu Ndong as a agent to procure business and collect premium, the defendant could be said to have held out the agent as a person authorised to write out cheques for the payment of premiums. I have given careful and anxious consideration to that submission but I do not see how the appointment of Fansu Ndong to procure business and collect and receive premium can lead to an implication of authority to write out cheques on behalf of customers. Besides, the evidence shows that the plaintiff permitted Fansu Ndong to write out his cheque not because he believed he was vested with authority to do so but because Fansu Ndong was able to persuade the plaintiff to rely on him as the plaintiff would rely on his own son for such activity. Fansu Ndong thus was the agent of the plaintiff in writing out the cheques. It was suggested that since clause 5b(i) of the terms and regulations appended to exhibit L provided for the agent to provide a guarantor to indemnify the defendant in the case of the agent's misappropriation of funds, the defendant assumed responsibility for the fraud of Fansu Ndong. I do not see clause 5(b)(i) as leading to such conclusion at all. First Fansu Ndong was described as an agent and not as "trainee-agent." Secondly, the guarantee only becomes enforceable if the trainee-agent misappropriated funds in respect of which the defendant incurred a liability or which has occasioned it a loss.

This, indeed, is an unfortunate case. The plaintiff is not without a remedy against Fansu Ndong. He has sued the defendant which, as the law stands, cannot be vicariously liable for the fraud of Ndong. In the result this action fails and the case must be dismissed.

The case is hereby dismissed.

Claim dismissed.

SYBB

KHADRA v INTERNATIONAL BANK FOR COMMERCE & INDUSTRY

SUPREME COURT (HIGH COURT), BANJUL

(Civil Suit No 29/87 K No 14)

14 March 1989

AYOOLA CJ

Shipping-Bill of lading-Liability of carrier-Duty of-Carrier obliged to deliver goods to holder of bill of lading-Liability of carrier in conversion for delivery of goods without production of bill of lading-Measure of damages in conversion not limited to value of goods specified on invoice or in bill of lading indemnity-Assessment including damages or loss arising from delivery of goods without production of bill of lading.

Some time in 1985, the plaintiff ordered some goods, being a quantity of textiles from Germany. The goods arrived in Banjul in March 1986. He could not take delivery of the goods because he had then not obtained the bills of lading. The plaintiff therefore requested the defendant bank to execute an indemnity in favour of the carriers of the goods, to enable him take delivery of the goods without the production of the bills of lading. The plaintiff stated the value of the goods as D309,142.88. The contract of indemnity as requested was executed by the defendant bank in favour of the carriers. Subsequently, the carriers sued the bank on the contract of indemnity. The parties agreed to a consent judgment and the bank paid the carriers a total sum of D695,819.48. The defendant bank immediately informed the plaintiff of the fact of payment under the requested contract of indemnity in favour of the carriers. The defendant bank paid the indemnity claim by utilizing a deposit of D673,420 which had been paid by the plaintiff into a special account with the bank. The bank also debited the difference between the indemnity claim and the amount deposited by the plaintiff and other charges such as the solicitor's fees in respect of the indemnity claim against the plaintiff's account with the bank. Subsequently the plaintiff brought the instant action against the defendant bank, claiming, inter alia, the sum of D386,676.59 being the amount allegedly paid without his authority out of his account by the defendant bank to a third party, ie the carriers of the goods.

Held, *dismissing the plaintiff's claim*: (1) the obligation of the carriers of goods was to deliver them to a person holding a bill of lading. If the shipowners of the carriers delivered the goods to a person who was not the holder of the bill of lading, they would be held to have done so at their peril. Dictum of Lord Denning in *Sze Hai Tong Bank* v *Rambler Cycle Co Ltd* [1959] AC 576 at 586, PC cited.

(2) The indemnity given by the defendant bank to the carriers of the goods included an indemnity against damages which the carriers might be put to by reason of the delivery of the goods to the plaintiff without production of the relevant bills of lading. Such damages, assessed in accordance with the normal measure of damages in conversion, could not be limited by the value of the goods as stated in an invoice or in the letter of request given though the liability of the carrier in conversion was to pay for the value of the goods. The indemnity given by the defendant bank the carriers, was in accord with the request made by the plaintiff and it must have been understood by the plaintiff that the indemnity he requested the defendant bank to join him in giving, was indemnity against loss or damage or claims that might arise to or against the carriers by reason of the delivery of the goods without production of the bill of lading.

Per curiam. It is clear from the manner in which the action is formulated that the complaint of the plaintiff is not that he is not liable to indemnify the defendants but that the extent of the indemnity should be limited to the value of the goods which he stated on the bill of lading indemnity. The terms of the indemnity contained in that document show that the plaintiff was mistaken in taking that position.

Cases referred to:

Sze Hai Tong Bank v *Rambler Cycle Co Ltd* [1959] AC 576.

ACTION by the plaintiff claiming, inter alia, the sum of over D386,000 being amount wrongly paid to a third party by the defendant bank without authority. The facts are sufficiently stated in the judgment of Ayoola CJ

SBS Janneh for the plaintiff.

M Bittaye for defendants.

AYOOLA CJ. The plaintiff's claim is as follows:

"(i) The sum of D386,676.59 being the sum wrongly paid to a third party by the defendant without authority.

(ii) The sum of D70,606.83 being the total sum wrongly debited to the plaintiff's account.

(iii) Interest at the rate of 28 per cent per annum from 16 December 1986 as to (i) and from 22 January 1987 as to (ii) above.

(iv) Damages

(v) Costs

(vi) Further or other relief as the court deems just."

The background facts which cannot really be disputed are as follows: Some time in 1985 the plaintiff ordered textiles in two lots from a West German firm called Warner TH Barnbeck (hereafter called "Barnbeck"), with headquarters in Hamburg. Barnbeck shipped to the plaintiff the two lots of textiles per *M/S Santa Marie* owned by Deep Sea Shipping Company (hereafter called "Deep Sea") whose agents in The Gambia were Maritime Agencies (Gambia) Ltd (hereafter called Maritime). Two consignments arrived in Banjul some time in March 1986.

On the arrival of the goods, the Standard Chartered Bank (Gambia) Ltd, apparently acting collecting bankers for Barnbeck's bankers, advised the plaintiff of the receipt of documents for the goods shipped for his account. The plaintiff was advised that the documents necessary to obtain delivery would be handed to him when he paid to that bank the bill amount plus expenses. As regards one of the consignments, as exhibit C shows, the bill amount was DM 19,764 and as regards the other, as exhibit C1 shows DM82,253.15.

For some reasons, not disclosed by evidence, the plaintiff did not obtain the bills of lading by which he could obtain delivery of the goods. As a result he requested the defendant bank to execute an indemnity in favour of Maritime in respect of the delivery of the goods without production of the bills of lading therefor - stating the value of the goods as D309,142.88. The defendants, upon that request and on the plaintiff executing an indemnity in their favour, in turn did indemnify Maritime.

After the defendants have executed the indemnity in favour of Maritime, they received a letter from Maritime (exhibit 0) stating that Maritime "have since learned that dispute exists between the shippers and Messrs Fadel, and that a claim is pending." It warned that "in that event we will have no choice but to claim against you in turn unless of course you are able to persuade your client to settle his difference with the shippers." The defendants then wrote to the plaintiff sending photocopies of the letter, exhibit 0, and stating that: "As claim is in the pipeline in connection with the indemnity issued on your behalf we would ask you to try and settle this dispute with your supplier to avoid the claim being made." That letter is exhibit P.

Apparently, the plaintiff did not settle his dispute with his supplier Barnbeck. Barnbeck demanded payment of the value of the goods which that firm put at DM216,631.22 from Deep Sea which in turn asked Maritime to obtain the money on the basis of the indemnity from the defendants. Some time in June 1986, as exhibit T shows, Bernbeck received from Deep Sea the sum of DM216,631.22 being payment in connection with two bills of lading relating to the goods in settlement of Barnbeck's claim for delivery of goods without presentation of the original bills of lading. Maritime, as Deep Sea agent, relying on the indemnity given by the defendants, called on the defendants to pay that amount with such incidental expenses as may arise as specified in the indemnity.

As apparently, no satisfaction was obtained from the defendants, Maritime in June 1986 sued the defendant's for the sum of DM216,631.22 on the contract of indemnity. In January 1987, Maritime and the defendants agreed to a consent judgment (exhibit J2) whereby the action was settled on terms that the defendants do pay to Maritime a total sum of D695,819.48. The defendants paid Maritime that sum and immediately informed the plaintiff (exhibit H4) of the fact of payment. The deposit account was utilized by the defendants in settling Maritime's claim. In addition, they debited the plaintiff's account with the amount by which payment made exceeded the amount deposited. Later, still, in January 1987 the defendants debited the plaintiff's account with D48,707.36 being solicitor's fees.

In February 1987 the plaintiff commenced this action claiming as earlier stated. What the plaintiff contends as the basis of his claim has been succinctly stated in the submission of learned counsel for the plaintiff. They are: first that the defendants should have joined him in the action instituted by Maritime against them or given him notice of the action instead of compromising that action; and second that the

indemnity requested by the plaintiff was not limitless. Elaborating on these points, Mr Janneh, counsel for the plaintiff, argued that if the plaintiff had been joined, he would have proved that neither Warnbeck nor Maritime was entitled to anything under the indemnity because he was not liable to pay over and above the invoice price relating to the consignments. Mr Sillah, counsel for the defendants on the other hand, contended that the issue was whether or not the defendants were liable to make the payments they made to Maritime. In his submission, the terms of the indemnity covered the situation.

There were two contracts of indemnity in issue. This case primarily concerns only one of them; and, that is the contract of indemnity between the plaintiff and the defendants the terms of which are to be found in the bill of lading indemnity, exhibit D. The vital parts of that document read thus:

"Please join us in giving an indemnity to Messrs Maritime Agencies their servants or agents, in respect of the delivery of goods viz: 1 container TPHU 298 - 252 - 0 19 Bales 34, 8, 15, 33-/47 value D309, 142.88 on *SS Santa Maria* arrived at Banjul without production of the bill of lading therefor, which has not arrived in Banjul but which is expected to arrive within 90 days.

In consideration of your joining with us in the indemnity, we hereby indemnify you against any claim, loss or damage, costs, charges and by you, or for which you may become liable, under or in respect of the said bill of lading or any one of the set of which it forms part, or otherwise howsoever in respect of the goods represented thereby, or arising out of or in any way connected with the delivery of the goods to us."

The second contract of indemnity is exhibit D1. On the face of it, it is difficult to know whether or not the plaintiff was a party to it but it seems clear enough that it was an indemnity from the defendants to Maritime. The material terms of that contract was that the defendants undertook:

"to hold (Maritime) and each of you harmless and keep you and each of you or any of you under said bills of lading or anyone of the set of which it forms part, and (sic) against all loss, costs (as between attorney or solicitor and client) damages, and expenses, which you or any of you suffer of (sic) be put to by reason of the delivery of the said goods to us."

It being common ground on the pleadings that "upon the plaintiff executing an indemnity in favour of the defendants in return for the defendants' indemnity in favour of Maritime Agencies Gambia Ltd. …", I need not let the puzzling question of absence of the signature of the plaintiff on the indemnity in favour of Maritime exhibit D1) delay me.

In order to put the terms of these two indemnities into proper perspective, it is expedient to recall that the obligation of Deep Sea (whose agents Maritime are) in relation to the goods as carriers of the goods is to deliver them to a person holding a bill of lading. It is trite law that if the shipowner (or his agent) delivers the goods to a person who is not the holder of the bill of lading, he does so at his peril. The law is succinctly put in *Sze Hai Tong Bank* v *Rambler Cycle Co Ltd* [1959] AC 576 where Lord Denning, who gave the judgment of the Judicial Committee of the Privy Council, said at 586.

"It is perfectly clear that a shipowner who delivers without production of the bill of lading does so at his peril. The contract is to deliver, on production of the bill of lading, to the person entitled to the bill of lading … The shipping company did not deliver the goods to any such person. They are therefore liable for breach of contract unless there is some term in the bill of lading protecting them. And they delivered the goods, without production of the bill of lading, to a person who was not entitled to receive them. They are therefore liable in conversion unless likewise protected."

The *Sze Hai Tong Bank* case has some similarities to the background facts of this case. That was a case in which the buyers, who had not paid the seller, induced the carriers to deliver the goods to them without bills of lading on an indemnity given by the buyers and their bank. In an action by the sellers against the carriers for damages for breach of contract and conversion, the carriers brought in as third parties the indemnifying bank against which the carriers claimed a declaration of indemnity. It was held that the carriers were liable and that the bank was obliged to indemnify them. The extent and nature of the liability of a carrier, who delivers goods to a person who is not the holder of a bill of lading, show quite clearly the nature of claim or loss the carriers would want to be indemnified against. Although the quantum of the claim of the shipper usually is the value of the goods so delivered, that quantum will not be conclusively determined by the terms of the contract between the shipper and the buyer who has taken delivery of the goods without a bill of lading.

In this case, rightly, the indemnity given by the defendants to Maritime included an indemnity against damages which the carriers might be put to by reason of the delivery of the goods without production of the relevant bills of lading. Such damages assessed in accordance with the normal measure of damages in conversion cannot be limited by the value of the goods as stated in an invoice or in the letter of request even though the liability of the carrier in conversion is to pay for the value of the goods. In my view, the indemnity given by the defendants to Maritime was in accord with the request made by the plaintiff and it must have been understood by the plaintiff that the indemnity he requested the defendants to join him in giving, was indemnity against loss damage or claim that might arise to or against Maritime by reason of the delivery of the goods without production of the bill of lading.

When Maritime sued the defendants, it would have been prudent on the defendants' part, to have brought the plaintiff as third parties and claimed a declaration of indemnity against the plaintiff. They have not done so. Their failure to do so does not affect the plaintiff's liability. It might only lead to multiplicity of action. In the circumstances of this case, the plaintiff had ample notice of the claim made against Maritime by the shippers and in turn by Maritime against the defendants. The defendants settled the claim against them by Maritime only after they have taken reasonable steps to satisfy themselves of the genuineness of the claim particularly as regards the value of the goods. In the claim by Warnbeck against Deep Sea, the dispute between Warnbeck and the plaintiff has no relevance and is not a defence to Warnbeck's claim as shipper against the carrier. In the case by Maritime against the defendants similarly, the Warnbeck/Khadra dispute has no relevance. What might be of relevance is the fact of payment of the value of the goods to Warnbeck and a release of the defendants from the indemnity. The plaintiff has not shown that the defendants have been released from the indemnity they gave to Maritime before they settled Maritime's claim. On the totality of the evidence, I hold that failure to join the plaintiff in the suit by Maritime against the defendants does not discharge the plaintiff from his liability on the indemnity which he executed in favour of the defendants.

It is clear from the manner in which the action is formulated that the complaint of the plaintiff is not that he is not liable to indemnify the defendants, but the extent of indemnity should be limited to the value of the goods which he stated on the bill of lading indemnity. The

terms of the indemnity contained in that document (exhibit D) show that the plaintiff was mistaken in taking that position.

On the totality of the evidence, I cannot hold that the defendants had wrongly paid D386,676.59 to Maritime. For the same reasons, which I have given, I cannot also hold that the sum of D70,606.83 was wrongly debited to the plaintiff's account. It must be emphasized that this case is decided strictly on the issues raised. The question does not arise whether or not the defendants should have automatically had recourse as they did to the money deposited with them in satisfaction of the claim. I do not think anything turns on the fact that they so utilized the money in this case.

For the reasons which I gave stated this action fails and it must be dismissed. The action is dismissed accordingly.

Action dismissed

SYBB

SISSOHO v NORTHERN ASSURANCE CO LTD

COURT OF APPEAL, BANJUL

(Civil Appeal No 2/82)

20 May 1983

LUKE, ANIN AND AYOOLA JJA

Courts-Appeal-Findings of fact-Conclusion by trial judge-Conflict of evidence on issue of primary fact-Proper conclusion to be reached only after estimating credibility of witnesses on oath-Trial judge not to be criticised for failing to review evidence before arriving at his conclusion of fact.

Insurance-Contract of insurance-Conditions-Breach-Waiver-Principle of waiver when applicable-Need for party relying on waiver to specifically plead defence of waiver at the trial court-Defence of waiver not to be raised on appeal when not pleaded at the trial court.

Insurance-Contract of insurance-Conditions-Breach-Policy of insurance prohibiting admission "made by or on behalf of the insured"-Whether a plea of guilty by insured's driver in criminal trial proceedings constituting breach by insured against prohibiting admission.

Evidence-Document-Secondary evidence-Admissibility-Conditions for.

Evidence-Facts-Burden of proof-Breach of conditions under policy of insurance-Insurer failing to produce admissible evidence of conditions-Insured not discharging burden of proof-Insurer admitting in pleadings third party insurance indemnifying insured for damage caused to third party's property-Insured entitled to claim for compensation as an indemnity.

Held, *allowing the appeal (per Ayoola JA, Luke and Anin JJA concurring*: (1) when there is a complete conflict of evidence on an issue of primary fact, where the proper conclusion can only be reached after estimating the credibility of the witnesses on oath, a trial judge is not be criticised for failure to review the evidence and he may properly only state his conclusion of fact as the trial judge did in the instant case. *Ijale* v *Shonibare* (Chukura) (1952) Privy Council Judgments 947 cited.

(2) Under the principle of waiver, if one party by his conduct leads another to believe that the strict rights arising under the contract will not be insisted on, intending that the other should act on that belief, and he does act on it, then the first party will not afterwards be allowed to insist on the strict rights when it would be equitable for him so to do. On the facts of the instant case, it cannot be said that waiver, argued on appeal by the plaintiff, was established. And the plaintiff-appellant in the instant case was also not entitled on appeal, to raise the plea of waiver against the defendant because he failed to plead or raise it at the trial court. *Lickiss* v *Milestone Motor Policies at Lloyd's* [1966] 2 All ER 972 at 975 applied.

(3) A plea of guilty at a criminal trial is by the nature of the proceedings personal to the person who makes the plea. It cannot by any means be construed as an admission made under a policy of insurance "by or on behalf of the insured" who is not a party to the proceedings and is not called upon to make a plea. In the instant case, the trial judge erred in holding that the guilty plea made by the insured's driver was in breach of the condition under the policy prohibiting admission by the insured, the plaintiff-appellant.

(4) The general rule is that except in cases in which secondary evidence is admissible, the contents of a document must be proved by primary and not secondary evidence. The exceptions or circumstances in which secondary evidence of the contents of a document are admissible are several: it is well settled that secondary evidence is admissible in the case of documents in the hands of an adversary who fails to produce them after being served with notice to produce at the trial. And the circumstances in which there is no need to give notice to produce are several and not exhaustive including: (a) where the document is itself a notice which has been served upon the adversary such as notice to quit in an action for possession; (b) or where the defendant's possession of the document forms the basis of the action so that the action itself acts as a notice; or (c) where the document is not a mere document but is a chattel as well as a document; or (d) where the service of the notice to produce on the party allegedly in possession of the original document and person had denied receiving the document. In that case, it would be useless to serve the notice to produce on him. *Lickiss* v *Milestone Motor Policies at Lloyd's* (supra) cited.

(5) The burden of providing the existence of conditions and the breach thereof under a policy insurance on which the insurer relies, is on the insurer. Since in the instant case, the insurer, the defendant, failed to

produce admissible evidence of the conditions, he had failed to discharge the burden. The defendant, by his pleadings, had also admitted that at the material time the plaintiff's vehicle had been insured under a third party insurance under which the insurer had undertaken to indemnify the insured in respect of all sums which the insured might become liable to pay as compensation for damage caused to the property of a third party. The plaintiff was therefore entitled to his claim for indemnity under the policy of third party insurance. The trial judge erred in holding otherwise.

Cases referred to:

(1) *Ijale* v *Shonibare* (Chukara) (1952) Privy Council Judgments 947.

(2) *Lickiss* v *Milestone Motor Policies at Lloyd's* [1966 2 All ER 972.

(3) *Dwyer* v *Collins* (1852) 7 Exch 639.

APPEAL from the judgment of the Supreme Court (High Court) per Bridges CJ, dismissing the plaintiff-appellant's claim for indemnity under a policy of third party motor insurance. The facts are sufficiently stated in the judgment of Ayoola JA.

SBS Janneh for the appellant.

C Reffin (Miss) for the respondent.

AYOOLA JA. This is an appeal from the decision of the Supreme Court (High Court) (Bridges CJ) given on 15 April 1981, dismissing the plaintiff-appellant's claim against the defendant, an insurance company, for the sum of D8,459. "being judgment and costs paid by the plaintiff to AM Cham in Suit No 1976-B-230 and refundable by the defendant under insurance policy No MB12 F 720287 plus interest at fourteen per cent from 15 April 1981 to payment."

The matter arose this way: Vehicle No GA 4214, owned by the plaintiff-appellant (hereafter called the plaintiff), was insured with the defendant-respondent (hereafter called the defendant), under a third party policy No 12 F 720287. On 5 May 1976, the said vehicle collided with another vehicle No GA 2229 belonging to one AM Cham. On 8 December 1976, Cham issued a writ of summons against the plaintiff and his driver, one Baba Galleh Barry, claiming damages for damage caused to his vehicle. The suit which was No 1976-B-230 was defended by the plaintiff and judgment was given against him in

favour of AM Cham in the sum of D8,059 and D400 costs on 15 April 1981. The plaintiff promptly delivered the said judgment to the defendant and demanded to be indemnified in conformity with the insurance policy earlier mentioned but the defendant failed to pay any sum to the plaintiff who then sued the defendant claiming as earlier stated.

The main plank of the defence was that the plaintiff had committed a breach of several of the conditions of his policy. Three of these conditions are as follows:

"(2) Every notice or communication to be given or made under this policy shall be delivered in writing to the company.

"(4) In the event of any occurrence which may give rise to a claim under this policy the insured shall as soon as possible give notice thereof to the company with full particulars. Every letter, claim, writ, summons and process shall be notified or forwarded to the company immediately on receipt. Notice shall also be given to the company immediately the insured shall have knowledge of any impending prosecution, inquest or fatal injury in connection with any such occurrence. In case of theft or other criminal act which may give rise to a claim under this policy the insured shall give immediate notice to the police and co-operate with the company in securing the conviction of the offender.

"(5) No admission, offer, promise or payment shall be made by or on behalf of the insured without the written consent of the company which shall be entitled if it so desires to take over and conduct in its name for its own benefit any claim for indemnity or damages or otherwise and shall have full discretion in the conduct of any proceedings in the settlement of any claim and the insured shall give all such information and assistance as the company may require."

The defendant's case at the trial was when the accident aforementioned happened on 5 May 1976, the plaintiff did not make a claim nor did he write, as he should, to notify the defendant of the accident; and that the plaintiff did not write to say that his driver "had been taken to court."

In his judgment the learned Chief Justice (Sir Phillip Bridges) noted, as was the case, that it was admitted in the pleadings that the plaintiff's vehicle was insured under a commercial vehicle policy against third party risks, and, also as was the case, that the plaintiff had not

produced the policy on which he sued. He held that the court must "therefore" look to the blank standard commercial vehicle policy form of the defendant for guidance.

Having considered the evidence, the learned Chief Justice held: first, that no notice in writing (apparently of the accident in which the vehicle was involved) was delivered to the defendant; secondly, that condition (4) of the policy (quoted above) was not complied with, that is to say, that notice of impending prosecution in connection with the accident was not given to the defendant; and thirdly, that the plea of guilty at the criminal trial of the plaintiff's driver without reference to the defendant, constituted a breach of condition (5) of the policy. Finally, the learned Chief Justice referred to paragraph (6) of section II of the policy which reads thus:

"The company may at its option:

(a) arrange for representation at any inquest or fatal injury in respect of any death which may be subject of indemnity under this section;

(b) undertake the defence of proceedings in any court of law in respect of any act or alleged offence causing or relating to any event which may be the subject of indemnity under this section."

The Chief Justice found that the benefit of that subsection of the policy had been spurned by the plaintiff in the various proceedings arising out of the accident. Although the judgment did not say so in specific terms, it seems manifest from the tenor of the concluding part of the judgment that the claim was dismissed on the ground that it was barred by breach of the conditions of the policy enumerated earlier or as the learned Chief Justice would put it, the plaintiff "had neglected to discharge the duties undertaken by him when entering into the contract of insurance."

In this appeal, the grounds of appeal filed and argued by counsel on behalf of the plaintiff are as follows:

"(i) The learned Chief Justice was wrong in admitting the copy insurance policy tendered by the respondents (the defendant) in evidence against the appellant's (plaintiff) objection.

"(ii) The learned Chief Justice was wrong in finding that no notice in writing was delivered to the respondent (the defendant).

"(iii) The learned Chief Justice erred in failing to decide whether in fact the appellant filled a form and left it with the respondent and if so whether such form constituted a "notice" or "communication" under the policy.

"(iv) The learned Chief Justice was wrong in finding that condition (4) of the policy was not complied with. Alternatively the learned Chief Justice was wrong in failing to determine whether or not the defendant had waived its right to be informed in writing of the plaintiff's driver's prosecution.

"(v) The learned Chief Justice was wrong in law in finding that guilty plea at the criminal trial of the appellant's driver, without reference to the respondent, was a breach of condition (5) of the policy.

"(vi) The judgment is against the weight of evidence."

The arguments of law submitted in support of these grounds, summarized, are: first, that in the absence of circumstances in which secondary evidence of a document can be admitted in evidence, the learned Chief Justice had wrongly admitted the copy of the policy in evidence and the learned Chief Justice had no right to base his judgment on the conditions contained in the document which was inadmissible; secondly, that since the plaintiff was not the person who made a guilty plea at the criminal proceedings resulting from the accident, the guilty plea made by his driver was personal to the driver and could not have been made on behalf of the insured; and, thirdly, that, from the evidence, the learned Chief Justice should have found waiver implied on the facts on the question whether the plaintiff had committed a breach of condition in not informing the defendant in writing of the plaintiff's driver's prosecution.

In the main, the defendant's reply to these submissions are: first, that it was not necessary for the defendant to produce the original policy and, further, and I believe, in the alternative, that as shown on the proposal form, in exhibit H, the insurance contract was on the terms used for that class of policy. Secondly, that waiver was not pleaded, and there was no evidence of waiver. The ground relating to a breach of condition (5) of the policy was conceded.

It is convenient to deal first the question raised in the second and third grounds of appeal which are in the final analysis questions of fact as to whether the learned Chief Justice was right in holding that no notice in writing was delivered to the defendant and whether the mere filling of

a form and leaving it with the defendant constituted compliance with the conditions of the policy relating to notice. It is easy to deal with these questions briefly. The plaintiff in his evidence under cross-examination said: "I did not write to tell them (ie the defendant) of the criminal case …" The defendant witness said: "When the accident happened on 5 May 1976 he did not make a claim. He should have written notifying them of the accident and we would have sent an accident claim form." That witness also said: "We know nothing of this until we got the civil judgment." Apparently, when cross-examined, he emphasized that the plaintiff never made a claim.

By holding that no notice in writing in accordance with condition (2) of the policy has been delivered to the defendant and that condition (4) of the policy had not been complied with, it is manifest that the learned Chief Justice accepted the evidence of Mr Faye, the defendant's witness, whose evidence was summarized by the learned Chief Justice and quoted above. The issues of fact as to whether oral or written notices were given to the defendant must be taken as resolved in favour of the defendant by the learned Chief Justice. In the circumstances, the ground of appeal which complained that the learned Chief Justice failed to consider whether in fact the plaintiff filled a form and left it with the defendant is without substance. Perhaps the learned Chief Justice's judgment might have been subjected to less criticism if he had reviewed the evidence in detail or commented on the plaintiff's evidence in greater detail. However, as held by the Privy Council its judgment in *Ijale* v *Shonibare* (Chukara) (1952) Privy Council Judgments 947:

"When there is a complete conflict of evidence on an issue of primary fact where the proper conclusion can only be reached after estimating the credibility of the witnesses on oath, a trial judge is not to be criticised for failure to review the evidence and he may properly only state his conclusion of fact."

Now as to the fourth ground of appeal which related to the learned Chief Justice's finding that the plaintiff had committed a breach of condition (4), the comment already made above covers the point. The alternative ground relating to waiver was apparently based on an assumption that there were findings of facts that the plaintiff had made an oral report to the defendant witness; and that Mr Faye had told him that when the criminal case was over he should come and tell him. No such findings of fact were made in favour of the plaintiff and it was clear that the learned Chief Justice did not accept the plaintiff's evidence in preference to that for the defendant's witness. For that

reason alone the plea of waiver must fail. In *Lickiss* v *Milestome Motor Policies at Lloyds* [1966] 2 All ER 972 at 975 the principle of waiver was described thus:

"… If one party by his conduct leads another to believe that the strict rights arising under the contract will not be insisted on, intending that the other should act on that belief, and he does act on it, then the first party will not afterwards be allowed to insist on the strict rights when it would be inequitable for him so to do."

On the facts as found by the learned Chief Justice, it cannot be said that waiver was established.

For yet another reason the question of waiver must be resolved against the plaintiff. Waiver must be pleaded. It was not raised at all at the trial by the insured by way of reply to the defendant's denial of liability by reason of breach of the conditions of the policy. In the circumstances, the learned Chief Justice cannot rightly be criticised for failing to consider the question of waiver which was not an issue before him. The rationale behind the principle that waiver must be pleaded is clearly stated in Ivamy, *General Principles of Insurance Law* (2nd ed 1970), at page 256 as follows:

"To put forward a plea of waiver, whether before or after breach, of a condition precedent to the right of action contained in a policy is a very serious step. It is quite obvious that it is essential in the interests of justice that the insurance company in such circumstances should have its attention called beforehand to the fact that it is intended to rely on an issue of the kind upon which evidence can be called."

The learned Chief Justice was quite right in not considering the issue of waiver which was neither pleaded nor raised before him.

Before I part with the aspect of this appeal, which deals with the defendant's denial of liability by reason of the plaintiffs alleged breach of conditions of the policy, I shall deal briefly with the fifth ground of appeal which, indeed, had been conceded by counsel on behalf of the defendant and which relates to condition (5) of the policy quoted above. That condition, inter alia, prohibits "admission, offer, promise of payment" to be made "by or on behalf of the insured without the written consent of the company." The learned Chief Justice held that the guilty plea at the criminal trial of Sissoho's driver without reference to the Northern Assurance was in breach of that condition. A guilty plea at a criminal trial is by the nature of the proceedings

personal to the person who makes the plea. It cannot by any means be construed as an admission "made by or on behalf of the insured" who is not a party to the proceedings and is not called upon to make a plea. The view held by the learned Chief Justice that the guilty plea made by the insured's driver was in breach of the condition prohibiting admission is therefore not correct. If this appeal had turned on the grounds relating to exclusion of liability of the defendant by reason of non-compliance with conditions (2) and (4) of the alleged policy, it is manifest that the appeal should not succeed. It is clear from the terms of the material relied on by the learned Chief Justice that non-fulfilment of conditions such as therein contained bars the insured from claiming. However, there is the question, fundamental to this appeal, raised by the plaintiff's first ground of appeal, whether the matter relied on by the learned Chief Justice in proof of the terms of the policy is admissible evidence. Learned counsel for the plaintiff contended that the policy form relied on by the learned Chief Justice was secondary evidence and that it ought not have been admitted in evidence in the absence of an explanation as to where the original was. When the policy form exhibit G was tendered in evidence and objected to, the learned Chief Justice ruled that he would admit the policy form "for what it is worth." In his judgment, apparently in elaboration of what it was worth, he said:

"It is admitted in the pleadings that at the relevant time the present plaintiff's vehicle was insured under a commercial vehicle policy against third party risks, and I hold that, as is always done in insurance matters, the policy document was prepared on the appropriate printed form duly signed and stamped and given to the insured. The insurance company kept in its files the carbon copies of such parts of the printed policy pro formas as had to be filled in to suit each individual case. The plaintiff has not produced the policy on which he sues and the court must therefore look to a blank standard commercial vehicle policy form of the Northern Assurance for guidance, which the defendant has put in evidence. I do not believe that the plaintiff never received the original policy document."

On the view held by the learned Chief Justice that there was an original policy document prepared on the appropriate printed form and duly signed, the best evidence of the terms of that contract of insurance is that original policy document. The contents of the policy form admitted in evidence is, at best, secondary evidence of the contents of that original. The position would have been different had there been no original policy document and the case of the defendant had been that an offer was made for insurance on the "usual terms"

and the question was merely an ascertainment of what those usual terms were. In that case, the contents of the policy form would have afforded primary evidence of those usual terms. That was not the case.

It is a general rule that except in cases in which secondary evidence is admissible, the contents of a document must be proved by primary and not secondary evidence. The circumstances in which secondary evidence of the contents of a document is admissible are several. In the instant case, from the findings made by the learned Chief Justice, it would appear that the excuse advanced for the use of secondary evidence was that the original was in the possession of the plaintiff. It is trite law that secondary evidence is admissible in the case of documents in the hands of adversary who fails to produce them after being served with a notice to produce at the trial. Generally, service of a notice to produce is a pre-condition to the admissibility of such secondary evidence, barring such circumstances as have been enumerated in several books of authority when notice to produce is unnecessary. In *Halsbury's Laws of England* (4th ed), Vol 17, para 143, these circumstances were stated as follows:

"Notice to produce is not necessary where the document is itself a notice which has been served upon the adversary, … a notice to quit in an action for possession, or a notice of assignment in an action by an assignee of a debt, or is an instrument in the nature of a notice; or where the defendant's possession of the document forms the basis of the action so that the action itself acts as a notice, as when the action is in detinue for the document; or in contract for non-delivery of the document; or on a prosecution for theft of the document; or where the document is not a mere document, but is a chattel as well as a document."

These exceptions were developed by case law. The circumstances stated above are not exhaustive; and, furthermore, it is to be doubted if the categories are closed. It suffices to say at this stage that the circumstances of this case do not fall within any of the enumerated exceptions.

However, I would now consider the submission made by counsel for the defendant which was that notice to produce was not necessary in view of the denial by the plaintiff that he received the original policy. The question is whether the service of notice to produce on the party allegedly in possession of the original document becomes unnecessary when that party had denied receiving the document against the other party's allegation that it was in his possession. To answer that

question, the object of a notice to produce must be put in proper perspective. A notice to produce is required merely to give sufficient opportunity to the opposite party to produce the document if he pleases, and to render secondary evidence admissible if it is not produced: see *Dwyer* v *Collins* (1852) 7 Exch 639. It is designed to ensure that the party who wishes to adduce secondary evidence has taken all reasonable means to produce the original. The notice to produce can be served at any stage of the proceedings. If, as in this case, the adversary said to be in possession of the document says he did not at all receive the document, of what useful purpose would be the service of a notice to produce on him? It would be futile to require the defendant to serve him with a notice to produce in view of such denial. The law never compels a person to do that which is useless and unnecessary: see *Lickiss* v *Milestone Motor Policies at Lloyds* [1966] 2 All ER 972 at 975. In such circumstances, it becomes an issue of fact whether the adversary received the document or not. If he is found to have received it, then his false denial would have misled him his opponent into thinking it futile to serve a notice to produce. In such circumstances, it would be unjust to exclude secondary evidence by reason of a failure to serve a notice to produce. To hold otherwise would, in my view, reduce to mere technicality a rule designed to achieve substantial justice.

In the instant case, the finding of fact has been made by the learned Chief Justice that the policy document *had been given* to the plaintiff. That is a crucial finding of fact. If it had been correctly made, I would have held that this was a case in which service of notice to produce can be legally excused. However, that finding has not been supported by any evidence whatsoever. All that was said by the plaintiff under cross-examination was: "I received no copy of the policy." (The emphasis is mine). The comment made by the learned Chief Justice that he did not believe that the plaintiff never received the original policy document is thus not related at all to the answer given, by the plaintiff. Throughout the case, the defendant's only witness said nothing whatsoever about giving the original policy document to the plaintiff. A finding that the original policy document had been given to the plaintiff is a serious misdirection of fact. In the circumstances, therefore, this is not a case in which the admissibility of secondary evidence turns, as counsel for the defendant thought, on whether notice to produce has been served or not, or on whether its service is legally excused. Simply, it is a case in which the defendant who put in evidence substitutionary evidence in the form of a policy form had not explained at all where the original document was. That being the case, the conclusion is inescapable that the policy form relied on by the

learned Chief Justice was a material which he ought not have admitted in evidence, and it is not a material on which the learned justice could properly rely in determining the existence or breach of any condition.

The position therefore is that the defendant had admitted by his pleadings that at the material time the plaintiff's motor vehicle had been insured under a third party policy. Such third party policy is one by which the insurer has undertaken to indemnify the insured in respect of all sums which the insured may become liable to pay by way, inter alia, of compensation for damage caused by the vehicle to any property belonging to a third person. The defendant has denied the existence of such policy and the defence put forward is almost one of confession and avoidance; the avoidance being that the claim had been barred by breach of conditions. The burden of proving the existence of conditions on which the insurer relies and their breach is on the insurer. By failing to produce admissible evidence of the conditions, the defendant had failed to discharge that burden. In the circumstances, nothing has been shown to bar the plaintiff's claim and judgment should have been entered for him on his claim.

The plaintiff had also claimed interest at fourteen per cent from 15 April 1981 to date of payment. There is evidence that he had paid the judgment debt in Suit No. 1976-B-281. The cause of action in this suit accrued when judgment was given against him in that suit, that is to say on 15 April 1981. In my view, he is entitled to interest from that date till the day judgment was given for him on this appeal. I would order an interest on the sum claimed and award interest at sixteen per cent per annum from 15 April 1981 to the date of this judgment.

In sum, I would allow this appeal and set aside the judgment of the learned Chief Justice (Sir Phillip Bridges) given on 12 April 1982, dismissing the plaintiff's claim. I would in place thereof enter judgment for the plaintiff in the sum of D8,459 as claimed with interest thereon calculated at six per cent per annum from 15 April 1981 till the date of this judgment. The plaintiff is entitled to his costs both at the Supreme Court and on this appeal which are assessed at D1000 and D600 respectively.

LUKE JA. I agree.

ANIN JA. I also agree.

Appeal allowed.

SYBB

JOOF v THE STATE

COURT OF APPEAL, BANJUL

(Criminal appeal No 6/83)

25 May 1984

FORSTER AG P, LUKE AND ANIN JJA

Courts-Criminal appeal-Finding of fact-Credibility of witnesses-Appellate court treatment of findings of fact by trial court-Circumstances in which appellate court may set aside findings of trial court-Appellate court seldom, if ever, reversing finding of fact based on credibility of witnesses heard by trial court-Rebuttable presumption of correctness of trial judge's assessment of credibility of prosecution witness.

Criminal law and procedure-Evidence-Circumstantial-Prosecution case based on circumstantial evidence-No rule of law requiring trial court to direct itself on law of circumstantial evidence-Need for trial court to be satisfied of guilt of accused beyond reasonable doubt.

Criminal law and procedure-Sentencing-Stealing-Conviction for stealing small amount of money-Police officer convicted of stealing only 500 CFA francs-Amount forming part of money subject-matter of bank robbery being investigated by police officer-Amount stolen not the only criterion for determining punishment-Need for consideration of all attendant circumstances in fixing punishment especially officer's breach of trust and fiduciary position-Whether deterrent sentence of four years' imprisonment imposed on police officer by trial court proper.

Held, *unanimously dismissing the appeal against conviction and sentence for stealing*: (1) in criminal appeals, it is open to the Court of Appeal to set aside a conviction on grounds relating to finding of fact by the trial court where: (i) there is no evidence to support those findings; or (ii) the findings are unreasonable having regard to the evidence; or (iii) the trial court has drawn wrong inferences from the proven facts. The court would seldom, if ever, reverse such findings where they are based on the credibility of witnesses which the trial court has heard. In the instant case, the trial judge, on the evidence both direct and circumstantial, made relevant findings of fact and came to the right conclusion in convicting the appellant of stealing the

sum of 500 CFA francs. And having assessed the credibility of rival witnesses and their demeanour, it was perfectly legitimate for the trial judge to believe the principal prosecution witness on certain crucial issues and disbelieve him on other issues. *Kujabi* v *The State*, Court of Appeal, Criminal Appeal No 8-12/82, 10 June 1982, Cyclostyled Judgments, May-June 1982, 120; *Camara* v *The State*, Court of Appeal, Criminal Appeal No 5-11/81, 11 June 1982, Cyclostyled Judgments, May-June 1982 at 71; and *R* v *Ekanem* 13 WACA 108 cited.

(2) There is a presumption of correctness, which must be displaced, regarding findings of fact and assessment of credibility of witnesses by a trial judge. In the instant case, the appellant failed to displace the presumption of correctness of the trial judge's assessment of the credibility of the principal prosecution witness.

(3) There is no rule of law requiring a trial court to direct itself on the law of circumstantial evidence where the prosecution's case is based on such evidence. It is sufficient if the trial court, as in the instant case, is satisfied of the guilt of the accused beyond reasonable doubt. *McGreevy* v *Director of Public Prosecutions* [1973] 1 WLR 276 at 285, HL applied.

(4) It was proper for the trial court to impose on the appellant, a Chief Inspector of Police, a deterrent sentence of four years' imprisonment with hard labour after convicting him of stealing only 500 CFA francs because the amount in fact stolen, is not the only criterion for fixing punishment. All the attendant circumstances deserved to be considered as was done by the trial court including especially the appellant's breach of trust, his fiduciary position, and the fact that he stole part of the money forming the subject-matter of the alleged bank robbery which he was himself investigating.

Cases referred to:

(1) Machent v *Quinn* [1970 2 All ER 255.

(2) Kujabi v *The State*, Criminal Appeal No 8-12/82, 16 June 1982, Cyclostyled Judgments, May-June 1982, 120.

(3) Aladessuru v *R* [1956] AC 49.

(4) Fox v *Commissioner of Police* 12 WACA 215.

(5) Camara v *The State*, Court of Appeal, Criminal Appeal No 5-11/81, 11 June 1982, Cyclostyled Judgments, May-June 1982, 71.

(6) R v *Olegen* (1935) 2 WACA 333.

(7) Teper v *R* [1952] AC 480.

(8) Owusu-Ansah v *The State* [1964] GLR 558.

(9) Dowuona v *The State* [1964] GLR 301.

(10) Abbey v *The State* [1964] GLR 546.

(11) R v *Kilbourne* [1973] AC 729.

(12) McGreevy v *Director of Public Prosecutions* [1973] 1 WLR 276, HL.

(13) R v *Ekanem* 13 WACA 108.

(14) *Davies* v *DPP* [1954] AC 378.

APPEAL from the decision of the Supreme Court (High Court), convicting the appellant, a Chief Inspector of Police, of stealing the sum of 500 CFA francs and sentencing him to a term of four years' imprisonment with hard labour. The facts are sufficiently stated in the judgment of the court delivered by Anin JA.

AAB Gaye for the appellant.

H B Jallow (with him *Miss M Jack*) for the State.

ANIN JA *delivered the judgment of the court.* The appellant, a Chief Inspector of Police, was on 20 June 1983 found guilty of the theft of 500 CFA francs. He was convicted and sentenced to a term of four years' imprisonment with hard labour. He has appealed against both his conviction and sentence on a number of grounds, factual as well as legal, which will be examined shortly.

But first, I would like to recapitulate the salient facts. The appellant was jointly tried with other policemen before the Supreme Court (High Court) presided over by the learned Chief Justice. The statement of offence reads simply "stealing: contrary to sections 252 and 257 of

the Criminal Code (Cap37)." The particulars of offence were in the following terms:

"Abdoulie Joof, Momodou Njie, Lamin Kamara and Seedy Ceesay being employed in the Public Service to wit, Gambia Police Force, on 1 October 1980 inclusive between Banjul, Latrikunda Sabiji, Serrekunda, and between Sunwing Hotel Beach and Banjul stole cash the sum of 50,286,000 CFA francs (fifty million two hundred and eighty-six thousand CFA francs) the equivalent of D 333, 899.04 (three hundred and thirty-three thousand, eight hundred and ninety-nine dalasis, four bututs) property of the Gambia Commercial and Development Bank."

At the close of the prosecution case, the learned trial judge upheld a submission of no case to answer in favour of the second accused (Momodou Njie) and found him not guilty and discharged him; and at the end of the whole case, the third and fourth accused were found not guilty and were also discharged and acquitted. The three former co-accused persons are not concerned in the instant appeal by the first accused, ie the appellant.

In the evening of 30 September 1980, three persons in a blue 504 Peugeot car waylaid and forced a vehicle carrying officials of the Gambia Commercial and Development Bank to stop on the highway near the Yundum International Airport, and by brandishing such dangerous weapons as a gun and a cutlass at the bank officials, succeeded in getting them to abandon their vehicle and run into the adjoining bush for safety. These three persons then forced the boot of the bank vehicle open and removed therefrom four carton boxes and sped off with in their blue Peugeot car.

The three persons who waylaid the bank vehicle were Momodou Ceesay, Momodou Conteh and Omar Kujabi, all of whom later stood trial on a robbery charge but were acquitted and discharged. In the instant case, they gave evidence for the prosecution respectively as the second, sixth and twelfth prosecution witnesses. They described in detail their attack on the bank vehicle, their seizure of the said four carton boxes containing a quantity of CFA francs; and the recovery of some carton boxes and certain quantities of CFA francs by the police, on different occasions and at the venues mentioned in the particulars of offence.

One of the victims of the said hold-up is Felix Ceesay a bank clerk, who gave evidence as the fourth prosecution witness in the court

below. He disclosed that the four sealed carton boxes which he and his colleagues were taking to Yundum Airport on 30 September 1980, contained a total of 196, 798,000 CFA francs and schedules intended for shipment to their correspondent bank in Switzerland. He tendered in evidence as exhibits D-D2 and E-E3 respectively, the receipts and triplicate copies of the schedules retained by the bank covering this particular consignment of CFA francs. He continued that he saw, from a reasonable distance, the boot of the bank vehicle being opened and the four parcels therein being unloaded by their three attackers and transferred into a blue 504 Peugeot car which then drove off. He and his bank colleagues subsequently reported the matter to the police.

Another witness, Babou Ceesay, the fifth prosecution witness, stated in evidence that on 1 and 2 October 1980, at the invitation of the Inspector General of Police, he assisted in counting CFA francs allegedly retrieved by the police from three suspects, Momodou Ceesay, Conteh and Omar Kujabi. The total, counted in six lots at different times, came to 146,500,000 CFA francs. Out of this amount 68,837,000 CFA francs contained in two carton boxes, was retrieved from Momodou Ceesay and it was the first to be counted at about 9 am on 1 October 1980, the counting having been done in the presence of Momodou Ceesay.

The difference between the total shipment and the amount retrieved, ie 196,798,000 CFA francs minus 146,500,000 CFA francs totalling 50, 286,000 CFA francs, forms the subject-matter of the stealing charge in the instant case.

The learned Chief Justice in his judgment held that:

"…for the prosecution to sustain a charge of theft of the entire sum of 50,286,000 CFA francs against the accused persons or any of them, it must be proved beyond reasonable doubt that they or any of them, recovered the entire CFA francs intercepted; that is to say, 196, 798,000 CFA francs and that they delivered, less than they recovered. While there is evidence of what was delivered as having been recovered, there is no evidence to show that they recovered the entire sum of 196,798,000 CFA francs intercepted and taken unlawful possession of by Momodou Ceesay, Momodou Conteh and Omar Kujabi on the night of 30 September 1980. Much of the prosecution case in this regard rests on an assumption that these three persons turned over to the police teams who investigated the case of the suspected robbery, the entire sum which they removed from the bank's vehicle. On the view I take of the evidence that assumption is not

tenable, and, in any event, a criminal case should not be decided on assumptions. On the evidence led, a reasonable tribunal must entertain grave doubts as to whether in truth Momodou Ceesay, Momodou Conteh and Omar Kujabi turned over all the CFA francs they took possession of on the night of 30 September 1980. On the totality of the evidence, I am not certain beyond reasonable doubt that what was recovered by the police investigation team was the entire sum amounting to 196,798,000 CFA francs…"

The learned trial judge next examined the evidence to determine whether the accused persons or any of them, could be found guilty of having stolen any part of the total amount specified in the charge; since it is established law that where a person is charged with the theft of a property, he could be found guilty if he is proved to have stolen any part thereof. He examined the prosecution case under four heads, connecting the accused persons in turn with the particular venue and specific occasion when recoveries of the intercepted money were made.

With respect to the appellant, the prosecution case is that he received from Momodou Ceesay, the second prosecution witness, at the Sunwing Hotel Beach, a full carton of CFA francs notes and travelled with it *alone* in a private car from Sunwing Hotel to the Police Headquarters, Banjul; and that on arrival at the latter place, the said carton was *less than full.* The prosecution case against the appellant is in essence that between Sunwing Hotel Beach and Banjul he stole part of the CFA francs notes in the full carton box retrieved by him from the second prosecution witness in consequence of which the said carton became less than full on arrival at the Banjul Police Headquarters.

The important witnesses relied on by the prosecution in support of their case against the appellant were Momodou Ceesay, the (second prosecution witness), Mass M Jarra, the (ninth prosecution witness), and Ousman Nico, the (tenth prosecution witness). The appellant, however, gave evidence on his own behalf and relied on the evidence of his witnesses Matilda Khan, Mr O'Brien Coker and Mr Sydney Riley.

After confessing his involvement in the suspected robbery to Sgt Njie and volunteering to hand over the intercepted money and documents to the police, Momodou Ceesay (the second prosecution witness), took the appellant and Sgt Njie first to his work place, Kayor Galleries, at Kanifing. All three of them travelled there in Mr Khan's (eighth

prosecution witness) private Peugeot car driven by the appellant. At his garage, the second prosecution witness showed the appellant and Sgt Njie carton boxes in his camper which he alleged contained part of the intercepted CFA francs. The appellant then opened the side of the boxes and examined their contents by tearing the side of a carton, taking out a wad of notes and after satisfying himself they were CFA notes, put them back. After examining one of the boxes, which was full, the appellant is alleged by the second prosecution witness to have said "let's go somewhere quiet" because by then people were milling around. The second prosecution witness, continued his evidence-in-chief as follows:

"We decided to go to Old Cape Road on Mr Joof's suggestion…We drove to the Old Cape Road. I travelled in my camper with Sgt Njie with me in the camper. Mr Joof followed in the vehicle that brought them from headquarters. We ended up at the back of Sunwing Hotel which is at the end of the Old Cape Road. It was a beach…I drove to the beach. There I turned my vehicle and faced the direction we had come from. Mr Joof also turned his car round and faced the direction we came. Then Mr Joof alighted from his car, opened the side door of my vehicle, took one of the boxes containing CFA and took it to his vehicle and put it in front in the passenger seat. During the process Mr Joof said: `Is this our share?' Nobody said anything in reply to that …It was the carton which had been partially open that Mr Joof took with the comment: `Is this our share?'...

After he had put the box in his car, he told me to drive on to Banjul and that he would follow me. I drove on to Banjul. We went back to Old Cape Road. At the end of the Old Cape Road, I took a left turn joining the main thoroughfare from Banjul to Serrekunda. I saw the first accused (ie the appellant herein) following in his car. Upon entering the main thoroughfare from Banjul to Serrekunda, he was directly behind me. His car was about two metres away form me at that time. The first accused was alone in his vehicle…He did not continue to follow me directly up to Banjul. As we proceeded, I kept looking through my rear window, by Mile 5 I lost sight of him and by Mile 1, I saw him re-appear, by the time we got to Independence Drive he was directly behind me. It is difficult to estimate the time I lost sight of him and the time he reappeared, but I would say it was about fifteen minutes. We came up to Buckle Street…When we got to the police station, I parked my camper in the parking lot in front of the police station but not inside the premises. Sgt Njie and I got out and I locked all the doors of the vehicle. I walked across the street to the fire station where Mr Joof's car was parked. I walked over to the passenger

side of his car to ask him what to do next. He told me to follow him. He alighted and we proceeded.

The box which the first accused had put in the front seat of his car was still there at the time. The box was still in the car. The box was partially open when it was put in the car at the back of Sunwing. It was still open when I saw it in the car when we arrived at Banjul Police Station. At the front of the police station, I observed that the box was fully open. At the time it was put in the car at the back of sunwing, it was partially open. I observed the CFA in the box when I saw the box in front of the police station in the car driven by first accused.

"From visual perception, I noticed that there was a discrepancy in that the box was not full as it was when we left the beach for Banjul. When I saw the box in front of the Banjul Police Station it was half or three quarters full. It was full when we left Sunwing Hotel Beach."

The second prosecution witness next described what happened to the box in the appellant's vehicle at the police station. According to him, the appellant alighted from his car and put the box in his car on his shoulders; and all three of them (ie himself, Sgt Njie and the appellant) went inside the station via the garage. The appellant went and talked to Mr Riley and Mr Coker momentarily. The group continued to the Criminal Investigation Department Office. The appellant took off, saying he was going to take the money for safe keeping. The second prosecution witness further alleged that of the three boxes in his possession, the one taken by the appellant into his car was the largest. He also disclosed that at some stage when he was writing his statement, the appellant came in angry and saying that Commander Nicol and some others were insinuating that he had taken part of the money and that as far as he was concerned he did not need that money. At a subsequent meeting at which Messrs Jarra, Nicol, Khan and Riley and he himself were present, the appellant reiterated that he did not need that kind of money.

During his cross-examination, the second prosecution witness denied that it was he who suggested that the police should go to his gallery in a private car; and repeated his earlier assertion that it was the appellant who suggested that they should drive to the Sunwing Hotel beach via the old Cape Road. He explained that he did not raise a hue and cry about the discrepancy prior to his trial because it was he who was then facing trial and not the appellant; and besides, some of the questions put to him in the present case by the prosecution were not put to him

in his trial. Describing the box in the appellant's possession, he said it had all four flaps at the top loose and fully opened.

The learned judge next reviewed the evidence of the eighth prosecution witness, Mr MB Khan, then the Acting Assistant Commissioner of Police, whose private car was driven by the appellant on the said occasion. The important piece of evidence given in cross-examination by him related to the condition and contents of the carton box retrieved by the appellant. On his return from the State House (where he and Mr Jarra, the Commissioner of Police, had been to see the Vice President about the missing money), Mr Khan and Mr Jarra were led to the Criminal Investigation Department Office (CID) by the appellant and Commander Nicol. In the words of the eighth prosecution witness:

"When we got there I saw a carton containing CFA notes. The carton was on a table in the CID Office. Ceesay the suspect was around then. The carton was tied with a string. The seal was broken. The carton is about the size of a medium sized Ovaltine carton. The first accused (ie the appellant herein) reported that the carton was recovered from Ceesay. From where I stood I was able to see CFA notes protruding from the carton. I had the impression then that it was a full carton. Momodou Ceesay did not at that spot report to me that the first accused had done anything unusual. I asked whether that was all recovered. The first accused said No. Some of the money was locked up in Ceesay's camper."

In his evidence, the Commissioner of Police, Mr Mass Jarra (the ninth prosecution witness) revealed that he had instructed Mr Nicol, then Commander of Police in charge of the CID, to use two police vehicles, the first to convey police officers and the suspects; and the second to convey CID Officers trailing the former. However, he later discovered that the appellant herein had left the station to recover the money without informing his superior, Mr Nicol. When he and Mr Khan returned from the State House, he made for the CID Office where they found the retrieved money in a carton on the table. Describing the carton, Mr Jarra said: "The carton I saw on the table was not sealed. It contained CFA francs. It was not full." Under cross-examination, Mr Jarra stated: "I think the box I said I saw on the table was recovered from Momodou Ceesay. That was what was reported to me…The box was not sealed and its contents were not full. The box would be about three feet long. I cannot remember if it was tied with strings. I think it had four flaps from recollection. I could see the contents of the box. It

must have been partly open otherwise I could not have seen what was inside. I looked at the box from a reasonable distance."

Commander Ousman Nicol, the tenth prosecution witness, confirmed the instructions he had received from Mr Jarra (the ninth prosecution witness), about the mode of recovery of the stolen money. As he went to brief his men and obtain transport for them, the appellant herein came to his office and announced: "I told you to wait. I have got the money." Mr Nicol asked "What money?" The appellant replied. "The money of the armed robbery." Asked where the money was, the appellant said it was in the CID Office. They both went downstairs to that office. There Mr Nicol was shown a carton three feet by two feet. He further disclosed in his evidence-in-chief: "It was a locally made carton. On looking at the carton I saw that it was open. The contents of the carton were CFA francs. I asked him to let us go to the commissioner. The carton was half full." Under cross-examination, Mr Nicol also said:

"The carton I found there was open and half full. Those were all I observed about the carton. The carton did not have a string tied round it. I did not observe a cellotape round it as well… The box which I said was half full was approximately three feet by two feet. I went right to the box and looked at its contents. It was half full. The box was wide open."

In his sworn defence, the appellant herein revealed that he used a private car for retrieving the stolen money on express request of the second prosecution witness, Mr Ceesay, who wanted to avoid being embarrassed before his employees. The two cartons he was shown by Ceesay in his caravan when he got to Kayor Galleries were only tied with string, they were not sealed. The appellant continued his testimony thus:

"I told Ceesay that we should go to Banjul. There were CFA notes in the carton. He wanted to offer me a bribe and I said: `Let's go to Banjul and I would see the authorities'. He said he was gong to give me a carton for my share with Sgt Njie and that he wanted to go to USA where he said he had his wife and children. He decided to go to Banjul with me. I asked Sgt Njie to join him while I drove the vehicle GO 6150 behind them. Before leaving the garage, I warned Sgt Njie to be very careful of Momodou Ceesay because he seemed to be a dangerous person. I never accepted the carton which Momodou Ceesay offered me before I left the Kayor Galleries. We left Kayor Galleries coming down to Banjul. Momodou Ceesay was driving his

vehicle. He was in front. We took the Serrekunda Highway Road. At Kayor Galleries none of us went inside the camper.

On our arrival at the junction of the Old Cape Road, Momodou Ceesay headed for the direction of Sunwing Hotel. It is not true that I suggested to Momodou Ceesay to go somewhere quiet. Momodou Ceesay went to the Sunwing Beach at high speed. When we got to Sunwing Beach, he alighted from the van, opened the van and gave me a carton. He said: "Please let me go. I want to go to the States to see my wife and my children. You can leave me here." I accepted the carton from him. I accepted it just to bring the accused to Banjul without violence. It is not true that it was I who got down from my car and went to Momodou Ceesay and took a carton with the statement: `Is this our share?"

The appellant herein said the carton which the second prosecution witness gave him was like a small size Ovaltine carton. He denied that he opened the carton at Sunwing Hotel and took out a wad and inspected it. From his observation, according to him, he noticed that the carton contained CFA notes. "The carton was tied with a string." He continued, "I was able to see the CFA in the carton because there was a gap between the two flaps. *It was a full carton clumsily packed."* He denied that he disappeared at Mile 5 only to reappear at Mile 1 on the way from Sunwing to Banjul. He did not stop at all during the journey. After parking his car in the police garage at Banjul, he removed the carton and "showed Mr O'Brien Coker and Mr Riley the money just by lifting a small bit of the flap." He then continued to the CID Office and placed the carton on top of the table and got WPC Matilda Khan and PC 25 Mboob then on duty, to book their arrival. When Messrs Jarra and Khan came into the office later after being informed of the recovery, they duly saw the carton on the table tied with a string.

The appellant herein denied that there was a discrepancy between what Momodou Ceesay gave him at the back of Sunwing Hotel and what he brought to Banjul. He denied that he removed any part of the money from the carton. He denied that he challenged the second prosecution witness or that there was at any time an argument amongst police officers. Asked during cross-examination why he accepted the carton the second prosecution witness was alleged by him to have given to him, he replied: "I accepted the carton because I was afraid that there might be a gun inside the van and secondly Momodou Ceesay was the holder of the black belt in Karate". The appellant admitted that he might have said at the preliminary investigation in the

robbery trial that: " He (ie Ceesay) asked me to follow with the private car I had come with, namely, Mr Khan's car to Old Cape Road where he would give me my share and that of Sgt N'jie."

WPC Matilda Khan, in her evidence for the defence, stated that the appellant herein brought into the CID Office a box containing CFA francs on 1 October 1980 accompanied by the second prosecution witness and the third co-accused in the court below. She said that she saw the contents of the box which was opened slightly. A flap, according to her, was slightly opened by the first accused. According to her, the box was full to the brim but it was not properly packed. Cross-examined, she said that she noticed the box about nine feet away and that Mr Jarra (the ninth prosecution witness) and Mr Nicol (the tenth prosecution witness) were closer to the box than she was. As to how she saw the contents of the box, she said: "When the first accused was opening the box, I got up and peeped and saw that it contained CFA francs."

Testifying for the defence, Mr O Brien Coker said that the appellant herein showed them the box containing CFA notes, adding: "Have you ever seen money like this before?" "I saw the money in the box" he continued his testimony. "They were CFA notes…The money came right up." Under cross-examination, the witness disclosed that the carton box was about two feet long. At the time he saw the money in the box, the box was in the hands of Mr Joof, who showed them the money in less than one minute. I would say a few seconds." I did not know the denominations of CFA notes I saw. I was not particularly interested." Commander SW Riley, the fourth witness for the defence, said that he saw the carton which the appellant herein brought in with notes right to the top. "It was a full box. I could see the notes right at the top." Under cross-examination, Mr Riley said that he and Mr Coker looked at the contents of the carton from about a distance of five yards. He admitted having said in his statement to the Attorney-General's Chambers: "The box was not completely covered and the way Detective Inspector Joof held the box under his arm enabled me to see *some* of the notes."

In his evaluation of the entire evidence, the learned judge observed, correctly in our respectful view, that the following facts were not in dispute:

"(i) that the second prosecution witness and Sgt Njie in the van and the first accused (ie appellant herein) following in a car drove to a point behind Sunwing Hotel with cartons containing CFA francs in the van;

(ii) that at the place behind Sunwing Hotel a carton full of CFA notes was placed in the front passenger seat of the car driven by the first accused; and (iii) that the first accused was alone in the car with that carton from the spot behind Sunwing Hotel to the Banjul Police Headquarters."

However, he identified four conflicts in the evidence. Here again he cannot be faulted. The first such conflict was whether it was the first accused who suggested that the group should go to the beach of Sunwing Hotel; and the second was whether it was the accused who took the carton by himself and put it in the car he was driving; the third whether he disappeared on the way to Banjul and re-emerged later; and the fourth whether the carton on arrival at the Police Headquarters Banjul remained intact as regards its contents or had become less than full.

On the first conflict, he disbelieved the first accused branding his story as "ridiculous" and "nonsensical." He did not, on the other hand, regard the second prosecution witness as a saint; in fact he observed that he may, to some, be an unsavoury character and that his escapade in intercepting the CFA trans-shipment for whatever motive was indefensible. Those observations made, however, he stated that he was impressed with his evidence, having watched him testify. He held that: "his evidence as to what transpired at Kayor Galleries, as to how the first accused suggested that they should go to somewhere quiet and decided on the first accused's suggestion to go to Old Cape Road and as to what happened behind Sunwing Hotel are all credible." He concluded: "After a careful consideration of the totality of evidence, I believe the evidence of Momodou Ceesay, the second prosecution witness, and I am satisfied beyond reasonable doubt that it was at the suggestion of the first accused that the second prosecution witness drove to the back of Sunwing Hotel on Old Cape Road. I am also satisfied beyond reasonable doubt on his evidence, which I accept, that it was the first accused who took one carton and with the statement: `Is this our share?' And took it to the car in which he was driving. I believe the evidence of Momodou Ceesay that on the road to Banjul, the first accused at a stage disappeared only to re-emerge some time later… The first accused's account of the event is riddled with nonsensical explanations and ridiculous excuses. I am in the event not impressed by his evidence and I disbelieve him."

Turning to the crucial issue whether the carton was full of its contents when it reached Banjul Police Headquarters, the learned judge accepted the evidence of the second, ninth and tenth prosecution

witnesses that it was not full. He considered the rival evidence of the accused, his witnesses (Messrs O'Brien Coker and Riley, and WPC Matilda Khan) as well as the testimony of Mr Khan, the eighth prosecution witness, who spoke of his impression that the carton was full. He found that the evidence of those witnesses for the accused was unconvincing; that both Messrs Coker and Riley were shown the box at a distance of five yards and only for a fleeting moment; that Mr Riley had in an earlier statement stated that that accused held the box under his arm thereby enabling him to see only *some* of the notes; that the evidence of Mr Khan, the ninth prosecution witness, about his "impression" is vague enough to be unreliable and falls short of the certainty that could stand up against the evidence of the other prosecution witnesses. He also found WPC Khan's evidence unreliable; as he did not believe that she had the opportunity of seeing the contents so as to be able to speak convincingly about them, she herself admitting that she "peeped to see the contents but the ninth and tenth prosecution witnesses were closer to the box."

Having reminded himself of the burden and standard of proof required in criminal case and observing that the prosecution's case is based on circumstantial evidence, the learned judge concluded that as the first accused left the back of Sunwing Hotel with a carton full of CFA notes but arrived at Police Headquarters with the carton less than full of its contents, the reasonable inference is that he had taken part of its contents. "That is what I find proved beyond reasonable doubt in this case… The accused is certainly guilty of the offence of theft." Being unable to find the exact amount stolen by him, the learned judge applied the law stated in *Machent* v *Quinn* [1970] 2 ALL ER 255 and held that "there is ample evidence that the first accused stole part of the 50,286,000 CFA francs mentioned in the information; and accordingly convicted him of stealing the lowest denomination, ie 500 CFA francs, out of denominations ranging from 500, 1000, 5000 to 10,000 contained in the consignment in question as evidenced by exhibits C and E.

Being aggrieved at the decision of the court below, the appellant has appealed to this court on no fewer than seventeen amended grounds, four of which were abandoned at the hearing. The grounds actually argued by learned counsel on his behalf are as follows:

"AMENDED GROUNDS OF APPEAL.

(1) The learned judge erred in law when having found that "All these also cast doubt on the question whether Ceesay had kept the money in

his possession in tact. On the totality of the evidence, I am not certain beyond reasonable doubt that what was recovered by the police investigating team was the entire sum amounting to 196,798,000 CFA francs which the second, sixth and twelfth prosecution witnesses unlawfully took possession when they intercepted the bank's vehicle on the evening of 30 September 1980", he failed to dismiss the charge since it had not been proved that 50 million CFA francs or any part of it was stolen by the appellant.

(2) The learned judge misconceived and misapplied the *ratio decidendi* in *Machent* v *Quinn* [1970] 2 ALL ER 255 at 256 upon which he relied to convict the appellant even though he stated the principle correctly that a person charged with stealing a specific sum of money can be convicted of stealing a lesser sum of money since the appellant in that case admitted stealing specified items and was convicted of stealing those items whereas in the instant case no specific or unspecified amount was either admitted by the appellant or proved by the evidence to have been stolen by him.

(3) The learned judge erred in law in convicting the appellant of stealing 500 CFA francs when there was no evidence of the amount of money in the carton recovered by the appellant from the second prosecution witness nor any evidence of the denominations of the amount in the said box.

(5) The learned judge erred in law when he failed to resolve the doubt which had been cast in the prosecution's case in the appellant's favour by the evidence of the eighth prosecution witness Momodou Khan.

(6) The learned judge misdirected himself by non-direction when having held that "the prosecution's case is based on circumstantial evidence" he failed thereafter to direct himself on the law on circumstantial evidence.

(7) The learned judge erred in law whom having narrowed the prosecution's case down to four areas, he failed to consider and/or properly assess and evaluate the defence of the appellant with regard to the particular aspect on which he convicted the appellant.

(8) The learned judge misdirected himself by relying on the evidence of the second prosecution witness and ignored material before him which went to the credibility of the said witness when he said: "The second prosecution witness on the other hand may, to some, be an unsavoury character. His escapade in intercepting the CFA francs-

shipment for whatsoever motive was indefensible. But I have watched him give evidence. I am impressed by his evidence. There are points on which he was in conflict with the testimony of other witnesses but these are really not material points and their totality does not affect his credibility."

(9) The learned judge erred in law when he acted upon the uncorroborated evidence of the second prosecution witness who was to all intents and purposes an accomplice.

(10) The learned judge erred in law when he failed to warn himself of the danger of acting upon the uncorroborated evidence in giving false evidence against that appellant.

(13) The learned judge misdirected himself on the burden of proof. When after having said: "After a careful consideration of the evidence, I have no doubt in my mind whatsoever that the box which was in the possession of the first accused from the spot at the back of Sunwing Hotel up to the time he arrived at the Banjul Police Headquarters was not full of its contents when the first accused brought it to the Police Headquarters in Banjul. He also said: "There is ample evidence that the first accused stole part of the 50,286,000 CFA francs mentioned in the information." The learned judge then proceeded to say: "The exact amount he stole is unknown. …I am unable to fund that he stole the amount charged but that does not matter."

(14) The learned judge erred in law by acting on evidence of the second prosecution witness, Momodou Ceesay, the ninth prosecution witness, Mass M Jarra, and the tenth prosecution witness, Ousman Nicol, which was full of material conflicts and contradictions on vital issues while rejecting the evidence of the appellant and his witnesses whose evidence was cogent, corroborative and reliable.

(16) The conviction of the appellant is unreasonable and cannot be supported having regard to the evidence.

(17) The sentence is harsh, excessive and out of proportion to the 500 CFA francs (less than D5) for which the appellant had been convicted of stealing."

Before dealing with the grounds of appeal in detail, it is appropriate to make a few general comments. In the first place, it is clear that apart from the sixth, ninth, tenth and seventeenth grounds of appeal (on sentence), the remaining grounds are substantially factual grounds

notwithstanding the pleader's inaccurate label of them as error in law in the majority of those grounds. What is really being complained about in those grounds is the learned judge's evaluation of the evidence and not his statement or application of the law. Secondly, these purely factual grounds constitute but variations of the theme of the general ground (the sixteenth ground) of the conviction being unreasonable and insupportable having regard to the evidence. In the third place, before embarking on a consideration of the grounds of appeal based on the evidence, it would be convenient to restate this court's attitude to criminal appeals based on findings of facts and the assessment of credibility of witnesses made by the trial judge.

In the resent case of *Kujabi* v *The State,* Criminal Appeal No 8-12/82 Cyclostyled Judgments, May-June 1982 Session at p 120, the Court of Appeal in its judgment dated 16 June 1982, observed as follows:

"A criminal appeal in this court is not by way of rehearing. While it may be open to this court to set aside a conviction on grounds relating to findings of fact by the trial court, it will only do so in such cases as those, for instance, in which there is no evidence to support those findings, or the findings are unreasonable having regard to the evidence, or the trial court has drawn wrong inferences from the proven facts. It will seldom, if ever, reverse such findings where they are based on the credibility of witnesses which the trial court has had before it."

In so holding, the Court of Appeal cited in support *Aladessuru* v *R* [1956] AC 49 and *Fox* v *Commissioner of Police* 12 WACA 215 at 218 per Harragin CJ. Reference may also be made to this court's judgment in *Camara* v *The State* Criminal Appeal Nos 5-11/81 11 June 1982, Cyclostyled Judgments, May-June 1982 Session at pp 71-72. The court said:

"It must be borne in mind that an appellate court is not entitled to reverse findings of fact made by a trial court unless those findings are not supported by the evidence. Similarly, where the evaluation of the evidence depends on the credibility of witnesses, it is normally the trial court which saw and heard the witnesses which should decide which of them to believe. It is only when it is shown that the trial court in assessing the credibility of a witness, omitted to consider the evidence which discredits him that the appellant court will be bound to interfere."

In *R* v *Ologen* (1953) 2 WACA 333, a perjury case, the West African Court of Appeal also stated in its judgment that:

"It is not the function of a Court of Appeal to retry a case on the notes of evidence and to set aside the verdict if it does not correspond with the conclusion at which the members of the court would have arrived on these notes, nor is it enough that they feel some doubt as to the correctness of the verdict. If there was evidence before the judge from which he could reasonably have inferred that the appellant made the false statement knowing at the time that it was false the verdict must stand."

The court held there was sufficient evidence to support the finding and accordingly dismissed the appeal.

In ground (1) of the grounds of appeal, the appellant's counsel criticised the learned judge for finding his client guilty after making the important findings quoted therein. In grounds (2) and (3), it was contended that in the absence of evidence at the trial of the amount of CFA francs and the breakdown of the dominations in the carton which the second prosecution witness alleged he gave to the appellant, the learned judge erred in convicting the accused of the theft of even a single CFA 500 franc note. Exhibits C and E show that only 2,675.000 CFA francs in 500 francs denominations was retrieved out of a total sum of 68,837.00 CFA francs. Unlike the appellant in the English case cited in ground (2) on whom were found part of the stolen articles laid in the charge, the accused in the case was not found with any of the missing francs on his person. The prosecution case was not lifted out of the realm of suspicions and uncertainty, it was argued. The circumstantial evidence adduced did not point conclusively to his guilt. Under ground (5) it was submitted that the learned judge was wrong in describing as vague and unreliable Mr Khan's (the eighth prosecution witness) evidence that he had the impression that it was a full carton.

Turning to ground (8), the appellant's counsel criticised the learned judge for holding the second prosecution witness to be credible witness despite evidence to the contrary that he had lied to the police and to Saloum Jeng and despite his earlier inconsistent statements. It was contended that the second prosecution witness should have been disbelieved, since he had an interest to serve, having used a vehicle to stage a robbery with violence and having told lies to suit his purpose.

Arguing grounds (7) and (14) together, learned counsel submitted that the evidence of the second, ninth and tenth prosecution witnesses should have been rejected on the ground that it contained material conflicts, and that the court should have preferred the evidence of the appellant and his witnesses as being more credible and cogent.

Even though learned counsel alleged misdirection by the learned judge on the burden of proof in ground (13), yet his argument related to the alleged unsatisfactory standard of circumstantial evidence relied upon by the prosecution. He reiterated his earlier remarks that the exact amount allegedly stolen unknown, that the carton box was full according to the eighth prosecution witness, Mr Khan, and referred to the unchallenged evidence of defence witnesses (Messrs Coker and Riley) that the carton box was tied with strings. Commenting on the rival evidence of the tenth prosecution witness, Mr Nicol, that the said box was wide open, counsel submitted that the court should have disbelieved him especially since cross-examination tended to show that he had *animus* against the accused.

With respect to the omnibus ground (1), learned counsel contended that the court should have considered the whole evidence instead of taking the condition of the carton box at the Sunwing Hotel out of context and relying heavily on the second prosecution witness whom he should have discredited as being actuated by revenge against the accused.

With respect to the legal grounds alleging error of law, learned counsel first criticised the learned judge for failing either to direct himself on the law of circumstantial evidence or to warn himself that before he could rely on circumstantial evidence, he had to be sure that there were no other co-existing circumstances which could destroy or weaken the inference of guilt. Support for the submissions under ground (6) was placed on *Teper* v *R* [1952] AC 480 at 489; *Owusu-Ansah* v *The State* [1964] GLR 558 at 562 and 563; *Dowuona* v *The State* [1964] GLR 301; and *Abbey* v *The State* [1964] GLR 546.

Grounds (9) and (10) which were argued together dealt with the second prosecution witness who was alleged to be an accomplice with a purpose of his own to serve and whose evidence therefore required corroboration, reliance being placed on *R* v *Kilbourne* [1973] AC 729 at 740 per Lord Hailsham LC.

Finally on sentence (ground (17)), the case of *Machent* v *Quinn* [1970] 2 All ER 255 at 256 was cited for the submission that the

learned judge having found the accused guilty of theft of only the paltry sum of 500 CFA francs (less than D5) out of the huge total mentioned in the charge, ought to have adjusted the sentence accordingly. It was contended that the sentence of four years' imprisonment with hard labour was in the circumstances excessive and disproportionate.

Learned counsel for the State, the respondent, replied first to the appellant's grounds of law. With respect to ground (6), he submitted that there was no legal duty incumbent on a judge in a case depending wholly or substantially on circumstantial evidence, to direct in express terms that before the court could find the accused guilty it had to be satisfied, not only that the circumstances were consistent with his having committed the crime but also that the facts proved were such as to be inconsistent with any other reasonable conclusion: it was enough for him to direct that the court had to be satisfied of the guilt of the accused beyond reasonable doubt. He cited *McGreevy* v *Director of Public Prosecutions* [1973] 1 WLR 276, a House of Lords decision in support of his submission. In the instant case, the learned Chief Justice had correctly directed himself on the *onus probandi* and he did not err in law in failing to give a special direction on circumstantial evidence.

Turing to grounds (9) and (10) learned counsel for the respondent, argued firstly that the second prosecution witness was not an accomplice of the present crime before the court. It had not been indicated by the appellant what interest or purposes that witness had to serve. Having been tried and acquitted of the original robbery charge, the second prosecution witness could not be said to be interested in the fate of the appellant herein. If , on the other hand, it be held that the second prosecution witness is an accomplice within the extended definition in *R*v *Kilbourne* (supra) as one having an interest to serve, it was submitted that, that witness's evidence was amply corroborated by other witnesses and even by the appellant, for example, with respect to the carton box being full at the Sunwing Hotel (though clumsily packed).

Learned counsel for the respondent argued all the grounds relating to the findings of fact together, and after referring in detail to several passages in the record or proceedings, he submitted that the learned judge was amply justified in his findings of fact, assessment of the credibility of witnesses and in his conviction of the accused. The crux of the case was that the appellant received from the second prosecution witness a full carton box of CFA francs at the Sunwing

Hotel and on his arrival at the CID Office in Banjul after travelling alone with the box, it was found to be less than full upon the cogent evidence of second, ninth and tenth prosecution witnesses whom the learned judge found to be witnesses of truth. It was submitted that the learned judge was correct in disbelieving the rival story of the appellant, his witnesses and eighth prosecution witness. The conviction of the appellant could not be said to be unreasonable in view of the ample evidence and the meticulous analysis and findings made and the assessment of credibility of the witnesses by the learned trial judge. The defence put up was given full consideration. He therefore argued that, the appellant's appeal ought to be dismissed; since it was based mainly on the evidence, the findings of fact and the learned judge's assessment of the credibility of witnesses; and since the appellant had, it was submitted, failed to bring his appeal within any of the circumstances in which a verdict could in law be reversed by an appellate court.

On the appeal against the sentence, learned counsel for the respondent submitted that the amount of money stolen is not the only criterion for determining the appropriate sentence; all the circumstances should be taken into consideration, especially the fiduciary relationship between the accused and the owner of the money; the fact that he is a police officer entrusted with the duty of investigating crime; and the fact that he committed the offence in the course of investigating a crime. In all the circumstances, it was contended, the sentence imposed was appropriate.

We have given a careful and full consideration to the arguments of both learned counsel on the thirteen grounds of appeal actually canvassed before us. As already observed earlier in this judgment, the main contention of the appellant's counsel is that his client's conviction is unreasonable and cannot be supported having regard to the evidence; while the majority of the grounds of appeal concentrated on particular aspects of the same factual complaint. In our considered view, the learned Chief Justice's judgment in the court below contained a lucid, will reasoned appraisal of the main issues in the case; a careful analysis of the prosecution case against the accused and the defence put up by him and his witnesses. Relevant findings of fact were made on the evidence adduced on both sides, and the learned judge assessed the credibility of the rival set of witnesses. He directed himself adequately and correctly on the burden and standard of proof in a criminal case. We have already set out at length the relevant evidence on both sides and summarised the findings of facts made and the conclusions reached on the evidence.

In essence, the prosecution case against the accused is that he received from the second prosecution witness Momodou Ceesay, hereafter called the principal prosecution witness, a *full* carton box of CFA francs notes at the back of Sunwing Hotel being part of stolen money, the property of the Gambia Commercial and Development Bank; that he travelled with the full box *alone* in a private car from Sunwing Hotel to the Banjul Police Headquarters, Banjul, trailing behind the principal prosecution witness and Sgt Njie in the camper; that when the accused reached Banjul Police Headquarters the carton he had with him had become less than full; that from all the direct and circumstantial evidence, the learned judge found it proved beyond reasonable doubt that the reasonable inference is that the accused (ie appellant herein) stole part of the retrieved money in his *sole* custody. Even though the exact amount he stole was not established by the evidence, he found him guilty of the theft of 500 CFA francs being the lowest of the denominations recorded in exhibits C and E.

In the light of the evidence in its totality, can it be said with any justification that this main finding of guilt of the learned trial judge is unreasonable? First, in our considered judgment, we are satisfied that the learned judge came to the right conclusion on the evidence as a whole, both direct and circumstantial; and we do not find that his conviction of the appellant is either unreasonable or not supported by the evidence. With respect to the condition of the carton box when it was received by the accused at the back of the Sunwing Hotel, both Momodou Ceesay, (the principal prosecution witness), the transferor of the box, and the accused, the transferee, stated in evidence that the carton box was full, the actual words of the accused being "it was full carton clumsily packed."

In the second place, the accused travelled *alone* with the said *full* carton box of CFA franc notes from Sunwing Hotel to the Police Headquarters Banjul. It is therefore obvious that he had opportunity to tamper with the contents of the carton box in his possession during his journey from Sunwing Hotel to the Police Headquarters in Banjul.

In the third place, on arrival at the Police Headquarters, CID Room in Banjul, the said carton box was found on inspection to be less than full by at least three witnesses (Messrs Jarra and Nicol and Momodou Ceesay, held to be truthful by the learned trial judge, who had the opportunity-denied us sitting in the appellate court and going by the record of proceedings only-of observing all the witnesses, their demeanour and assessing their credibility. The learned judge, having found Momodou Ceesay to be an unsavoury character who got

himself involved in the indefensible escapade of intercepting the CFA trans-shipment, nevertheless found his evidence on the crucial issues affecting the accused to be credible. It is perfectly legitimate for a trial judge to believe a witness on certain issues and disbelieve him on other issues: see *R* v *Ekanem* 13 WACA 108.

In this appeal, as in his address in the court below, learned counsel attacked the credit of the principal prosecution witness (Momodou Ceesay). On findings of fact and assessment of credibility of witnesses by a trial judge, there is a presumption of correctness which must be displaced by the appellant. We do not find that this presumption of correctness of the learned trial judge's assessment of the credibility of Momodou Ceesay (the principal prosecution witness) has been displaced. The fact that he told lies on other matters; that he may have had an interest to serve in giving damning evidence against his erstwhile police investigator; that he was an unsavoury character, all these facts were canvassed before the learned judge at the trial by the learned counsel and were duly adverted to by him in his judgment. At the end of the day, however, he found him, as he was entitled to do, to be a witness of truth on at least the crucial matters appertaining to the accused's handling of the full carton box entrusted to him at Sunwing Hotel. Having considered all the pertinent arguments of both counsel on the point, we are not inclined to reverse the learned judge on his assessment of the credibility of the principal prosecution witness.

Likewise, we do not find that the learned judge erred in treating Mr Jarra as a reliable, independent and credible witness. Accepting, as we do, the learned judge's finding of fact that Mr Jarra gave evidence with candour, his positive evidence that at the Police Station in Banjul the box in question which he saw was not full, provides sufficient corroboration of Momodou Ceesay's (the principal prosecution witness) evidence to the same effect.

The reasons given by the learned judge for rejecting the rival claim of the accused, his witnesses (Messrs Coker, Riley, WPC Khan) and Mr Khan's (the eighth prosecution witness) "impression that the carton was full" are in our considered judgment sound. We would highlight here the facts that Messrs Coker and Riley had only a fleeting look at the box at a distance of five yards; that WPC Khan conceded that Messrs Jarra and Nicol were closer to the box than she was; and that she herself was nine feet away from the box; and that she claimed to have peeped and seen the contents of the box which was at the time opened slightly; and the fact that Mr Khan, the eighth prosecution witness, only gave his "impression". The factual basis for his

"impression" that the box was full was not disclosed by him. In the circumstances, we think the learned judge's preference for the more cogent and direct evidence of Messrs Jarra and Nicol is reasonable.

Since there evidence to support these findings of fact and his assessment of the credibility of three prosecution witnesses: (Momodou Ceesay), the principal prosecution witness, Mr Jarra, the ninth prosecution witness, and Mr Nicol, (the tenth prosecution witness), is not erroneous. His ultimate finding that when the said carton reached the police station it was less than full cannot be faulted. That being so, it follows logically, that his next finding that the accused (the appellant herein) stole the difference is reasonable and sound; since he alone had the custody of the full box during his solitary trip from Sunwing Hotel to the Police Headquarters, Banjul. His decision to find the accused guilty of theft of only one 500 CFA francs note (the lowest denomination) packed in the cartons, according to the relevant evidence, is eminently fair and merciful to the accused.

Other relevant conclusions reached by the learned judge on the attendant facts were, in our considered view, reasonable and are borne out by the evidence accepted by him; for example, that the accused suggested a quiet spot after the original recovery of the money from Momodou Ceesay's (the principal prosecution witness) Kayor Galleries; that it was at his suggestion that, that witness drove to the back of Sunwing Hotel; that when the first accused took the one carton at that place, he asked: "Is this our share?"; that along the road from the junction of Old Cape Road and the Serrekunda Highway while driving behind the camper of the principal prosecution witness, he disappeared only to re-emerge some time later; and that the explanations he gave in his account of the event are not reasonable.

On the whole, we hold that the main criticism of the judgment of the court below on the facts has not been made out. On the contrary, the learned judge came to a right conclusion on the facts and the appellant's conviction is *not* unreasonable; but it is fully supported by the whole evidence.

Turning to the legal ground in ground (6) (supra), we hold that there is no rule of law requiring a trial judge to direct himself on the law of circumstantial evidence, where the prosecution's case is based on circumstantial evidence, as is otherwise alleged therein by the appellant's learned counsel. The legal issue raised was settled by the House of Lords' decision in *McGreevy* v *Director of Public Prosecutions* [1973] 1 WLR 276. In that case the Court of Criminal

Appeal of Northern Ireland certified the following point of law and granted leave to the appellant to appeal and have it decided by the House of Lords:

"Whether at a criminal trial with a jury, in which the case against the accused depends wholly or substantially on circumstantial evidence, it is the duty of the trial judge not only to tell the jury generally that they must be satisfied of the guilt of the accused beyond reasonable doubt but also to give them a special direction by telling them in express terms that before they can find the accused guilty they must be satisfied not only that the circumstances are consistent with his having committed the crime but also that the facts proved are such as to be inconsistent with no other reasonable conclusion."

It was held by the House of Lords, dismissing the appeal, that there was no misdirection in the summing up, since at a criminal trial with a jury, in which the case against the accused depended wholly or substantially on circumstantial evidence, there was no duty on the trial judge to give the jury a special direction, telling them in express terms that before they could find the accused guilty they had to be satisfied, not only that the circumstances were consistent with his having committed the crime but also that the facts proved were such as to be inconsistent with any other reasonable conclusion; it was sufficient for him to direct the jury that they had to be satisfied of the guilt of the accused beyond reasonable doubt: see per Lord Morris at [1973] 1 WLR 276, 278, 286, especially at p 285 D-F where it was stated that:

"To introduce a rule as suggested by learned counsel for the appellant would, in my view, not only be unnecessary but would be undesirable. In very many criminal cases it becomes necessary to draw conclusions from some accepted evidence. The mental element in a crime can rarely be proved by direct evidence. I see no advantage in seeking for the purposes of a summing up to classify evidence into direct or circumstantial with the result that if the case for the prosecution depends (as to the commission of the act) entirely on circumstantial evidence (a term which would need to be defined) the judge becomes under obligation to comply when summing up with a special requirement. The suggested rule is only to apply if the case depends "entirely" on such evidence. If the rule is desirable, why should it be so limited? And how is the judge to know what evidence the jury accept? Without knowing this how can he decide whether a case depends entirely on circumstantial evidence? If it were to apply, not only when the prosecution case depends entirely on circumstantial evidence, but also if "any essential ingredient" of the case so depends,

there would be a risk of legalistic complications in a sphere where simplicity and clarity are of prime importance."

Grounds (9) and (10) can easily be disposed of. In the first place, Momodou Ceesay (the principal prosecution witness) is not a partaker of the very crime of theft with which the accused was charged (nor is he a receiver of the alleged stolen money) within the definition of an accomplice in the leading case of *Davies* v *DPP* [1954] AC 378, to wit, *particeps criminis*. However, it was contended by the appellant's counsel that Momodou Ceesay must be deemed to be an accomplice in the extended sense described by Lord Hailsham LC in *R* v *Kilbourne* [1973] AC 729 at 740. "A judge is almost certainly wise to give a similar warning about the evidence of any principal witness for the Crown where the witness can reasonably be suggested to have some purpose of his own to serve in giving false evidence." But it is not clear from the evidence on record that the principal prosecution witness falls into this special category of accomplice. For one thing, it is uncertain what purpose or interest he is supposed to have in the case. He was indeed tried and acquitted on the different charge of robbery before the present prosecution of the accused. As far as the crucial evidence in this case is concerned, the learned trial judge found him to be a witness of truth even if he found him to be generally an unsavoury character who had lied about other collateral matters. The fact that the appellant was among the investigation team that investigated his abortive robbery case would not, without more, bring him within the purview of Lord Hailsham's new category of accomplice. As far as the evidence of the prosecution witness on the relevant issues of the carton being full at the Sunwing Hotel is concerned, he was in fact, corroborated by the accused himself who testified that "it was a full carton clumsily packed." Again, the statement of the principal prosecution witness that at the Police Station, Banjul he noticed that there was a discrepancy in that the box was not as full as it was when they left the beach for Banjul and that it was half to three quarters full, received some support from the two prosecution witnesses: Messrs Jarra and Nicol both of whom said that they found the box at the station to be not full. In the circumstances, we do not find that the learned judge erred in not treating Momodou Ceesay, (the principal prosecution witness) as an accomplice.

On sentence (ground (17)), we are satisfied from the record that the learned judge considered learned counsel's submissions ("I am moved by the submissions made by counsel" he stated), and that among the submissions made by learned counsel was the following: "The accused is convicted for stealing only 500 CFA francs." It is reasonable

therefore to infer that the learned judge did not disregard the actual sum found to have been stolen. Nevertheless, he gave due, and in our respectful view, proper consideration to the accused's official position; the fact that his conduct is bound to reflect on public confidence in the police force; that the offence was indefensible; that it was a clear breach of the public trust in the accused as a police officer; that he was a first offender with family responsibilities factors he considered ought to be taken into consideration in mitigating sentence for the detestable offence, made punishable by imprisonment for seven years; that the case was not a proper one meriting a non-custodial sentence. For the stated reasons he imposed four years' imprisonment with hard labour. We do not think the learned judge exercised his discretion with respect to sentence wrongly. In our view, the amount in fact stolen, is not the only criterion for fixing punishment; all the attendant circumstances deserved to be considered as was done by the learned judge including especially t*he appellant's breach of trust, his fiduciary position, the fact that he stole part of the money forming the subject-matter of the alleged bank robbery which he was himself investigating.* Clearly, a deterrent sentence was merited in the circumstances of the case. We do not consider the sentence imposed to be inappropriate in all the circumstances; and we would accordingly dismiss the appeal against sentence.

In the event, the appeal is dismissed in its entirety.

Appeal against conviction and

sentence for stealing dismissed.

SYBB

AKI v AZIZ

JUDICIAL COMMITTEE OF THE PRIVY COUNCIL

(Privy Council Appeal No 17/83 on appeal for

the judgment of the Gambia Court of Appeal)

18 June 1984

LORD KEITH OF KINKEL, LORD SCARMAN, LORD BRIGHTMAN, LORD TEMPLEMAN AND SIR GEORGE BAKER

Courts-Appeal-Findings of fact-Appellate court treatment of findings of fact by trial court-Plaintiff claiming damages for personal injuries sustained in motor accident-Trial judge finding excessive speed by defendant driver as cause of accident-Finding reasonable inference from defendant's own evidence-Further finding by trial judge that driver not blinded by high lights of oncoming vehicle-Finding supportable on balance of probabilities-Whether appellate court entitled to reverse findings of trial court.

Held, *unanimously allowing the appeal from the judgment of The Gambia Court of Appeal*: the Court of Appeal erred in concluding that the trial judge had failed to evaluate the primary facts correctly. On the evidence, the trial judge was fully justified in finding that excessive speed on the part of the defendant - respondent was the cause of the accident and that he was not blinded by the high lights of the oncoming vehicle. Furthermore, upon the evidence, the judge's finding that the defendant was not blinded by the high lights of the oncoming vehicle accorded with the balance of probabilities. It was a reasonable inference for the judge to draw from the defendant's own evidence, that it was because of his speed that the vehicle left the road when he swerved to the right and that his subsequent loss of control of the vehicle was not causative of the accident but itself a consequence of his excessive speed, which was causative.

Cases referred to:

(1) *Hazell* v *British Transport Commission* [1958] 1 WLR 169.

(2) *Quinn* v *Scott* [1965] 2 All ER 588.

APPEAL from the judgment of The Gambia Court of Appeal, reversing the judgment of the Supreme Court (High Court), giving judgment for the plaintiff and awarding him damages for personal injuries sustained in a motor accident caused by the negligence of the defendant. The facts are sufficiently stated in the judgment of the Judicial Committee of the Privy Council delivered by Lord Scarman.

Name of Council for the parties not specified in the judgment.

LORD SCARMAN *delivered the judgment of the court*. The appellant (plaintiff at the trial, hereafter called the plaintiff) was travelling from Bakau to Banjul as a passenger in a car owned and driven by the respondent (defendant at the trial hereafter called the defendant), when an accident occurred in which he sustained severe personal injury. The accident occurred at or near midnight on 31 October 1975 on a stretch of road described as straight but with a slight bend to the right ahead of them. There was a car coming from the opposite direction to that in which they were going. To avoid a collision the defendant swerved to his right or nearside. Almost immediately he lost control of the car, which careered across the road from right to left and crashed into a rice field beyond. The other car did not stop and has never been identified.

The plaintiff's case is that the defendant was driving too fast in the circumstances, and that his excessive speed was the cause of the accident. The defendant denies negligence, giving as his explanation of the accident that he was " … completely blinded by the high lights of a car coming on the opposite side and on my lane …" and that in trying to avoid a collision he swerved to the right, causing his nearside wheels to go off the surface of the road so that a tyre burst and he lost control. He gave this explanation to his insurance company on 23 December 1975, incorporated it in paragraph (5) of his pleaded defence, and gave evidence at the trial to the same effect save in one significant respect, namely, that in evidence he said only that the oncoming car was in the middle of the road.

The plaintiff, as well as the defendant, gave evidence at the trial. So also did a sergeant of The Gambian Police Force who was called to the scene of the accident. This was the totality of the evidence at trial on liability save for a statement alleged to have been made by the plaintiff to a doctor some five years later and denied by him. After considering the totality of the evidence, the trial judge found that the accident was caused by the defendant driving too fast in the night when he was meeting another vehicle and when he was either in the

bend of the road or approaching it. He awarded the defendant D250,951 damages and D10,000 costs.

The defendant appealed on the issue of liability. The Court of Appeal allowed the appeal, holding that the trial judge had failed to evaluate the primary facts correctly and further that he had misdirected himself in law. The plaintiff now appeals by special leave to their Lordships' Board.

Learned counsel for the defendant made it clear at the outset of argument before the Board that he could not support the Court of Appeal's view that the trial judge had misdirected himself as to the standard of care required by law in this class of case. The learned judge had ruled that the standard was that of what a reasonable man would have done in the defendant's situation: see *Hazell* v *British Transport Commission* [1958] 1 WLR 169 at 171. Counsel maintains, however, that the learned trial judge did fall into error when he ruled that because, in his view, no defence of tyre burst had been pleaded, he must ignore the evidence as to tyre burst in reaching his decision.

Counsel's concession on standard of care was in their Lordships' view undoubtedly correct: there was no misdirection. The judge was, however, wrong to ignore the evidence, such as it was, of tyre burst; and for two reasons. First, tyre burst was pleaded: paragraph (5) of the defence. Secondly, even if it had not been expressly pleaded, it was a factor which could have a bearing on the denial of negligence, which was the essence of the defence. Whether this error invalidates the trial judge's finding that driving too fast was a cause of the accident is, however, quite another matter, to which their Lordships will return at a later stage.

The learned judge accepted the plaintiff's version of what happened. Indeed, he thought that it was commonsense and supported by the defendant's evidence. According to the judge's note of the evidence (there was no transcript) the plaintiff said that the defendant was driving at a speed recorded on the speedometer as 80 mph; that because of his speed the nearside wheels of the car went off the road when the defendant swerved to his right; that the defendant tried to bring the car back onto the road; but that he lost control and the car somersaulted into a swamp. In cross-examination it was put to him that the defendant was driving at 50 mph; that the other car came at speed towards him and blinded him with his high lights, thus causing the accident. The plaintiff replied that the suggestion was incorrect

and that there were no high lights from the other car. It was not put to him that there was a tyre burst.

The defendant said in evidence that the other car was in the middle of the road; that he swerved to the right; that a rear tyre burst on some gravel by the edge of the road, and that he then lost control. He admitted that he was driving fast but estimated his speed as no faster than between 50 and 60 mph. Under cross-examination, he gave a number of answers which without doubt strongly influenced the decision of the trial judge. First, he said that he was not aware until some days later of the possibility of a tyre burst; the plain inference is that he was unaware of a burst at the time of the accident. Secondly, when it was put to him that, had he driven at a slower speed, the accident would not have happened, he replied that it would not have happened if his speed had been about 30 mph. Thirdly, asked why he did not stop when he saw the other vehicle approaching with its high lights and when he was blinded by them, he replied that he could not stop because he was speeding. Fourthly though he said that he could not see ahead, he noticed that the oncoming car was a white Renault 4. Finally, in answer to the judge he admitted that he did not feel or notice in any way a tyre burst.

Their Lordships do not doubt that the learned trial judge was fully justified upon the state of the evidence as revealed by his notes in finding that the defendant was not blinded by the high lights of the oncoming car and that his speed was excessive in the circumstances and the cause of the accident. Further, it was a reasonable inference for the judge to draw from the defendant's own evidence that it was because of his speed that the vehicle left the road when he swerved to the right and that his subsequent loss of control of the car was not causative of the accident but itself a consequence of his excessive speed, which was causative.

The learned judge did consider whether, if he had found that the defendant was blinded by the high lights, he would have been led to a different conclusion. He thought not; and for the convincing reason that, if the defendant could not see ahead, it would have been grossly negligent of him to continue to drive at 50 mph - let alone 80 mph - towards the oncoming car. Their Lordships would add that the road, where the accident occurred, passes through rice fields, and is straight with only a slight bend to the right some distance ahead. The oncoming car's lights, whether full or dimmed, must have been visible for some time before the accident. The presence of a car coming

towards him could not have been a matter of surprise to the defendant, unless he was failing to keep a proper look-out.

The judge also considered the evidence of tyre burst, although he had decided to ignore it. He said that, had he thought it necessary to make a decision, he would have rejected the evidence of tyre burst as "most unconvincing." Their Lordships consider that he was fully justified in this assessment of the evidence.

The Court of Appeal, however, reversed the judge. The court made a number of criticisms, the accumulation of which led them to allow the defendant's appeal. First, they criticised the judge for failing to make an express finding as to the position on the road of the oncoming vehicle. No measurements of the road were given in evidence, nor any measurements of the defendant's car or of the alleged Renault 4. All that was said was that the Renault car was in the middle of the road; and it is clear from the question put by the judge to the defendant at the very end of his evidence that the judge was well aware that the Renault was said to be in the middle of the road as it approached. No doubt, the judge also bore in mind the defendant's earlier evidence that, had he been travelling at 30 mph, there would have been no accident. Such was the state of the evidence that it could not be determined with any degree of certainty, whether, as the incident developed, there was, or was not, room for the defendant to pass on his nearside without going off the road. The judge was, therefore, right to leave that question undetermined: but he did have the defendant's evidence that he was going too fast to avoid the swerve to the right which took his car off the road.

The Court of Appeal's second criticism was directed against the finding by the trial judge that the defendant's excessive speed had caused the accident. Citing *Quinn* v *Scott* [1965] 2 All ER 588, the Court of Appeal held that the judge had fallen into error in that he had proceeded upon the assumption that a high speed on a freeway can, of itself, amount to evidence of negligence. With respect, the learned trial judge never committed himself to any such abstract proposition. He considered all the evidence and concluded that in the circumstances, which included the visible presence of a car approaching him on the middle of the road at night, the defendant maintained a speed which was excessive because, as the defendant himself recognised, it prevented him from avoiding an accident, which on his own admission, he could have avoided had he been travelling more slowly. The court's third criticism was of the finding by the trial judge that the defendant was not blinded by the high lights of the oncoming vehicle.

In their Lordships' opinion this finding was open to the trial judge upon the evidence. But their Lordships would go further: upon the evidence the judge's finding accorded with the balance of probabilities.

Counsel for the defendant added a fourth point which, though mentioned by the Court of Appeal, does not appear to have been treated by the Court of Appeal as of crucial importance. Criticising the learned trial judge for ignoring the evidence of the tyre burst, counsel submitted that the tyre burst could sufficiently explain the accident as happening without negligence on the part of his client. Their Lordships reject the submission. First, the learned trial judge considered the evidence of a tyre burst to be unconvincing; their Lordships see no reason to dissent from his view of the evidence. Secondly, if there was a tyre burst, it arose because as a result of the defendant's excessive speed he could not stop or otherwise avoid the swerve which took the nearside wheels of the car off the road surface. In their Lordships' opinion, the Court of Appeal fell into error in concluding that the learned trial judge failed to evaluate the primary facts correctly. The judge was fully justified in finding that excessive speed on the defendant's part was the cause of the accident. Their Lordships accordingly would allow the appeal and restore the judgment of the Supreme Court (High Court). The defendant must pay the defendant's costs here and in the Court of Appeal.

Appeal allowed.

SYBB

JAWARA v GAMBIA PORTS AUTHORITY & Others

SUPREME COURT (HIGH COURT), BANJUL

(Civil Suit No 177/86 J No 16)

12 April 1989

AYOOLA CJ

Detinue and conversion-Damages-Assessment-Measure of damages in action for conversion-What constitutes conversion and detinue-Exercise of control essence of conversion.

Practice and procedure-Action-Commencement-Statutory notice-Want of-Effect-Need for prior notice to be pleaded before reliance on statute as defence-Ports Act, 1972 (No 1 of 1972), s 70(1).

Held, *allowing the claim in part*: (1) to amount to conversion, the act of the defendant must be an act of deliberate dealing with the chattel inconsistent with another's right and such act must deprive that other of the use and possession of the chattel. Exercise of control is of the essence of conversion: the defendant must be shown to have been in a position to exercise control and to have exercised control over the chattels. Where the conversion is by taking, actual or constructive, taking must be proved. Where it is by keeping, it must be shown that the chattel came into the possession of the defendant, actual or constructive, and that he unlawfully retained it or voluntarily destroyed or parted with it. There cannot be conversion if the chattel is lost by accident or carelessness or destroyed. In such cases, the defendant may be liable on contract, if there was, for example, a contract of bailment; or for negligence or in detinue, the essence of which is wrongful withholding of possession of the chattel in defiance of another's right. In the instant case, the plaintiff's claim for conversion against the second defendant is to be dismissed in respect of goods the defendant did not take possession of.

(2) The normal measure of damages in conversion is the value of the goods together with any special loss which is the natural and direct result of the wrong. No special loss has been proved in respect of the goods which the second defendant wrongly delivered to the third defendant. While transitory exercise of dominion over another's goods may amount to conversion, the re-delivery of the goods may be a factor in mitigation. If there is evidence that between the date of

conversion and re-delivery, the plaintiff had lost a bargain in respect of the goods, that loss may well qualify for consideration as special loss. There is no such evidence in the instant case.

(3) Where the Gambia Ports Authority wishes to rely on absence of notice under section 70 (2) of the Ports Act, 1972 (No 1 of 1972), for commencement of action against the authority, the fact of absence of notice must be pleaded so that that question of fact may be put in issue. Absence of notice is not pleaded by merely stating that the authority shall rely on the Ports Act, 1972. The issue of notice has not been raised by the pleadings and it is now too late for the second defendant, the ports authority, to raise that issue.

ACTION for, inter alia, damages for conversion and detinue in respect of the plaintiff's goods. The facts are sufficiently stated in the judgment of the court.

Miss Ida Drameh for the plaintiff.

Alhaji A M Drameh for the defendants.

AYOOLA CJ. The plaintiff ordered 52,500 bags of rice from Bangkok. The said 52,500 bags of rice were shipped to him in bags bearing the mark "B Jawara, Banjul." The shipment consisted of 45,000 bags of rice packed in 50 kilo bags and 7500 bags of rice packed in 100 kgs bags. In all, the shipment by weight should consist of 3,000,000 kilograms of rice. Some time in July 1986 the consignment arrived in Banjul. The plaintiff took delivery of 7,500 bags weighing 100 kilos each and 40,471 bags weighing 50 kgs each. He also took delivery of 3007 bags of rice in discrepant condition. Of the plaintiff's consignment, the second defendant, the Gambia Ports Authority, which was at all material times warehousemen, delivered 1,216.50 kilos bags of rice to the third defendant, A-Z Co. Ltd. The plaintiff saw his bags of rice with the third defendant and went back to the second defendant and requested them to recover them from the third defendant. The second defendant refused so to do. Eventually the plaintiff on his own recovered the said 1216 bags of rice from the third defendant.

By writ issued in August 1986, the plaintiff commenced this action, initially against the first defendant only, claiming damages for conversion and detinue of bags of rice bearing the plaintiff's name and injunction. Subsequently on the plaintiff's application, the second and

third defendants were joined as defendants. The plaintiff's claim as finally amended was as follows:

"(i) damages for conversion and detinue against the second defendant;

(ii) interest at 35 per cent per annum against the second defendant;

(iii) damages for conversion and detinue of 1216 bags from 31 July 1986 to 28 August 1986; and

(iv) interest." The main basis of the plaintiff's claim is contained in paragraphs (5) - (7) of the amended statement of claim. They state as follows:

"(5) The second defendant delivered 3007 damaged and discrepant bags of rice swept from the floor, weighing a total of 42, 130 kilograms, to the plaintiff. The plaintiff had to sell these bags of rice at D50 per bag.

(6) The second defendant wrongfully delivered part of the plaintiff's consignment of rice to the first and third defendants and therefore the plaintiff received less than what was consigned to him by his suppliers. 1216 bags containing rice weighing 50 kilograms each were kept by the first and third defendants, knowing fully well that it belonged to the plaintiff. The plaintiff was put to great expense and trouble to recover the same from the first and third defendants. The particulars expenses and legal costs total: D50,000

(7) In the premises the defendants converted the said rice to their own use and wrongfully deprived the plaintiff thereof by reason whereof the plaintiff has suffered loss and damage.

Particulars of claim

Equivalent of 843 bags not delivered to the plaintiff at

D150 per bag D126,450

Rice swept and put in 3007 bags sold at D50 per bag

instead of D150 per bag = loss of ... D300,700

Total D427,150

As regards the 1216 bags delivered to A-Z Co, there cannot be any doubt that there was by the act of misdelivery a conversion. The law is clear that a misdelivery is a conversion. Counsel for the second defendant rightly conceded liability as regards the misdelivery after a futile effort to justify the misdelivery by raising an alleged but unproved custom in Banjul Ports. In view of the concession made by Alhaji Drameh, counsel for the second defendant, and which I think was rightly made, having regard to the evidence and the law, the only question as regards the misdelivery of the 1216 bags is as to damages.

As regards the rest of the plaintiff's claim, the plaintiff it would appear, wants liability to be fixed on the second defendant for the quantity of rice which he did not take delivery of. He also seeks to fix second defendant with liability for what has been described as the discrepant bags, ie as I understand it, rice which had spilt from the bags and had been swept and re-bagged into 3007 bags. Going by weight, the plaintiff took delivery in all of 2957.87 metric tons instead of 3000.00 net metric tons. The balance of 42.13 metric tons is the equivalent of 843 bags of 50 kgs each. The plaintiff's case shorn of all embellishment, is that because the rice delivered to him was short by the equivalent of 843 bags of 50 kgs each, the second defendant could be made liable in detinue and conversion for that quantity of rice.

Conversion has been defined as "an intentional exercise of control over a chattel which so seriously interferes with the right of another to control it that the intermeddler may justly be required to pay its full value." (See Fleming, *Law of Torts* (6^{th} ed) at p 49. To amount to conversion the act of the defendant must be an act of deliberate dealing with the chattel inconsistent with another's right and such act must deprive that other of the use and possession of the chattel. While noting that it is not possible to categorise exhaustively all modes of conversion, *Clerk and Lindsell on Torts* (14^{th} ed), para 1078) contains a useful statement of the principal ways in which conversion may take place as follows:

"(1) when property is wrongfully taken,

(2) when it is wrongfully parted with,

(3) when it is wrongfully sold in market overt although not delivered,

(4) when it is wrongfully detained,

(5) when it is so dealt with that it is destroyed or otherwise totally lost to the person entitled, and

(6) when it is so dealt with that the manner of dealing constitutes a denial of title in the person entitled, that dealing being otherwise than the modes previously mentioned."

Since exercise of control is of the essence of conversion, the defendant must be shown to have been in a position to exercise control and to have exercised control over the chattels. The chattel must be shown to have come under the control of the defendant. Where the conversion is by taking, actual or constructive, taking must be proved. Where what is alleged is conversion by keeping, it must be shown that the chattel came into possession of the defendant, actual or constructive, and that he unlawfully retained it or voluntarily destroyed or parted with it. In all cases of conversion, the act of the defendant which is relied on as amounting to conversion must be voluntary. It is for this reason that there can be no conversion if the chattel is lost by accident or carelessness or destroyed. In such case the defendant may be liable on contract, if there was, for example, a contract of bailment; or for negligence or in detinue. In detinue the essence of the tort is wrongful withholding of possession of the chattel in defiance of another's rights.

In this case the plaintiff must show that the quantity of rice in respect of which he claims against the second defendant as warehousemen was landed and thereby came into possession and/or control of the second defendant and that the second defendant dealt with it in such manner as to amount to conversion or withheld possession of it from the plaintiff in such manner as would amount to detinue. In his statement of claim, the plaintiff averred that 45000 bags of rice containing 50 kilograms each and 7,500 bags containing 100 kilograms each arrived at Banjul Port. The second defendant denied his fact but as regards the 7500 bags containing 100 kilograms it is common ground on the evidence that such arrived. So really the question is as regard the 45000 bags of 50 kilograms each.

There is no direct evidence from the plaintiff that 45000 bags weighing 50 kilograms each were actually landed. He sought to rely on the customs entry (exhibit B) as indicating that such consignment was landed. But nothing in exhibit B shows the weight of rice referred to in the document. It was also not the second defendant's document. In my view, payment of custom duties on 52,500 bags of rice does not lead me to find that 52,500 bags of rice weighing a total of 3,000,000 kilograms was actually landed. It is noteworthy that although the

consignment arrived in July 1986 duty was paid in October 1986 well after the plaintiff had taken the short delivery. The Customs Act, Cap 43 to which counsel for the plaintiff has referred, is of no assistance as to the weight of goods landed. Indeed, regulation 50 of the Customs Regulations shows that entry and payment of duty on any goods are no guarantee of the receipt of the goods and an importer who has paid duty for goods not received may need to have the goods re-entered at a future time.

On the evidence of the second defendant's witnesses, which I accept, I think this a clear case of short-landing. The quantity of which the consignment was short was in fact not landed from the vessel. Part of the shipment was in discrepant condition and the contents of burst bags had spilt out, thereby leading to a waste or loss of some of the contents of those bags. The second defendant cannot be held responsible for loss caused by the discrepant condition of the cargo or for short-landing. The plaintiff was ill-advised not to have accepted the second defendant's offer of a short-landing certificate.

In my judgment, on the facts of this case, the plaintiff's claim against the second defendant in respect of the quantity of rice which it did not take possession of and in respect of the quantity swept and rebagged is misconceived. The plaintiff has proved neither conversion nor detinue, nor is there a claim in negligence which in any event, has not been proved. The plaintiff succeeds against the second defendant in conversion in respect of the 1216 bags misdelivered to A-Z Co Ltd only.

As against the third defendant, it was contended by counsel on the plaintiff's behalf that as regards 1216 bags misdelivered to the third defendant, that company converted those goods when it took the goods out of the ports knowing that they were not its own and committed detinue when it kept the goods knowing that they were not its own. I am of the opinion that to the extent that the third defendant took the 1216 bags of rice intending to treat them as its own, conversion has been established. As for detinue, the evidence falls short of proving detinue. There was no evidence of demand and refusal. I cannot find third defendant liable in detinue. There is no evidence whatsoever against the first defendant. The action must fail against him.

I now turn to the claim for damages. The 1216 bags of rice had already been returned. The normal measure of damages in conversion is the value of the goods together with any special loss which is the

natural and direct result of the wrong. No such special loss has been proved in this case. While a transitory exercise of dominion over another's goods may amount to conversion, the re-delivery of the goods may be a factor in mitigation. The principle of law which I think is applicable to this case is stated in *Clerk & Lindsell on Torts* (14th ed) at para 1173 as follows:

"When a chattel has been wrongfully taken, detained or otherwise converted, there is a vested cause of action which cannot be defeated merely by the fact that the plaintiff subsequently gets his goods again. But after such redelivery the action is merely for the special damage or deterioration in value, and if there is no such special damage or deterioration, and the plaintiff is not content to accept the return of the goods and costs, but insists upon continuing his action for substantial damages, he may be made to pay costs though he recovers nominal damages."

It has been suggested by counsel for the plaintiff that I assess damages by taking the value of 1216 bags and assuming a notional investment of the sum it represented at 25 per cent and treat that as the damage suffered. I am not at all impressed by this rather novel approach to the award of damages in conversion. It is too speculative to be useful. I must assume that the 1216 bags would have been sold and the proceeds invested, but there is no evidence of a ready and immediate market for rice. If there is evidence that between the date of conversion and re-delivery, the plaintiff had lost a bargain in respect of the goods, that loss might well qualify for consideration as special loss. There is no such evidence in this case.

There is also a claim for the costs of obtaining a redelivery of the 1216 bags from the third defendant. It was described as expenses and legal costs and was said in the statement of claim to have amounted to D50,000. In his evidence, the plaintiff said he spent more than D5,000 to recover the goods from the third defendant. He mentioned a sum of US $110,000 which he spent to bring his lawyer from Jamaica. The evidence of the plaintiff's legal expenses and costs is so vague that no reasonable tribunal would make an assessment of damages on such evidence. There was no itemisation of the expenses that totalled D50,000 nor were there receipts in proof of the expenditure. On the whole I think this is a case in which nominal damages should be awarded if liability is found.

Alhaji Drameh, counsel for the second defendant, has submitted that the second defendant is not liable by reason of section 64 of the Ports

Act, 1972 (No 21 of 1972). He also relied on section 70 (2) of the same Act. The said section 64 provides as follows:

"Subject to the provisions of this Act or any contract, the Authority shall not be liable for the loss, misdelivery or detention or damage to goods

(a) delivered to or in the custody of, the Authority otherwise than for the purpose of carriage;

(b) … except where such loss, misdelivery, detention or damage is caused by want of reasonable foresight and care on the part of the Authority or any employee or agent of the Authority."

Provided that the Authority shall in no case be liable for such loss, misdelivery, detention or damage arising from …

(ix) unprotected cargo, insufficient or improper packing or leakage from defective containers or packages."

Section 70(2) provides that no suit shall be commenced against the authority until one month at least after written notice of intention to commence the same shall have been served upon the authority by the intending plaintiff and the relief which he claims.

As regards the misdelivery of 1216 bags to the third defendant liability, as I said, has been conceded. I need only add that in the circumstances of the case misdelivery could only have occurred by want of reasonable foresight and care on the part of the employees of the authority. The second defendant is not exempted from liability in relation to those bags of rice.

As regards section 70(2) where the authority wishes to rely on absence of notice, the fact of absence of notice must be pleaded so that that question of fact may be put in issue. Absence of notice is not pleaded by merely stating that the authority shall rely on the Ports Act, 1972 - an Act which contains 92 sections! The issue of notice has not been raised by the pleadings in this case and it is now too late for the second defendant to raise that issue.

On the totality of the evidence, I find that the plaintiff has failed to prove his claim against the second defendant for conversion and detinue in respect of 843 bags of rice not delivered and for whatever loss he sustained in respect of the discrepant condition of part of the

consignment. I find the second and third defendants liable for conversion in respect of 1216 bags and I award nominal damages of D1000 each against the second and third defendants.

In the result there will be judgment for the plaintiff against the second and third defendants for damages for conversion assessed at D1000 against each of them. The action fails against the first defendant and is hereby dismissed against him.

Claim allowed in part.

SYBB

SARR & Another v JUWARA & Others

SUPREME COURT (HIGH COURT), BANJUL

(Civil Suit No 79/88 S No10)

12 April 1989

AYOOLA CJ

Local government-Local markets-Operation-Individuals-Right to-Right of individuals to operate market upon grant of franchise-Mere acquisition of land for operating market not enough-Need to prove existence of right to operate market.

Held, *dismissing the plaintiff's claim*: in the absence of statutory enactment, individuals or group of individuals can only operate markets upon a grant of franchise by the President. The owner of a market is entitled to protection from disturbance and he can protect his right by an action for disturbance which is a possessory action. For such action to lie, the plaintiff must prove the grant of a franchise to hold a market and that he actually holds the market or would do so if he were not prevented by the act of disturbance. Where, as in the instant case, all that the plaintiff has been able to prove is that he acquired a place for the purpose of enabling buyers and sellers to gather at regular intervals and that such regular intervals do occur without proving a franchise, such gathering of buyers and sellers will not amount at common law to a market and would not enjoy the privilege of a franchise market. The plaintiffs have failed to prove the basis of the market right they lay claim to.

Per curiam. It is one thing for a person not to be prohibited from doing an act; it is another to say that he has a right to perform that act. Absence of prohibition merely gives right to liberty. Where a claim is made, however, liberty may not be enough basis on which to found a right ...

Where a person claims or relies for his claim a right to hold a market, it is for him to show on what his claim is founded. A right to hold a market may be confirmed by statute. It may exist at customary law or at common law. In this case, the plaintiffs have not claimed that they have a right of market by statute. They have been silent as to customary law … *Musgrove* v *Chun Teeong Tov* [1891] AC 272 and

Schmidt v *Secretary of State for Home Affairs* [1969] 1 All ER 904 cited. **Cases referred to:**

(1) *Musgrove* v *Chun Teeong Toy* [1891] AC 272

(2) *Schmidt* v *Secretary of State for Home Affairs* [1969] 1 All ER 904.

ACTION by the plaintiffs for an injunction to restrain the defendants from interfering with the right of the plaintiffs to hold a Saturday Market or "Lumo" at Brikamaba. The facts are sufficiently stated in the judgment of the court.

A A B Gaye for *A N Darboe* for the plaintiffs.

L Thomasi, State Counsel, for the defendants.

AYOOLA CJ. This is an action brought by the plaintiffs in a representative capacity for loss and damages they claim have been occasioned to them by the first and second defendants preventing them from operating, holding and/or managing a Saturday Market or *lumo* at Brikamaba. They seek an injunction "restraining the second defendant, by himself or his servants or agents or howsoever called from holding a new market or disturbing the plaintiffs' market or otherwise interfering with or prejudicially affecting the plaintiffs' market rights."

The plaintiffs are officers of the Brikamaba Youth Movement and have brought this action on behalf of themselves and as representatives of all other members of the Youth Movement. The first defendant is the Commissioner in charge of the Administrative Division known as MacCarthy Island Division. The second defendant is the Ag Alkalo of Brikamaba and he is the revenue collector charged with the responsibility of collecting duty from vendors at the Brikamaba Market as well as the Saturday Market locally called the *lumo*. He is also a member of the District Tribunal for Fulladu West District.

The plaintiffs' case, both on their pleadings as well as on the evidence, was that they rented an open space in Brikamaba from the second defendant at a rent of D10 for each day a market is held and proceeded to erect sheds and stalls thereon for the purpose of using the same as a Saturday Market. They alleged that they built 425 stalls on the land. Some time in February 1987, the second defendant demolished fifteen

sheds on the land and the plaintiffs consequently wanted to leave the land. On the intervention of an elder, one Alhaji Banja, they remained in the place. What immediately led to this action as narrated in the evidence of the first plaintiff was this: In April 1987, the person whom he described as "the Head of the Area Council", but is apparently the local government officer in charge of the area council, came to the plaintiffs and said that the commissioner, ie the first defendant, had sent him to take the *lumo* from the plaintiffs and hand it over to the second defendant. He did take the *lumo* from them as directed and handed it over to the second defendant. Later, the first defendant came to confirm the instruction and the "take-over" of the market. As a result of the seizure and transfer of the market from the plaintiffs, they have lost an average of D300 weekly which they earned from the *lumo*. The plaintiffs called one witness in addition to the first plaintiff. That witness, Ebrima Fatty, gave evidence of the grant of the land used for the *lumo* by the second defendant to the Youth Movement.

The substance of the defence as contained in the statement of defence is that "all Saturday Markets/*lumo* are possessed and managed by the area council and the plaintiffs were stallage collectors of the *lumo* appointed by the second defendant" and a denial that the plaintiffs were possessed of a market. The defence admitted that the first defendant instructed the Local Government Officer, Georgetown Area Council, to stop the plaintiffs from operating as stallage collectors either for the area council or village, but averred that this was due to the fact they could not account for some of the stallage they had collected.

The main question of fact in this case is whether *lumo* was established by the Youth Movement as the plaintiffs claim or by the area council as the defendants contend. The main question of law is whether the plaintiffs are possessed in law of a market right. To succeed the plaintiffs must establish such a right. The evidence in support of the plaintiffs' claim has been earlier noted. The first defendant gave evidence of the procedure laid down for the establishment of a *lumo*. He said:

"*Lumos* are established after an application to the Commissioner's Office which will make a feasibility study to see if the market is viable. The area council will then secure land. We ask the villagers to build temporary sheds from which they can collect dues, normally D1 per stall."

The area council appoints the Market Master while the villagers appoint a committee to help him in the management and operation of the *lumo*. The first defendant denied that in 1986 the Brikamaba Youth Movement informed him that they were going to establish a *lumo*. He said that it was the area council and not the youth movement which acquired the land from the second defendant.

The second defendant gave evidence that the whole village met and decided to have a *lumo*. Approval was obtained to operate a *lumo*. The villagers met, agreed to erect sheds and erected sheds. He said that it was he who gave the land for the *lumo* to the whole village. According to the second defendant, after sheds for the *lumo* had been erected, the plaintiffs and others were selected by the elders of the village to collect fees for the occupation of the temporary stores. In his evidence, the second defendant said that what brought about this dispute was the failure of the plaintiffs to account for moneys they had collected from the *lumo* for the benefit of the whole village and their removal as collectors as a result. I am more favourably impressed by the evidence of the first plaintiff and the first plaintiffs' witness than that of the two defendants. I am not at all convinced by the evidence of the first defendant that the *lumo* was owned, managed and controlled by the area council. The first defendant, who is commissioner with jurisdiction over the area, gave rather elaborate evidence as to procedure for establishing a *lumo* and he would want me to believe that that procedure was gone through as regards the *lumo* now in question. Business of area councils are normally matters of record. The Local Government Act, Cap 109 provides for minutes of councils to be kept and reports of committees to be made to councils. Such important business as establishing a market would certainly feature in the minutes of council. In this case, no record or minutes of the council had been produced to support the first defendant's evidence. If the *lumo* belongs to the area council as the first defendant claimed, then there ought to have been produced records of the area council in support of such claim.

Quite apart from this, the first defendant's assertion that the *lumo* belonged to the area council to which the land for the *lumo* was given on behalf of the village, was in conflict with the evidence of the second defendant who said that it was only the villagers who approached him for land and to whom he gave land; and also his evidence that the villagers established the *lumo* after "a paper" had been sent to the area council and the council "agreed that we could operate a *lumo*."

As I have earlier said, I find the evidence in support of the plaintiffs' claim more credible and I prefer it to that of the defence. I find as a fact that it was the Brikamaba Youth Movement which established the *lumo* and was operating it on land owned by the second defendant with the second defendant's permission on condition as to payment to him of D10 per week. I also find as a fact that from 21 April 1987 the defendants have prevented the plaintiffs from operating the *lumo*.

The interference of the first defendant with the running of the *lumo* was ostensibly based on the contention raised in paragraph (4) of the statement of defence that all Saturday Markets/*Lumo* are possessed and managed by the area council. Mr Thomasi, learned State Counsel, elaborated more on this in his address. He submitted that it is the exclusive prerogative of the area council to operate markets. He relied for this submission on section 24(1) of the Local Government, Act, Cap 108 which specified the functions of councils and the Area Council (Additional Functions) Notice (LN 112 of 1963), which stated the additional functions which may be carried out by area councils. One of these was "the establishment and regulation of markets" Mr Thomasi submitted that if the establishment of markets is not a public function, the legislature would not have provided rules for regulation thereof as was done by the Provinces Market Rules. Mr Darboe, counsel for the plaintiffs on the other hand, submitted that if a government body has a discretion to exercise its functions in any place and decides not to do so there is nothing which prohibits an individual from exercising these functions so long as it is lawful.

There was never a time when establishment of markets was by statute made the exclusive prerogative of councils. In the Protectorate Markets Ordinance (Cap 51 of the 1955 Revision), power was given to district authorities to establish markets with the approval of the Governor who himself may establish markets. Section 6 of that Ordinance provided that after the commencement of the Ordinance, no person shall, without the consent of the Governor, establish any market, or permit a market to be established on land of which he is owner, lessee or occupier; or maintain, conduct or manage a market established in breach of the provisions of the section. Section 7 empowered the Governor or with his approval a district authority to order any market to be closed. Perhaps, most significantly, section 4 of that Ordinance placed the management of all markets established under the Ordinance under the control and management of the district authority within whose jurisdiction such markets are situated. It is to regulate such management that the Provinces Market Rules were made

This brief reference to the repealed Ordinance has been made to show the significance, I venture to think, of the gap occasioned in statute law by the repeal of the Protectorate Markets Ordinance by the Local Government Act, Cap 109 (No 26 of 1963). As the schedule to the Act shows, that Ordinance was repealed in its entirety but the Market Rules were saved and "shall *mutatis mutandis* remain in full force and effect in those markets, which are hereby saved, which were established under the Ordinance (now repealed), until revoked and replaced by any Act replacing that Ordinance." No Act has been enacted, that I know of, replacing that Ordinance and the market now in question was not one of those established under the Ordinance. The position as I understand it, therefore, is that whereas before 1963 there were statutory provisions for the establishment of markets by government or with government approval, there is now no statutory restriction on establishment of markets by individuals or group of individuals.

This case, however, as formulated, deals more with right than with prohibition. To succeed, the plaintiffs must show that they have a market right which at law must be protected. It is one thing for a person not to be prohibited from doing an act; it is another to say that he has a right to perform that act. The distinction in many cases may be subtle but it nevertheless exists. Absence of prohibition merely gives rise to liberty. Where a claim is made, however, liberty may not be enough basis on which to be found a right. Some authority can be used to illustrate the point. I refer to two of them. First *Musgrove* v *Chun Tesong Toy* [1891] AC 272; and second, *Schmidt* v *Secretary of State for Home Affairs* [1969] 1 All ER 904. These are mainly immigration cases. In the first one, although at common law an alien had the liberty to enter British territory, he had no claim not to be prevented from entering. Similarly, this was affirmed in the second case.

Where a person claims or relies for his claim on a right to hold a market, it is for him to show on what his claim is founded. A right to hold a market may be confirmed by statute. It may exist at customary law or at common law. In this case the plaintiffs have not claimed that they have a right of market by statute. They have been silent as to customary law. It becomes therefore necessary to examine their claim in the light of the common law. This I do not without some discomfort. It seems to me rather incongruous that the right to hold a market in a village in the provinces of The Gambia should be determined by the common law of England which is nothing but the custom of the people of England. Be that as it may, since common law

is made applicable in this jurisdiction, even in the provinces by section 15 of the Provinces Act, Cap 151 it is to the common law I must resort.

The nature of a market at common law is as has been described in *Halsbury's Law of England* (4th ed.), para 601, namely:

"At common law a market is a franchise conferring a right to hold a concourse of buyers and sellers to dispose of the commodities in respect of which the franchise is given. The term is also applied to the like when conferred by Act of Parliament. Though strictly applicable to the right itself, the term is often applied to the concourse of buyers and sellers, or to the market place, or to the time of holding the market.

A gathering of buyers and sellers, though held at regular intervals in a fixed place, if it is not held by virtue of a franchise or under statutory authority, is not in law a market and cannot enjoy the privileges of a franchise market or fair."

A market or fair which depends for its legal existence upon a grant from the Crown in a franchise. A franchise is granted by virtue of the royal prerogative. In The Gambia, by the provisions of section 128 of the Constitution, 1970 all prerogatives and privileges hitherto vested in the Crown were vested in the President. As the law now stands, in the absence of statutory enactment, individuals or groups of individuals can only operate markets upon a grant of franchise by the President. The owner of a market is entitled to protection from disturbance and he can protect his right by an action for disturbance which is a possessory action. For such action to lie, the plaintiff must prove the grant of a franchise to hold a market and that the actually holds the market or would do so if he were not prevented by the act of disturbance (see *Halsbury's Laws of England* (4th ed), Vol 29, para 652). Where, as in this case, all that the plaintiffs have been able to prove is that they acquired a place for the purpose of enabling buyers and sellers to gather at regular intervals and that such regular gatherings do occur without providing a franchise such gathering of buyers and sellers will not amount at common law to a market and would not enjoy the privileges of a franchise market. (As to the rights involved in a right to hold a market: see *Halsburys' Laws of England* (4th ed), Vol 29, para 620. The organiser of such gathering of buyers and sellers may not be without remedy if disturbed. There is available to him in appropriate circumstances an action of trespass and where the disturbance amounts to a breach of licence to be on the land or a

tenancy relating to the land he has his remedy against the grantor of the licence or tenancy if such grantor has committed a breach of the obligation that arises from that relationship. Where, however, the plaintiff lays claim to a "market right" and founds his action thereon, he cannot succeed unless he proves the basis of that right. The plaintiffs have failed to prove the basis of the market right they lay claim to in this case. In so far as the claim is based on the existence of a market right, it must fail. The plaintiffs from the evidence, which I accept, are the owners of the sheds on the land used by traders and they have claimed to be leaseholders of the land. While they have not established a market right and their claim must fail on that ground, without pronouncing definitively on the point since the issue does not arise in this action, it does appear to me that the defendants might open themselves to further litigation should they continue to use the structures which belong to the plaintiffs without agreement of the plaintiffs and without first determining the right, if any, of the plaintiffs over the land.

Be that as it may, this action as formulated must fail. It is hereby dismissed.

Action dismissed.

SYBB

SAVAGE v SOCEA-BALENCY SOBEA SA

SUPREME COURT (HIGH COURT), BANJUL

(Civil Suit No 161/87 S No 50)

11 July 1987

AYOOLA CJ

Contract-Breach of contract-Repudiation-Justification-Conduct justifying party to treat contract as repudiated-Whether failure to pay one instalment out of many due under contract sufficient to amount to repudiation-Duty of person relying on implied repudiation of contract.

Detinue and conversion-Detinue-Action for-Factors-Need to show demand and refusal to deliver goods.

Contract-Breach of contract-Quantum of damages-Measure of damages.

Contract-Mobilisation payment-Payment in advance-Refund-Claim for-Moblilsation payment in advance not refundable where no total faiture of consideration.

Held, *upholding the plaintiff's claim in part and the defendant's counterclaim in part*: (1) not every refusal to perform part of the contract amounts to a repudiation entitling the other party to treat the contract as at an end. The question whether the refusal to perform part of the contract amounts to a repudiation of the whole of the contract depends on the construction of the contract in the circumstances of the case. Where implied repudiation is alleged, the person seeking to rely on repudiation implied from conduct must show that the defaulting party has so conducted himself as to lead a reasonable man to believe that he will not perform or will be unable to perform at the stipulated time. Where there is a contractual duty to make an instalment of payment, it is a question of fact in each case whether failure to pay is a repudiation. Ordinarily, failure to pay one instalment out of many due under the terms of the contract, is not sufficient to amount to a repudiation of the whole contract. To determine how such non-payment affects the contract, one should look at the practical results of non-payment and decide whether or not it goes to the root of the contract; or whether it is evidence of intention to abandon the contract. In the circumstances of the instant case, it is not reasonable to say that

the failure by the defendant to pay in time for the additional work done by the plaintiff goes to the root of the main contract as to justify a repudiation on the part of the plaintiff. Dictum of Salmon LJ in *Decor-Wall International SA* v *Practitioners in Marketing Ltd* [1971] 2 All ER 216 at 221-222 cited

(2) The gist of a claim in detinue is the unlawful failure to deliver up goods when demanded. If there is no refusal before action is brought and there is no conversion, as in the instant case, a claim in detinue will fail. Even if it can be said that the facts, as in the instant case, show that a demand would have met with a refusal, such as to make a demand unnecessary, the further fact remains that there was no unconditional withholding of the goods from the plaintiff. *Clayton* v *Le Roy* [1911] 2 KB103 cited.

(3) Where a contractor, such as the plaintiff in the instant case, repudiates the contract and fails to complete the works, the measure of damages normally is the difference between the contract price and the amount it would actually cost the employer to complete the work substantially as it was originally intended, and in a reasonable manner, and at the earliest reasonable opportunity. If the employer has spent less to complete the work than he would have had to pay the contractor under the contract, then the employer would have suffered no loss and damages would be nominal. In the instant case, the defendant as the employer, is entitled to claim as special damages the cost of completing the contract works unlawfully repudiated by the plaintiff, the contractor; but there is no evidence that such costs as special damages are higher than what would have been paid to the plaintiff under the contract if it had not been breached by him. *Merteus* v *Home Freeholds Co* [1921] 2 KB 526 cited.

(4) The plaintiff is not liable to make a refund of money paid in advance of performance to him by the defendant as mobilisation payment under the contract because there has been no total failure of consideration.

Cases referred to:

(1) Decro-Wall International v *Practitioners in Marketing Ltd* [1971] 2 All ER 216.

(2) Clayton v *Le Roy* [1911] 2 KB 103.

(3) Merteous v *Home Freeholds Co* [1921] 2 KB 526.

ACTION for delivery up of some plants and equipments or in the alternative payments of their value; damages for detinue and payment for work done on *quantum meruit* basis. The facts are sufficiently stated in the judgment of the court.

S H A George for the plaintiff.

Alhaji A M Drameh for the defendant.

AYOOLA CJ. This action is for delivery up of certain plants and equipments described by the plaintiff in the writ of summons and in the statement of claim as "his said plant/equipment" or in the alternative payment of their value given as £3,968; damages for detinue; the sum of £13,938 for work done on a quantum meruit basis and the sum of £8,964.95 described as "demobilization cost."

Some time in April 1987 the plaintiff, a marine civil engineer and diving consultant, and the defendant, a company incorporated in France which at the material time was engaged in constructing a sewerage system in this country for the government, entered into a written agreement under which the defendant sub-contracted works connected with the sea outfall of the sewerage system to the plaintiff. Some time in May 1987, the parties made a supplementary agreement by which the plaintiff agreed to perform additional works and the defendant agreed to pay for such consisting of underwater works at a location described as P 4 Pumping Station, Banjul. The terms of the additional works contract were contained in a letter written by the plaintiff to the defendant dated 21 May 1987 and accepted by the defendant. In June 1987, the plaintiff completed the works at P 4 Pumping Station and sent an invoice to the defendant on 22 June 1987. When that invoice had not been paid on 20 July 1987, the plaintiff wrote to the defendant calling the defendant's attention to the non-payment of the invoice and intimating that he would not resume "any works" for the defendant until that invoice had been paid. The parties exchanged several letters on the question of payment of the invoice, the upshot of which was that they could not agree as to the exact time within which the particular invoice ought to be paid. The defendant insisted that the last date for payment was 21 August 1987. The plaintiff by his letter of 31 July 1987 informed the defendant that he considered the contract as terminated.

The defendant did not agree with the reasons for the plaintiff's termination of the contract and wrote to tell him so and that it considered the plaintiff in breach of the agreement. It also informed

him that it would not allow him to use his plant and equipment which have been imported into The Gambia in the name of SOBEA for the sole purpose of executing works under the Banjul Sewerage and Drainage Project until he had cleared the equipment/plant through customs for final importation or re-exportation.

The plaintiff, alleging that his equipment had been impounded and that he had not been paid for work done, claimed as earlier stated. The defendant counter-claimed for damages for breach of contract and a refund of the mobilization payment made to the plaintiff.

It is common ground that the plaintiff was entitled to payment for work done by him before the termination of the contract. The defendant contends that since the plaintiff wrongfully determined the contract, he was not entitled to demobilization payment and that there was no wrongful detention of the plaintiff's plant/equipment.

It is convenient to deal first with the question whether or not the plaintiff was justified in terminating the contract. The resolution of that issue depends first, on whether the operative clause as regards payment of invoices is that contained in the main contract or whether it has been varied by subsequent agreement as the plaintiff contends; and secondly, even if that clause had been varied, whether failure to pay according to the tenor of the varied clause is lawful excuse for repudiation of the contract by the plaintiff. Clause (13) in the original contract, exhibit A, page 4, reads as follows:

"Payment

Payment will be made after presentation of invoice and after completion of the works within 30 days from receipt of invoice at our Head Office in Paris."

The supplementary contract (exhibit F) contains clause (8) as follows:

"General

All terms and conditions as agreed in the main contract, signed and dated 14 April 1987 will apply except as specifically amended by this variation."

On the photocopy of the supplementary agreement tendered by the plaintiff (exhibit A pp 6-10), the plaintiff had written on the margin thereof in ink: "invoice to be submitted to SOBEA Banjul to permit

local order to be raised and paid, 30 days term apply (sic) from delivering Banjul." It was initialed, apparently by the plaintiff, and dated 22 May 1987. The original copy of that supplementary agreement (exhibit F), which the defendant tendered in evidence does not contain such term. It must be observed that what was intended by the supplementary contract, it would appear, was to spell out which of the terms of the original contract would apply to the additional works and how such were varied in relation to the additional works.

The plaintiff's evidence is that he and Mr Beck, the defendant's project manager and first witness, went through the letter dated 21 May 1987, which contained the terms of the supplementary agreement, point by point and agreed on all terms in their entirety except items 6 and 8. The original version of the supplementary agreement (exhibit F), and the photocopy tendered by the plaintiff (exhibit A pp 6-10), both show that item 6.3 was deleted. As regards item 8, the plaintiff said that he was told by Mr Beck that invoice was to be submitted to Sobea Banjul to permit local order to be raised and paid and that the 30 days' term applied from delivery of invoice in Banjul. The defendant's witness, Mr Beck, said that the term of payment on the supplementary contract was that the plaintiff would submit the invoice to him upon the completion of the works and that he would forward it to the defendant's head office in Paris from where it would be paid within 30 days of the arrival at the defendant's head office. Cross-examined, he denied that he agreed that the invoice would be paid in Banjul and explained that he could not pay in pounds sterling in Banjul and the invoice was to be paid in pounds sterling. I prefer the version given by the defendant's witness to that of the plaintiff. The addition to item 8 of the supplementary agreement made in the margin of exhibit A pp 6-10, is not binding on the defendant. It was not contained in the original version of the agreement (exhibit F) in the custody of the defendant. What the defendant's witness stated as the terms as to payment for the additional works was mere elaboration of clause 13 of the original contract in that it clarified that the invoices were to be presented in Banjul while payment was to be made within 30 days of receipt of the invoices at the defendant's head office in Paris. I do not believe and I do not find that the parties agreed that the invoice was to be paid within 30 days from its presentation in Banjul. In his letter exhibit A p 13, the plaintiff seemed to have accepted it as the position that the invoice was to be passed to Paris for payment when he complained that: "I have now been told that the invoice has not even been passed to Paris for payment."

Even if the term as to payment was as the plaintiff alleged and the defendant has failed to comply with the term, that, in the circumstances of this case, is not lawful excuse for the plaintiff failing to provide due performance of the contract and repudiating his obligations under it. Not every refusal to perform part of the contract amounts to a repudiation which entitles the other party to treat the contract as at an end. I take the law as stated in *Halsbury's Laws of England* (4th ed), Vol 29, para 547: "The question whether the refusal to perform part of the contract amounts to a repudiation of the whole contract depends on the construction of the contract and the circumstances of the case." Where implied repudiation is alleged, the party seeking to rely on repudiation implied from conduct must show that the defaulting party has so conducted himself as to lead a reasonable man to believe that he will not perform or will be unable to perform at the stipulated time. Not every breach of contract gives rise to a right to rescind even though the injured party always has a right of action for damages. Where there is a contractual duty to make an instalment of payment, it is a question in each case whether failure to pay is a repudiation. Ordinarily, failure to pay one instalment out of many due under the terms of the contract is not sufficient to amount to a repudiation of the whole contract. To determine how such non-payment affects the contract, one should look at the practical results of non-payment and decide whether or not it goes to the root of the contract: or whether it is evidence of intention to abandon the contract. In *Decro-Wall International SA* v *Practitioners in Marketing Ltd* [1971] 2 All ER 216 at 221-222 Salmon LJ said:

"A breach of contract may be of such a nature as to amount to repudiation and give the innocent party the right (if he desires to exercise it) to be relieved from any further performance of the contract or the breach may entitle the innocent party only to damages. How is the legal consequence of a breach to be ascertained? Primarily from the terms of the contract itself. The contract may state expressly or by necessary implication that the breach of one of its terms will go to the root of the contract and accordingly amount to repudiation. Where it does not do so, the courts must look at the practical results of the breach in order to decide whether or not it does go to the root of the contract: see *Mersey Steel and Iron Co Ltd* v *Naylor, Benzon & Co*: [1881-85] All ER Rep 365 at 370 per Lord Blackburn; *Hong Kong Fir Shipping Co Ltd* v *Kawasaki Kisen Kaisha Ltd* [1962] 1 All ER 474 at 487, 488) per Diplock LJ and the *Mihalis Angelos* [1970] 3 All ER 125 at 128 per Lord Denning MR." The principle so enunciated is applicable to this case. Assuming that the plaintiff was right as to the term relating to payment, what happened was not a refusal by the

defendant to pay what was due on the additional work. Put at the highest, what the plaintiff could have complained of (that is, assuming he was right as to the term of payment) was of delay in payment. Counsel for the parties seemed in this case to have ignored the fact that the works covered by the additional work contract has been completed and that the item 8 in the supplementary contract only specified how and which of the terms of the original contract would be applied to the additional work. It is not reasonable in these circumstances to say that failure to pay for the completed additional work goes to the root of the main contract. However one looks at it, the firm conclusion seems inescapable that failure to pay in time, even if the plaintiff was right in his contention as to time, does not constitute such a breach as would justify a repudiation on the part of the plaintiff. Counsel for the plaintiff did submit that even assuming that time was not of the essence of the contract, the plaintiff had made by his letter (exhibit B p 8) time of the essence. The short answer to that submission is that on the facts, the defendant has not been shown to fail to pay within the time stipulated in clause 13 of the original agreement. The question of making time of the essence of the contract does not thus arise. Where parties have agreed as to the time for the performance of a contract, one party cannot abridge that time by serving notice on the other party demanding performance at an earlier time. The termination of the contract by the plaintiff amounts to a repudiation by the plaintiff of the contract. It was based on the erroneous belief that the defendant had committed a breach of the contract and that such breach justified the plaintiff in treating himself as discharged from the obligation to tender further performances. The fact that a contracting party purports to rely upon an inadequate reason for rescinding a contract will normally amount to a repudiation by him. The plaintiff has committed a breach of contract. I now turn to the plaintiff's claim for payment of demobilisation. Clause(6) of the main contract (exhibit A pp 1-6) was relied on by the plaintiff in his claim for demobilisation payment. Demobilisation as indicated in clause (5) of the main contract starts after completion of works. The plaintiff who was in breach did not complete the works and the question of demobilization payment should not arise. Further, demobilization is payable on equipment actually shipped back to UK and personnel who actually returned to UK. There is no evidence that any equipment was shipped back and no invoice with back-up documents (receipts etc) have been submitted as required by the agreement in relation to mobilization. (See clause (2) of exhibit A pp 1-6.)

It is now left to consider the claim for detinue. It seems common ground that after the plaintiff had ceased to continue the work, his equipment stored or used by him on land controlled by the defendant were impounded by the defendant. The plaintiff gave a list of the equipment (exhibit D) and showed ticked `red' on exhibit D those not returned to him. The rest were returned to him in June 1988. Under cross-examination, the plaintiff admitted that all the equipment listed in exhibit D were brought into this country for the defendant's project and were not intended for other use. The defendant's witness said that he blocked two containers of the plaintiff to which the defendant had access and ensured that access to the containers by the plaintiff were rendered impossible. The reason for this, according to him, was that the plant and equipment were brought to The Gambia by the plaintiff on temporary importation in the name of Sobea and the defendant had to make sure that they would not be used for any other purpose than the execution of works on the drainage project. He said the plant and equipment were imported by the defendant on duty free basis. In its letter dated 3 August 1987 to the plaintiff (exhibit B p 11) the defendant wrote, inter alia:

"We hereby inform you that we will not allow you to use any part of your plant or your equipment for other works until you have cleared your equipment/plant through customs for final importation or re-exportation. We will inform the concerned authorities accordingly and request you to let us know your intention concerning the plant and equipment."

The letter concluded that: "Until such time as all matters mentioned above are resolved satisfactory, your plant/equipment will remain impounded in our possession." The defendant also wrote to the Comptroller of Customs & Excise (exhibit B p 12) requesting him to intervene by impounding the plant/equipment.

From the evidence, it is manifest that there was a detention of the plaintiff's chattel. The question is whether such detention was wrongful. The gist of the action of detinue is the unlawful failure to deliver up the goods when demanded. In order to establish wrongful detention, it is usual to prove demand and refusal after reasonable time to comply with the demand. If there is no refusal before action is brought and there is no conversion alleged, neither trover nor detinue will lie. *Clayton* v *Le Roy* [1911] 2 KB 103 is often cited as authority for the principle that a cause of action does not arise in detinue until there has been a demand and a refusal. In this case the plaintiff neither alleged nor proved a demand and a refusal. To that extent the

statement of claim did not disclose a cause of action and the evidence did not rectify the defect. For that reason alone, the claim in detinue should fail. Even if it can be said that the facts show that a demand would have met with a refusal, such as to make a demand unnecessary, the further fact remains that there was no unconditional withholding of the chattels from the plaintiff. On the facts, I am of the view that the defendant was justified in asking the plaintiff to clear the equipment/plant through customs. The project manager's letter to the Comptroller of Customs & Excise (exhibit B p12) and letters attached thereto coupled with the admission by the plaintiff that the equipment/plant were brought into the country for the defendant's project supports that conclusion. The defendant acted, in my view, in lawful protection of its own reputation and of its obligation to the Customs & Exercise by preventing the plaintiff from using the plant/equipment for purposes other than the project without payment of custom dues. The claim for detinue must fail. Even if the claim had succeeded, I would have assessed the value of goods detained at £847 converted to dalasis and awarded general damages for loss of use of the equipment assessed at D2,000. The plaintiff is entitled to judgment in his claim for value of work done which was put at £13,938 and I will enter judgment in pounds sterling in accordance with the agreement of the parties since the money was to be paid in London. The rest of the claim will be dismissed. I now, consider the defendant's counterclaim. On the evidence which I accept, and for the reason which I have given, I hold that the plaintiff has committed a breach of contract and liable to the defendant in damages. Where the contractor repudiates the contract and fails to complete the works, the measure of damages normally is the difference between the contract price and the amount it would actually cost the employer to complete the work substantially as it was originally intended, and in a reasonable manner, and at the earliest reasonable opportunity: see *Merteus* v *Home Freeholds Co* [1921] 2 KB 526. If the defendant (the employer) has spent less to complete the work than he would have had to pay the plaintiff (the contractor) under the contract then the defendant would have suffered no loss and damages would be nominal. In this case there is evidence from which a fair assessment could be made of the cost to the defendant of completing the work; but there has been no evidence of the contract price or what it would have cost the defendant if the plaintiff had fully performed the contract.

The defendant in a separate head of claim has claimed a refund of the mobilization payment made to the plaintiff. The plaintiff is not liable to make such a refund since there has been no total failure of

consideration. I take the law as stated in *Keating Building Contracts* (4th ed), at p 54 as follows.

"If the employer pays money under a contract which the contractor fails to complete the employer can recover that money in an action for money had and received if there had been a total failure of consideration. If the employer has received any value from performance by the contractor there has not been a total failure of consideration, and any payment is not recoverable even though it was made in advance of performance. In such circumstances the employer can claim damages for breach of contract."

Although the plaintiff is not liable to refund the money paid to him as mobilization, the fact remains that the defendant has been shown have expended moneys in air freighting equipment and as fares for personnel from Paris to Banjul which it would not had spent if the plaintiff had fully performed the contract and for which the plaintiff had been paid as part of the mobilization. This expenditure totaled 29,950.00 French francs made up as follows: freighting of equipment: 10,400 French francs (exhibit C p20); air fare for two divers: 19,500 French francs (exhibit C p7). These are the only items of expenditure which can be taken into consideration as loss flowing from the plaintiff's breach in computation of damages. The other items claimed as special damages in the statement of claim in respect of the counter-claim represent the cost of completing the works, and as I have said, it is not shown that such cost is higher than would have been paid to the plaintiff under the contract if he had not committed a breach.

In the result, I would award to the defendant as special damages in dalasis equivalent of 29,950 French francs which as the rate of 0.83 French francs to the dalasi stated on the statement of claim amounting to D36,084 and D2,000 as general damages. There will be judgment for the defendant on his counter-claim in the total sum of D38,084; and there will be judgment for the plaintiff on his claim in the sum of £13,938 or its equivalent in dalasis at the date of this judgment.

Both the plaintiff's claim and

the defendant's counterclaim

upheld in part. SYBB

JOBE v JALLOW

COURT OF APPEAL, BANJUL

(Civil Appeal No 15/86)

9 July 1987

LUKE AND ANIN JJA AND AYOOLA CJ

Mortgage-Land-Mortgagor-Right of-Failure of mortgagor to make repayment of loan on agreed date-Equity of redemption-Mortgagor having equitable right to redeem mortgaged property on payment of loan within reasonable time-Provision in loan agreement preventing redemption constituting clog or fetter on right of redemption.

Mortgage-Land-Mortgagee-Foreclosure-Right to-What constitutes foreclosure-Procedure in foreclosure action-Whether action for foreclosure includes claim for order for possession.

Held, *allowing the appeal (per Luke JA, Anin JA and Ayoola CJ concurring*): (1) a mortgage is a conveyance of a legal or equitable interest in property as a security for the payment of a debt or the discharge of some other obligation for which it is given, the security being redeemable on the payment or discharge of such debt or obligation. Any provision in the mortgage instrument to prevent redemption or which is inconsistent with the right to redeem, as in the instant case, constitutes a clog or fetter on the equity of redemption. The equitable right to redeem is the right conferred by equity on a mortgagor to redeem at any time after the stipulated date and time, on payment within a reasonable time of the principal, interest and cost. Dictum of Lord Parker in *Kreglinger v Patagonia Meat & Cold Storage Co Ltd* [1911-13] All ER Rep 970 at 980; *Stanley* v *Wilde (*1899) 2 Ch 474, CA and *Kora* v *Sidibeh*, Court of Appeal, 16 May 1978 [1960-1993] GR 155 cited.

(2) Foreclosure is the process whereby the mortgagor's equitable right to redeem was declared by court order to be extinguished and the mortgagee was left owner of the property both at common law and in equity. The procedure in a foreclosure action is for the court to make a foreclosure order *nisi* unless the mortgagor redeems within the time allowed by the court. The order *nisi* directs the taking of the necessary accounts and provides that if the mortgagor pays the money due by a fixed date (usually six months from the accounts being settled by the

Master) the mortgage shall be discharged; but if that was not done, the mortgagor shall be foreclosed. In the instant case, there was no debt due on the security to warrant a foreclosure order *nisi*.

(3) An action for foreclosure includes a claim for possession and therefore delivery of possession may be ordered as against a mortgagor though not asked for the writ as in the instant case. However, there was no ground for granting the plaintiff-respondent possession of the deputed property because the balance of the debt due had been tendered to the plaintiff-respondent, the mortgagee. *Manchester & Liverpool Bank* v *Parkinson* (1889) 60 LT 258 cited.

Cases referred to:

(1) Stanley v *Wilde* (1899) 2 Ch 474, CA.

(2) Krelinger v *Patagonia Meat & Cold Storage Co Ltd* [1911-13] All ER Rep 970.

(3) Kora v *Sidibeh*, Court of Appeal, 16 May 1978; reported [1963-1993] GR 155 *ante*.

(4) Manchester & Liverpool Bank v *Parkinson* (1889) 60 LT 258.

APPEAL by the defendant from the decision of the Supreme Court (High Court) per O'Brien-Coker J, 31 July 1986, giving judgment for the plaintiff's claim for enforcement of mortgage of the defendant's property by foreclosure and ordering the defendant to deliver possession of the mortgaged property to the plaintiff.

AAB Gaye for the appellant.

SBS Janneh for the respondent

LUKE JA. The appellant is a trader living in the City of Banjul. The respondent is a businessman living in Kanifing and having business interests in bakeries situated in Banjul, Bakau New Town and Brikama. The appellant is the fee simple owner of the house and land situated at 23 Primet Street, Banjul. The respondent owns a house and land situated at 78 Hagan Street, Banjul and a substantial house and land situated at Pipe Line Road, Kombo.

In September 1983, the appellant was taken by one Mr J L Njie, a notary public, to the premises of the respondent. The appellant had in

his possession the title deeds of his property situated at 23 Primet Street, Banjul. The appellant applied to the respondent for a loan. Thereupon the respondent took the appellant and Mr J L Njie to see his solicitor. The solicitor prepared a deed which the appellant and the respondent executed, witnessed by Mr J L Njie and the loan was made to the appellant. According to the terms of the deed, the loan was to be repaid on or before 28 February 1985. On that date, the appellant still had a balance of D9989 due to the respondent. In March 1985, the appellant offered to pay the balance, but the respondent refused to accept it on the ground that their agreement had expired on 28 February 1985.

The next episode in the story took place a few days after the respondent's refusal to accept the balance. The respondent, hereafter called the plaintiff, initiated proceedings in the Supreme Court (High Court) against the appellant, hereafter called the defendant.) The writ of summons was dated 18 March 1985 and the claim was for: (i) the enforcement of mortgage … in respect of 23 Primet Street, Banjul by foreclosure; and (ii) that an account be taken of what is due as between the parties.

Pursuant to an order made by the Master on 19 April 1985, pleadings were filed in due course. In the meantime the defendant had paid into court the balance of D9989 on 28 March 1985 and notice thereof had been given to the plaintiff's solicitor by the defendant's solicitor.

It would be useful to set out the pleadings. The statement of claim was in the following terms:

"(1) The plaintiff is a businessman engaged in the bakery business.

(2) On 30 September 1983, the defendant executed a mortgage of his freehold premises situate at No 23 Primet Street, Banjul, The Gambia to secure the sum of D29,000 lent by the plaintiff to the defendant. The said mortgage bears serial Registration No 71/83 Vol 32KM.

(3) Prior to the execution of the said mortgage, the defendant had procured the valuation of the said premises which was given a value of D50,600.

(4) By clause (7) of the said mortgage, it was agreed that if the defendant failed to pay the entire debt of D29,000 within the stipulated time, ie not later than 28 February 1985 the plaintiff would

be entitled to foreclosure after payment to the defendant by the plaintiff the sum of D50,600.

(5) As at the date of issue of writ, the defendant owes the plaintiff the sum of D11,889 under the said mortgage.

(6) Although the plaintiff has offered to pay the defendant the sum of D38,711 and take over the said property as agreed the defendant has failed to do.

And the plaintiff claims

(i) for the enforcement of the said mortgage by foreclosure; and

(ii) that an account be taken of what is due as between the parties."

In the defence it was pleaded as follows:

"(1) The defendant admits paragraphs (1), (2), (3) and (4) of the statement of claim.

(2) The defendant denies paragraph (5) of the statement of claim and avers that he has liquidated the entire debt of D29,000 in two instalment as follows:

(a) D21,011 paid to the plaintiff on 26 February 1985; and

(b) D9,989 paid on 26 March 1985.

(3) The defendant further avers that notwithstanding the admissions contained in this statement of defence, the plaintiff is not entitled to foreclosure and prays that the plaintiff's prayer for foreclosure may be dismissed."

The trial was by O'Brien-Coker J. Only the parties to the dispute gave evidence. The evidence on both sides substantially confirmed the allegations in the pleadings. The plaintiff produced the mortgage deed and it was admitted in evidence and marked exhibit A. He confirmed that on 28 February 1985, the defendant had paid D21,011, leaving a balance of D9,989 of the mortgage debt. His evidence under cross-examination revealed his whole attitude towards the transaction and it will be useful to quote part of it. He said, inter alia:

"I would rather have the compound than the balance because he has breached the agreement. I don't want the money … If the defendant had sent some one with the D9,989 I would not have accepted because our agreement had expired on 28 February 1985."

In his evidence, the defendant confirmed that he had offered to pay the balance of D9,989, but the plaintiff had refused to accept it. He disclosed that the plaintiff had asked him on three occasions to sell his property to him but he was not prepared to sell it.

The learned trial judge delivered judgment on 31 July 1986 in favour of the plaintiff and, inter alia, ordered the defendant to deliver up possession of his property to the plaintiff. It is against that decision that the defendant has appealed to this court.

Four grounds of appeal were argued before us. They are in the following terms:

"(i) that the learned judge erred in law when he failed to hold that the covenant which at the time of the creation of the mortgage, gave the plaintiff (respondent) mortgage option to purchase the mortgage property was repugnant and void being a clog or fetter on equity of redemption and an unwarranted exclusion imposed by the mortgagee on the mortgagor;

(ii) that there was misdirection by nondirection which amounted to a material irregularity in that having held that "The point to be decided is whether there was a clog in the equity of redemption" the learned judge completely failed to decide the issue so raised; (iii) assuming that the learned judge was entitled to make an order (of foreclosure and not possession) the learned judge could at the most have only made an order of foreclosure *nisi* and not an order of foreclosure absolute; and

(iv) that there was material irregularity in that the learned judge granted a relief (of possession) which was not prayed for in the writ and/or statement of claim."

It would be convenient to consider grounds (i) and (ii) together. In his argument before us, Mr Gaye, learned counsel for the defendant, drew our attention to the following passage in the judgment of the trial judge: "The point to be decided is whether there was a clog on the equity of redemption." Learned counsel stated that point was never

answered by the learned judge. He referred to clause (7) of exhibit A which reads as follows:

"(7) The parties hereto agree that should the borrower fail to pay the principal herein or any part thereof on or before 28 February 1985 the mortgagee shall foreclose this mortgage and upon paying the borrower the difference between what is then owing and D50,600 (fifty thousand six hundred dalasis) assume ownership of the said premises."

Learned counsel then submitted that that clause was repugnant to the whole object of a mortgage transaction and constituted a clog on the equity of redemption.

Mr Janneh, learned counsel for the plaintiff-respondent submitted that clause (7) provided for a collateral advantage and further that a collateral advantage clause is not repugnant.

It is now necessary to determine what is the nature of the deed (exhibit A). I think that it is common ground that it is a mortgage. It is so described in the body of the deed itself, in the pleadings, in the evidence and in the submissions of learned counsel.

The essential nature of a mortgage is that it is a conveyance of a legal or equitable interest in property as a security for the payment of a debt or the discharge of some other obligation for which it is given, the security being redeemable on the payment or discharge of such debt or obligation: see *Stanley* v *Wilde* (1899) 2 Ch 474, CA per Lindley MR. Any provision in the mortgage instrument to prevent redemption or which is inconsistent with the right to redeem is what is called a clog or fetter on the equity of redemption. The equity of redemption is an equitable right of a mortgagor arising as soon as the mortgage is made, conferring on the mortgagor not only right to redeem the mortgage but also an equitable right or interest in the land. A mortgagor has two rights to redeem the mortgage, namely, a legal right to redeem and an equitable to redeem. Briefly defined, a legal right to redeem is the right of the mortgagor to redeem at the precise time stipulated in the mortgage; whilst the equitable right to redeem is the right conferred by equity on a mortgager to redeem at any time after the stipulated date and time on payment within a reasonable time of the principal, interest and costs. Therefore a clog or fetter on the equity of redemption means that the mortgagor cannot be prevented from eventually redeeming his property on repayment of the sum advanced together with interest due and the mortgagee's proper costs, and also that after redemption, he is free from all the conditions of the mortgage.

In discussing this subject, Lord Parker of Waddington said, inter alia, in *Kreglinger* v *Patagonia Meat & Cold Storage Co Ltd* [1911-13] All ER Rep 970 at 980:

"If, as was not infrequently the case, such a legal mortgage as above described contained a further stipulation that, if default were made in payment of the money secured on the date specified, the mortgagor should not exercise his equitable right to redeem, or should only exercise it as to part of the mortgaged property, or on payment of some additional sum or performance of some additional condition, such stipulation was always regarded in equity as a penal clause against which relief would be given. This is the principle underlying the rule against fetters or clogs on the equity of redemption. The rule may be stated thus: The equity which arises on failure to exercise the contractual right cannot be fettered or clogged by any stipulation contained in the mortgage or entered into as part of the mortgage transaction."

The equitable rights are based on the equitable principle that once a mortgage, always a mortgage: see *Kora* v *Sidibeh*, Court of Appeal, 16 May 1978 reported in [1963-1993] GR 155 *ante*.

I now turn to a consideration of the question whether clause (7) of the mortgage was a clog on the equity of redemption. The clause has already been set out above. It provides in no uncertain terms that upon failure to pay the mortgage debt or any part thereof on the stipulated date, the mortgagee shall "foreclose this mortgage and …assume ownership of the said premises." It is perfectly clear that this provision means that upon failure to exercise his legal right to redeem, the mortgagor automatically lost his equitable right to redeem. And quite apart from losing his equitable right to redeem, the clause deprived him ab initio of his equity of redemption. In my judgment therefore clause (7) is repugnant to and inconsistent with the whole concept of a mortgage and constitutes a clog or fetter on the equity of redemption. In those circumstances, the provisions contained in the clause are void. Unfortunately the learned trial judge did not consider the serious implications of that clause and inevitably failed to answer the very material question which he had himself posed in the course of his judgment.

It is perhaps understandable that the plaintiff being a layman did not appreciate the legal effect of the clause. He insisted on the strict letter of the clause and was uncompromising in his insistence that the defendant observe its strict terms. His attitude was the defendant

having failed to pay the whole debt in accordance with the "agreement" he was entitled to "assume ownership" of the property in accordance with the "agreement." He would not accept any more money after the specified date. He said so in no uncertain terms and repeated it in evidence. He wanted the property. He was not interested in the money. Even though the money was paid into court and his solicitor was duly informed, he still was not interested. He still wanted his pound of flesh; he wanted his property. His attitude is reminiscent of the position of the common law before the courts of equity intervened. At common law, unless the mortgagor strictly complied as to time and place with the condition of payment, he forfeited his estate, which became the absolute property of the mortgagee.

Unfortunately for the plaintiff he did not seem to realise that the law in The Gambia is not so unsympathetic to defaulting mortgagors. Fortunately for the defendant the law of equity as applied in The Gambia confers on a mortgagor certain vested rights which protect his right over his property. Therefore the remedy available to the plaintiff is not that provided in clause (7) but those developed by the law of equity or conferred by statute.

This brings me to the grounds dealing with remedies, ie grounds (iii) and (iv) of the grounds of appeal. It will be convenient to deal with them together. It should, however, be mentioned at the outset that Mr Janneh, counsel for the plaintiff-respondent, conceded ground (vi). It would be recalled that the learned judge granted possession of the property to the plaintiff-respondent and ordered that accounts be taken. So it becomes necessary to consider whether the remedy granted by the judge was right or proper.

Arguing ground (iv), Mr Gaye pointed out that the remedy claimed in the writ as well as in the statement of claim was foreclosure, and not possession. He therefore submitted that the learned judge was wrong to order possession, and that the proper order the judge should have made was a foreclosure order *nisi*. Mr Janneh conceded to the second part of the submission, but as regards the first part, he submitted that the judge had power to make an order for possession.

The plaintiff-respondent's claim was for foreclosure and accounts. Foreclosure was the name given to the process whereby the mortgagor's equitable right to redeem was declared by the court to be extinguished and the mortgagee was left owner of the property both at common law and in equity. An order of the court is essential. The procedure in a foreclosure action is for the court to make foreclosure

order *nisi*, that is, unless the mortgagor redeems within the time allowed by the court. The order *nisi* directs the taking of the necessary accounts and provides that if the mortgagor pays the money due by a fixed date (usually six months from the accounts being settled by the master) the mortgage shall be discharged; but that if this was not done the mortgage shall be foreclosed.

In this case there was no need to order the taking of accounts because both parties agreed that the balance due on the mortgage debt was D9,989. In fact that amount had been paid into court and notice thereof had been given to the plaintiff-respondent. Therefore, there was no debt due on the security to warrant a foreclosure order *nisi*. The plaintiff-respondent was and still is at liberty to apply to the court for payment out of the money deposited in court.

With regard to the order for possession, Mr Janneh was right in his submission that an action for foreclosure includes a claim for possession. Indeed, delivery of possession may be ordered as against a mortgagor though not asked for by the writ or summons: see *Manchester & Liverpool Bank* v *Parkinson* (1889) 60 LT 258. But in the present case there was no ground for granting possession since the balance of the debt due had been tendered to the mortgagee.

In view of the foregoing, the proper order the learned judge should have made in the circumstances was an order dismissing the plaintiff's claim and ordering the re-conveyance of the property and return of the defendant's title deeds.

In the result, I would allow the appeal and set aside the judgment and orders of the court below. I would substitute therefor an order dismissing the plaintiff's claim and ordering the plaintiff- respondent to re-convey the defendant-appellant's property situated at 23 Primet Street Banjul to him on or before 31 July 1987 and also return the plaintiff-appellant's title deeds in respect of the said property to him on or before 31 July 1987. I would award costs to the defendant in this court as well as in the court below.

ANIN JA. I agree.

AYOOLA CJ. I also agree.

Appeal allowed.

SYBB

SANKUNG SILLAH & SONS LTD v GAMBIA PORTS AUTHORITY

COURT OF APPEAL, BANJUL

(Civil Appeal No 10/89)

7 December 1989

ANIN, DAVIES AND OLATAWURA JJA

Practice and procedure-Court of Appeal-Procedural rules-Failure to comply with rules-Effect of failure to comply with mandatory rules of procedure-The Gambia Court of Appeal Rules, Cap 6:02, rr 11 and 12(1).

Contract-Breach of contract-Special damages-Proof-Claim for special damages to be pleaded and proved strictly-Evidence of special damage to be rejected and expunged from record where not pleaded.

It is provided by rules 11 and 12(1) of The Gambia Court of Appeal Rules, Cap 6:02: that:

"11. The forms set out in Appendices A and C to these rules, or forms as near thereto as circumstances permit, shall be used in all cases to which such forms are applicable."

12. (1) All appeals shall be by way of rehearing and shall be brought by notice (hereinafter called "the notice of appeal") to be filed in the Registry of the court below which shall set forth the grounds of appeal, shall state whether the whole or part only of the decision of the court below is complained of (in the latter case specifying such part) and shall state also the nature of the relief sought and the names and addresses of all parties directly affected by the appeal, and shall be accompanied by a sufficient number of copies for service on all such parties."

Held, *unanimously dismissing the appeal against award of damages for breach of contract*: (1) rules of procedure regulating appeals are intended to be strictly complied with and it is only in special circumstances and after careful scrutiny will the Court of Appeal afford relief where there has been a departure from the rules. The provisions in rules 11 and 12(1) of The Gambia Court of Appeal Rules are for mandatory compliance; they give no discretion to the appellant

or his counsel to do what he likes. In the instant case, the proper thing was to have struck out the notice of appeal filed as an infringement of rule 12(1).

Per curiam. Our duty is not to encourage or facilitate appeals but it is our manifest duty to insist on due diligence by appellants and their legal advisers.

(2) A claim for special damages must be strictly proved. Before a plaintiff can give evidence of special damages, it must be pleaded. If not pleaded, evidence led should be rejected but if admitted, even without objection, it should be expunged from the record as it goes to no issue. In the instant case, there was no evidence in proof of the claim for special damages, ie air fares and hotel bills. It is not enough to place reliance on the *ipse dixit* of the managing director of the plaintiff company. Dictum of Lord Donovan in *Perstrello* v *United Paint Co* [1969] 1 WLR 570, CA cited.

Per curiam. Reliance is pleaded on the *ipse dixit* of the managing director of the plaintiff company…Did he travel by sea or by air? If by air as a result of which he is claiming the fares, where is the evidence that he travelled by air? The best evidence is the stump of his ticket. That he went to France is not conclusive that he stayed in any hotel…If he stayed in any hotel where are the hotel bills and the receipts issued after the settlement of the bill? He was unable to produce any evidence that he stayed in any hotel. If he produced ordinarily the bills, there may be a presumption that he paid the bills. The plaintiff company ought to have pleaded when it managing director travelled…, where he stayed and when he returned. The absence of the pleading together with the evidence is fatal to its claim.

Cases referred to:

(1) Fouche v *Braid* (1913) 2 NLR 102.

(2) Jaber v *Basma* 14 WACA 140.

(3) Amos Bros & Co Ltd v *British West African Corporation Ltd* 14 WACA 220.

(4) Agunwa v Onukwue [1962] 1 All NLR 537.

(5) Perestrello v *United Paint Co* [1969] 1 WLR 570, CA.

(6) Flint v *Lovell* [1935] 1 KB 354, CA.

(7) Oduro v *Davis* (1952) 14 WACA 46.

(8) Okoroji v *Ezumah* [1961] 1 All NLR 183.

APPEAL against the decision of the Supreme Court (High Court), refusing to, inter alia, award special damages for breach of contract. The facts are sufficiently stated in the judgment of Olatawura JA.

S B Semega-Janneh for the appellant.

Alhaji A M Drameh for the respondent.

OLATAWURA JA. The only issue raised in this appeal is the question of quantum of damages. This is covered by the two grounds of appeal which read thus:

"1 The learned judge was wrong in refusing to award special damages as claimed by the plaintiff.

(2) The learned judge's award of damages is inadequate under the circumstances."

From these two grounds, it would appear that the appeal is against part of the judgment and therefore the notice of appeal filed is not in accordance with Civil Form 1 under rule 12 of The Gambia Court of Appeal Rules, Cap 6:02. It cannot be over-emphasised that the rules of this court are not made for fun. There has been too much laxity on the part of counsel generally to comply with and apply the rules laid down. As was decided in *Fouche* v *Braid* (1913) 2 NLR 102 the rules of procedure regulating appeals are intended to be strictly complied with and it is only in special circumstances and after careful scrutiny will the Court of Appeal afford relief where there has been a departure from the rules. Our duty is not to encourage or facilitate appeals but it is our manifest duty to insist on due diligence by appellants and their legal advisers. The provision in rule 12(1) of The Gambia Court of Appeal Rules is for mandatory compliance; it gives no discretion to the appellant or his counsel to do what he likes. The proper thing was to have struck out the notice of appeal filed as an infringement of this rule. I can only hope those appealing to this court will bear this in mind and comply with the provision in rule 11 of the Court of Appeal Rules which states: "The forms set out in Appendices A and C to these rules, or forms as near thereto as circumstances permit, *shall* be used

in all cases to which such forms are applicable." (The emphasis is mine.)

Now to the substance and merits of the appeal. In paragraphs (11A) and (11B) of the amended statement of the claim, the pleadings of the appellant (hereafter called the plaintiff) are as follows:

"(11A) As a result of the defendants said act and omission the plaintiff has suffered loss.

PARTICULARS OF SPECIAL DAMAGE

(i) transport cost within France 1,200 FF or D1,285

(ii) transport from Paris to Antwerp 250,000 CFA or D5,350

(iii) personal air fares to Europe and back D25,295

(iv) hotel bills 16,800 FF or D7,276.00 TOTAL = D39,206.00

(11B) Loss of earnings at D3,000 per diem from 23 June 1986 to payment. And the plaintiff claims:

(i) the sum of D94,000 being the total value of the said trucks and trailers;

(ii) the sum of D39,206 special damages;

(iii) loss of earnings at D3,000 per diem from 23 June 1986 to payment of the claim at above;

(iv) any further or other relief as the court deems just; and

(v) costs."

In his judgment dated 2 March 1989, the learned trial judge N'Jie J when dealing with damages said:

"…I will deal first with the claim for special damage. *Apart from the fact that this has not been proved, as it is so required, I am unable to presume fairly that this was within the contemplation of the parties* at the time of entering into the contract assuming there was a contract." (The emphasis is mine).

Mr Janneh, the learned counsel for the plaintiff, submitted there was a contract between the parties, and that there was the tort of conversion but that the learned trial judge concentrated on the breach of contract. Counsel referred to particulars of special damage and loss of earnings as pleaded in paragraph 11 of the amended statement of claim. It was his submission that damages should be granted whether the vehicle was used for "profit yielding purposes or not." He cited *McGregor on Damages* (13th ed), para 36 at page 29 under the rubric: "Loss of use, loss of profits, interest." He again referred to paragraph 945, page 645 of the same edition and submitted that "the trucks were bought for the appellants for profit-making purposes." He finally asked for the reliefs claimed.

In his reply, Alhaji Drameh, the learned counsel for the defendant, submitted that the judge was right in his conclusion that the damages claimed were not pleaded and proved, since the pleadings referred to loss of earnings, the plaintiff company cannot be awarded loss of use which it did not plead. Learned counsel then submitted that since special damages must be strictly proved; it is difficult for the plaintiff to be awarded anything in respect of paragraph (11A) (iii) and (iv) of the amended statement of claim since no receipts were tendered. Furthermore, counsel further submitted there was no evidence that the managing director of the plaintiff company travelled to Europe as claimed in the amended statement of claim. On general damages, learned counsel submitted that there was no evidence of what profit the plaintiff company should have made. Mr Janneh, in reply, drew attention of the court to the evidence of the managing director of the plaintiff company that he went to France and bought two trucks and their trailers.

I have earlier set out in this judgment paragraph 11 of the statement of the amended statement of claim where these claims were itemised. That special damages must be proved strictly is indubitably the law: see *Jarber* v *Basma* 14 WACA 140; *Amos Bros and Co Ltd* v *British West African Corporation Ltd* 14 WACA 220; and *Agunwa* v *Onukwue* [1962] 1 All NLR 537. Before a plaintiff can give evidence of the special damages incurred, it must be pleaded. If not pleaded, evidence led should be rejected; but if admitted, even without objection, it should be expunged from the record as it goes to no issue. General damages are such that will follow the event once the plaintiff succeeds in establishing the liability of the defendants.

What was the evidence led in support of these two claims: air fares and hotel bills? Reliance is placed on the *ipse dixit* of the managing

director of the plaintiff company when in his evidence-in-chief he said: "In 1985 I went to France." Did he travel by sea or by air? If by air as a result of which he is claiming the fare, where is the evidence that he travelled by air? The best evidence is the stump of this ticket. That he went to France is not conclusive that he stayed in any hotel. He might have stayed with a friend. If he stayed in any hotel where are the hotel bills and the receipts issued after the settlement of the bill? He was unable to produce any evidence that he stayed in any hotel. If he produced ordinarily the bills, there may be a presumption that he paid the bills. The plaintiff company ought to have pleaded when its managing director travelled to France; where he stayed and when he returned. The absence of the pleading together with the evidence is fatal to its claim. The defendant denied the plaintiff's entitlement; the onus is therefore on the plaintiff to discharge the burden of proof.

The difference between general damages and special damages must first of all be shown in the pleadings. In the case of general damages, the plaintiff can simply claim general damages but the position is clearly different in the case of special damages where the plaintiff is expected to plead the facts leading to the claim and must at the trial prove those facts: see paragraphs 1496-1508 of *McGregor on Damages* (14th ed). The reason why it should be pleaded is emphasised by Lord Donovan in *Perestrello* v *United Paint Co* [1969] 1WLR 570, CA as follows:

"not because the nature of the loss is necessarily unusual, but because a plaintiff who has the advantage of being able to base his claim upon a *precise calculation* must give the defendant access to the facts which make such calculation possible." (The emphasis is mine.) The reason for this notice is based on fairness to the defendant. The appeal on special damages in so far as paragraph (11A) (iii) and (iv) of the amended statement of claim is concerned therefore fails. I now come to the alternative relief sought. The plaintiff asks "that proper and adequate general damages be awarded over and above what was awarded by the lower court." Before the Court of Appeal can interfere in the award of general damages, the appellant must show: (i) that the trial judge acted on a wrong principle of law; and (ii) that the award is an erroneous estimate of the damages suffered or claimed. This principle was well illustrated in *Flint* v *Lovell* [1935] 1 KB 354, CA cited with approval in *Oduro* v *Davis* (1952) 14 WACA 46 at 48. See also *Okoroji* v *Ezumah* [1961] 1 All NLR 183. The learned trial judge had awarded damages of D100,635.00 "limited to the cost price of the vehicles and charges already paid by him in connection with the transport of the goods within France and from Paris to Antwerp." In

his summary of findings, the relevant findings against the first defendant, the respondent to this appeal is: "The first defendants (sic) (ie the respondent to this appeal) were in breach of agreement by causing the goods to be shipped on board a vessel other than the *Bintang Bolong*." The judge had earlier found that there was no contract between the plaintiff and Anglian, but yet concluded that "Anglian had no right to sell the cargo or authorise its sale." In my view, unless there is an appeal against the finding more so when before the Master of the High Court, the first defendant moved to join Anglian Shipping Co Ltd as a defendant and the application was granted; that remains the finding of the court. As at that stage, the writ and the statement of claim should have been amended. When on 9 July 1987, Mr Janneh moved under Order 24, r 1 to amend the statement of claim, the plaintiff appellant still did not consider it necessary to join "Anglian Shipping Co Ltd" as the second defendant. The submission on tort of conversion without the second defendant or an amendment of the writ appears to me misconceived. A plaintiff can only succeed on the cause of action filed and pleaded, and this the plaintiff failed to do. The action was a breach of contract; and plaintiff company did not plead any facts on conversion. If because of the tort of conversion, the learned counsel thought the damages ought to have been increased or re-assessed, I regret the procedure which includes the amendment of the writ and the pleading has been ignored or at least brushed aside.

The learned judge was not even addressed on the issues of conversion in the lower court. It is worthwhile to remind counsel again of the use of pleadings. A writ of summons enables the defendant to know the claim or claims against him. Order 2, r 2(1) states:

"It (ie the writ of summons) shall contain the name and place of abode of the plaintiff and of the defendant so far as they can be ascertained, *it shall state briefly and clearly the subject matter of the claim and the relief sought for…"* (The emphasis is mine.)

When the plaintiff settles his pleadings, he must comply with Order 23, r 6 which states:

"Where the plaintiff seeks relief in respect of *several distinct claims or causes of complaint founded upon separate and distinct facts,* they shall be stated, as far as may be, separately and distinctly. And the same rule shall apply where the defendant relies upon several distinct grounds of set-off or counter-claim founded upon separate and distinct facts." (The emphasis is mine.) An appeal is decided on the issues

properly raised and canvassed before the lower court. To allow an appeal on matters not canvassed or raised in the lower court and in respect of which the judge had no opportunity to make any pronouncement, is to give this court an original jurisdiction in matters not provided for by the Court of Appeal Act, Cap 6:02 or the Constitution 1970.

On the reasons for interference by the court and which reasons I have stated above, I am of the firm view that this is not a case in which we can interfere with the award of damages. Consequently this appeal fails and is dismissed. By agreement no order as to costs.

ANIN JA. I agree.

DAVIES JA. I also agree.

Appeal dismissed.

SYBB

CHAM v THE STATE

COURT OF APPEAL

(Criminal appeal No 14/92)

28 May 1993

ANIN P, ABDULLAHI JA AND OMOSUN CJ

Criminal law and procedure-Murder-Self-defence-Consideration by trial judge-Proper test-Subjective test and not objective test now the proper test applicable.

Held, *unanimously allowing the appeal against conviction and sentence to death for murder*: the trial judge made a grave error, based solely on an extra-judicial document, the confession statement made to the police by the appellant, in ignoring the sworn and unchallenged evidence of the appellant and in giving a cursory consideration of the defence of self-defence raised by the appellant. In doing so, the trial judge applied the objective test which is the wrong test, instead of the subjective test, which is now the right test. *Beckford* v *R* [1987] 3 All ER 425 cited.

Cases referred to:

(1) R v Abraham [1973] 3 All ER 694.

(2) *Beckford* v *R* [1987] 3 All ER 425.

(3) *Ikpi* v *The State* [1976] 10 NSCC 730.

APPEAL against conviction and sentence to death for murder by the trial High Court. The facts are sufficiently stated in the judgment of the court delivered by Abdullahi JA.

A A B Gaye (with him *O Njie* and *Ms M A Samba*) for the appellant.

Onadeko, DPP (with him *Ms A Coker* and *Ms Haddijatou Kah*) for the State.

ABDULLAHI JA *delivered the judgment of the court*. On Monday, 24 May 1993, this appeal was heard. It was allowed. The appellant

was set free. Fuller reasons were to be given at a later date. The following are the fuller reasons for the judgment.

The appellant was charged with the offence of murder contrary to section 187 of the Criminal Code, Cap 10 of the Laws of The Gambia. He was tried. He was found guilty of the offence charged and was accordingly convicted and sentenced to death. The appellant was not satisfied with the conviction and sentence and he appealed to this court.

A total number of nine grounds of appeal were filed. Some of the grounds were abandoned at the hearing of the appeal, namely, grounds (5), (6) and (7). They were accordingly struck out The facts of the case are straightforward. There was a naming ceremony which the appellant and some other people attended including one Kebba Njie, now deceased. Late in the evening, a disagreement arose between the appellant and the deceased over a girl. When the dispute was getting more heated up with an invitation from the deceased to fight, some people present intervened and initiated some form of settlement. Somewhere along the line, the appellant and the deceased had an occasion to be all by themselves away from the crowd. The next thing that came to light was that the appellant had stabbed the deceased with a knife. The deceased was taken to the hospital where he eventually died. A post mortem examination was conducted and a certificate was issued, after that the deceased was buried. In the course of the trial, the prosecution called witnesses comprising people who were at the naming ceremony, but not exactly eyewitnesses to the stabbing incident; some police officers, a medical doctor, who performed the post mortem examination, and a mortuary attendant.

The appellant gave evidence on oath and was cross-examined. At the end of the day, the learned trial judge made the following findings at page 35, last paragraph of the record of appeal:

"On the defence of self-defence, the accused made no mention in exhibit A of his belief that Kebba Njie would kill him. He said he was cut with a razor blade which he had not seen. The first prosecution witness saw no injury on the accused nor did any other witness. Although the accused stood by a bleeding Kebba Njie he (accused) did not say anything. In answer to a question from the court, the accused described the razor about two inches, hardly the sort of thing one would throw casually into one's pocket and take out with facility. From the evidence as a whole, I am not satisfied that the accused has established a defence of self-defence. He was the aggressor and had no

cause to entertain any injury on him before or at the time he stabbed Kebba with a knife. I find the accused guilty of the murder of Kebba Njie and I convicted him."

Learned counsel for the appellant started his attack on the findings and conclusions reached by the trial court as per ground (1) of the grounds of appeal which reads as follows:

"The learned trial judge erred in law in holding that the appellant's stabbing of the deceased was unlawful before considering the issue of self-defence and, in effect, foreclosed his mind to the appellant's defence."

Learned counsel submitted that the learned trial judge prejudged the issue of self-defence when he went ahead to hold that the stabbing was unlawful without giving the issue any serious consideration. He contended that a plea of self-defence means not guilty of the offence. He cited the case of *R* v *Abraham* [1973] 3 All ER 694 in support. Learned counsel contended further that the prosecution did not disprove that the stabbing was in self-defence, which would in effect make it lawful, since using reasonable force to defend oneself is not an unlawful act. In fact it is fair to say that the line of argument adopted by the learned counsel for the appellant in ground (1) spilled over to grounds (2), (3) and (4). They all dealt with issue of self-defence not considered by the trial court.

Learned counsel for the appellant continued to submit that the duty placed on the appellant was to raise his defence, which in this case had been raised before and during the trial. It then became the duty of the prosecution to negative it; after that had been done, it then became the duty of the learned trial judge to look for proof beyond reasonable doubt, since it was a criminal case. In this case, however, not only had the prosecution failed to negative the defence of self-defence; the learned trial judge also failed to give any serious consideration to the defence of self-defence raised by the appellant; rather the learned judge considered irrelevant matters not in evidence. Counsel further contended that the learned judge confused matters when at a certain stage of his judgment he applied the subjective test correctly but then changed it to the objective test to reach his conclusion. Learned counsel contended finally on this issue that, worst of all, the learned trial judge based his reasoning on an extra judicial document, exhibit A, ignoring totally the sworn and unchallenged evidence of the appellant before the court. This had greatly prejudiced the case of the

appellant and inevitably caused the learned judge to reach a wrong conclusion.

The exhibit A referred to by learned counsel and relied upon by the learned trial judge is the voluntary statement made by the appellant to the police. In a portion of this statement, the appellant gave out a background story about the dispute between him and the deceased and, among other things, stated as follows:

"On our return, I told Fatou to go to bed I am coming. As she was doing so Kebba called me and said. `I am talking with her, why are you telling her to go to bed?' I answered him that "if you don't know, you ask, she is my girl friend and you are a friend of my brother leave her." That is what hurt him and he wanted to fight me. He told me to go and wear a short trouser for us to fight. I told him that I am not going to fight, but he did not answer me and he went to their home and wore a short trouser and came with a razor blade and met me at where I was standing at our compound gate. He said to me let us go for what I told you, let us go and see each other. My elder brother Lamin said no let me not go and I decided to stay. Kebba himself told my brother that he wants to see me privately. There I agreed and we went up to a junction where he produced the blade and hurt me at my left ear and said I told you, we must fight today. There I also took out my knife and stabbed him at the left side of his chest …"

In the course of the trial, the appellant gave a copious account of all that happened on oath. He was subjected to a rigorous cross-examination where he gave out more details of what actually happened. Some of the relevant portions of the evidence go like this:

"… Kebba Njie moved to the corner of the compound about sixteen feet from the gate. Kebba Njie took his hand out of his pocket and made a cut on my left ear with a razor … I did not see the razor before the cut. I felt pain from the cut. Kebba Njie was older, stronger and taller. I cannot tell at what time all this happened but it was late at night … When I had the cut and felt the pain, I thought of the pain and death. I thought Kebba Njie would kill me. Kebba Njie said that he had told me that we must fight. I took a knife and stabbed him… I stabbed Kebba Njie because I believe he would kill me."

Under cross-examination, the appellant stated as follows:

"I always carry my knife. When I took out my knife the deceased was rushing towards me. After he cut my ear he took a step backwards.

The deceased and I were facing each other immediately he cut my ear."

This is the evidence on oath given by the appellant which the learned trial judge ignored completely and merely made a cursory comment on exhibit A, a portion of which I had quoted earlier.

In her reply to the above mentioned submissions, Miss Coker started gallantly but in vain to submit that the prosecution is not required to lead evidence to negative defence of self-defence raised by the appellant, and that in any case, there are pieces of evidence that, in fact, did negative the defence in this case. She referred to the evidence of the first and fifth prosecution witnesses but on a second thought, as a result of quick thinking, she abandoned that line of argument and admirably conceded that the learned trial judge, in fact, did not advert his mind to the evidence of self-defence given by the appellant and there was nowhere in the record where he considered it and made a finding.

It is clear from the points raised by the learned counsel for appellant discussed above and the stance finally taken by Miss Coker that this appeal is on a firm ground. It is clear that the learned trial judge made a grave error, based solely on an extra-judicial document, a confession statement made by the appellant, in ignoring the sworn and unchallenged evidence of the appellant before the court and in giving a cursory consideration of the defence of self-defence raised by the appellant. In doing so, he applied the objective test which, in effect, was a wrong test. He should have applied the subjective test. This is now the law: see *Beckford* v *R* [1987] 3 All ER 425.

Before I conclude this judgment, it is worthy to consider briefly the issue raised in ground (9). The issue here is lack of proper identification of the corpse of the deceased to the doctor, the sixth prosecution witness, who performed the post mortem examination. It was contended on behalf of the appellant that the doctor did not identify the body on which he performed the post mortem examination in respect of which he issued a certificate, exhibit D; in which the type of injury and the cause of death, in the opinion of the doctor, were stated.

Even though this issue is a very important issue, I do not intend to delve into it in detail. All I need to say is that it is always desirable to have a proper identification of a corpse, when a post mortem examination is to be carried out. This becomes even more necessary,

where the death is shrouded with some mysteries. In cases where the facts are clear and not in dispute as to the person killed and the probable cause of death as in this case, trial court does not normally bother so much with a medical certificate to reach its conclusion, although naturally great weight ought to be attached to such certificate whenever it is necessary to do so: see *Ikpi* v *The State* (1976) 10 NSCC 730.

Having said that, it is our obvious conclusion that this appeal has merit and it deserves to succeed. It is allowed. The decision of the trial court cannot be allowed to stand. The conviction is hereby quashed and the sentence of death is set aside. The appellant is set free forthwith.

Appeal against conviction and

sentence for murder allowed.

SYBB

GAMBIA PRODUCE MARKETING BOARD v KASHIM (GARNISHEE)

SUPREME COURT (HIGH COURT), BANJUL

(Civil Suit No 3/86 G No 1)

27 March 1991

AGIDEE J

Courts-Master of the High Court-Jurisdiction-Extent of-Powers and duties laid down in Courts (Amendment) Act, 1974 as amended by Courts (Amendment) Act, 1986-Master vested with jurisdiction to only perform all acts as may be required by law to do and such acts as may be required by a judge-Master having jurisdiction which judge has in hearing certain type of matters in chambers-Order 24A, r 2, Rules of the Supreme Court, Sched II, Cap 6:01-Courts (Amendment) Act 1974-Courts Amendment Act, 1986.

Practice and procedure-Judgment or order -Default of defence-Place of delivery-Default judgment given in chambers proper under Order 24A, r 1, as distinct from judgment given after trial under Order 34, r 3 to be given in open court as required by Order 40, r 1-Orders 24A, r 1, 34, r 3 and 40, r 1, Rules of the Supreme Court, Sched II, Cap 6:01.

Courts-Jurisdiction-Void judgment or order-Setting aside-Judgment or order delivered by competent court valid until set aside by appellate court vested with jurisdiction.

Held, *granting the application for a garnishee order:* (1) under the powers and duties of the Master of the Supreme Court as spelt out in the Courts (Amendment) Act, 1974 and as further amended by the Courts (Amendment) Act, 1986, the Master can only perform all such acts as he may be required by law to do and such acts as may be required by a judge. The Master therefore has the jurisdiction which a judge has in hearing certain type of matters in chambers. Thus a matter brought pursuant to Order 24A, r 2 of the Rules of the Supreme Court (High Court), Sched II, Cap 6:01, can be heard in chambers by the Master. Consequently, where a matter which should have been dealt with in open court is dealt with in chambers by the Master, proceedings of such nature are a nullity. *Oviasu* v *Oviasu* [1973] 2 SC 315 and *Macpherson* v *Macpherson* [1936] AC 177, PC cited.

(2) Judgment given by reason of Order 24A, r 1 is judgment given for a defendant's failure to file a defence as opposed to judgment given pursuant to Order 34, r 3 of the Rules of the Supreme Court, ie a judgment given after a trial. It is in respect of such judgment which, under Order 40, r 1, must be delivered in open court unless the court otherwise directs and not (as wrongly contended by counsel for the garnishee) in respect of judgment given under Order 24A, r 2.

(3) A judgment delivered by a competent court remains valid and must be obeyed by the parties affected until set aside by a competent court, ie an appellate court vested with jurisdiction to do so. In the instant case, it is too late to challenge as a nullity the default judgment delivered in 1986 by the Master of the Supreme Court and relied upon by the judgment creditor. *Orewere* v *Abieghe* (1937) 9 &10 SC 1 cited.

[**Editorial Note**. Jurisdiction and powers of the Master of the Supreme Court (High Court) as provided in the 1974 and 1986 Courts Amendments Act, has been consolidated in section 6A of the Courts Act, Cap 6:01.]

Cases referred to:

(1) Badjie v *Ass Mboob*, Court of Appeal, Case No 29/88, November 1988, unreported.

(2) Crisby v *Jubwe* (1954) 14 WACA 647.

(3) Oviasu v *Oviasu* (1973) 2 SC 315.

(4) Macpherson v *Macpherson* [1936] AC 177, PC.

(5) Orewere v *Abieghe* (1937) 9 &10 SC 1.

APPLICATION for a garnishee order brought under Order 44, r 11(1) of the Rules of the Supreme Court, Sched II, Cap 6:01. The facts are sufficiently stated in the ruling of the court.

GBS Janneh for the applicant.

AMNO Darboe for the garnishee.

AGIDEE J. The application before the court is an *ex parte* one brought under garnishee proceedings pursuant to Order 44, r 11(1) of the Rules of the Supreme Court, Sched II, Cap 6:01.

Briefly, the facts leading to this application are that on 14 April 1986, judgment was given in favour of the plaintiff-applicant in this suit. By the said judgment, the defendant, one Farid Abourizk, was ordered to be ejected from the premises he was occupying and was also ordered to pay mesne profits at the rate of D2,500 per month from 1 November 1985 to the date of delivery of the possession of the premises and to costs assessed at D500. The defendant delivered up possession of the premises at the end of July 1986, ie nine months thereafter. As a result, the said defendant is now owing the plaintiff-applicant on the judgment, the sum of D22,500 and the D500 costs awarded respectively.

The certified true copy of the said judgment is annexed to the plaintiff- applicant's affidavit as exhibit GJ. The garnishee proceedings brought under the said Order 44, r 11(1), against one Ali Kashim was filed on 20 August 1990. It is for the court to make the following orders:

"(i) an order that all the debts owing or accruing from Ali Kashim of Brikama, Western Division, The Gambia, to the defendant, be attached to answer the judgment and order together with costs of these proceedings; and

(ii) an order that the said Ali Kashim appear before the court to show cause why he should not pay to the plaintiff-applicant the debt due to it from the defendant or so much therefore as may be sufficient to satisfy the judgment/order together with the costs aforesaid."

The said motion was argued on 17 December 1990, and both orders were granted as prayed on the motion paper. On the same day, the court made an order that the *ex parte* motion and the orders made to be served on the aforesaid Ali Kashim forthwith. The return date was put on 10 January 1991 when the motion on notice would be heard *inter partes*.

On the said 10 January 1991, the matter was adjourned to 23 January 1991. After two more adjournments, the motion was heard on 5 March 1991. Mr AMNO Darboe (with him Mr Baba Aziz) appeared for the garnishee.

It is pertinent to note that the judgment of 14 April 1986 mentioned earlier was delivered by the Master of the Supreme Court (High Court). According to counsel for the garnishee, it was delivered in chambers. On the contrary, the plaintiff-applicant's counsel stated that there is no indication of this in the said judgment.

The submissions of counsel for the garnishee are that it is the duty of the garnishee to show why he ought not to make payments to the garnishor; that the garnishee is not relying on any factual matter to absolve him from making any payment to the garnishor; and that reliance is placed on the law that the garnishee cannot be called to make any payment to the garnishor when the garnishor's claim to such right is based on the judgment dated 14 April 1986. Counsel also referred to Order 40, r 1 of the Rules of the Supreme Court and submitted that the judgment was entered, not in open court, but in chambers and that based upon this premise, the judgment is a nullity. He referred also to the case of *Badjie* v *Ass MBoob*, November 1988, Case No 29/88 of The Gambia Court of Appeal.

Counsel further submitted that the questions for the court to determine are:

(i) has the Master jurisdiction to enter judgment under order 24A, r 2 of the Rules of the Supreme Court; and

(ii) if the Master has such a jurisdiction, should such a jurisdiction be exercised in chambers or in open court?

Counsel therefore submitted that the powers conferred on the court by Order 24A, are powers exercisable by the judge and certainly not by the Master. That there is no known authority as far as counsel is aware, which confers jurisdiction of the Master in England or the Master in this country to enter judgment in favour of a plaintiff by reason of the fact that a defendant has defaulted in appearing in court. Counsel also submitted that for the court to hold that the garnishee is not a party to the judgment is misconceived in its entirety for the following reasons, namely, that the aforesaid judgment is now being used by the garnishor against the garnishee and if the garnishee can show that the judgment on which the garnishor is relying on is not valid, then the garnishee cannot be made to satisfy that judgment. He also submitted that if it is argued by the applicant that the garnishee has no *locus standi*, then why should he be called upon to show cause and why should he (the applicant) seek the order of this court for the garnishee to pay the judgment debt? Counsel therefore urged the court

not to call upon the garnishee to satisfy the judgment dated 14 April 1986 or any part thereof since the said judgment is invalid and, indeed, a nullity.

The gist of the submission of the reply of counsel for the applicant is that the purpose of the application is to enforce the judgment obtained by the plaintiff-applicant against the defendant, Farid Abourizk, and not against the garnishee; that counsel for the garnishee had clearly misconceived the second leg of the application; that the whole purpose of affording the garnishee the opportunity to show cause, is to prevent a situation whereby enforcement of the judgment is not detrimental against the garnishee without first given him the opportunity to protest; that the garnishee does not deny owing the debt to the judgment/debtor and the garnishee is not aware of the process leading to the judgment and technically, has no right to argue that the judgment is a nullity; that the garnishee does not deny owing the debt to the judgment-debtor and that assuming the judgment is a nullity, the garnishee's interest is not a nullity; that a judgment is valid until reversed by a court of competent jurisdiction and that since the instant judgment has not been reversed, it is still subsisting; that the only person who could have reversed the judgment was the defendant, Farid Abourizk, who stood to be adversely affected by the judgment; and that the Master has jurisdiction to give judgment in chambers in this type of cases. Counsel also referred to Order 34, r 3 and submitted that, that was the issue considered by the Court of Appeal in its judgment in the case of *Badjie* v *Ass MBoob* (supra) and that this is different in all aspects from the operation of Order 24A, r 11 by which the applicant obtained judgment in default of filing a defence. Counsel therefore submitted that the said case of *Badjie* v *Ass MBoob* (supra) does not support the garnishee counsel's argument; that on the contrary, it supports the garnishor's position. Finally, counsel for the plaintiff-applicant prayed the court to order the garnishee to pay the garnishor the judgment debt being claimed from Farid Abourizk. The said judgment dated 14 April 1986, which is the bone of contention, was given in favour of the plaintiff for the failure of the defendant to file a defence. The motion was brought pursuant to Order 24A, r 2 of the Rules of the Supreme Court. The failure to file a defence, no doubt, implies the acceptance of the facts of the statement of claim and also goes to show that the defendant has no defence to the claim. For the avoidance of doubt, the said Order 24A, r 2 of the Rules of the Supreme Court states: "If the defendant, having been ordered by Court to file a defence, does not do so within the time allowed by the order, the plaintiff may, at the expiration of the time, apply by motion to the Court to enter Judgment for him with costs upon his claim for want of

defence and on the hearing of such application the court may, if no defence shall have been delivered, enter judgment accordingly or make such other order or such term as may seem just …"

In contrast, Order 34, r 3, of the Rules of the Supreme Court, Sched II, states thus:

"…if the plaintiff appears and the defendant does not appear or sufficiently excuse his absence, or neglects to answer when duly called, the Court may, upon proof of service of the summons, proceed to hear the cause and give judgment on the evidence adduced by the plaintiff, or may postpone the hearing the cause and direct notice of such postponement to be given to the defendant."

See also, the case of *Crisby* v *Jubwe* (1954) 14 WACA 647. The difference in both rules of court is that while judgment is given in the former by reason of the defendant's failure to file a defence within the prescribed time, the latter is judgment in default of appearance of the defendant and this involves a trial. The former does not. The then Master of the Supreme Court, Hon WG Grante, gave the said judgment of 14 April 1986. It has been contended by counsel for the garnishee that the judgment was given in chambers and that since the said Master cannot hear a motion pursuant to Order 24A, r 2 in chambers, the aforesaid judgment given on 14 April 1986 is a nullity. Counsel went further to add that by Order 40, r 1 of the Rules of the Supreme Court such judgments are to be given in open court. The said Order states that: "The decision or judgment in any suit shall be delivered in open court, unless the Court otherwise directs." In reply, counsel for the applicant also argued that if he (the Master) did not give the judgment in chambers, he must have directed himself accordingly and submitted that the Master has jurisdiction to give judgment in chambers in this type of cases.

Before proceeding any further, I am of the view that it would be desirable to state here the jurisdiction and the powers of the office of the Master of the Supreme Court (High Court). The powers and duties of the Master are clearly spelt out in the Courts (Amendment) Act, 1974 as further amended by the Courts (Amendment) Act, 1986 which clearly define the duties and powers of the Master as follows:

(a) to transact all such business and exercise all such authority and jurisdiction as may be transacted and exercised by a judge in chambers;

(b) have the powers and exercise the jurisdiction of a Magistrate of The First Class; and

(c) without prejudice to the provisions of paragraph (a) above perform all such acts as he may be required by law to do and such acts as he may be required by a judge to do.

It is therefore clear from paragraph (c) above, that a Master can only perform all such acts as he may be required by law to do and such acts as he may be required by a judge to do. The Master therefore has the jurisdiction which a judge has in hearing certain type of matters in chambers. Consequently, where a matter which should have been dealt with in open court is dealt with in chambers by the Master, proceedings of such matters are a nullity. The law is that if a cause is wrongly heard in chambers, the whole proceedings may, on appeal, be declared a nullity: see *Oviasu* v *Oviasu* (1973) 2 SC 315. See also the case of *Macpherson* v *Macpherso*n [1936] AC 177, PC.

The next question for the court to determine is whether or not a matter brought pursuant to Order 24, r 2, RSC, Sched II, can be heard in chambers by the Master. I am of the view that he can. As pointed out by counsel for the applicant, judgment given by reason of Order 24A, r 2 RSC, Sched II, is judgment given for a defendant's failure to file a defence as opposed to judgment given pursuant to Order 34, r 3 of Rules of the Supreme Court, Sched II which is judgment given after a trial. It is in respect of such judgment which Order 40, r 1, Sch II, RSC is talking about and not in respect of judgment obtained given under Order 24A, r 2, Sch II, RSC.

Garnishee's counsel is contending that the said judgment of 14 April 1986 is a nullity because hearing took place in chambers. Based on the premise of the case of *Oviasu* v *Oviasu* (supra), it is my view that garnishee's counsel ought to have taken steps to set aside the said judgment of 14 April 1986 for the appellate court to declare the judgment a nullity. I agree with the applicant's counsel that since the judgment has not yet been reversed by an appellate court, it is therefore still subsisting. I would accordingly hold that the judgment given by the Master on 14 April 1986 is valid and subsisting.

The law is that once the judgment of a competent court has been delivered, it remains valid and must be obeyed by the parties affected until set aside by a competent court, usually a court with power to take appeals from the court that has pronounced the judgment: see *Orewere*

v *Abieghe* (1937) 9 & 10 SC 1. In my view, I hold that it is too late in the day to start challenging the validity of the judgment aforesaid.

I am dismayed that garnishee's counsel had done nothing about the said judgment of 14 April 1986 since 1986 when the judgment was delivered. Accordingly, I hereby order that the garnishee to pay the garnishor the judgment debt being claimed from one Farid Abourizk, the defendant. The garnishee is hereby ordered to pay costs assessed at D500.

Application for garnishee

order granted.

SYBB

CENTRAL BANK OF THE GAMBIA v CONTINENT BANK LTD

COURT OF APPEAL

(Misc Appeal NO 1/91)

12 August 1991

ANIN JA (sitting as single justice of the Court of Appeal)

Courts-Court of Appeal-Appellate jurisdiction-Interlocutory decisions of High Court-Would- be appellant entitled to apply to Court of Appeal for leave to appeal against interlocutory decision of High Court under section 96(1)(c) of Constitution, 1970-Proper construction of the words "such other cases as may be prescribed by Parliament" in section 96 (1)(c)-Phrase "but not otherwise" in Cap 6:02, s 3(b) inconsistent with constitutional provision in section 96 (1)(c)-Constitution, 1970, s 96 (1)(c)-The Gambia Court of Appeal Act, Cap 6:02, s 3(b).

Courts- Judgment or order-Final or interlocutory-Test for-Whether or not judgment or order finally disposing of rights of parties.

Practice and procedure-Appeal-Enlargement of time to appeal-Application for enlargement of time for leave to appeal from interlocutory decision by High Court to be made in first instance to trial court-Court of Appeal entitled to consider application after prior refusal by trial High Court- The Gambia Court of Appeal Rules, Cap 6:02, rr 14 (1) and 32.

It is provided by section 96 (1) *(a),(b)* and *(c)* of the Constitution of The Gambia (No 1 of 1970), that:

"96(1) Subject to the provisions of section 70 (c) of this Constitution, an appeal shall lie as of right to the Court of Appeal from any decision given by the Supreme Court (now High Court) in the following cases …

(a) final decisions in any civil proceedings where the matter in dispute in the appeal is above the value of five hundred dalasis….

(b) final decisions in proceedings for dissolution or nullity of marriage …

(c) such other cases as may be prescribed by Parliament." It is also provided by section 3(b) of the Gambia Court of Appeal Act, Cap 6:02 that:

"3 For the purposes of paragraph (c) of subsection (2) of section 95 of the Constitution (misprint for section 96 (1) (c) of the 1970 Constitution), an appeal shall lie to the Court of Appeal from ….

(b) all interlocutory orders and decisions made in the court of any suit or matter by leave of the Judge making the order, but not otherwise …"

It is also provided by rules 13 and 14 of The Gambia Court of Appeal Rules, Cap 6:02 that:

"13 (1) Where an appeal lies by leave only any person desiring to appeal shall apply to the Court by notice on motion for leave within fourteen days from the date of the decision against which leave to appeal is sought.

(2) If leave is granted the appellant shall file a notice of appeal as provided by rule 12 of these rules within fourteen days from the grant of leave.

14. (1) Subject to any provision which may be made by the legislature, no appeal shall be brought after the expiration of fourteen days in the case of an appeal against an interlocutory decision or of three months in the case of an appeal against a final decision, unless the court below or the Court shall enlarge the time.

(2) The prescribed period for appeal shall be calculated from the date of the decision appealed against:

Provided that where there is no appeal as of right the prescribed period shall be calculated from the date upon which leave to appeal is granted.

(3) An appeal shall be deemed to have been brought when the notice of appeal has been filed in the Registry of the court below.

(4) No application for enlargement of time in which to appeal shall be made after the expiration of one month from the expiration of the time prescribed within which an appeal may be brought. Every such application shall be supported by an affidavit setting forth good and

substantial reasons for the application and by grounds of appeal which prima facie show good cause for leave to be granted. When time is so enlarged a copy of the order granting such enlargement shall be annexed to the notice of appeal."

Held, *dismissing the preliminary objection to the application for special leave to appeal to the Court of Appeal from the interlocutory decision of the High Court*: (1) section 96(1)*(c)* of the Constitution of The Gambia (No 1 of 1970), has conferred on a would-be appellant, the right to apply for leave to appeal against an interlocutory decision by the High Court. The words in subsection (1)*(c)* of section 96, namely "such other cases as may be prescribed by Parliament" are not to be construed as meaningless or creating unsubstantial right. On the contrary, the words must be given a liberal, purposeful and generous construction in order to advance the important remedy of appeal which they are obviously intended to provide. Consequently the phrase "but not otherwise" occurring in section 3*(b)* of The Gambia Court of Appeal Act, Cap 6:02 is inconsistent with the constitutional provision in section 96(1)*(c*) and must be deemed to have been superceded or overruled. *Attorney-General of The Gambia* v *Jobe* (1985) LRC (Const) 556, PC cited.

(2)The test for determining "final" order or decision from an "interlocutory" decision or order is: if the judgment or order as finally made disposes of the rights of the parties, it is a final order; if it does not, then it is an interlocutory order. *State Gold Mining Corporation* v *Sissala* [1971] 1 GLR 359, CA and *Bozzen* v *Altrincham Urban District Council* [1903] 1 KB 547 at 548 and *Gilbert* v *Endean* [1975] 9 Ch D 259, CA cited.

(3) By virtue of rules 14(1) and 32 of The Gambia Court of Appeal Rules, a motion for enlargement of time for leave to appeal from an interlocutory decision must be made in the first instance to the High Court or court below; if that court refuses it, as in the instant case, then it should be made to the Court of Appeal.

Cases referred to:

(1) *Lartey* v *Baku II* [1980] GLR 257, CA.

(2) *Moore* v *Tayee* [1934] 2 WACA 43.

(3) *Short* v *Attorney-General of Sierra Leone* [1964] 1 All ER 125; [1963] 1 WLR 1427.

(4) *Nye* v *Nye* [1967] GLR 76, CA (full bench).

(5) *Attorney-General of The Gambia* v *Jobe* [1985] L R C (Const) 556, PC.

(6) *State Gold Mining Corporation* v *Sissala* [1971] 1 GLR 359, CA

(7) *Bozzen* v *Altrincham Urban District Council* [1903] 1 KB 547

(8) *Gilbert* v *Endean* (1875) 9 Ch D 259, CA.

APPLICATION under rule 14 (1) of The Gambia Court of Appeal Rules, Cap 6:02 for special leave to appeal against the interlocutory decision of the trial High Court dated 10 May 1991, following an earlier refusal by the trial judge.

Mrs AN Bensouda for the applicant.

A N M O Darboe for the respondent.

ANIN JA. The Solicitor-General (Mrs Bensouda) filed a motion on notice for leave to appeal against Agidee J's decision given on 26 June 1991, refusing leave to appeal to The Gambia Court of Appeal from his interlocutory decision given on 10 May 1991 at the Banjul Supreme Court (High Court).

At the hearing on 1 July 1991, the Solicitor-General sought, and obtained, leave to amend her motion paper by:

(i) substituting the date "10 May 1991" for "26 June 1991"; and

(ii) deleting the words "refusing leave to appeal to The Gambia Court of Appeal against his interlocutory decision given 10 May 1991."

In support of these amendments, Mrs Bensouda submitted that they do not in any way prejudice or detract from her accompanying affidavit to the motion and the exhibited grounds of appeal.

Learned counsel for the respondent, Mr Darboe, was not opposed to the amendments sought; he only insisted that they should be clearly typed out and served on him. Leave for these amendments was granted by the court, as prayed. As typed out the Solicitor-General's amended motion paper reads as follows:

"NOTICE OF MOTION FOR SPECIAL LEAVE TO APPEAL UNDER RULES 13 AND 14 OF THE GAMBIA COURT OF APPEAL RULES

Take notice that The Gambia Court of Appeal at Banjul will be moved on 1 July 1991 at 9.30 o'clock in the forenoon or so soon thereafter as counsel can be heard on the hearing of an application for special leave to appeal against the *interlocutory decision of Agidee J dated 10 May 1991. Leave to appeal having been refused by the said judge.*

And further take notice that the grounds of his application are:

(1) the learned trial judge was wrong in holding that the application for leave to appeal against his decision of 10 May 1991 was out of time;

(2) the learned trial judge misconstrued rule 14 of The Gambia Court of Appeal Rules.

Dated 1 July 1991.

(SGD) A N BENSOUDA

SOLICITOR FOR THE APPLICANT."

Preliminary objection

Before the Solicitor-General could address the court on her amended motion, Mr Darboe counsel for the respondent, raised a preliminary objection to it, contending that it was incompetent and ought to be dismissed because of its non-compliance with section 3*(b)* of the Gambia Court of Appeal Act and rules 13 and 14 of The Gambia Court of Appeal Rules. The said section 3(6) of The Gambia Court of Appeal Act, Cap 6:02 states:

"For the purpose of paragraph (c) of subsection (2) of section 95 of the Constitution (sic) (an obvious misprint of section 96 (1)(c) of the 1970 Constitution in the 1990 Edition of the Laws of The Gambia), an appeal shall lie to the Court of Appeal from …

(b) all *interlocutory* orders and decisions made in the court of any suit or *matter by leave of the Judge making* the order, but not *otherwise* … (The emphasis is mine).

And rules 13 and 14 of the Gambia Court of Appeal Rules, (Cap 6:02) also provide that:

"13. (1) Where an appeal lies *by leave only* any person desiring to appeal shall apply to the Court by notice on motion for leave *within fourteen days from the date of the decision* against which leave to appeal is sought.

(2) If leave is granted the appellant shall file a notice of appeal as provided by rule 12 of these rules *within fourteen days from the grant of leave*.

14. (1) *Subject to any provision which may be made by the legislature, no appeal shall be brought after the expiration of fourteen days in the case of an appeal against an interlocutory decision* or of three months in the case of an appeal against a *final decision, unless "the court below or the Court" shall enlarge the time.*

(2) *The prescribed period for appeal shall be calculated from the date of the decision appealed against*:

Provided that where there is no appeal as of right the prescribed period shall be calculated from the date upon which leave to appeal is granted.

(3) An appeal shall be deemed to have been brought when the notice of appeal has been filed in the Registry of the court below.

(4) *No application for enlargement of time in which to appeal shall be made after the expiration of one month from the expiration of the time prescribed within which an appeal may be brought*. Every such application shall be supported by an affidavit setting forth good and substantial reasons for the application and by grounds of appeal which prima facie show good cause for leave to be granted. When time is so enlarged a copy of the order granting such enlargement shall be annexed to the notice of appeal. "(The emphasis is mine.)

Summary of Mr Darboe's arguments in support of the preliminary objection.

Firstly, Mr Darboe submitted in a vacillating manner that Agidee J's said ruling of 26 June 1991 was a *final* order and not an interlocutory one since the learned judge refused the applicant leave to appeal.

Secondly, after submitting that this court has jurisdiction to decide finally whether a ruling is interlocutory or final by virtue of rule 33 of the Gambia Court of Appeal Rules, Mr Darboe contended that the present application of the Solicitor-General does not "concern" leave to appeal against Agidee J's order of refusal made on 26 June 1991; but that it rather "concerns" his earlier order dated 10 May 1991. In fact, the applicant's solicitor states in her amended motion that she is applying for leave to appeal against the interlocutory decision of Agidee J dated 10 May 1991.

Thirdly, the said earlier order of 10 May 1991 was, in Mr Darboe's submission, an interlocutory order; it being "an order made in the interim" and before the court's final adjudication upon the rights of the parties herein.

Fourthly, he submitted that on account of the phrase "but not otherwise" occurring in section 3(b) of the Gambia Court of Appeal Act, this court lacks jurisdiction to entertain the instant motion. Rule 13 of The Gambia Court of Appeal Rules does not, in his contention, derogate from the force of that subsection because The Gambia Court of Appeal Rules, Cap 6:02 is, according to him, a subsidiary legislation.

Fifthly, Mr Darboe argued that where the Supreme Court (High Court) refuses a party leave to appeal from its interlocutory order, the intending appellant should appeal against the Supreme Court order refusing leave to appeal; but he should not apply to the Gambia Court of Appeal for such leave to appeal. Only the trial court is empowered to grant leave to appeal; not this court. Were it otherwise, according to Mr Darboe, and the discretionary power vested in the court below were to be deemed to be vested also in The Gambia Court of Appeal, then the effect of rule 13 of The Gambia Court of Appeal Rules would be to nullify the parent enactment, section 3*(b)* of the Gambia Court of Appeal Act. I shall soon demonstrate how wrong this fifth submission is.

Sixthly, Mr Darboe contended that the instant application of 26 June 1991, seeking leave to appeal from a decision of the court below dated 10 May 1991, is hopelessly out of time. The ordinary period of limitation for such an application is fourteen days from the date of decision; while assuming rules 13 and 14 of The Gambia Court of Appeal Rules to be applicable and a maximum total limitation period of six weeks be allowed from the date of such a decision, then the latter limitation period expired on 21 June 1991; and an application

like the present one filed five days later, ie on 26 June 1991, is belated and incompetent. Obviously, if as in the *unamended* motion, the application were lodged against the decision of the same date, ie 26 June 1991, then it would, indeed, be prompt and would not offend against limitation period either of two weeks or six weeks.

Seventh, judging by the affidavit of the Solicitor-General in support of her motion, her intention (according to Mr Darboe) was to seek leave to appeal from the said 10 May 1991 order and not from the recent 26 June 1991 ruling. Indeed, the respondent-applicant's solicitor's motion as amended, states she is applying for leave to appeal against the interlocutory decision of Agidee J dated 10 May 1991.

For all the above reasons, Mr Darboe contended that the present application was incompetent and ought to be dismissed *in limine*.

Solicitor-General's reply

In her reply to the said arguments, the Solicitor-General submitted that this court is competent to entertain her application. The Constitution of The Gambia, 1970 (No 1 of 1970), has enacted as provided in section 96(1)(c) that: "an appeal shall lie *as of right* to the Court of Appeal from any decision given by the Supreme Court and from *such other cases as may be prescribed by Parliament*." (The emphasis is mine.) She contended that an important example of this "omnibus" class of legislation dealing with appeals from Supreme Court to The Gambia Court of Appeal in *interlocutory* orders and decisions is to be found in The Gambia Court of Appeal Act, s 3*(b)* as quoted above.

She also cited rules 13 and 14 of The Gambia Court of Appeal Rules, Cap 6:02 as instances of other enactments conferring jurisdiction on this court to entertain an application for leave to appeal against an interlocutory decision of the Supreme Court where an earlier application for leave to appeal from that court's interlocutory decision to this court has been refused by the court below. She next referred to rule 32 of the Gambia Court of Appeal Rules for the rule of practice that:

"Whenever . . . an application may be made *either to the court below or to the Court* it shall be made in the first instance to the court below but if the *court below* refuses the application the applicant . . . shall be entitled to have the application determined by *the Court*. . . (The emphasis is mine.)

As to the time limits for the lodging of such an application, she cited rule 13 as laying down *fourteen days from the date of the decision against* which leave to appeal is sought as the normal period of limitation. She also cited rule 14(4) which grants an additional maximum grace period of one month thereafter upon an application for enlargement of time in which to appeal being made, provided such an application is supported not only by an affidavit setting forth "good and substantial reasons" for it but also "by grounds of appeal which *prima facie* show good cause for leave to be granted."

She next submitted that advantage can obviously be taken of the provision in rule 14 of The Gambia Court Appeal Rules only after an original application for leave to appeal from an interlocutory decision has been refused by the court below and not before then, as happened in this case on 10 May 1991.

Reply of Mr Darboe

Mr Darboe in his reply stressed that there was no need for statutory interpretation in this matter since the language of the relevant statutes was clear and unambiguous; and since the trial judge of the court below is only given jurisdiction either to permit or refuse leave to appeal from his interlocutory decision "but not otherwise."

Adjudication

I have given careful consideration to these interesting arguments on the meaning and scope of the constitutional provisions and other enactments dealing with leave to appeal against an interlocutory decision of the Supreme Court the law and practice of the trial and appellate courts, and the material facts and circumstances of the instant application before me.

To start with, I wish to emphasise the trite law that the right to appeal and the power of a court to hear appeals are creatures of statute; that the court's discretionary power under an enactment to enlarge time within which to appeal from both final and interlocutory judgments and decisions are not unlimited or unqualified. Reference may here be made to the unanimous judgment of the Ghana Court of Appeal dated 25 April 1979 in the case of *Lartey* v *Baku II* [1980] GLR 257 at 262 (*coram* Apaloo CJ, Anin and Koranteng-Addow JJA written by me) wherein I drew attention to some pertinent judicial dicta on these issues.

It would, however, suffice for our present purpose to recall Lord Atkin's famous dicta in the Gold Coast appeal case of *Moore* v *Tayee* when speaking for the Judicial Committee on 20 October 1934 and reported in (1934) 2 WACA 43 at 44-45, namely:

"It is to be remembered that all appeals in this country and elsewhere exist merely by statute and unless the statutory conditions are fulfilled no jurisdiction is given to any court of justice to entertain them… It is quite true that their Lordships, as every other court, attempt to do substantial justice and to avoid technicalities; but their Lordships are bound by the statute law; and if the statute law says there shall be no jurisdiction in a certain event, and that event has occurred then it is impossible for their Lordships or for any other court to have jurisdiction."

To the same effect is the following dictum of Lord Evershed MR when delivering the unanimous opinion of the Judicial Committee in the Sierra Leone appeal case of *Short* v *Attorney-General of Sierra Leone* [1964] 1 All ER 125:

"Where an appeal has been dismissed for failure to comply punctually with the conditions of appeal the Privy Council will not interfere. Rules such as those of the West African Court of Appeal Rules are necessary for the proper functioning of the appellate court, and it is particularly incumbent upon members of the legal profession properly to observe them."

See also the Ghana Court of Appeal (full bench) decision in *Nye* v *Nye* [1967] GLR 76 and the holding of the court per Akufo-Addo CJ that:

"the right to appeal and the power of a court to hear appeals, being creatures of statute, the right of a court to enlarge time within which to appeal from a final judgment as provided for in rule 10 (1) of the Supreme Court Rules, 1962 (which are incidentally in *pari materia* with our own Court of Appeal Rules) was not unlimited or unqualified; rather it was qualified by rule 10 (4) which precluded appeals attempted after four months from the date of the final judgment."

Salient facts

From the affidavits filed and oral arguments heard in support of the rival cases of both parties, the salient facts, so far as relevant to the present case, are summarised below:

(1) On 10 May 1991, Agidee J made an order described by the defendant-applicant herein as "interlocutory" but by the plaintiff-respondent variously as "interlocutory" and "final." The said order maintained an earlier order of injunction dated 9 April 1991 pending the determination of the substantive suit. Agidee J's full reasons for his ruling on the present application for leave to appeal against his interlocutory order of 10 May 1991 were given on 26 June 1991.

(2) On 24 May 1991, ie thirteen days after the Agidee J's said interlocutory order, the defendant-applicant, then represented by Mrs F H Allen of the Attorney-General's Chambers, Department of State for Justice, filed a notice of motion moving the court below on 6 June 1991 "or so soon thereafter as counsel can be heard by Amie Bensouda as counsel for the defendant-applicant bank that the court (below) may grant it leave to appeal to (this) court against the ruling of the court (below) made on 10 May 1991." This motion remained unheard.

(3) Another motion on notice praying for the same relief as contained in the said earlier motion of 23 May 1991 was filed in this court on 26 June 1991 (ie six weeks and five days after the said interlocutory order of 10 May 1991) by the same defendant-applicant herein; on this occasion by Mrs A N Bensouda, the Solicitor-General and Legal Secretary. This latter application was relied upon; and she adopted Mrs Allen's said earlier one of 23 May 1991, exhibiting not only the said first motion of 23 May 1991 and marked ANB II, but also the reasons for the application together with grounds of appeal and the said ruling of Agidee J dated 10 May 1991 sought to be appealed from with leave and marked ANB II. This said motion on notice was amended with leave of this court at the hearing on 14 July 1991 without objection from counsel for the opposing party; and the amended motion has already been reproduced in full in this ruling.

(4) It would be noticed from the enactments quoted above in particular rule 14(2) of The Gambia Court of Appeal Rules "that the prescribed period for appeal shall be calculated from the date of the decision appealed against." With respect to this interlocutory order which was given on 10 May 1991, the ordinary fourteen days period of limitation for the filing of an application for leave to appeal therefrom expired on 24 May 1991, ie a day *after* Mrs Allen's said motion was filed. That application was, therefore, in my judgment, filed within the ordinary time limited by the relevant rule of practice. In my considered judgment, any subsequent supplementary documents or amendments thereto have been competently filed and are not rendered any the less

competent or timeous for being supplements filed after the original time-limit of fourteen days. A motion which has been filed within the time limited by the current rules of practice is not rendered incompetent or invalid by reason of a subsequent amendment thereto granted by leave of the court. The operative time for considering the rule of limitation is as expressly laid down in rule 14 (2) of the Gambia Court of Appeal Rules "from the date of the decision appealed from" and not from a later date when either full reasons for the decisions are given or a later hearing date or date of later amendment thereto or the date of filing of supplementary documents subsequently thereafter.

Furthermore, in this case, a constitutional *right* of appeal has been conferred on a would-be appellant for leave to appeal against the court below's interlocutory order by section 96(1)(c) of the Constitution of The Republic of The Gambia (No 1 of 1970) and this constitutional right with super added statutory condition cannot be whittled down by any stratagem or argument.

The important additional omnibus *right* "such other cases as may be prescribed by Parliament" in section 96(1)*(c)* ought, in my considered view, not to be reduced to a meaningless or unsubstantial right. On the contrary, the phrase deserves, in Lord Diplock's memorable words in *Attorney-General of The Gambia* v *Jobe* (1985) LRC (Const), 556, PC, a liberal, purposeful and generous construction in order to advance the important remedy of appeal which they are obviously intended to provide.

In my view, a learned judge of the Supreme Court (High Court) is not intended to have the final word on the right of an aggrieved applicant for leave to appeal from his interlocutory order. His decision to deny the latter a right of an appeal to the appellate court is subject to a further right of appeal to, and a fresh determination by, this court within the provision of time-limits and other parameters of statutory conditions laid down in rules 13 and 14 of the Court of Appeal Rules. These conditions represent instances of some "other cases prescribed by Parliament" ie enactments. These conditions in the form of enactments, incidentally, having been first enacted in 1961 in their present form, actually predate the constitutional provisions now under discussion. Parliament must be deemed to know the state of the law when passing the later law, No 1 of 1970.

I now turn to the Mr Darboe's arguments summarised above. His first vacillating submission that the order being appealed from is "final" but

not "interlocutory" is plainly wrong. I rely on the familiar test: does the judgment or order, as made finally dispose of the rights of the parties? If it does, then it is a final order; but if it does not, then is an interlocutory order: see *State Gold Mining Corporation* v *Sissala* [1971] 1 GLR 359, CA (coram Apaloo, Anin and Archer JJA) applying the English Court of Appeal decision in *Bozzen* v *Altrincham Urban District Council* [1903] 1 KB 547 per Lord Alverstone CJ at p 548. See also *Gilbert* v *Endean* (1975) 9 Ch D 259, CA per Cotton LJ at pp 268 and 269 - cited in Saunders' *Words and Phrases Legally Defined* (1969 ed), Vol 3 at p 82:

"These applications only are considered interlocutory which do not decide the rights of parties, but are made for the purpose of keeping things in *status quo* till the rights can be decided, or for the purpose of obtaining some direction of the court as to how the cause is to be conducted, as to what is to be done in the progress of the cause for the purpose of enabling the court ultimately to decide upon the rights of the parties."

Applying the above tests to the order of 10 May 1991 herein, I hold that it is undoubtedly interlocutory. Likewise, as an *obiter*, I observe that the later reasoned ruling of Agidee J of 26 June 1991 is also interlocutory since it did not finally dispose of the rights of the parties.

For the foregoing reasons, I disagree with the fourth submission of Mr Darboe summarised above. Ever since the former West African Court of Appeal (whereof The Gambia Court of appeal is a relic) was established in 1928, its practice and procedure has been regulated by enacted rules some of which were subsequently amended by Imperial enactments, eg Statutory Instruments (S I) 1948/1330, 1955/1821, 1956/1700, 1957/279, 1958/1525, 1959/1977, 1960/440; and especially by 1961/743 (The Gambia Court of Appeal Order-in-Council, 1961) which enacted that the said rules shall be deemed to have been made under the said Order. The latter were subsequently amended by The Gambia Court of Appeal (Adaptation of the West African Court of Appeal Rules, 1963 (L N 1963), and continued in operation and had effect as part of the Laws of The Gambia immediately before the commencement of The Gambia Independence Order, 1965 (S I 1965/135 (L N 9/1965). Consequently they were saved by section 4 of this last mentioned Order, notwithstanding that its section 2 had repealed the Order-in-Council under which they were deemed to have been made.

A similar short history prefaces both the 1966 and 1990 editions of the relevant Laws of The Gambia; and I respectfully endorse and approve these historical notes of both learned Editors as accurate. "Rules of Court" are interpreted by section 2 of The Gambia Court of Appeal Act as "The Gambia Court of Appeals Rules in existence immediately before the coming into effect of the Constitution …" The current Gambia Court of Appeal Rules, Cap 6.02 (1990 edition) are examples of pre-existing enactments which are alluded to in section 96(1)*(c)* viz "such other cases as may be prescribed by Parliament." Incidentally the word "Act" is missing from the title of Cap 6:02 in the 1990 edition; in my view, due to a typographical omission, having regard to the correctly stated title of that enactment in its very first section:

In my considered judgment, the phrase "but not otherwise occurring in the Gambia Court of Appeal Act, Cap 6:02, s 3(b), first enacted on 31 August 1961 and quoted above is clearly inconsistent with the constitutional provisions in section 96 (1) and *(c)* and must be deemed to have been superseded and overruled by the Constitution of 1970 as well as the said statutory conditions of appeal in rules 13 and 14 of the Gambia Court of Appeal Rules, both being examples of "such other cases as have been prescribed by Parliament."

To sum up, I would construe the cumulative effect of rules 13 and 14 (in so far as they relate to appeals from the Supreme court's interlocutory decisions) to be:

(i) the ordinary time limit for filing a motion on notice for leave to appeal (in appeals from interlocutory decisions of the Supreme Court to this court which lie only by leave to appeal) is fourteen days from the date of the decision against which leave to appeal is sought;

(ii) if such leave to appeal is granted by the court below, the requisite notice of appeal under rule 12 shall be filed ordinarily within fourteen days from the grant of leave;

(iii) such application for leave to appeal must not ordinarily be filed after fourteen days of the date of the interlocutory decision in question;

(iv) however, a further grace period of one month and two weeks from the date of the interlocutory decision in question is given; and such a motion on notice for leave to appeal from the said interlocutory decision may be filed in the registry of either the Supreme Court (ie the court below) or this court.

(v) every such motion notice for enlargement of time for leave to appeal from the said interlocutory decision must be supported by an affidavit of merits, ie "an affidavit setting forth good and substantial reasons for the application" plus grounds of appeal which prima facie show good cause for leave to be granted;

(vi) by virtue of rules 14 (1) and 32 of the Gambia Court of Appeal Rules, such a motion for enlargement of time for leave to appeal from the said interlocutory decision must be made in the first instance to the court below (ie Supreme Court); but if that court refuses it, then it should be made to this court. This peculiar procedure arises by virtue of the term of art - "the court below or the Court", occurring in rule 14 (1), whose technical meaning as explained in this paragraph is deducible from rule 32.

(vii) a copy of either court's order granting such enlargement of time for appealing must be annexed to the notice of appeal filed in accordance with rule 12 and Civil Form No1 ("Notice of Appeal"); and

(viii) the ordinary time limit for filing the said motion on notice for leave to appeal from the Supreme Court's interlocutory decision is two weeks from the date of the interlocutory decision in question; while the maximum grace period is four weeks thereafter. In other words, six weeks after the date of an interlocutory decision of the Supreme Court's, it is not permissible to seek either enlargement of time or leave to appeal from it."

On the facts of this case, it is clear that the applicant bank having originally filed its application for leave to appeal within thirteen days of the date of the interlocutory decision in question through its solicitor, Mrs F H Allen, its application has been lodged within the said ordinary time limit; and Mr Darboe's preliminary objection is misconceived and without foundation. His preliminary objection to this court's competence to hear the said motion on notice on the merits is accordingly overruled. I would therefore proceed to hear on the merits the instant application for leave to appeal from Agidee J's interlocutory decision herein of 19 May 1991. Costs in the cause.

Preliminary objection dismissed.

SYBB

WADDA & ATTORNEY-GENERAL v KABBA

COURT OF APPEAL, BANJUL

(Civil Appeal No 22, 23/90)

4 December 1991

AYOOLA CJ, DAVIES AND AKANBI JJA

Estoppel-Proprietary estoppel-Application-Meaning and conditions for-Need for specifically pleading defence of proprietary estoppel but not in any special form-Appellant trespassing on leasehold land previously granted to respondent by government-Appellant expending substantial amount on building erected on land in reliance of right of re-entry for breach of covenant exercised by government-Respondent having unsubstantial equitable interest in land despite initial breach of covenant to erect building on land-Appellant entitled to continue with possession of land and respondent entitled to compensation by government.

Held, *allowing the appeal and dismissing the respondent's claim for possession of the disputed land*: (1) under the doctrine of proprietary estoppel, where a stranger begins to build on a land supposing that he has a right or an interest in it and someone who has a right to it observes his mistake and abstains from setting him right and leaves him to persevere in his error, equity will not afterwards allow the latter to assert his title to the land. Proprietary estoppel is one of the qualifications to the general rule that a person who spends money on improving the property of another has no claim to re-imbursement or to any proprietary interest in the property. The application of the equitable doctrine is subject to satisfaction of four conditions: (i) the person invoking the doctrine must have incurred expenditure or otherwise have prejudiced himself or acted to his detriment; (ii) the person must have acted in the belief either that he already owned a sufficient interest in the property to justify the expenditure or that he would obtain such an interest; (iii) the claimant's belief must have been encouraged either actively or passively; and (iv) the equity would not arise if to enforce the right would contravene some statute or prevent the exercise of a statutory discretion or prevent or excuse the performance of a statutory duty.

Per curiam. The extent of the equity is to make good between the parties, the expectation of the claimant, which had been encouraged by

his predecessor in title. When once the equity is established, it is the duty of the court to give effect to it in the most appropriate way.

(2) Every estoppel must be specifically pleaded, not only because it is a material fact, but also because it raises matters which may take the other party by surprise. It is not, however, necessary to plead estoppel in any special form so long as the matter constituting the estoppel is stated in such a manner as to show that the party pleading relies upon it as a defence or answer. *Re Robinson's Settlement; Grant* v *Hobbs* (1912) 1 Ch 717 at 728 cited.

(3) In the instant case, the equity would be satisfied by holding that the appellant who had trespassed on the disputed leasehold land, in pursuance of a right of re-entry exercised by the government, and had expended a substantial amount by erecting a building on the land, valued D454000, should continue with his possession. And, the respondent, who had performed his obligation under the lease, after the initial breach, by building on the land to the value of D12,500 is entitled to compensation of D50,000 by the government.

Case referred to:

Re Robinson's Settlement; Grant v *Hobbs* (1912) 1 Ch 717.

APPEAL from the decision of the trial High Court, finding for the respondent and granting him possession of the disputed land and awarding him nominal damages for trespass. The facts are sufficiently stated in the judgment of Davies JA.

E Cotran (with him *Mrs Sey*) for first the appellant.

Mrs A Bensouda, Solicitor-General (with her *Miss Ceesay)* for second the appellant.

Miss I D Drameh for the respondent.

DAVIES JA. The Minister of Lands (hereafter called the Minister) by a lease dated 16 February 1971, demised a plot of State land at Fajara to the respondent for a term of 21 years which commenced on 1 August 1970, with an option for a further term of 21 years. The land fell within the administration of the Lands (Banjul and Kombo Saint Mary) Act. Cap 57:02. The administration is done by the Department of Lands.

In 1985, the Minister claimed to have re-entered the land consequent on breaches of covenant by the respondent. A notification of the re-entry was published as Government Notice No 147/85 in the Gambia *Gazette* No 28 of 28 May 1985. The land was then demised to the appellant for a term of 21 years. The appellant went on the land and in consequence of that lease, erected a house and other outhouses on it.

The respondent commenced these proceedings in the Supreme Court against the appellant, one Saikou Colley (who was the respondent's watchman on the land), the Minister of Lands and the Attorney-General claiming damages for trespass against the appellant and Saihou Colley, an order for their ejectment from the land; an injunction restraining them from entering the land; and a declaration that the four defendants on the writ of summons "were not at all times entitled to enter or use the premises."

The learned trial judge found for the respondent and granted him possession of the land and awarded him nominal damages for trespass. This appeal is against that decision.

I shall now turn to examine the evidence adduced at the trial. The land as I have said, was demised to the respondent by Lease No C39/1971 for a term of 21 years as from 1 August 1970 with an option for a similar term. It was a building lease. The relevant portions for present purposes state:

"(2) The lessee hereby agrees to observe and perform the said implied covenants with the Minister that the lessee will throughout the term hereby granted perform and observe the provisions and stipulations contained in the Second Schedule hereto.

(4) Provided always that if …there shall be any breach or non-observance of the covenants and conditions express or implied by virtue of the said Act or as contained in the Second Schedule hereto on the part of the lessee then the Minister may at any time after such breach or non-observance re-enter into and upon the premises or any part thereof in the name of the whole and have again repossess, hold and enjoy the same as in his former estate on behalf of the government of the Republic."

The pertinent stipulations in the Second Schedule are:

"(1) To erect within three calendar months from the date hereof and at all times hereof to maintain in good condition and complete and repair

a sufficient boundary fence surrounding the whole of the demised premises.

(2) To erect upon the demised premises within two years from the date hereof a dwelling house costing not less than 2,500 (two thousand five hundred pounds sterling) and outbuildings fit for immediate occupation."

The stipulations I have set out above required the respondent: first to erect a sufficient boundary fence surrounding the whole of the demised premises; and secondly to erect a dwelling house costing not less than 2,500 (two thousand five hundred pounds sterling) and outbuildings "fit for immediate occupation" within two years of the granting of the lease. The respondent's evidence regarding his compliance with those stipulations was: "I erected a corrugated structure there. I also erected a fence on two sides the other sides having been fenced by the neighbours. My fence is with cement blocks… Since 1986 I have not been able to enjoy the land. I would have built on it by now if I were not disturbed."

Under cross-examination by counsel for the appellant, the respondent said:

"Yes I was granted the lease in February 1971. I erected the corrugated house on it in 1978. I cannot remember the cost of its construction …I did not build any cement block house on the land. I could not afford to do so in the two years I was supposed to build it."

It is unclear from the evidence, when the respondent erected the fence on the land. It is certainly clear that the corrugated iron sheet structure erected on the land by him was done in 1978 about eight years after the granting of the lease. He could not afford to erect a "cement block house" within the two years stipulated in the lease. He did not comply with the stipulations up till 1985 when the appellant entered the land. The respondent was undoubtedly in breach of the second stipulation. The breach of that stipulation entitled the Minister to terminate the lease.

Section 19 of the Lands (Banjul and Kombo Saint Mary) Act, Cap 57:02 empowers the Minister to re-enter demised premises on breach of covenant by any lessee. It provides:

"19(1) If there shall be any breach or non-observance by the grantee or by any person deriving any interest in the premises through or under

the grantee of any of the covenants or conditions, whether express or implied, contained in any grant under this Act, the Minister may at any time after such breach or non-observance re-enter into and upon the premises or any part thereof in the name of the whole, and have again, repossess, hold and enjoy the same as in his former estate:

Provided that the power of re-entry authorised by this sub-section shall not be exercisable in respect of the breach or non-observance of any covenant or condition express or implied which is capable of immediate remedy (other than a covenant for payment of rent or a covenant against assigning or subletting) unless and until the Minister shall have caused to be served upon the lessee a notice specifying the particular breach or non-observance of which complaint is made and requiring the lessee to remedy such breach or non-observance, and, at the discretion of the Minister, to make reasonable compensation in money therefor, and the lessee has failed to remedy such breach or non-observance and to pay such compensation as aforesaid to the Minister. Such notice shall-

(a) be served personally upon the lessee; or

(b) be sent to him by registered post to his last known address; or

(c) be published in the *Gazette* and a copy thereof be affixed to the premises."

An official of the Lands Department, Mr Demba Jack, claimed that the requisite statutory notice of a breach of stipulations (1) and (2) had been given under paragraph *(b)* of the proviso to section 19(1) of the Act. The notice he said, had been sent to the respondent's last known address at 7 Oxford Street, Banjul. The respondent denied receiving the notice. Paragraph *(b)* requires that the notice should be sent by registered post. There was no trace in the Department's files of a copy of the notice alleged to have been sent to the respondent. There was no proof of its delivery to the respondent. No registration slip had been produced from the Post Office that it had been so dispatched.

The learned judge after a careful evaluation of the evidence regarding the service of the statutory notice held that the third defendant ("the Minister") had failed to comply with paragraph *(b)* to the proviso to section 19(1) and also that the lease granted to the appellant was consequently invalid.

Does the matter end there? I do not think so. There is evidence that the appellant has erected a substantial building on the land costing D454,000. He had, in addition, beautified the land by planting thick ornamental plants and flowers, the total expenditure being in the region of D500,000. He had entered upon the land in the belief that he had a valid lease granted by the Minister who had lawfully re-entered the land and terminated the respondent's possession.

The respondent had gone on the land; he knew that a building was being erected on it. His evidence on this point was: "As soon as I noticed that the building of a house had been commenced in my plot, I instructed a solicitor. My solicitor wrote a letter." The letter exhibit B made no mention of a house being built on his plot. It was in the following terms:

"116/K/3

16 May 1986

The Director of Lands

Department of Lands

69 Hagan Street

Banjul

Dear Sir,

RE: PLOT IN FAJARA LEASED TO ALHAJI MOMODOU KABBA LEASE SERIAL REGISTRATION NUMBER C39/1971

We act for Mr Alhaji Momodou Kabba.

2. Alhaji Kabba has told us that he paid his rents for the years 1972 to 1979 and we would be grateful for a confirmation in writing with regard to this.

3. Thanking you in advance.

Berthan Macauley

PP Macaulay & Drameh"

The Director of Lands' reply to that letter is dated 10 February 1987. It states

"Sir,

RE: PLOT IN FAJARA LEASED TO ALHAJI MOMODOU KABBA LEASE S R NO C39/1971

I refer to your letter reference 116/K/ 3 of 16 May 1986 on the above captioned subject. May I inform you that this plot was re-entered in 1985 and allocated to another applicant who has now secured a lease."

The appellant's evidence was that he had developed the land in six months. He finished it in 1986. It follows therefore that between 16 May 1986 (when the respondent's solicitor wrote asking whether he had paid rents for the period 1972-1979) and 10 February 1987 (when the Director of Lands replied that the land had been re-entered and re-allocated) the respondent had performed his obligation under the lease by building a house to the value of at least D12,500 within two years. He is in the circumstances of this case clearly entitled to the protection of equity.

However, if a stranger begins to build on a land supposing that he has a right or an interest in it and someone who has a right to it observes his mistake and abstains from setting him right and leaves him to persevere in his error, equity will not afterwards allow the latter to assert his title to the land. That in a nutshell is the doctrine of proprietary estoppel.

"Proprietary estoppel is one of the qualifications to the general rule that a person who spends money on improving the property of another has no claim to re-imbursement or to any proprietary interest in the property…It is permanent in its effect, and it is also capable of operating positively so as to confer a right of action." (See *Snell's Principles of Equity* (28th ed) at page 558.)

The equity arises when four conditions are satisfied:

(i) the person invoking the doctrine must have incurred expenditure or otherwise have prejudiced himself or acted to his detriment;

(ii) the person concerned must have acted in the belief either that he already owned a sufficient interest in the property to justify the expenditure or that he would obtain such an interest;

(iii) the claimant's belief must have been encouraged, for example, by his predecessor in title. This may be done either actively or passively. The circumstances of looking on is in many cases as strong as using terms of encouragement;

(iv) the equity would not arise if to enforce the right would contravene some statute or prevent the exercise of a statutory discretion or prevent or excuse the performance of a statutory duty.

The extent of the equity is to make good between the parties, the expectations of the claimant, which had been encouraged by his predecessor in title. When once the equity is established, it is the duty of the court to give effect to it in the most appropriate way.

Every estoppel must be specifically pleaded, not only because it is a material fact, but because it raises matters which may take the other party by surprise. It is not, however, necessary to plead estoppel in any special form so long as the matter constituting the estoppel is stated in such a manner as to show that the party pleading relies upon it as a defence or answer: see (*Bullen and Leake and Jacob's Precedents of Pleadings* (12th ed) at page 1056.) The effect of this rule is, according to Buckley LJ in *Re Robinson's Settlement; Grant* v *Hobbs* (1912) 1 Ch 717 at 728:

"For reasons of practice and justice and convenience to require the party to tell his opponent what he is coming to Court to prove. If he does not do that the Court will deal with it in one of two ways. It may say that it is not open to him, that he has not raised it and will not be allowed to rely on it; or it may give him leave to amend…The rule is not one that excludes from the consideration of the Court the relevant subject matter for decision simply on the ground that it is not pleaded. It leaves the party in mercy and the court will deal with him as is just."

The defence of the first appellant which was filed in the court below was rather inelegantly drafted. It states in part:

"(2) The second defendant is a servant of the first defendant. The first defendant avers that his and his servant's entry into the land in question was lawful and further aver that any works carried out on the said land was lawfully done.

(3) The first and second defendants further deny that they have trespassed on any land belonging to the plaintiff or at all.

(4) The first defendant avers that his and his servant's entry into the land was in exercise of his right as a lessee by virtue of a lease granted to him by the Minister for Local Government and Lands in about August 1985 in respect of a leasehold plot numbered 81 and situated at Booster Station Estate Layout at Fajara, KSMD vide Lease Serial Registration Number K180/85.

(5) Paragraph (3) of the statement of claim is denied. The first and second defendants aver that the plaintiff was in breach of several covenants in his lease whereupon the third defendant by himself his servants or agents served him with a notice and upon expiry of the said notice the third defendant caused a Notice of Re-Entry to be published in The Gambia *Gazette*. The first and second defendants aver that the plaintiff's lease has been properly cancelled.

(6) The first defendant avers that since the execution of the lease mentioned in paragraph (4) herein he has developed the said plot by way of construction on it on the following namely:

(a) a three-bedroom self-contained dwelling house

(presently occupied) valued about D362,000

(b) boys quarters D 26,000

(c) cement block wall fence value about D 37,000

(d) service connection of electricity and water D 5,000

(e) outbuilding D 24,000

(f) landscaping, cement concrete terrace D 22,000

TOTAL D476,000

The above defence discloses that the appellant entered on the land by virtue of a lease; believing that the respondent's lease had been determined and expended money on the erection of a building. There is also the evidence at the trial that he had spent money on the land to which the respondent was entitled to possession, relying on the lease granted to him by the Minister believing that he had acquired an immediate interest in the land. The respondent knew that the building was being erected. He did not stop the appellant. He did not notify him of his trespass. I find that he passively encouraged the respondent to

erect the building. The appellant achieved in six months what the respondent failed to achieve in fourteen years. At the trial, the respondent lamented his inability to erect a house on the land due to the appellant's trespass on it. He had been twelve years (1973-1985) in continuous breach of his undertaking to erect a substantial building on the land, before the appellant's entry upon it. He admitted having been offered an alternative plot of land and D50,000 by the "Government" and that he had rejected it. He wanted his land. He ought not to have it; to do so would be to perpetrate an injustice.

I am satisfied that the equity has been established and it is the duty of this court to give effect to it in the most appropriate way. The equity would be satisfied by holding that the appellant continues on the land with his lease. The Minister to pay compensation of D50,000 to the respondent. The appeal is upheld. The respondent's claim for possession is dismissed.

AYOOLA CJ. I agree.

AKANBI JA. I also agree.

Appeal allowed.

SYBB

MARENA v THE STATE

COURT OF APPEAL

(Criminal Appeal No 11/92)

18 November 1992

ANIN P, OMOSUN CJ AND NJIE J

Criminal law and procedure-Prosecution-Material witness-Failure to call-Duty of prosecution to call all material witnesses or else make them available to defence for cross-examination-Basis for determining whether or not a witness is material.

Held, *unanimously allowing the appeal against conviction for possession of drugs and trading in drugs*: it is the duty of the prosecution to call all material witnesses present at the commission of crime or else make them available to the defence for cross-examination. Whether or not a witness is material in a particular case depends on the peculiar facts of the case, the issues for trial and the role and knowledge of the witness in question. In the instant case, the prosecution failed to prove the case against the accused beyond reasonable doubt on account of the missing evidence of their material witness. *R* v *Kuree* (1941) 7 WACA 175; *R* v *Essien* (1938) 4 WACA 112 at 113; *Addae* v *Commissioner of Police* 11 WACA 42; *R* v *Ansere* (1958) 3 WALR 385, WACA; *Twumasi-Ankrah* v *R* (1955) 14 WACA 673 and *Yeboah* v *R* (1954) 14 WACA 484 cited.

Cases referred to:

(1) *R* v *Kuree* (1941) 7 WACA 175.

(2) *R* v *Essien* (1938) 4 WACA 112.

(3) *Addae* v *Commissioner of Police* 11 WACA 42.

(4) *R* v *Ansere* (1958) 3 WALR 385, WACA.

(5) *Twumasi-Ankrah* v *R* (1955) 14 WACA 673.

(6) *Yeboah* v *R* (1954) 14 WACA 484.

APPEAL against conviction for possession of drugs and trading in drugs. The facts are sufficiently stated in the judgment of the court delivered by Anin P.

Appellant in person

A O Onadeko, DPP, for the State

ANIN P *delivered the reasons for the unanimous judgment of the court*. This appeal brings into focus the important two-fold duty of the prosecution to call all material witnesses present at the commission of a crime (including those named in the information in a trial upon information) or else to make them available at the trial to the defence for cross-examination. Obviously, whether or not a witness is material in a particular case depends on the peculiar facts of that case, the issues for trial and role and knowledge of the witness in question.

The relevant cardinal common law rules were enunciated in such cases as *R* v *Kuree* (1941) 7 WACA 175 where the material evidence of the complainant in a rape case was not called. It was held in that case that without this evidence, the trial judge could not adequately gauge the truth and that in the fair administration of the criminal law, the conviction could not stand. See also *R* v *Essien* (1938) 4 WACA 112 at 113 where it was also held that: "It is the duty of the Crown to call all known material witnesses, whether in favour of the Crown case or not" - a decision followed in *Addae* v *Commissioner of Police* 11 WACA 42; *R* v *Ansere* (1958) 3 WALR 385, WACA; *Twumasi-Ankrah* v *R* (1955) 14 WACA 673 and *Yeboah* v *R* (1954) 14 WACA 484.

The present case involved the prosecution of the appellant for the possession of drugs (two counts) and trading in drugs. The first prosecution witness, Det Sgt 524 Kebba Sawaneh, testified that in July 1992, he and DSI Jobe led a drug squad team, armed with a search warrant, to search the premises of the accused suspected of the said offences. He disclosed in his testimony that it was one Lamin Danso, a member of the search party, who found some quantity of the illicit drugs, ie heroin and cocaine drugs hidden in small nylon bags in a jacket which the accused claimed to be his. The illicit drugs were impounded and kept in police custody, while the suspect was arrested and detained at the police cell to await trial.

Both at the police station and at the trial and on the hearing of the appeal, the unrepresented appellant denied the prosecution allegations

of the alleged discovery of the drugs in his jacket. He also complained that if the prosecution allegations were true, they should have called the said Lamin Danso as their witness or else made him available for cross-examination. In the event he had been denied a fair trial; and at worst, there was a failure of due process of law. In our judgment, the prosecution failed to prove the case against the accused beyond reasonable doubt on account of the missing evidence of their material witness, Lamin Danso.

In his submission, Mr Onadeko, the learned Director of Public Prosecutions (who had nothing to do with either the investigation or trial of the case in the two courts below), conceded that the said Lamin Danso was a vital witness; he could not tell from the record of appeal why he was not called as a witness nor made available to the defence for cross-examination. Nevertheless, Mr Onadeko further submitted that in this case, the prosecution's failure either to call that material witness or else make him available to the accused for cross-examination did not in fact affect the fairness of the trial since the search of the accused's premises and the offending jacket was conducted by a team of police and customs officers some of whom actually testified despite Lamin Danso's inexplicable absence. Mr Onadeko added for good measure that undoubtedly the prosecution case would have been "stronger and unassailable" if Lamin Danso had, indeed, testified. In the circumstances, without Lamin Danso's key evidence, and having regard to the overriding need for fair proceedings, the DPP finally submitted he was unable to support the conviction.

The court unanimously agreed with the DPP and thereupon allowed the appellant's appeal against conviction and sentence and acquitted and discharged him while reserving our reasons for our judgment until now.

Appeal allowed.

SYBB

NJIE v THE STATE

COURT OF APPEAL

(Criminal No 12/92)

3 December 1992

ANIN P, OMOSUN CJ AND NJIE J

Criminal law and procedure-Obtaining goods by false pretences-Ingredients of-Proof-Duty of prosecution-Criminal Code, Cap 10, ss 287 and 288.

Criminal law and procedure-Plea of guilty-Appeal from-Guiding principles-Circumstances in which appellate court may disturb convictions based on plea of guilty.

The accused introduced himself to the proprietor of a shop that he was an employee of an NGO, Action Aid, which urgently needed to purchase certain goods from the shop, ie ten drums of vegetable oil. He offered to pay by cheque but the proprietor insisted on cash payment. The accused agreed and offered to make cash payment after the delivery of the goods. The goods were then conveyed by a vehicle supplied by the accused to a designated location indicated by the accused. After the delivery of the goods, the accused and the proprietor boarded the same vehicle and proceeded to the main market in the area. The accused requested the proprietor to wait in the vehicle parked at the market whilst he, the accused, left allegedly to collect the agreed cash price for him from a nearby house. The accused thereafter vanished into thin air without paying for the goods. The proprietor made a complaint to the police. The accused was subsequently arrested and charged with the offence of obtaining goods by false pretences. The accused was convicted on his own plea of guilty and sentenced by the trial magistrate to three years' imprisonment. He appealed to the High Court which reduced the sentence to two years. In the instant further appeal against the conviction and sentence,

Held, *unanimously allowing the appeal*: (1) the duty of the prosecution on a charge of obtaining goods by false pretences contrary to sections 287 and 288 of the Criminal Code, Cap 10 was to prove (i) false pretence ie a representation of the existence of a state of facts made by a person either with the knowledge that such representation was false or without the belief that it was true; and (ii) that the false

pretence should be made with an intent to defraud not just to deceive. On the facts of the instant case, the ingredients of the offence charged, ie obtaining goods by false pretences were not proved; neither could a conviction for an alternative charge of stealing contrary to section 245(1) of Cap 10 be sustained because the owner of the goods consented to their asportation. *Chief Superintendent of Police* v *Ceesay & Gomez* (1956) 2 WALR 87; *Macaulay* v *Inspector General of Police* (1954) 14 WACA 546; *R* v *Lawani* (1943) 9 WACA 98 and *Commissioner of Police* v *Mutari* [1960] GLR 201, CA cited.

(2) The principles upon which the appellate court would act where the accused had pleaded guilty at the trial were: (i) if it could be shown that the appellant did not appreciate or understand the charge or procedure and thus pleaded guilty by mistake; (ii) if the plea was so ambiguous that the appellant could not be said to have unequivocally pleaded guilty; (iii) if the appellant had pleaded guilty but had given an explanation which practically amounted to a defence or negatived the plea of guilty; (iv) if the plea of guilty was such as in fact to be no plea at all; or (v) if, as in the instant case, on the admitted facts upon which the prosecution was founded or if it could be shown that the appellant had pleaded guilty to a non-existent crime or no offence was disclosed upon which the appellant could legally be convicted on the charge preferred or there had been a miscarriage of justice by an apparent wrong acceptance of a plea of guilty. *Alpha Zabrama* v *The Republic* [1976] 1 GLR 291 and *Duah* v *Commissioner of Police* 13 WACA 85 cited.

Cases referred to:

(1) *Phillips* v *Brooks Ltd* [1919] 2KB 243.

(2) *Chief Superintendent of Police* v *Ceesay & Gomez* (1956) 2 WALR 87.

(3) *Macauley* v *Inspector General of Police* (1954) 14 WACA 546.

(4) *R* v *Lawani* (1943) 9 WACA 98.

(5) *Commissioner of Police* v *Mutari* [1960] GLR 201, CA.

(6) *Alpha Zabrama* v *The Republic* [1976] 1 GLR 291.

(7) *Duah* v *Commissioner of Police* 13 WACA 85.

APPEAL against conviction and sentence for pleading guilty to a charge of obtaining goods by false pretences. The facts are sufficiently stated in the judgment of the court delivered by Anin P.

Ida Denise Drameh (Ms) for the appellant.

OA Onadeko, DPP (with him) *FM Bensouda (Mrs)* Principal State Counsel, for the State.

ANIN P *delivered the judgment of the court.* Before hearing the merits of the appeal, the learned Director of Public Prosecutions, submitted that the appellant at the trial court had pleaded guilty to the charge of obtaining goods by false pretences contrary to section 288 of the Criminal Code, Cap 10 of the Laws of The Gambia and was therefore debarred from appealing therefrom by virtue of section 272 of the Criminal Code, Cap 12:01 which states:

"No appeal shall be allowed in the case of any accused person who has pleaded guilty and has been convicted on such plea by a subordinate court, *except as to the extent or legality of the sentence*:

Provided that there shall be no appeal from a sentence of imprisonment passed by such court in default of the payment of a fine, when no substantive sentence of imprisonment has also been passed *unless such sentence in default is an unlawful one.*" (The emphasis is mine.)

Having examined the record of appeal, we were satisfied that he was well within his legal rights in appealing in law and on an issue of mixed fact and law; and we accordingly treated his application for leave to appeal as notice of appeal.

The facts as narrated by the prosecutor at the trial magistrate's court (coram Mr Batchilly) on 3 December 1991, did not, in our considered judgment, disclose a prima facie case of the offences of either obtaining by false pretences or stealing. The accused allegedly introduced himself as an employee of an NGO, Action Aid, which urgently needed to purchase certain goods from the complainant, the proprietor of Wally's Enterprise at Tallingding. The accused offered to pay for ten drums of vegetable oil by cheque but the complainant insisted on cash payment. The accused agreed and requested the latter to put the goods bought on credit in a vehicle which would then be conveyed to their destination for prompt cash payment, a suggestion to which the complainant readily agreed. For his own safety, the

unsuspecting shopkeeper boarded the vehicle together with another person and the goods were duly unloaded upon the request of the purchaser en route at New Jeshwang; and thereafter they proceeded on their journey to Serrekunda Market where the accused got the shopkeeper to wait for him in the parked vehicle while he alighted allegedly to collect the agreed purchase price for him from a nearby house. When after a fruitless 40-minutes waiting the accused was not forthcoming with the purchase money, the complainant smelled a rat and reported the accused to the police, who lost no time in effecting the latter's arrest and prosecuting him for the said offence before the court.

The learned magistrate duly convicted the accused upon his plea of guilty; and after the accused had pleaded with him that he was a family man and that would be "the last", he was sentenced to the maximum term of three years' imprisonment with hard labour. Incidentally the convict had three previous convictions for similar offences. On appeal to the High Court from the decision of the trial magistrate court, the appellant succeeded in convincing the learned judge into allowing his appeal against the sentence and reducing it to two years' imprisonment. His lordship expressing his sanguine hope that the appellant "would have learnt his lessons."

On the facts as presented to the trial court by the prosecution, there is obviously no sympathy for this rogue who took the unsuspecting shopkeeper for a ride and made away with his ten drums of vegetable oil for free in the event. Reprehensible as his conduct was, unfortunately, his conduct on that occasion did not inevitably amount to either the crime of obtaining goods by false pretences or stealing under sections 288 and 245(1) respectively of the Criminal Code, Cap 10 of the Laws of The Gambia.

Both the seller and the buyer were *ad idem,* if even the seller was under a mistake of an attribute of the latter who claimed falsely to be an employee of Action Aid. Nevertheless, he was present physically in his store and he intended to sell his existing goods to him for cash. Both parties agreed that the delivery should be immediate, the seller agreeing to convey the goods to the buyer's nominated destination. If in the event there was a total failure of consideration in respect of the unrecovered goods, civil action for restitution or balance of the agreed price and damages would lie at the seller's instance.

Some features of the present case recall to mind the not dissimilar facts and ratio in the law student's textbook case of *Phillips* v *Brooks*

Ltd [1919] 2 KB 243, where a rogue called North entered the plaintiff's shop and asked to see pearls and rings. He selected, inter alia, a ring worth 450 (four hundred and fifty pound sterling); produced a cheque book, claimed to be Sir George Bullough (a wealthy man known by name to the plaintiff) and gave Sir George's address. The plaintiff checked this address in a directory, and then allowed North to take away the ring in exchange for a cheque which was dishonoured. North later pledged the ring with the defendant. The plaintiff claimed that there was never any contract between him and North, so that the latter had no title to the ring which he could pass to the defendant. But Korridge J held at 246-247 that the plaintiff had contracted to sell and deliver (the ring to the person who came into his shop…who obtained the sale and delivery by means of the false pretence that he was Sir George Bullough. "His intention was to sell to the person present and identified by sight and hearing."

Arising out of the local statutory definition of the offence of obtaining goods by false pretences under sections 287 and 288 of Cap 10 of the Laws of The Gambia, the prosecution is in duty bound to prove: (i) false pretence, ie a representation of the existence of a state of facts made by a person, either with the knowledge that such representation is false or without the belief that it is true; and (ii) that the false pretence should be made with an intent to defraud, not just to deceive.

As to useful analogous local case law on the offence of false pretences, reference may be made, inter alia, to the case of *Chief Superintendent of Police* v *Ceesay & Gomez* (1956) 2 WALR 87, a Gambian "money- multiplication" case heard by Miles J (as he then was) in which the analogous English case law was reviewed and applied as to the meaning and scope of the offence of false pretences and statement of intention of future conduct coupled with false statement of an existing fact. See also *Macaulay* v *Inspector General of Police* (1954) 14 WACA 546; *R* v *Lawani* (1943) 9 WACA 98 and *Commissioner of Police* v *Mutari* [1960] GLR 201, CA (on the issue of intention to defraud).

On the facts relied upon by the prosecution to sustain the charge and the plea of guilty, it is clear beyond peradventure that the ingredients of the offence charged were not present; neither could a conviction for an alternative charge of stealing be sustained because the owner of the goods consented to their asportation.

In his comprehensive judgment in *Apha Zabrama* v *The Republic* [1976] 1 GLR 291, Taylor J (as he then was), in his accustomed

zealous manner, summarised the circumstances under the law (analogous to The Gambian) in which the courts would not only entertain but would also allow an appeal against conviction despite the convicted person's plea of guilty of the charge, inter alia, at pages 302-303 as follows:

"(1) if it can be shown that an appellant did not appreciate or understand the charge or procedure and thus pleaded guilty by mistake...

(2) if it can be shown [as in this case] that the appellant has pleaded guilty to a non-existent crime...

(3) if the plea is so ambiguous that the appellant cannot be said to have unequivocally pleaded guilty...

(4) if the appellant pleaded guilty but gave an explanation which practically amounted to a defence or negatived the plea of guilty...

(5) if the plea of guilty is such as in fact be no plea at all...

(6) if on the admitted facts [as in this case] upon which the prosecution is founded, no offence is disclosed upon which the appellant could legally be convicted on the charge preferred...

(7) if [as in this case] there has been a miscarriage of justice by an apparent wrong acceptance of a plea of guilty..."

We would in the circumstances, allow this appeal under grounds (2), (6) and (7) above; for on the alleged facts, there was no prima facie case of obtaining goods by false pretences or of stealing the goods, contrary to section 245(1) since the accused's asportation of the ten drums of vegetable oil was done not only with the consent of the complainant/storekeeper but with his personal assistance and safe conduct, and since the requisite *animus furandi* is missing in this case; which is really a case of either breach of contract for the sale of goods; or for a total failure of consideration (which is also actionable civilly for damages).

We would leave open for future consideration by prosecutors in cases like the present, a possible alternative charge of "obtaining credit by false pretences" under section 291 of the Criminal Code, Cap10.

On the issue of the possibility of an appeal lying in certain exceptional cases after a plea of guilty in the trial court, references may further be made to the case of *Duah* v *Commissioner of Police* 13 WACA 85 for a shorter re-statement of the principles upon which the appellate court acts where the accused has pleaded guilty at the trial, *viz*:

"A plea of guilty having been recorded, this court can only entertain an appeal against conviction if it appears (i) that the appellant did not appreciate the nature of the charge or did not intend to plead he was guilty of it, or (ii) that upon the admitted facts he could not in law have been convicted of the offence charged."

It was for the above reasons that we allowed the appeal herein on 19 November 1992, quashed both conviction and sentence of the appellant, and acquitted and released him forthwith.

Appeal allowed.

SYBB

WILLIAMS v THE STATE

COURT OF APPEAL, BANJUL

(Criminal Appeal No 3/93)

28 May 1993

ANIN P, ABDULLAHI JA AND OMOSUN CJ.

Criminal law and procedure-Murder-Defences-Killing on provocation-Ingredients of killing on provocation-Meaning of provocation-Exceptions to what constitutes legal provocation-Proper test for determining existence of provocation-Whether or not accused provoked to lose self-control a question of fact for trial court sitting without jury-Duty of trial court to direct itself (in no-jury trial) to acquit where there is evidence of provocation unless satisfied evidence of provocation disproved-Criminal Code, Cap 10, ss 191 and 192.

Criminal law and procedure-Murder-Defences-Self-defence-When plea of self-defence sustainable-Test for determining defence of self-defence-Excessive use of force in self-defence not having effect of reducing what would otherwise be murder to manslaughter-Circumstances when verdict of manslaughter available after unsuccessful plea of self-defence.

The appellant and the deceased lived in separate rooms in the same compound. Whilst the appellant was asleep in his room, the deceased, at an ungodly hour, ie about 3 am, trespassed into the appellant's bedroom and forcibly took off the appellant's sleeping blanket. And without any provocation from the appellant, the deceased subjected the appellant to a tirade of coarse abuses, vilification of his parents, followed by persistent physical assaults. The deceased also brandished a knife at the appellant, kicked him in the stomach and threatened to kill him. The appellant came out from his bedroom. He found a stick nearby. The deceased again kicked the appellant and he fell down. In his attempt to knock down the knife from the hand of the deceased, the appellant rather mistakenly hit the forehead of the deceased with the stick. The deceased fell down, bleeding from the forehead. He died eight days later from the resultant injury to the head. The appellant was later arrested and charged with the offence of murder.

At the trial, the judge in his summing up, rejected the defence of provocation, self-defence and accident raised by the appellant both in

his pre-trial statements made to the police and in his unchallenged sworn evidence at the trial. The trial judge also held, inter alia, that the ingredients of the defence of provocation and self-defence were the same. The appellant was convicted of the offence of murder and sentenced to death. In the instant appeal against the conviction, issues turned on the invocation or otherwise of the defences of provocation and self-defence.

Held, *unanimously allowing the appeal against conviction for murder:* (1) the ingredients for the invocation of section 191 of the Criminal Code, Cap 10 (killing on provocation) were: (a) where the accused has *unlawfully* killed another with malice aforethought; (b) in the heat of passion; (c) caused by sudden provocation and before there was time for his passion to cool; and (e) the provocation (as defined in section 192 of the Criminal Code) meant any wrongful act or insult of *such a nature* as to be likely, when done either to an ordinary person or *in the presence* of an ordinary person to another person who was under his immediate care, or to whom he stood in conjugal, or parental, filial, or fraternal relation, or in the relation of master or servant, and which has deprived him of the power of self-control and has induced him to assault the person by whom the act or insult was done or offered. On the facts of the instant case, the appellant was entitled to raised the defence of provocation.

(2) However, there were three instances where a factual provocation would not constitute legal provocation as defined in section 192 of the Criminal Code, namely:

(a) where the aggressor did a lawful act against the accused, ie the former was covered by a plea of justification;

(b) where one person did an act as a result of an incitement received from another person which induced the former to do the said act and thereby to provide an excuse for committing assault; and

(c) where an arrest was unlawful, it would not necessarily constitute provocation, though it might provide evidence of provocation to a person who knew that it was illegal.

Per curiam. The Gambian enactment on legal provocation is a codification which encapsulates the basic relevant common law rules… At common law, as…under The Gambian statute, a dual test is applicable: firstly, the subjective question, was the accused provoked to lose his self-control, followed by the second, an objective question,

was provocation enough to make a reasonable man do as he did? Whether or not, in a particular case the accused was provoked to lose his self-control is a question of fact for the court sitting without a jury (as in The Gambia) to decide…If there is evidence of the defence of provocation, though it has not been specifically raised by the accused, the judge must direct himself (in a no-jury trial) to acquit unless satisfied that the defence has been disproved. *Mancini* v *DPP* [1942] AC 1 at 9; *Palmer* v *R* [1971] AC 814; *Wheeler* v *R* [1967] 3 All ER 829 and *Hammond* v *R* (1985) 82 Cr App R 65, CA cited.

(3) On the facts, the appellant was also entitled to raise the defence of self-defence and the trial judge had erred in holding otherwise. The plea of self-defence would be sustained where the act by the accused and the kind of degree or quantum of force used by him on the occasion and in all the circumstances of the case, must appear to the court to have been reasonably necessary for the prevention of crime in question being committed against either himself or the third person he was bound to defend or for the defence of his property from damage or destruction by the aggressor. Whether the force used in self-defence was reasonable was objective. However, in so deciding, the trial court of fact should be directed to consider what the accused himself thought (the subjective test in relation to the accused). Dictum of Lord Morris of Borth-y-Gest in *Palmer* v *R* (1971) 55 Cr App R 223 at 242 and *R* v *Shannon* (1980) 71 Cr App R 192, CA cited.

Per curiam. The old rule that "a man must retreat as far as he can in order to avail himself of the defence of self-defence" has now been overruled by authorities like *Palmer* (supra)…Whether the accused did retreat is only one element for the court of fact to consider on the question of whether the force used by him was reasonably necessary in the circumstances.

Obiter. There was no rule of law that the excessive use of force in self-defence would reduce what would otherwise be murder to manslaughter. However, in a proper case, the facts on which the defence of self-defence was unsuccessfully put forward, might raise a reasonable doubt as to whether the accused had been provoked or had the necessary intent for murder and thus lead to a verdict of manslaughter. *R* v *Pascoe* (1970) 54 Cr App R 40 cited.

Cases referred to:

(1) *R* v *Duffy* [1949] 1 All ER 932, CCA.

(2) *Palme*r v *R* [1971] AC 814; (1971) 1 All ER 1077; (1971) 55 Cr App R 223, PC.

(3) *Wheeler* v R [1967] 3 All ER 829; (1968) 52 Cr App R 28.

(4) *Hammond* v *R* (1985) 82 Cr App R 65.

(5) *Bullard* v *R* [1957] AC 635.

(6) *Lee Chun Chuen* v *R* [1963] AC 220.

(7) *Ibrams* v *R* (1982) 72 Cr App R 154.

(8) *Hayward* v *R* (1933) 6 C & P 157.

(9) *Mancini* v *DPP* [1942] AC 1.

(10) *Manneh* v *The State* (1991) GCA Cyclostyled Judgments, unreported.

(11) *R* v *Grunshie* [1959] GLR 124, CA.

(12) *R* v *Igwe* 4 WACA 117.

(13) *Konkomba* v *The State* [1964] GLR 616.

(14) *Woolmington* v *Director of Public* Prosecutions [1935] AC 462; 25 Cr App R 72, HL.

(15) *Chan Kau* v *R* [1955] AC 206.

(16) *R* v *Lobell* [1957] 1 AC 547; [1957] 1 All ER 734.

(17) *Drammeh* v *The State* GCA Cyclostyled Judgment, November/December 1987, 21.

(18) *Bah* v *The State,* GCA Cyclostyled Judgments, May/June 1992, 21.

(19) *Marong* v *The State*, GCA Cyclostyled Judgments, May/June 1992, 27.

(20) *R* v *Shannon* (1980) 71 Cr App R 192.

(21) *R* v *Pascoe* (1970) 54 Cr App R 40.

(22) *R* v *Deana* (1909) 2 Cr App R 75.

(23) *Dabla* v *The State* [1963] 2 GLR 14, SC

(24) *State* v *Dabinameka alias Nyen* (1963) CC 41.

(25) *R* v *Roberts* [1942] 1 All ER 187.

(26) *Mensah* v *R* (1945) 11 WACA 2, PC.

APPEAL against the judgment of the Supreme Court (High Court), 10 February 1993, per Adio J, convicting the appellant of the offence of murder. The facts are sufficiently stated in the judgment of the Court of Appeal delivered by Anin JA.

Baba Aziz for the appellant.

SA Onadeko, DPP (with him *Ms Rougie Bah*) for the State.

ANIN P *delivered the judgment of the court.* The salient facts of this unfortunate and tragic murder case were simple and are contained mainly in the unchallenged pre-trial statements and sworn evidence of the accused (the appellant herein) who was the sole surviving eyewitness of the unfolding tragic incidents that led to, and caused the death of the victim named in the information, Saihou Sumareh. Alas the other actor is no more; and dead men do not tell tales!

The particulars of offence in the information filed by the Director of Public Prosecutions on 2 September 1992 read:

"Daddy Joseph Williams ie the (accused/appellant herein) on or about 18 January 1992 at Latrikunda in the Kombo St Mary Division of the Republic of The Gambia murdered one Saihou Sumareh."

Briefly stated, the bare facts are that on 10 January 1992, the appellant, who shared with the deceased the same Latrikunda premises belonging to Lawyer Mahoney but each with is own separate back door and key, had an altercation with him at about 3am; in the course of which the appellant assaulted the deceased with a stick which accidentally struck and wounded the latter on the forehead; and that the latter bled and died eight days later at he Royal Victoria Hospital (RVH) Banjul from the injuries sustained during the assault.

In the ensuing trial before the Supreme Court (High Court) presided over by Adio J, the prosecution relied primarily on the evidence of eleven prosecution witnesses, including the police who recorded the appellant's pre-trial voluntary and cautionary statements, the Consultant Pathologist at the RVH, Dr DJ Oldfield, the landlady of both the appellant and deceased (Mrs Princess Margaret Mahoney), her caretaker and a relative of the deceased who identified his dead body at the Royal Victoria Hospital Mortuary to the Consultant Pathologist. Secondly, the prosecution relied heavily on the appellant's own pre-trial statements and sworn evidence which contained an adequate account of the altercation and the incidents leading to the murder of the deceased, which were undisputed and therefore not in issue in this appeal.

The accused in the court below admitted in his pre-trial statements and sworn evidence having assaulted the deceased, but explained in detail his reasons for acting in the way he did on the occasion. In sum, he raised facts amounting to legal provocation, self-defence and accident under the law.

In his judgment , the learned judge adverted his mind to the admitted facts and to the said defences of provocation and self-defence. Unfortunately, he seriously misdirected himself about the two defences, confused them, and made confusion worse confounded by equating them in certain key passages by holding, erroneously of course, that they are established by the same ingredients. He also omitted to refer to the defence of accident which was clearly available on the evidence to the accused; and in the event, he erred in law and on the facts in convicting him of the offence of murder.

In this appeal, learned counsel, who was assigned by the State to represent the appellant, argued, with leave, very ably, three grounds of appeal substituted by him for the two bare ones filed by his (appellant himself in prison), *viz*:

(1) the learned trial judge erred in law in convicting the appellant of the offence of murder when the appellant's evidence which was impliedly accepted by the learned trial judge conclusively established the defence of provocation and self-defence;

(2) the learned trial judge failed to appreciate the evidence of the appellant which he accepted and by so doing misdirected himself in law by holding that the appellant was not entitled to the defence of provocation and self-defence; and

(3) the learned trial judge erred in law in convicting the appellant of the offence of murder when the essential ingredient of the said offence, to wit, malice aforethought, was not proved.

He first referred to certain passages in the judgment for the learned judge's misapprehension of the true nature of the uncontroverted evidence; for his failure to deduce from the said evidence the availability of the defences of legal provocation, self-defence and accident to the accused in this case, having regard to the state of the facts and the relevant law; and to the inescapable fact that the prosecution neither succeeded in rebutting nor even attempted to rebut these pieces of material evidence or else the applicability of the relevant law to the material undisputed facts.

In reply, the Director of Public Prosecutions, Mr Onadeko, struggled vainly to support the judgment appealed against on the facts and the law. He dutifully submitted, firstly, that the appellant's act in assaulting the deceased was not done in self-defence, since, he submitted further, at the material time, the appellant's assault was not done in reasonable apprehension of threat to his life. Next, the learned DPP cited some passages of the appellant's evidence which, in his submission, buttressed his first submission that the plea of self-defence did not avail the appellant since his evidence, especially passages at page 21, lines 26 to 37; page 22, lines 1 to 4 and page 23 lines 10 to 15 of the record of the trial, taken together with the pathologist's expert evidence did not show that the accused was in imminent danger of his life; consequently, in Mr Onadeko's submission, the said defence was not available to him as a matter of law.

Turning to the learned judge's statement of the applicable law of self-defence, and provocation, Mr Onadeko submitted frankly and categorically, after a preliminary hesitation and prevarication:

(i) that the judge was wrong to have stated, in effect, "that the essential element of the defences of self-defence and provocation are the same"; that he further erred by relying on section 15 of the Criminal Code Cap 10 (the general common law defence of "necessity") since it related to an entirely different factual scenario not present in this case;

(ii) that section 191 of the Criminal Code, (dealing with provocation) was misapplied by the learned judge to the facts of the case;

(iii) that the learned judge wrongly cited such authorities as *R* v *Duffy* [1949] 1 All ER 932 and *Lee Chung Cheung* v *R* [1963] AC 220 PC both of which were not on all fours with the instant case; and

(iv) that even though the learned judge rightly quoted the relevant pronouncements in *Archbold's Criminal Procedure, Pleading and Practice* (41st ed), at p 36-37 on self-defence, he ended up misapplying the law therein stated to the facts of the case, and even managed to confuse and equate those mutually incompatible and distinct defences.

After granting him an hour adjournment during the hearing upon his request, the learned DPP (who incidentally conducted the prosecution in the court below) and had earlier before us struggled vainly to defend the judgment appealed against, finally capitulated and threw in the towel, making this final submission to wit: "In view of the misdirection in law on the important issue of self-defence and provocation, the conclusions reached by the learned judge cannot be supported." We were unanimously of the same view having perused the whole record; having listened patiently to the arguments of learned counsel on both sides, and having considered all the arguments canvassed. We accordingly allowed the appeal against both conviction and sentence for murder; quashed and set them aside; released the appellant from custody forthwith, and reserved our full unanimous reasons for our judgment for delivery in the following week, which we now proceed to give.

We firstly turn respectively to the law of provocation, self-defence, the differences between the ingredients of both, the law of accident and necessity and *mens rea* in murder cases in so far as applicable to the facts of this case; pointing out in our analysis where and how the learned judge erred on this key issues.

Defence of provocation.

The statutory law on provocation in The Gambia is contained in sections 190 (malice aforethought), 191 (killing on provocation) and 192 (provocation defined) of the Criminal Code, Cap 10 and are respectively set out hereinbelow:

"190. Malice aforethought shall be deemed to be established by evidence proving any one or more of the following circumstances

(a) an intention to cause the death of or to do grievous harm to any person, whether such person is the person actually killed or not;

(b) knowledge that the act or omission causing death will probably cause the death of or grievous harm to some person, whether such person is the person actually killed or not, although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not, or by a wish that it may not be caused;

(c) using violent measures in the commission of attempt at a felony;

(d) an intention by the act or omission to facilitate the flight or escape from custody of any person who has committed or attempted to commit a felony."

"191. When a person who unlawfully kills another under circumstances which, but for the provisions of this section, would constitute murder, does the act which causes death in the heat of passion caused by sudden provocation as hereinafter defined, and before there is time for his passion to cool, he is guilty of manslaughter only."

"192. The term `provocation' means and includes, except as hereinafter stated, any wrongful act or insult of such a nature as to be likely, when done to an ordinary person, or in the presence of an ordinary person to another person who is under his immediate care, or to whom he stands in a conjugal, parental, filial or fraternal relation, or in the relation of master or servant, to deprive him of the power of self-control and to induce him to assault the person by whom the act or insult is done or offered.

When such an act or insult is done or offered by one person to another, or in the presence of another to a person who is under the immediate care of that other, or to whom the latter stands in any such relation as aforesaid, the former is said to give to the latter provocation for assault.

A lawful act is not provocation to any person for an assault.

An act which a person does in consequence of incitement given by another person in order to induce him to do the act and thereby to

furnish an excuse for committing an assault is not provocation to that other person for an assault.

An arrest which is unlawful is not necessarily provocation for an assault, but it may be evidence of provocation to a person who knows of the illegality."

The indispensable ingredients for the invocation of section 191 (*killing on provocation constituting manslaughter*) are the following:

(a) the person (ie accused) *unlawfully* kills another (ie his victim) with *malice aforethought,* ie either by an unlawful act or an omission: see section 187);

(b) in the heat of passion;

(c) caused by sudden "provocation" (as defined in section 192); and

(d) before there is time for his passion to cool;

(e) "provocation" in this context means as a rule either a wrongful act or insult of *such a nature* as to be likely, when done either to an ordinary person or *in the presence* of an ordinary person to another person who is under his immediate care, or to whom he stands in conjugal (ie in marriage or as a spouse) or parental or filial (ie father or son or daughter relationship) or in the relationship of master or servant (ie if there is contract of service between the parties);

(f) to deprive him of the power of self-control; and

(g) to induce him to assault the person by whom the *act or insult* is done or offered (ie the aggressor or victim).

Then follows a categorisation of three instances where a factual provocation would not constitute "legal provocation" as defined in section192 namely:

(i) where the aggressor does a lawful act against the accused, ie if the former is covered by a plea of justification;

(ii) where one person does an act as a result of an incitement received from another person which induces the former to do the said act and thereby to provide an excuse for committing an assault; and

(iii) where an arrest is unlawful, it will not necessarily constitute provocation, though it may provide evidence of provocation to a person who knows that it is illegal.

The Gambian enactment on legal provocation is a codification which encapsulates the basic relevant common law rules. For example, in what has been described as a "classic direction", Devlin J (as he then was) described provocation thus in *R* v *Duffy* [1949] 1 All ER at 932, CCA:

"Provocation is some act or series of acts, done by the dead man to the accused which would cause in any reasonable person, and actually cause in the accused, a sudden and temporary loss of self-control, rendering the accused so subject to passion as to make him or her for the moment not the master of his mind."

At common law, as indeed under The Gambian statute, a dual test is applicable: firstly, the subjective question, was the accused provoked to lose his self-control, followed by the second, an objective question, was the provocation enough to make a reasonable man do as he did? Whether or not, in a particular case the accused was provoked to lose his self-control is a question of fact for the court sitting without a jury (as in The Gambia) to decide.

In accordance with the general rule in criminal trials, it is for the trial judge to say whether there is any evidence of that fact. Sufficient evidence may appear in the prosecution case (as happened in the instant case). If not there is an evidential burden on the accused to advert to it and establish it on the balance of probabilities. If there is evidence of the defence of provocation, though it has not been specifically raised by the accused, the judge must direct himself (in a no-jury trial) to acquit unless satisfied that the defence has been disproved: see *Palmer* v *R* [1971] AC 814; *Wheeler* v *R* [1967] 3 All ER 829 and *Hammond* v R (1985) 82 Cr App R 65.

The accused's failure to testify to his loss of self-control is not necessarily fatal to his case. Provocation as a partial excuse is usually set up as an alternative to the completely exonerating defence of self-defence; and the admission of loss of self-control would weaken or destroy the alternative defence; and the courts recognise that an accused person may have tactical reasons for not expressly asserting what may be the truth: see *Bullard* v *R* [1957] AC 635; *Lee Chuen* v *R* [1963] AC 220 and *Ibrams* v *R* (1982) 72 Cr App Rep 154 where the accused had received gross provocation but the last act occurred on

October 7. The attack was carefully planned on 1 October and carried out on 12 October. It was held that the judge was right to hold there was no evidence of loss of self-control.

Case law demonstrates amply that provocation may extend over a long period of time provided it culminates in a sudden explosion, sparked off by some relatively minor incident: see on this a useful article by Martin Wasik entitled "Cumulative Provocation and Domestic Killing" in (1982) Criminal Law Review 29, where the relevant cases are examined.

Cooling time is obviously a fact of very great importance in deciding this question. As Tindal CJ told the jury in *Hayward* v *R* (1933) 6 C & P 157 at 159:

"Whether the mortal wound was given by the prisoner while smarting under a provocation so recent and so strong that the prisoner might not be considered at the moment the master of his own understanding; in which case, the law, in compassion to human infirmity, would hold the offence to amount to manslaughter only; or whether there had been time for the blood to cool, and for reason to resume its seat before the mortal wound was given, in which case the crime would amount to wilful murder."

Turning to the *objective test* in provocation (section 192 above) the *locus classicus* in case law is to be found in Viscount Simon's dictum in *Mancini* v *DPP* [1942] AC 1 at 9:

"It is not all provocation that will reduce the crime to manslaughter…The test to be applied is that of the provocation on a reasonable man, as was laid down by the Court of Appeal in *R* v *Lesbini* [1914] 3 KB 1116, so that an unusually excitable or pugnacious individual is not entitled to rely on provocation which would not have led an ordinary person to act as he did." *Macini* has been consistently applied and followed by this court.

Self-defence

I next turn to the defence of self-defence. Where available, this defence completely exonerates the accused from criminal liability or penalty. Contrast the legal effect of a successful plea of provocation to a charge of murder which results in the mitigation or reduction of the penalty to that for manslaughter, made punishable for life under section 189; but even in the court's discretion by a fine only under

section 31(1) of the Criminal Code, Cap 10 or under section 32 the convict may be ordered to enter into recognisance with or without sureties and to be of good behaviour for a time fixed by the sentencing court: see also our dicta in *Manneh* v *The State* in (1991) GCA Cyclostyled Judgments.

Self-preservation, it has been well said, is the first law of nature; and the law recognises that every free person in the society is entitled to protect his person and life against any attack, harm or injury by another person. He is entitled to do this with the aid of his own body, eg his hand or foot or head or with the aid of any object such as a stick, cudgel, a cutlass or even a gun or any other means to repel any assault.

For a plea of self-defence to succeed, the act done by the accused and the kind or degree or quantum of force used by him on the occasion and in all the circumstances of the case, must appear to the court to have been reasonably necessary for the prevention of the crime in question being committed against either himself or the third person he was bound to defend or for the defence of his property from damage or destruction by the aggressor. If the force or harm used was not reasonably necessary for the prevention of the particular crime being committed against his person or another person or his property, then the force or harm used by the accused is unreasonable and cannot be said to be in necessary self-defence.

Thus, if an accused is faced with such a predicament created by another in the commission of a crime that the person against whom this crime is to be committed has ample reason to believe that the only way open to him to prevent the criminal from committing the crime is to kill him, then his act of killing would be considered to be force or harm which is reasonably necessary for the prevention of the crime. On the other hand, if the crime being committed can easily be prevented by a blow of the fist or a single push, it would be unjustifiable of the person preventing it to use a knife, a cudgel, or a cement block or a gun to kill the criminal.

I now turn to a few decided cases to illustrate the practical application of these rules in the peculiar factual circumstances and scenario of those cases. In the Ghana case of *R* v *Grunshie* [1959] GLR 124, CA the question arose as to whether the force or harm used by the appellant in preventing the deceased from committing homicide against him was reasonably necessary under the circumstances. The appellant was charged with manslaughter for killing his own son by

inflicting cutlass wounds on him. On the day of the incident, the appellant was eating when the deceased, who was armed with a bow and arrow and cutlass, threw a spear at him which missed him. The deceased threw a second spear which hit the appellant's elbow. When the latter picked up the spear which missed him and tried to hit the deceased, the spear hit the ceiling of the house. The deceased approached him. The appellant tried to hit him with the spear but the deceased cut him with a cutlass. The deceased then started walking backwards calling: "come! come!" while still armed. As he walked backwards, he fell into a gutter and the cutlass fell down. The appellant took the cutlass. The deceased tried to get up. All this time the deceased was armed with his bow and arrow. Fearing that if he ran away the deceased might get up and kill him with his bow and arrow, the appellant killed him by inflicting cutlass wounds on him. At his trial, the assessors gave a unanimous opinion of "Not Guilty" but the trial judge disagreed and found the accused guilty on the grounds that his act was revenge and not in necessary self-defence because of the fact that the deceased was on the ground, even though he was armed with the bow and arrow. He therefore held that the accused's act went a great deal further than was necessary in self-defence. On appeal against the conviction, the Court of Appeal held that there is no limit to the force or harm that may be used in necessary self-defence against murder. In any case, the question that had to be decided was whether the act done was necessary in self-defence and not whether it went further than was necessary in self-defence against murder. Homicide is justifiable as soon as the act is found to be necessary in self-defence and not whether it went further than was necessary in self-defence.

It is to be further noted that when an assailant has in his possession any lethal or dangerous weapon and all the circumstances point unmistakenly to the accused-a subjective test-that the aggressor intends to commit a homicide with it against him, the victim is entitled to kill his aggressor after disarming him because it may be that if he fails to do so, his aggressor would take the opportunity to kill him. In such a case, the fact that the aggressor would take the opportunity to kill him and is disarmed at the onset does not alter the situation from being one of extreme necessity. If the accused has ample reason to fear that his life is in danger-a subjective matter- the law permits him to kill in order to prevent the danger to his life.

In the 1938 Nigerian case of *R* v *Igwe* 4 WACA 117, the appellant was charged and convicted of murder by the High Court at Okigwe. The facts leading to the charges were that the deceased during a dispute between him and the appellant over some palmnuts, suddenly

rushed on the appellant armed with a machete. He, however, succeeded in disarming the deceased, fell him to the ground defenceless and then used the same machete in inflicting on him multiple mortal wounds. His plea of self-defence was rejected by the trial judge. On appeal to the West African Court of Appeal, the question arose as to whether the appellant, after disarming the deceased, was justified in seizing the deceased's machete and killing him with it. The appellate court held:

"Upon this point the accused in the heat of the moment may well have thought and indeed not without reason, that he was engaged in a life and death fight with the deceased, if he could not kill the deceased he would certainly be killed by the deceased. And it must be remembered that it was the deceased who started the deadly fight."

The case of *Igwe* may be compared with the Gold Cost case of *Konkomba* v *The State* [1964] GLR 616. The facts were that the appellant went into a market to buy pito from his former girlfriend, then married to another person, the first prosecution witness. The woman refused to sell the pito to him, whereupon the appellant who was then holding a cutlass left for his house and came back to the spot with two brothers each carrying a cutlass. The woman's husband was still there. The appellant insisted on buying the pito while the woman still refused. The first prosecution witness, the husband, who had previously been told by his wife that the appellant was still making overtures to her, told the appellant to go away. At that juncture, the deceased, an old man of about 70 came there and advised the woman to pack her things and leave the market to avoid trouble. Upon this, the appellant hit the deceased twice on the head with an axe and cut the deceased with his cutlass causing his death instantly. When the first prosecution witness rushed to lift the deceased up, one of the appellant's brothers struck him on the head with an axe. In his statement to the police, the appellant alleged that a fight took place between him and the woman's husband on one hand, and others on the other hand, during which the first prosecution witness hit him with a stick; that during the fight the deceased came to aid the first prosecution witness whereupon the appellant struck him with a cutlass.

His evidence on oath which differed from his statement to the police was that while he was engaged in a quarrel with the first prosecution witness, the deceased and others attacked and beat him up and his brothers with sticks, inflicting injuries on them; that each of them fell to the ground while their assailants ran away; he therefore denied

killing the deceased with an axe or cutting him with a cutlass. The appellant was convicted of murder by the trial court. In his summing-up, he failed to direct the jury on the alternative defence of self-defence and provocation, and expressly told the jury that there was no question of justification for the harm inflicted on the deceased On appeal, the Supreme Court stated that on the evidence, the trial judge ought to have directed the jury to consider whether or not there was justification for the harm under the law and within the legal limits and in the alternative, whether or not there was provocation which could reduce the crime to manslaughter because when the police arrested the appellant and his brother the day following the incident, they noticed that the appellant and his brother had each injuries on them and they were even treated and discharged by the doctor who performed the post-mortem examination on the deceased. In any case, the Supreme Court was not satisfied that the appellant was justified in killing the deceased in self-defence; nevertheless the court was of the opinion that with proper direction the jury might most probably have returned a verdict of manslaughter and it accordingly substituted that verdict of manslaughter.

On the principle of *Woolmington's* case [1935] AC 462, HL, the burden of proving the guilt of the accused was throughout on the prosecution: see on this latter point, *Chan Kau* v *R* (1955) AC 206 and *R* v *Lobell* [1957] 1 AC 547. In this case, it was held that where a defence is raised, the burden of negativing it rests on the prosecution but the prosecution are not obliged to give evidence in-chief to rebut a suggestion of self-defence before the issue is raised, or indeed to give any evidence on that issue at all. If on the consideration of the whole of the evidence, the jury are either convinced of the innocence of the prisoner or are left in doubt whether he was acting in necessary self-defence, they should acquit.

The classic pronouncement on the law of self-defence is that of the Privy Council in *Palmer* v *R* (1971) 55 Cr App R 223 at 242, per Lord Morris of Borth-y-Gest delivering the unanimous judgment of the Board:

"It is both good law and commonsense that a man who is attacked may defend himself. It is both good law and common sense that he may do, but only do, what is reasonably necessary. But everything will depend upon the particular facts and circumstances. Of these a jury can decide. It may in some cases be only sensible and clearly possible to take some simple avoiding action. Some attacks may be serious and dangerous. Others may not be. If there is some relatively minor attack,

it would not be commonsense to permit some act of retaliation which was wholly out of proportion to the necessities of the situation. If an attack is serious so that it puts someone in immediate peril, then immediate defensive action may be necessary.

If the moment is one of crisis for someone in immediate danger, he may have to avert the danger by some instant reaction. If the attack is over and no sort of peril remains, then the employment of force maybe by way of paying off an old score or may be pure aggression. There may be no longer any link with a necessity of defence. Of all these matters the good sense of the jury will be the arbiter. There are no prescribed words which must be employed or adopted in a summing-up. All that is needed is an exposition, in relation to the particular facts of the case of the concept of necessary self-defence. If there has been an attack so that defence is reasonably necessary, it will be recognised that a person defending himself cannot weigh to a nicety the exact measure of his defensive action.

If the jury thought that in a moment of unexpected anguish a person attacked had only done what he honestly and instinctively thought necessary, that would be the most potent evidence that only reasonable defensive action had been taken…But their Lordships consider…that if the prosecution have shown that what was done was not done in self-defence, then the issue is eliminated from the case. If the jury consider that an accused acted in self-defence or if the jury are in doubt as to this, then they will acquit. The defence of self-defence either succeeds as to result in an acquittal or it is disproved; in which as a defence it is rejected. In a homicide case the circumstances may be that it will become an issue as to whether there was provocation so that the verdict may be manslaughter. Any other possible issue will remain. If in any case the view is possible, then the intent necessary to constitute the crime of murder was lacking, then the matter would be left to the jury."

Palmer v *R* (supra) was followed and applied by this court to the assault and breach of peace case of *Drammeh* v *The State,* November/December 1987, Cyclostyled Judgments of Gambia Court of Appeal at pp 21,24, 25 and 26; *Bah* v *The State*, May/June 1992 Gambia Court of Appeal Cyclostyled Judgments at pp 21, 24, 25 and 26 and *Marong* v *The State* May/June 1992 Gambia Court of Appeal Cyclostyled Judgments at pp 27, 30 and 31.

In conclusion it must be reiterated that whether the force used in self-defence was reasonable is objective. However, in deciding this, the

trial court of fact should be directed to consider what the accused himself thought (ie the subjective test in relation to the accused): see *R* v *Shannon* (1980) 71 Cr App R 192. Secondly, the old rule that "a man must retreat as far as he can in order to avail himself of the defence of self-defence" has now been overruled by authorities like *Palmer*. Whether the accused did retreat is only one element for the court of fact to consider on the question of whether the force used by him was reasonably necessary in the circumstances.

Finally, there is no rule of law that the excessive use of force in self-defence reduces what would otherwise be murder to manslaughter. However, in a proper case, the facts on which the defence of self-defence was unsuccessfully put forward, may raise a reasonable doubt as to whether the accused was provoked or had the necessary intent for murder and thus lead to a verdict of manslaughter: see *R* v *Pascoe* (1970) 54 Cr App R 40. And there is no rule of law that a man must wait until he is struck before striking in self-defence. If another strikes him he is entitled to get his blow in first if it is reasonably necessary so to do in self-defence: see *R* v *Deana* (1909) 2 Cr App R 75. The plea of self-defence is not open to an aggressor: the defence as the name implies is only open to a person who is assailed by another person unlawfully: see *Dabla* v *The State* [1963] 2 GLR 4, SC for an illustrative case; as well as The *State* v *Dabinameka alias Nyen* (1963) CC 41.

Under section 17 of The 1970 Constitution of The Gambia, no person shall be subjected to torture or *inhuman or degrading punishment or other treatment*. It is conceivable that in this case, the victim's protective freedom from inhuman or degrading punishment or other treatment was being violated by the deceased who forcibly entered the privacy of his locked room at midnight and subjected him to an orgy of assault and battery by coarse abuses and a knife attack. And section 15 of the Criminal Code, Cap 10 provides expressly for the defence of necessity in the following terms:

"An act or omission which would otherwise be an offence shall be excused if the accused can show that it was done or omitted to be done only in order to avoid consequences which could not otherwise be so avoided, and which if they had followed would have inflicted upon him or upon others whom he was bound to protect inevitable and irreparable evil, that no move was done than was reasonably necessary for that purpose and that the evil inflicted by it was not disproportionate to the evil avoided."

The main principle underlying the defence of necessity is the fact that the person accused committed a criminal offence under necessity. Professor Kenny in his *Criminal Law* (17th ed) p 67 posited three conditions, *sine qua non*, under which the defence of necessity cannot be accepted:

(a) first, where the evil averted was a lesser evil than the offence committed to avert it; or

(b) secondly, where the evil could have been averted by any thing short of the commission of that offence; and

(c) thirdly, where more harm was done than was necessary for averting the evil.

The material facts of the case against appellant.

I now turn to the material facts in this case on the strength of which the defences of self-defence, provocation and accident have been relied upon. The appellant's own sworn account of the incidents leading to the death of Saihou Sumareh, the victim, as given in his evidence in-chief is as follows:

"I went to bed (on 9 January 1992) by 10 pm at Serrekunda (in Lawyer Mahoney's compound). I was asleep; I was covered with my blanket. I was scared. The deceased Saihou Sumareh came and took my blanket off and he said "fucking, give me the front door key." I do not know what the deceased has to do with the house where I sleep. I told him it is after 3 am and that I will go and tell Mr Mahoney. I do not know why he asked for the front door key. He said "fuck you, and fuck Bola Mahoney too." The altercation was taking place in my room. I locked the door before I went to sleep. I did not open the door to let the deceased into the house. He had his own key. We share the accommodation together. Saihou Sumareh went and telephoned Mrs Mahoney saying that your boy living in the house is giving him problems. He was referring to me, I was not giving him any problems. Thereafter he came and said to me "you know you are not the owner of the house." He held my shirt at the collar and was shaking me and he gave me a slap. I fell down, opened the back door**.** I was not happy, this shows me that there is going to be problems.

When the deceased slapped me I was angry. I did something as a result of the slap. I went out to find a stick. I found a stick. I came inside the house. The deceased attacked me. He gave me another slap

and he knocked me in the stomach where I have some operational pain. He was holding a knife at the time he was kicking me. He said. "Today, I am going to kill you." He kicked me and I fell down. Then I picked the stick on to the ground. I was going to knock down the knife in his hand but it mistakenly hit the head of the deceased just once. The deceased fell down. I noticed blood; he was trying to get up and come and meet me, so I ran. I did not hit him when he got up for the second time. I went to look for a stick in case he attacked me. I will knock him. I ran outside and went away inside the town. I was going to have rest outside because the deceased was bothering me in the house. I did not come back to the house again. I never saw the deceased in the house after hitting him and ran away.

After the incident I saw the deceased at the mortuary. It was about three times the confrontation between me and the deceased. He started to abuse my mother. He called me a bastard; "you think that you are the owner of this house?" Whenever he went out and came he will find me sleeping. I reported these incidents to Mr SJB Mahoney. I was arrested in connection with the death of the deceased. I was charged with the offence of murder. In my statement to the police, I admitted assaulting the deceased. I admitted I hit the deceased but not kill him. I am now sad about the whole incident."

Under cross-examination, the accused was not shaken. But he used the opportunity of further questioning on the sequence of events previously narrated by him to repeat himself and stress that the deceased was the aggressor at about 3 am while he was asleep and that he merely assaulted him to stop him doing further danger to him; and used the stick (an ordinary small stick) to defend himself. Afterwards, he threw it away, without recollecting the exact dumping place. His assailant was described as being "taller than me"; he was "tougher than me." "I know", he continued under cross-examination:

"that the knife the deceased was holding he was going to use to kill somebody. The deceased tried to stab me with the knife. When I came inside with my stick, as soon as I arrived, he kicked me in the stomach and slapped me again. I fell down. The stick was down. I picked the stick and tried to knock the knife off him and I then hit him. The deceased was standing when I was on the ground. The knife was in (his) hand firmly. The stick was down. It was when I got up that I tried to knock the knife from his hand. He tried to hit me with the knife when I was on the floor. The deceased did not stab me when I was on the floor. I sustained injury because he kicked me in the stomach. It was appendicitis. It was about a year ago. I had two operations, bile

and stomach (appendicitis). After I hit the deceased's head, he did not do anything to me. I ran after the deceased. I saw the deceased holding a knife and he would use it on me if I did not run. He was wild. I hit the deceased once. I saw blood after hitting him. I saw blood from his head. Not so bad. The knife did not fall from the deceased's hand when I knocked him on the head. He held to it tight."

Pausing here for comment, it would be noticed from the foregoing lengthy cross-examination of the accused, that he did not shift from his earlier story of self-defence in the persistent assaults received, coupled with the brandishing of the knife by his wild dawn attacker-intruder. The persistent questioning he was subjected to, the more graphic detailed and consistent his story of self-defence in the agony of the moment caused by his unrelenting attacker became. In other words, the cross-examination by counsel surprisingly and unwillingly gave the accused ample opportunity to rub in the salient features of his defence; which incidentally tallied with his brief earlier accounts in his police statements; thereby underscoring his consistency and truthfulness to the court of fact, which had no hesitation in accepting his story as factually and wholly true. For example in his earlier statement (exhibit 4) the accused stated, inter alia, "It occurred yesterday Friday 10 January at about 22.00 hours. That I went to bed and in the event one Saihou Sumareh came in and started disturbing me in uncovering and even up to the extent of insulting my parents. He further went as far as telephoning Mrs Mahoney and reporting that I was disturbing instead, which was not true. In that interlude, he came again and started disturbing me and as a result we held one another by our throats and later released one another. There and then he took a knife and I took a stone and met again and held each other; I was able to dispossess him of his knife; where I knocked him with my stone on his forehead and caused him injury."

His second cautionary statement dated 12 January 1992 stated, inter alia;

"On arrival (at the Serrekunda Police Station) I confessed to him (Commander Sainey Mbye) that I used a stick on the complainant which I threw over the fence. Afterwards we went to search for the said stick but we could not find it."

His third and last cautionary statement dated 20 January 1992 written after been charged with the offence of murder, contained a single poignant sentence: "Yes I assaulted the deceased Saihou Sumareh which resulted in his death."

It would therefore be noticed that at the earliest opportunity, the prosecution had an uncontradicted, wholly consistent story of an unprovoked assault and murder in a self-defence or accident or provocation situation. Speaking for myself, granted the victim's account could never be rebutted without a rival testimony from the deceased aggressor, the chances of prosecution succeeding on this bare plausible exonerating story were very slight or highly improbable; and it behoved a fair minded prosecutor to have acted courageously and decided against prosecution on the facts of this case and not left the nettle with the court.

Be that as it may, the decision to prosecute was persevered in; and the trial judge did not come to the rescue of the prosecution in the event, thanks to the multiplicity of his unfortunate but serious errors in law in the only cardinal important legal issue of self-defence, accident or provocation, all of which availed the accused in this case having regard to the relevant law already expounded above.

It remains for us to point out how and where the learned judge erred in law in his judgment, as has been correctly urged on us by both learned counsel at the hearing of this appeal. In the first place, the learned judge with respect erred in law and on the facts seriously when he held that:

"(a) the defence of provocation does not avail the defendant ; (b) the same elements are required for self-defence as for provocation; and (c) that the essential mental element of murder (malice aforethought) was proved."

The earlier analysis of both provocation and self-defence suffice to disprove his second holding. With regard to his first and third holding, it cannot be gainsaid that apart from being completely exonerated from the offence charged because of the availability of necessary self-defence to the accused, as has already been demonstrated at length in this judgment, it is also indisputable that the accused did not have the necessary *mens rea* of malice aforethought as expounded in earlier analysis of the material definition in sections 190 to 192 of the Criminal Code as well as the material unchallenged evidence thereon in this case.

In essence, the deceased was a midnight intruder, trespasser and aggressor who invaded the accused's privacy at that ungodly hour while he slept; and without any provocation received, subjected him to a tirade of coarse abuses, vilification of his parents, and capped it with

persistent physical assault and battery; coupled for good measure with threats to kill his sleeping victim, brandishing a knife at him; kicking "him" more than once in his weak post-appendicitis stomach and brandishing a knife at him. The case here is on all fours with *Grunshie, Konkomba, Palmer, Wheeler, Lee Chun Cheun and Ibrams* cited above.

With respect to the availability of the complete defence of "accident" the leading case of *Woolmington* (supra); *R* v *Roberts* [1942] 1 All ER 187 CCA and *Mensah* v *R* (1945) 11 WACA 2, PC are clearly applicable and on all fours with the material facts of the instant case. It would be recalled from our earlier recapitulation of the facts that there was no contradiction of the appellant's material evidence that he intended to knock down the knife being wielded by the deceased by hand during the fight but it (ie the stick) *mistakenly* hit his head just once; causing him to fall down and bleed. This was a clear invocation of the plea of accident, as expounded by us above; and the learned judge erred in law by omitting to consider it as he should have done on the above authorities, eg *Mensah* (supra); *Woolmington* v *DPP* (supra) and *R* v *Roberts* (supra).

The learned judge's further invocation of the general defence of "necessity" under section 15 of the Criminal Code again shows the confusion of his self-direction and serious misapplication of irrelevant statutory law to the case, as we have already attempted to demonstrate above.

In the final analysis, we could not agree more with learned Director of Public Prosecutions' final submission that in view of misdirection of important issues of self-defence and provocation, the conclusion reached by the learned judge cannot be supported.

The verdict on the accused being guilty and convicted of the offence of murder is clearly wrong in law and insupportable on the whole of the non-controversial evidence in the case. The proper verdict ought to have been not guilty on the alternative grounds of necessary self-defence and accident. Alternatively, also the defence of provocation was manifestly available to the accused on the evidence and in law as already explained.

It was for the above reasons that we unanimously allowed the appellant's appeal here on 19 May 1993; set aside and quashed his conviction and sentence for murder; substituted thereof a verdict of acquittal and thereupon ordered his immediate release from custody.

Appeal allowed.

SYBB

KEBBEH v SILLAH; SILLAH v KEBBEH (CONSOLIDATED)

COURT OF APPEAL

(Civil Appeals No 22/92 & 23/92

3 June 1993

ANIN P, ABDULLAHI JA AND OMOSUN CJ

Contract-Breach of Contract-Specific performance-Contract for sale of land-Receipt of substantial part payment of agreed purchase price-Award of damages or order for specific performance of agreement-Acid test being whether specific performance would do more perfect and complete justice than award of damages.

Held, *unanimously allowing the appeal and upholding the claim for specific performance of the agreement for the sale of the suitland:* the traditional view was that specific performance would not be ordered where damages were an adequate remedy. However, the acid test is not simply whether damages would be an adequate remedy, but rather whether specific performance would do more perfect and complete justice than an award of damages. In the instant case, the vendor, under the contract for the sale of the suitland, has received substantial part payment of the agreed purchase price totalling fifth-sixth thereof and the purchaser, the appellant, is consequently entitled to the relief of specific performance. Damages as ordered by the trial court would not be adequate recompense. *Tito* v *Waddell* (*No 2*) [1977] Ch D 106 applied. *Walsh* v *Lonsdale* (1882) 21 Ch D; Re *Maugham*; *Ex parte Monkhouse* (1885) 14 QBD 956 at 958; *Manchester Brewery Co v Coombs* (1901) 2 Ch 608 at 617 and *Hasham* v *Zenab* [1960] AC 316 cited.

Cases referred to:

(1) *Harnett* v *Yielding* (1805) 2 Sch & Lef 549.

(2) *Tito* v *Waddell* (No 2) [1977] Ch D 106.

(3) *Evans Marshall & Co Ltd* v *Bertola SA [*1973] 1 WLR 349.

(4) *Beswick* v *Beswick* [1968] AC 58.

(5) *Walsh* v *Lonsdale* (1882) 21 Ch D 9.

(6) *Maugham, re; Ex parte Monkhouse* (1885) 14 QBD 956.

(7) *Manchester Brewery Co* v *Coombs* [1901] 2 Ch 608.

(8) *Hasham* v *Zenab* [1960] AC 316

CONSOLIDATED APPEAL against the judgment of the Supreme court (High Court), upholding the plaintiff's action for breach of contract for the sale of land but awarding the plaintiff damages in lieu of claim for specific performance. The facts are sufficiently stated in the judgment of the court delivered by Anin P.

Alhaji A M Drameh for the plaintiff-appellant.

M M Bittaye for defendant-respondent.

ANIN P *delivered the judgment of the court*. By order of the court dated 27 May 1993, these two civil appeals involving the same parties, the same subject-matter, legal and equitable issues, as well as the same legal representation, were consolidated together and heard as one in the court's discretion. Both appeals raise directly the equitable doctrine of specific performance in a contract for the sale of land.

The law takes the view that the purchaser of a particular piece of land or of particular house (however ordinary), cannot, on the vendor's breach, obtain a satisfactory substitute, and therefore specific performance is available to him. It seems that this is so even though the purchaser has bought for resale: see *Chitty on Contracts* Vol 1 (General Principles), (26th ed), para 1864 at page 1204. As was observed in *Harnett* v *Yielding* (1805) 2 Sch & Lef 549 at 553, the historical foundation of the equitable jurisdiction in granting a decree for specific performance of a contract is that the party seeking it cannot obtain a sufficient remedy by the common law judgment for damages. Hence the traditional view was that specific performance would not be ordered where damages were an adequate remedy. However, the acid test is not simply whether damages are an adequate remedy, but rather whether specific performance would do more perfect and complete justice than an award of damages: see *Tito* v *Waddell (No 2)* [1977] Ch D 106. Reference may also be made to a similar formulation of the same test: is it just, in all the circumstances, that a plaintiff should be confined to his remedy in damages? See *Evans Marshall & Co Ltd* v *Bertola SA* [1973] 1 WLR 349 at 379; and see also *Beswick* v *Beswick* [1968] AC 58 for the evidentiary rule that

the burden is on the plaintiff to show that the common law remedy is not adequate.

The salient facts in both cases are simple and largely non-controversial, as patent from the pleadings and evidence on record. In Civil Appeal No 22/92, the defendant offered a plot of land situate in Bijilo, Western Division of The Gambia to the plaintiff for the sum of D60,000, the plot being clearly identified and delineated in a sketch to the pleadings and admitted by the defendant. The parties entered into written agreement for the said sale of the land on 5 October 1988; and the plaintiff paid the defendant the total sum of D50,000 in three instalments of D24,000 (on 6 October 1988), D6,000 (on 11 November 1988), and D20,000 (on 17 November 1988) respectively. The relative agreement was duly tendered in evidence without objection, accepted and marked exhibit C. Under, and by virtue of exhibit C, the vendor (the defendant herein) covenanted to produce and assign to the purchaser (the plaintiff herein) "the appropriate documents of title in his possession" and the former in paragraph three thereof recited the fact that "the vendor has applied to the Director of Lands for the issue of the said plot of land it shall be sufficient if the vendor produces the documents supporting the application he has made to the Director of Lands."

Under a paragraph of exhibit C the purchaser (the plaintiff herein) covenanted to complete payment for his purchase in October 1988. By then, it would be recalled he had substantially performed the payment of the agreed purchase price, leaving only a balance outstanding of D10,000. Despite his receipt of the said part payment of D50,000 of the agreed purchase price, the defendant qua vendor was still in default of his covenant to obtain for and assign to the plaintiff qua purchaser the covering title deeds, and lease of the land sold from the appropriate authorities (ie the Minister of Lands acting through the Director of Lands). Persistent demands made by the plaintiff for these documents proved futile; hence the present action instituted on 26 February 1990 for the main relief of specific performance of the said contract for the sale of the land for other ancillary reliefs which would be alluded to later in this judgment.

After hearing evidence and the addresses of both counsel for the parties, the learned trial judge of the Supreme Court (High Court), Njie J, by his judgment dated 11 November 1992, accepted the plaintiff's evidence in its entirety and held: "that the defendant was in breach of the contract, exhibit C, which he admitted he had signed." But declined to order specific performance, holding instead that

"damages will fully compensate the plaintiff"; that, since in his finding, the *res vendita* had been sold to a third party, "an order for specific performance would cause hardship to that other person and to the defendant although in the case of the defendant he would have brought upon himself." In the event, the learned judge made an award of D150,000 in favour of the plaintiff against the defendant together with interest thereon of twelve and a half per cent from 26 February 1990 to 25 June 1992. He further disallowed the special damages claimed for the settlement of the documents, payment of stamp duty totalling D2790, castigating them as "frivolous." Costs of D2,000 were also awarded the plaintiff.

Being aggrieved with only the portion of the judgment refusing an order of specific performance, the plaintiff-appellant has appealed to this court seeking the setting aside of the judgment, "except the decision to refuse specific performance of exhibit C." The plaintiff-appellant was also dissatisfied with the whole of the said judgment of the court below and also appealed to us, seeking the following compendious relief:

"The whole decision of the learned trial judge be set aside and judgment be entered in favour of the plaintiff for specific performance and a declaration that the six leases (into which the suitland had been subdivided) belong to the plaintiff and that the defendant should do everything possible to vest the six leases in the plaintiff."

The argument of Alhaji Drameh, counsel for the appellant, was simple and direct. His client had made a case for the grant in his favour of an order of specific performance of the contract to sell the entire suitland sketched in exhibit C; having substantially part performed his covenant to pay the purchase price of the *res vendita* on account of his instalment payments of fifth-sixth of the agreed purchase price; that damages were an inadequate remedy to him in lieu of specific performance; that the defendant-respondent had failed to show cause why such an equitable order of specific performance should not be made, despite his alleged subsequent obligation to resell the *res vendita* to a third party; and that any imagined or real hardship he may have brought upon himself by his alleged subsequent third transaction could not be visited on the appellant.

For the defendant-respondent, Mr Bittaye countered that the learned trial judge was right in the circumstances of this case in awarding damages instead of ordering specific performance in the correct exercise of his equitable jurisdiction. Furthermore, it was contended,

since the plaintiff-appellant had defaulted in paying the whole of the purchase price, he was not entitled to an order of specific performance.

In our considered judgment, this is clearly a case involving a contract of the sale of land where equity acts on the conscience of the defaulting vendor who has received substantial part payment of the agreed purchase price totalling fifth-sixth thereof and the purchaser is consequently entitled to the relief of specific performance. Damages would not be an adequate recompense. Specific performance would, in our view, do more perfect and complete justice than an award of damages; and we would accordingly apply the test laid down in *Tito* v *Waddell* (No 2) (supra). See also *Walsh* v *Lonsdale* (1882) 21 Ch D 9 and per Field J in *Re Maugham; Ex parte Monkhouse* (1885) 14 QBD 956 at 958. "Equity looks upon that as done which ought to be done" per Farwell J (as he then was) in *Manchester Brewery Co v Coombs* (1901) 2 Ch 608 at 617 and *Hasham* v *Zenab* [1960] AC 316. We are satisfied that "the commonest case in which the court specifically enforces a contract is where the contract is for the sale of land or for the granting of a lease." It has also been noted that: "Contracts relating to land differ greatly from contracts respecting most goods, because the land may have a peculiar value to the purchaser or lessee." See *Snell's Equity* (28 ed) page 570, para 2 and the cases cited therein.

We take judicial notice of the notorious fact that Bijilo is a popular tourist area with a much-frequented sea front and beaches. It is our considered judgment that damages will not adequately compensate the plaintiff-appellant in this case in lieu of the most precious land he bargained to purchase; fifth-sixth of the purchase price whereof he had paid thereby substantially performed his part of the agreed bargain; and it would be inequitable now to deprive him of his contract for the sale of this precious land. In the event, we would allow his appeal, uphold the judgment of the trial court in his favour but vary the order made therein of damages, and substitute therefor an order for specific performance of the said agreement for the sale and assignment to him by the defendant-respondent of the covering documents of title and lease for the whole suitland and as delineated in exhibit B together with all the other ancillary reliefs claimed in the writ and granted by the court below.

In Civil Appeal No 23/92, the respondent, qua plaintiff, by his amended statement of claim, claimed specific performance of an agreement for the sale of the said land or in the alternative, a declaration that the leases registration plan Nos P 107/89 - P112/89

situated in Bijilo as shown on the annexed plan are held by the defendant in trust for the plaintiff together with specific damages; 27 per cent interest per annum from 1 December 1988 to date of payment, and any further order as the court may seem meet. In the event, substantially the same rival arguments *mutatis mutandis* were advanced in support of the amended claim and defence and evidence thereon as well as on the relevant law.

By his judgment dated 11 November 1992, the same learned judge who heard Civil Appeal No 22/92 (Hon Mr Justice S F Njie) and was therefore familiar with both cases dismissed the claim for special damages as being frivolous and likewise dismissed all other reliefs claimed. We entirely agree with his main judgment; and would accordingly dismiss this appeal in Civil Appeal No 23/92 and enter judgment in favour of the respondent with the ensuing consequential orders.

Appeal in respect of

Civil Appeal No 22/92

allowed. Claim for specific

performance of agreement

for sale of suitland upheld.

Appeal in Civil Appeal No 23/92 dismissed.

SYBB

MBALLOW v THE STATE

COURT OF APPEAL, BANJUL

(Criminal Appeal No 2/93)

4 June 1993

ANIN P, ABDULLAHI JA AND OMOSUN CJ

Criminal law and procedure-Prosecution-Witnesses-Failure to call-Duty of prosecution to place before trial court all available relevant evidence subject to caveat-Need for prosecution to call witness whose evidence would settle vital point in issue.

Held, *unanimously dismissing the appeal against conviction and sentence for the offence of defilement contrary to section 127 of the Criminal Code, Cap 10*: the prosecution is duty bound to place before the trial court all available relevant evidence. However, this does not mean that a whole host of witnesses must be called upon the same point; if there is a vital point in issue and there is one witness whose evidence would settle it one way or the other, that witness ought to be called. In the instant appeal, the person who accompanied the prosecutrix was not a vital witness whose testimony would have settled one way or the other a vital point in the case. *R* v *Kuree* 7 WACA 175 at 177 applied.

Case referred to

R v *Kuree* 7 WACA 175

APPEAL against conviction and sentence for the offence of defilement of a girl under sixteen years of age contrary to section 127 of the Criminal Code, Cap 10.

Alh A M Drameh for the appellant.

Mrs J R Sallah-Njie, Assistant Legal Draughtsman, for the State.

OMOSUN CJ *delivered the judgment of the court*. The appellant was charged before the Supreme Court of the offence of defilement of a girl under sixteen years of age contrary to section 127 of the Criminal

Code, Cap 10. The offence was allegedly committed on 30 January 1989 at Tabokoto and the prosecutrix was one Fatou Bah, a girl under the age of sixteen. The prosecution called six witnesses to prove its case. At the close of the case for the prosecution, Alhaji Drameh , counsel for the accused, stated that: "I am not putting the accused person into the witness box. I would address the court on the evidence before it. In other words, I am resting his case on that of the prosecution." Counsel on both sides addressed the court.

In a reserved judgment on 14 December 1992, the learned trial judge (Agidee J) convicted and sentenced the appellant to a term of five years' imprisonment with hard labour. The appeal is against both conviction and sentence.

In broad outline, these are the facts as revealed in the evidence. The prosecutrix Fatou Bah was a student of the Latrikunda Technical School. She was twelve years of age by 30 January 1989 on the day of the incident. She left home to buy some kerosene in a nearby store. The second prosecution witness accompanied her and the time was 6 p.m. The appellant invited her home to take D5. She followed the accused to his room. The appellant did not allow the second prosecution witness into his room and locked the door. The appellant pushed her on the bed and got undressed. He tore the pants of the prosecutrix Fatou Bah. She shouted. The appellant had sex with her and ran away. The second prosecution witness stood outside and was crying. The prosecutrix was examined by the sixth prosecution witness, Dr Duanda of the Royal Victoria Hospital, Banjul. On examination, he found bruises and bleeding around the vagina. He said the hymen had been broken.

The appellant filed the notice of appeal. We allowed Alhaji Drameh to file and argue four additional grounds of appeal. He abandoned ground (3). On ground (1), learned counsel for the appellant criticised the evidence of the sixth prosecution witness, the doctor, as inconsistent. He described it as unreliable. He said the witness could not say how long the hymen had been absent even though he testified that it was broken. He submitted that the conclusion of the sixth prosecution witness was not certain. The doctor was unable to say when the sexual intercourse took place. He said there was delay in reporting the incident. For these and more he submitted that the evidence of the sixth prosecution witness was unreliable.

It is noted that the defence called no evidence. It rested its case on that of the prosecution. In other words, it accepted the case of the

prosecution. Counsel for the appellant did not make a no case submission. The only evidence available to the learned trial judge was that of the prosecution. The evidence was not discredited and the learned judge was duty bound to accept it. We do not find the evidence of the sixth prosecution witness unreliable. His examination revealed bruises and injuries in the vagina. No suggestion was made to him that these bruises were caused by other means. The appellant himself admitted having sexual intercourse with the prosecutrix. If anything else, the evidence of this witness showed that there was intercourse. In any case, the sixth prosecution witness on re-examination, said that the bruises he saw could have been committed within 24 hours. He examined the prosecutrix on 31 January 1989 and the offence is said to have been committed on 30 January 1989. We do not find the evidence of the sixth prosecution witness unreliable. He said there was penetration. It was argued next that the learned judge erred in law in admitting exhibit B, a cautionary statement. Learned counsel for the appellant admitted he did not object to the admission of the statement in the lower court. He did not adduce any cogent reason why exhibit B should not have been admitted in evidence and there is no merit in the submission.

Lastly it was submitted that the second prosecution witness, Isatou Jallow, who accompanied the prosecutrix, is a vital witness and should have been called. The evidence is that Isatou Jallow accompanied the prosecutrix. The appellant did not allow her to come in. After the incident, the prosecutrix found her outside crying. It is not in dispute that the prosecutrix entered the room of the appellant who locked the door and effectively barred Isatou from entering the room. She stood outside. She was not an eyewitness to the incident of defilement. The prosecution is duty bound to place before the trial court all available relevant evidence: see *R* v *Kuree* 7 WACA 175 at 177. At page 177 the judgment reads thus:

"This does not mean, of course, that a whole host of witnesses must be called upon the same point, but it does mean that if there is a vital point in issue and there is one witness whose evidence would settle it one way or the other, that witness ought to be called."

It is plain to us that Isatou Jallow was not a vital witness whose testimony would have settled one way or the other a vital point in this case. The submission lacks substance.

On sentence, we are told it was too severe. The appellant was sentenced to five years' imprisonment with hard labour. Learned

counsel for the appellant argued that two years with hard labour would be adequate. It was only on the issue of sentence that we heard Mrs Sallah-Njie who pointed out that the offence carries a penalty of fourteen years but she left it to the court to decide what is best in the circumstances. We were not convinced by the persuasive arguments of Alhaji Drameh that the sentence was severe.

The appeal lacks merit. It is dismissed. We confirm the conviction and sentence passed by the lower court.

Appeal against conviction

and sentence for defilement

of girl under sixteen dismissed

SYBB

ATLEY v GAMBIA PORTS AUTHORITY

COURT OF APPEAL, BANJUL

(Civil Appeal No 3/93)

4 June 1993

ANIN P, ABDULLAHI JA AND OMOSUN CJ

Estoppel-Per rem judicatam-Judgment-Issue estoppel-Issue determined by court of competent jurisdiction-Party to proceedings estopped from re-litigating issue by formulating fresh claim-Application of principle of interest reipublicae ut sit finis litium.

Held, *unanimously dismissing the appeal:* the plaintiff-appellant was estopped *per rem judicatam* from re-litigating the same issue by formulating a fresh claim; the law being that where a competent court has determined an issue and entered judgment thereon, as in the instant case, neither party to the proceedings may re-litigate that issue by formulating a fresh claim. It is in the public interest that there should be an end to litigation (*interest reipublicae ut sit finis litium*). Dictum of Brett MR in *Re May* (1885) 28 Ch D 516 cited.

Cases referred to:

(1) Amoah II v *Atta* 1 WACA 332.

(2) *Brobbey* v *Kyere* 3 WACA 106.

(3) *Edet* v Edet 6 WACA 20.

(4) *Kwao* v *Coker* 1 WACA 169.

(5) *May, in re* (1885) 28 Ch D 516.

APPEAL from the judgment of the Supreme Court (High Court), holding that the plaintiff was estopped from re-litigating the same issue relating to wrongful dismissal from employment, an issue which had been determined in a judgment in previous proceedings involving the same parties.

SHA George for appellant.

Alhaji AM Drameh for the respondent.

ANIN P *delivered the judgment of the court.* This appeal turned solely on the availability, *vel non,* of the plea of *estoppel per rem judicatam*. By his writ, the plaintiff claimed, inter alia, "D48,532 being salary due to the plaintiff from 1 July 1988 to 11 March 1991, ie 32 months and eleven days at D1,500 per month."

In the supporting statement of claim and other pleadings, it emerged that the plaintiff had successfully taken action against the defendant, his erstwhile employers, for wrongful dismissal of his contract of service when he still had about 32 months to go before his normal retirement and was awarded general damages totalling D1,500 by learned trial judge which were increased to D6000 having regard to his age at the date of the wrongful termination of employment and the residue of his normal tenure of office, which the said increased general damages were deemed to flow naturally and directly from the defendant's breach of contract on the basis of the *Hadley* v *Baxendale* principle.

In this second action between the same parties involving the same subject-matter and the same breach of contract, the plaintiff again sought to recover special damages for the balance of salary which he could have earned but for his wrongful dismissal 32 months prior to his normal retirement age. This second action was resisted by his employers principally on the grounds of *res judicatam* since, it was alleged that the same issues had been raised or were necessarily implicit in the first suit between the same parties. The plaintiff sought to rebut this plea of *res judicata* by contending that the plaintiff in the instant suit was claiming the difference between what he had and what he ought to have had.

The learned trial judge, rightly, in our respectful view, disallowed the second suit on the ground that plaintiff was estopped *per rem judicata* from "re-litigating the same issue by formulating a fresh claim; the law being that where a competent court has determined an issue and entered judgment thereon neither party to the proceedings may re-litigate that issue by formulating fresh claim." There must be an end to litigation. We entirely agree with and endorse the learned judge's succinct statement of the well known rule of *res judicatam* which has been regularly enforced by this court in number of cases in the past. For other instances for the application of the rule: see *Amoah II* v *Atta 1* WACA 332, *Brobbey* v *Kyere* 3 WACA 106, *Edet* v *Edet* 6 WACA 20 and *Kwao* v *Coker* 1 WACA 169.

The rule of *res judicata* was concisely stated by Brett MR in *Re May* (1885) 28 Ch D 516 as follows:

"it is a very substantial doctrine, and it is one of the most fundamental doctrines of all courts that there must be an end to all litigation, and that the parties have no right of their own accord, having tried a question between them, and obtained a decision of a court, to start that litigation over again on precisely the same question." We were unanimously of the view that the issue sought to be re-litigated in the instant appeal had been conclusively and finally determined by this very court for the same parties; that it was in the public interest that there should be an end to litigation (*interest reipublicae ut sit finis litium)*. It was for these reasons that we upheld the respondent's plea of *res judicata* and dismissed the appellant's appeal.

Appeal dismissed.

SYBB

COLLEY & Others v COLLEY

COURT OF APPEAL, BANJUL

(Civil Appeal No 30/92)

7 June 1993

ANIN P, OMOSUN CJ AND NJIE J

Practice and procedure-Appeal-Appeal from subordinate court-Forwarding of proceedings and judgment of trial cadi court-Duty cast on trial court after filing notice of appeal and not on appellant-Duty enforceable by order of mandamus apart from administrative orders and sanctions from appellate High Court.

Held, *unanimously allowing the appeal and ordering a hearing de novo of the appeal from the cadi's court*: the duty to forward the proceedings and judgment of the trial cadi court to the Supreme Court (High Court), is cast not on the appellants, as erroneously held by the appellate High Court but on the trial court after the lodgment of the notice of appeal; and the said duty is enforceable by an order of mandamus, being addition to the usual administrative orders and sanctions emanating from the appellate court it self, ie the Supreme Court (High Court) as in the instant case. Counsel for the intending appellants has nothing to do with the discharge of these official duties and completion of formalities under the existing civil appeal procedures and rules of practice.

APPEAL from the interlocutory ruling of the appellate High Court, striking out an appeal from the decision of the Kanifing Cadi Court, on the ground that the appellants had failed to furnish the appellate court with the record of appeal. It is unnecessary to state the facts of the case.

Sam George for the appellants.

Fafa E Mbai for the respondent.

ANIN P *delivered the reasons for the judgment of the court*. This suit was instituted in the Kanifing Cadi's Court, which gave judgment, allocating half of the proceeds of the premises situate at New Jeshwang to the defendant (respondent herein) when, according to the

plaintiffs, the appellants herein, in their first ground of appeal, she was entitled to only one quarter.

The second ground of appeal filed on 12 February 1992 against the judgment delivered on the previous day, states that: "the Cadi was acting *ultra vires* by allowing information not given as evidence to influence his decision."

When the appeal came on for hearing after several unnecessary adjournments in the Supreme Court (High Court), Banjul, *coram* Adio J, the learned judge held as follows:

"This appeal has been put on the list for eight times *and the appellants have not furnished the court with the record*. Two orders were made by this court on 12 May and 24 June 1992; *still the record of appeal is not in court. An appeal is only entered when the notice of appeal and record are before the court*. In the instant case, this appeal *has not been properly entered*. In the court's view, further adjournment of this appeal would congest the court. *The appellants should therefore come back when they are ready*. In the circumstances *the appeal is struck out*." (The emphasis is ours.)

Being aggrieved with this interlocutory ruling of Adio J, the appellants sought and obtained leave to appeal there from verbally on the date of delivery and duly filed their notice of appeal the next day, praying therein the following relief: "That the decision of the Supreme Court be set aside and judgment entered for the appellants."

At the hearing of the appeal, the appellants's learned counsel, canvassed the several errors inherent in the above ruling and invited this court to allow the appeal therefrom and order a hearing *de novo* of the appeal from the cadi's court by another learned judge of the Supreme Court.

The learned counsel for the respondent easily conceded the appeal and did not seek to justify the ruling of the court below. We ourselves had no difficulty in unanimously allowing the appeal and ordering a hearing *de novo* from the cadi's said ruling, while at the same time making consequential orders compelling the cadi to prepare and forward his judgment and proceedings to the Supreme Court on or before the end of June 1993; failing which, an order of mandamus would lie to compel him to produce and submit his said judgment and entire proceedings to the Principal Registrar of the Supreme Court, Banjul. The registrar shall thereafter inform His Lordship the Chief

Justice and request the hearing and determination of the said appeal from the cadi by another learned judge of the Supreme Court, the costs of the abortive trial to abide the event of the hearing of the appeal *de novo.*

In our considered judgment, the said ruling of Adio J was erroneous in several respects: see, in particular, the emphasised passages. Firstly, it wrongly imposed the duty of the forwarding of the proceedings and judgment of the trial cadi's court to the Supreme Court on the would-be appellants, contrary to the existing rules and civil practice procedure which impose those duties on the trial court and their reception on the Principal Registrar of the Supreme Court, who thereafter is obliged to notify the parties of the dispatch of the record of appeal from the trial to the appellate court; prepare the record of appeal; and fix it for mention or hearing before the assigned judge of the Supreme Court.

Section 26 of the Subordinate Courts (Civil Proceedings) Act, Cap 8:02 provides:

"26(1) Any party, who feels himself aggrieved by any judgment or decision of a Court may appeal therefrom to the Supreme Court in such manner and subject to such conditions as may be provided for the time being by the Rules of the Supreme Court regulating such appeals…"

The procedure of lodging civil appeals from a subordinate court such as the cadi's court to the Supreme Court, Banjul, has been provided for in Order 53.[*Here the Court of Appeal after quoting the provisions of Order 53, continued*:]

Quite apart from the formal procedure of proceeding by way of appeal, on the facts of this case, it was competent for either the Supreme Court itself or the interested party to act expeditiously, cheaply and administratively, by requesting the cadi and his registrar in writing to produce promptly the said proceedings and judgment before the Supreme Court within a stated time. Furthermore, the party also has the option of proceeding by an application for an order of mandamus filed within six months of the date of judgment in the Supreme Court under section 16 of Cap 5 for orders compelling the said cadi and registrar to discharge their mandatory duties of furnishing the said documents of their court to the Supreme Court (High Court).

The duty to forward the record of appeal to the appellate court is cast, *not* on the appellant as was erroneously assumed by Adio J, but rather on the trial court after the lodgment of the notice of appeal; and the said duty is enforceable by the well known procedure of mandamus, in addition to the usual administrative orders and sanctions emanating from the first appellate court itself, ie the Supreme Court in this case. Learned Counsel for the intending appellant has nothing to do with the discharge of these official duties and completion of formalities under the existing civil appeal procedures and rules of practice. It is unfortunate that the erroneous views held by the court below have had the effect of delaying the administration of appellate justice in this simple matter quite unnecessarily.

Learned counsel for the respondent in the court below could also have assisted as an officer of the court by bringing the true legal situation to the notice of the court below and not have appeared to be conniving at or else condoning the unfortunate errors and misconceptions of the learned judge.

It was for the above reasons that this court unanimously allowed the appeal herein and made the above-mentioned orders on 4 June 1993.

Appeal allowed. Order for

hearing of appeal de novo.

SYBB

FARAGE v FARAGE

COURT OF APPEAL, BANJUL

(Civil Appeal No 15/92)

10 June 1993

ANIN P, ABDULLAHI JA AND OMOSUN CJ

Land law and conveyancing-Land-Assignment-Effect-Assignee obtaining equitable title to be converted to legal title after grant of approval by Minister of Lands-Assignment effective notwithstanding assignor's unilateral revocation.

Equity-Assignment-Specific performance-Refusal by trial court-Refusal of order of specific performance proper where assignee has unclean hands-Equity not allowing a person to derive advantage from wrongdoing.

Held, *dismissing the appeal (per Anin P, Abdullahi JA and Omosun CJ concurring)*: (1) the effect of the agreement to assign the suitland to the plaintiff is that he obtained an equitable title which was converted to legal title from the date when the Minister of Lands gave approval to that assignment notwithstanding the defendant's unilateral revocation.

(2) A deed of assignment, bearing no indication of sealing, would still be legally binding if there is evidence, eg attestation, as in the instant appeal, that the document was intended to be executed as a deed. *Ex parte Sandilands* (1871) LR 5 CP 411; *Stomdale & Ball Ltd* v *Burden* [1952] Ch 223 at 230 and *First National Securities Ltd* v *Jones* [1978] Ch 109 cited.

(3) The failure of the trial judge to grant to the plaintiff an order of specific performance of the concluded agreement for assignment of the suitland to him, would be upheld because his hands are not clean. No court of equity will aid a person like the plaintiff to derive advantage from his own wrong.

Cases referred to:

(1) *Odoi* v *Hammond* [1971] 2 GLR 375, CA.

(2) *Esso Petroleum Co Ltd* v *Southport Corporation* [1956] AC 218, HL.

(3) *Fox* v *Star Newspaper Co* [1898] 1 QB 636, HL.

(4) *Ahenkora II* v *Kumah* [1963] 1 GLR 84.

(5) *Ajaye* v *Odunsi* (1959) 4 FSC 189.

(6) *Ibeh* v *Pan African Metal Aaron* [1967] GLR 188, CA.

(7) *Mundy* v *Butterfly Co* (*The*) [1932] 2 Ch 227.

(8) *Carlill* v *Carbolic Smoke Ball Co* [1893] 1 QB 256.

(9) *Benmax* v *Austin Motor Co Ltd* [1955] AC 370.

(10) *Sandilands, Ex parte* (1871) LR 5 CP 411.

(11) *Stromdale & Ball Ltd* v *Burden* [1952] Ch 223.

(12) *First National Securities Ltd* v *Jones* [1978] Ch 109.

(13) *Xeros* v *Wickham* (1863) 14 CB (NS) 435.

(14) *Vincent* v *Premo Enterprises Ltd* [1969] 2 QB 609.

(15) *Meyers* v *Casey* (1913) 17 CLR 90.

APPEAL from the refusal of the trial High Court to grant order of specific performance of an agreement for assignment of the disputed property.

A A Gaye (with him *Mrs M Sey* and *Omar Njie*) for the appellant.

S B Semega-Janneh for the respondent.

ANIN P. The reliefs claimed by plaintiff-appellant against the defendant-respondent in his writ issued on 3 January 1991 were as follows:

"(1) An order against the defendant for the specific performance of a written contract made on 15 December 1987 between the plaintiff and the defendant for the assignment by way of sale by the defendant of a

portion of leasehold land Serial Registration Number K82/1971 Assignment Serial Registration No 127/86 situated at Kanifing to the plaintiff.

(2) An injunction to restrain the defendant by himself, his servants, agents workmen or otherwise howsoever from entering, constructing and/or continuing to enter and to construct anything whether permanent or temporary on that portion of that piece or parcel of land demised by lease Serial Registration No: K82/1971-Assignment Serial Registration No 127/86 delineated on the plan attached to the statement of claim pending the determination of the suit.

(3) An injunction to restrain the defendant by himself, his servants, agents; workmen or otherwise howsoever from selling, leasing, devising mortgaging and/or otherwise alienating that portion of lease Serial Registration No: 127/1986 delineated on the plan attached to the statement of claim pending the determination of the suit.

(4) Damages for breach of contract.

(5) Interest.

(6) Costs.

(7) Further or other relief."

The parties are uterine brothers; the defendant being the younger brother who was helped in his business career by the former in business opportunity, cash and help in kind culminating in the assignment of lease for valuable consideration.

In his amended statement of claim, the plaintiff-appellant stated in paragraph (3) that he had assigned the residue of his leasehold Plot No K82/1971 to the defendant, exhibit A. The head lease had been made in the former's favour by the head lessor, Alhaji H O Semega-Janneh, for a consideration of D50,000. Paragraph (4) of the amended statement of claim also stated: "By an agreement in writing made on 15 December 1987 between him and the defendant, sold the said residue of the plot exhibit A, to the former for D200,000." The terms of the agreement between the assignor and assignee (ie the parties herein) as stated in paragraph (5) were that:

(a) "the purchaser (ie plaintiff) pays the full price to the vendor who acknowledges same by signing the agreement;

(b) the vendor shall diligently endeavour to obtain the written consent of the Minister for Local Government and Lands for the assignment of the said land by the vendor to the purchaser;

(c) the assignment shall be made by the vendor within a week of the written consent of the Minister being obtained;

(d) the title deeds of the lease shall be handed over to the purchaser by the vendor on the signing of the agreement."

It was also stated in paragraph (6) of the amended statement of claim that: "pursuant to the said agreement the defendant duly handed over the original top copy of the Assignment No 127/86 in respect of the said portion of Land to the plaintiff". It is averred in paragraph (7) that the defendant on 15 December 1987 wrote to Ag Director of Lands for his Minister's consent to the said assignment. It is further alleged in paragraph (9) that the plaintiff and the defendant "duly executed a deed of assignment of the said residue of the defendant's said lease in anticipation of the Minister's consent." Paragraph (10) of the amended statement of claim also states:

"in breach of the (above) agreement and before the Minister's consent could be officially communicated to him, the defendant unlawfully on 11 July 1988 wrote to the Ag Director of Lands stating therein inter alia*: `After keeping silence for so long I now decided to revoke my assignment of (the said plot) of the plaintiff who fails to honour the assignment or agreement between us. I shall be grateful if you seek the Minister's approval'*." (The emphasis is mine.)

It was also stated in paragraph (11) that on 19 July 1988, the said Director of Lands by his letter Ref L/1518/ 1969/(10) replied to the defendant's letter and informed him that his said request had been honoured. Paragraph (13) also says. "As at July 1988, the said portion of land was undeveloped and has only a few citrus trees." Then follow paragraphs disclosing subsequent futile attempts at an amicable settlement of the differences between the parties about the said assignment. In paragraph (17) the important averment is made that "the defendant by various acts and deeds has evinced a clear intention no longer to be bound by the said contract of assignment and he has in fact repudiated the said contract and has acted in a manner detrimental to the plaintiff's interest in the said leasehold land." The particulars of acts of repudiation and detrimental acts were stated as follows:

(i) the defendant had constructed what appears to be a large (unfinished) store *cum* warehouse at the rear of the said plot;

(ii) the defendant has commenced the construction of what appears to be a large shop with several doors at the front of the said plot. A sketch plan of the plot showing the structures therein is attached and is marked B;

(iii) Every day for the past few weeks, several workmen are to be seen at the said plot busily engaged in the construction of the above structures; and

(iv) the defendant has offered the said plot and the unfinished building for sale.

The plaintiff also pleaded that "the defendant threatens and intends, unless restrained by the Supreme Court to continue and, repeat the wrongful acts above complained of." Then follow the seven reliefs claimed already set out above.

In his amended statement of defence and counterclaim dated 17 May 1991, the defendant admitted some formal parts of the amended statement of claim, eg the uterine brotherly relationship of the parties; the assignment of exhibit A (the identity of the suitland was therefore not in dispute) together with the details of the terms of agreement as pleaded in paragraph (5) above).

Be that as it may, by virtue of the said material pleadings by both sides coupled with the oral evidence, neither the fact of the assignment nor the identity of the suitland sketch in exhibit A, nor the consideration therefor, nor the rights and obligations of the parties to the assignment remained in doubt or even to be formally proved thereafter. After all, "the purposes of pleadings is to define the issues or matters in controversy which the trial court is called upon to adjudicate": see *Odoi* v *Hammond* [1971] 2 GLR 375, CA to which I would respectfully add: "the facts which the parties admit and do not therefore invite the trial court to adjudicate thereupon or determine." See also Lord Normand's famous dictum on pleadings in *Esso Petroleum Co Ltd* v *Southport Corporation* [1956] AC 218 at 238-239, HL.

Other traversed points (and therefore triable issues) emerging from the defendant's amended defence and counterclaim are the following: "the original top copy of the assignment No 127/86 was handed over to the

plaintiff before the execution of the said agreement"; "the Ag Director of Lands said letter dated 15 December 1987 was written and signed contemporaneously with the said agreement"; the defendant executed the deed of assignment in anticipation of the payment of the price of the said leasehold; the allegation that the defendant did not receive the Minister's alleged approval; that the defendant did not act in breach of the said agreement; and that apart from admitting the several citrus and other trees on the leasehold premises, there was an admission of a watchman's house thereon.

The crucial outstanding issues in the case are contained in paragraphs (14) and (15) of the amended statement of defence which state:

"(14) *Particulars (1)-(3) are admitted* but the defendant denies that they are acts of *repudiation* detrimental to the plaintiff because it was the plaintiff who *impliedly repudiated the agreement by failing to pay the price.* Paragraph (4) of the particulars is denied."

(15) The defendant pleads *laches* and estoppel and avers that the plaintiff slept on any right he might have had although the defendant denies the existence of any such rights over the said property. The defendant further avers that the said agreement is void for *uncertainty*." (The emphasis is mine).

The defendant further appended a counterclaim which was by notice of discontinuance dated 4 November 1991, discontinued and was later adjudged to have been discontinued and duly struck out. We will therefore not be bothered with the said counterclaim any longer. In *Fox* v *Star Newspaper Co* [1898] 1 QB 636, HL, Chitty LJ commented on the then existing practice rule as to discontinuance with leave, *in pari materia* with our local rule thus:

"The substance of the provision is that, after a stage of the action has been reached at which the adversaries are meeting face to face, it shall only be in the discretion of the judge whether the plaintiff shall be allowed to withdraw from the action so as to retain the right of bringing another action for the same subject-matter."

See also similar remarks in *Ahenkora II* v *Kumah* [1963] 1 GLR 77 at 84. It was held that where the plaintiff discontinues without reserving to himself the rights of later bringing a similar action, the discontinued action will operate as *res judicata*: see *Ajaye* v *Odunsi* (1959) 4 FSC 189 at 190; *Ibeh* v *PanAfrican Metal Aaron* [1967] GLR 188, CA and *Mundy* v *The Butterfly Co* [1932] 2 Ch 227.

Adverting his mind to the primary issue whether or not there was in fact and law an assignment of the suitland from the defendant to the plaintiff conferring title on the plaintiff, the learned trial judge in his judgment dated 18 May 1992 concluded incorrectly, in my respectful view, the question in the negative. His main reasons, with which I respectfully differ, were two: the first being a portion of the evidence of Kebba Njie, the plaintiff's witness, and the Principal Lands Officer, to the effect that on 15 December 1987 (exhibit C), there was a letter from the defendant to his department seeking permission to assign a portion of the property to the plaintiff. His evidence was that approval was granted by the Hon Minister of Lands on 11 July 1988. It was not conveyed to the defendant or anybody. He also said he did receive a letter from the defendant revoking exhibit C.

The trial judge's second ground related to the defendant's letter revoking exhibit C. The learned judge (Agidee J) construed this letter revoking exhibit C and held, quite wrongly:

"It is obvious…there never was an assignment of the suitland from the defendant to the plaintiff. That being the position, it is also obvious that the property in the suitland still remains with the defendant."

His reasoning is *non sequitur* quite apart from it being wrong evaluation of the antecedent evidence on the assignment.

Pausing here for comment, it is indisputable that the learned judge misdirected himself about the assignment. Whether or not the parties entered into the said assignment is a matter of mixed fact and law to be deduced from their conduct as a whole, the material oral and documentary evidence and the relevant applicable law of contract and, of course, the pleadings in this case. It would be recalled from my analysis of the relevant pleadings above that the said assignment as pleaded by the plaintiff was not contradicted by the defendant. On the contrary, it was admitted expressly together with the full terms of the said agreement above as set out. It is significant that before his said erroneous holding, the learned judge recapitulated this relevant oral and documentary evidence on the assignment from both parties but refrained from deducing the obvious legal effect of the transaction by the parties. In my judgment, it was never in doubt between the parties either on the pleadings or in their oral testimony that they voluntarily executed a deed given to the plaintiff after the defendant had divested himself from any rights to the suitland on the day the said agreement was signed, ie on 15 December 1987.

Indeed, the defendant's own senior counsel, E Cotran Esq (as he then was), conceded so much in his recorded address to the court on 7 February 1993.

He was recorded as having said that:

"(i) That exhibit P is a good agreement in writing and complies fully with the requirements of the statutes of fraud and that there is nothing whatsoever that is uncertain about it.

(ii) That *in relation to the land,* the defendant has divested himself from any rights as from the day of the agreement, to wit 15 December 1987, exhibit B, when he gave the plaintiff the title deeds and signed the assignment exhibit 1. *That under the agreement the plaintiff obtains an equitable title which was converted to legal title on 12 July 1988 when the Minister gave his approval to that assignment. The defendant's unilateral revocation shortly after, which he admits, has no effect in law whatsoever. From then on the defendant in law became a trespasser*." (The emphasis is mine).

I agree *in toto* with each of the foregoing submission of the defendant's own senior counsel. I have no doubt in my mind that the agreement to assign was voluntary, complete and binding in law and equity on both parties thereto, the defendant's subsequent unilateral revocation notwithstanding. There was a clear intention on the part of both parties to create legal relations by their act of assignment of the suitland from the defendant to the plaintiff in consideration of the stipulated price: see the well-known student's textbook contract case on the formation of contract: *Carlill* v *Carbolic Smoke Ball* [1893] 1 QB 256. I do accordingly hold and affirm the said assignment as being legally binding on the parties thereto. The alleged unilateral revocation by the defendant, unwittingly aided and assisted by the Lands Development, are, in my considered view, *res inter alios acta* which cannot derogate from the conclusive contractual nature and binding legal effect of the said assignment of the suitland in favour of the plaintiff, the assignee. I fully endorse in this connection as correct the following submission of Mr Cotran as emphasised above by me:

"Under the agreement the plaintiff obtains an equitable title which was converted to legal title on 12 July 1988 when the Minister gave his approval to that assignment. The defendant's unilateral revocation shortly after…has no effect in law whatsoever. From then on the defendant in law became a trespasser."

I would apply Viscount Simonds' famous dictum in *Benmax* v *Austin Motor Co Ltd* [1955] AC 370 about the trial court's *perception* of the facts but the *evaluation* being at large for the appellate court as well for the trial court of fact; and hold that in this mixed question of fact and law, the legal effect of the parties' conduct in its entirety is indisputably a concluded contract of assignment from which the defendant could not resile unilaterally. Furthermore, I would dismiss as wrong and unwarranted by the facts and the relevant law, the learned judge's final conclusion that "on the balance of probability, I prefer the defendant's case" since the whole evidence on its proper evaluation points unmistakenly to a concluded existing contract of assignment between the parties.

Learned counsel for the respondent contended that the assignment agreement is legally ineffectual and not binding since it was not sealed. I disagree. Whatever the ancient law might have been, eg "no writing without a seal can be a deed" (see Shappard's *Touchstone of Common Assurances*) the modern legal position is that "to constitute a sealing neither wax nor wafer nor a piece of paper nor even an impression is necessary": see *Ex parte Sandilands* (1871) LR 5 CP 411 at 413. Pieces of green ribbon or a circle printed on the document containing the letters "LS" ("*Locus Sigilli*") or even a document bearing no indication of seal at all, will suffice, if there is evidence, eg attestation as in this case, that the document was intended to be executed as a deed: see *Chitty on Contracts* (Vol 1, 26 ed), para 23 and the cases of *Ex parte Sandilands* (*supra*); *Stromdale & Ball Ltd* v *Burden* [1952] Ch 223 at 230; and *First National Securities Ltd* v *Jones [*1978] Ch 109.

Furthermore, "where a contract is to be by deed, there must be a delivery to perfect it." :See *Xeros* v *Wickham* (1863) 14 CB (NS) 435 at 473. In this connection, however, "delivery" does not mean handed over to the other party, but rather delivered in the old legal sense of an act done so as to evince an intention to be bound: see *Vincent* v *Premo Enterprises Ltd* [1969] 2 QB 609 at 619. This is what happened in this case: the said deed of assignment was duly *signed, sealed* and *delivered*, as required by law. I would accordingly dismiss the grounds of appeal argued by the appellant's counsel to the effect that the learned judge erred in law in holding that the parties entered into the said agreement when the assignment deed is undated for the foregoing reasons advanced by me.

Mr Gaye's further criticism of the learned judge for his failure to grant his client an order of specific performance is unwarranted and

unjustified since his client did not come into the court of equity with clean hands, even though the defendant was a trespasser on the suitland, title wherein he had completely transferred and assigned to the plaintiff in a concluded agreement which he abortively attempted to resile from and even attempted unsuccessfully to repudiate. "No court of equity will aid a person like the appellant herein to drive advantage from his own wrong": see *Meyers* v *Casey* (1913) 17 CLR 90 at 124. Specific performance being an equitable remedy, is not available to the appellant herein in my considered judgment; since his hands are unclean and he who seeks equity must do equity.

For all the foregoing reasons, I would dismiss the appellant's appeal herein as being without any merit whatsoever.

I now turn to the respondent's notice of contention that the decision of the court below should be varied in the manner already indicated above. The notice is well-merited; and I would, for the reasons contained above, substitute the following orders for those given by the learned judge, to wit; the claim is hereby dismissed in its entirety together with all the reliefs claimed in the writ of summons.

The respondent shall be entitled to his costs in this court fixed at D5000 and to his cost in the court below assessed at D1000.

ABDULLAHI JA. I agree.

OMOSUN CJ. I also agree.

Appeal dismissed.

SYBB

GAMBIA NATIONAL INSURANCE CORPORATION v

SENEGAMBIA MANUFACTURERS LTD

COURT OF APPEAL

(Civil Appeal No 29/92)

4 June 1993

ANIN P, OMOSUN CJ AND NJIE J

Insurance-Marine insurance-Shipment of cargo-Waiver of material fact-Cargo of dry batteries shipped on deck of a vessel-Cargo of dry batteries subsequently contaminated and extensively damaged by sea water-Claim for loss by shipper-Whether shipment of dry batteries on deck material fact to be communicated by shipper to underwriter-Meaning of "waiver" in marine insurance-Circumstances for allowing waiver in marine insurance.

Contract-Marine insurance-English Marine Insurance Act 1906-Application of 1906 Act in The Gambia-Marine Insurance Act 1906 embodied in Marine Convention Act, 1911-Marine Insurance Act 1906 applicable in The Gambia by virtue of section 13 of Cap 5-Marine Insurance Act, 1906 - Maritime Conventions Act, 1911-Law of England-(Application) Act, Cap 5, s 13.

Held, *allowing the appeal (per Anin P, Omosun CJ and Njie J concurring)*: (1) the shipment by the plaintiff-respondent or its agent of 34 cases of dry batteries on the deck of a vessel (subsequently contaminated by chemicals from sea water which flooded the said cargo, resulting in the total loss of the dry batteries), was a material fact which the plaintiff-respondent ought to have disclosed to the appellant, the underwriters. Therefore, the appellant could not be said to have waived information about the unsuitability of the cargo of the dry batteries on the deck of the ship and the hazard of subjecting them to the deleterious effect and vagaries of the weather and the corrosive effect of sea water during the sea voyage. The expression "waiver" is term of art in marine insurance; it bears a much wider meaning than in ordinary parlance; and it allows no waiver except where there has been an intentional act with full knowledge of the facts. Dictum of Lord Mansfield in *Carter* v *Boehm* (1766) 3 Burr 1905 and *Darnly (Earl of*) v *L C & D Railway* (1867) LR 2 HL 43 cited.

(2) The trial judge erred in failing to apply the English Maritime Insurance Act, 1906, which is relevant to the facts of the case and is embodied in the Maritime Conventions Act, 1911 and subsequent enactments. It is consequently applicable in The Gambia by virtue of section 13 of the Law of England (Application) Act, Cap 5. *Jawara* v *Seagull Fisheries Co Ltd*, Court of Appeal, November/December 1979 Cyclostyled Judgments followed.

Cases referred to

(1) *Carter* v *Boehm* (1766) 3 Burr 1905.

(2) *Mann, MacNeal & Steeves v Capital & Counties Insurance Co* [1921] 2 KB 300, CA.

(3) *Darnly (Earl of)* v *LC&D Railway* (1867) LR 2 HL 43.

(4) *Jawara* v *Seagull Fisheries Co Ltd*, Court of Appeal, November/December 1979, Cyclostyled Judgments.

APPEAL from the judgment of the Supreme Court (High Court), upholding the plaintiff's claim for loss under a policy of marine insurance. The facts are sufficiently stated in the judgment of Anin P.

M M Bittaye for the appellant.

GBS Janneh for the respondent.

ANIN P. The following grounds of appeal were argued:

(1) the learned judge was wrong in law in holding that there was nothing in exhibits 2 and 3 and in all the circumstances of the case which made the shipment of cargo of dry batteries on deck by the respondent or their agent a material fact that the respondent should have disclosed to the appellant; and

(2) the learned judge failed to consider and apply the Law of Marine Insurance to the evidence before the court and especially section 18 (1) of the Marine Insurance Act, 1906 and, in the event, failed to apply the relevant law to the facts.

I agree that the fact of shipment of cargo of dry batteries on the deck was a material fact which ought to have been disclosed to the appellant, an insurance company. Commonsense dictates the duty of

such a disclosure incumbent on the respondent and their agents. Reasonable men of business would do likewise in such a situation.

On the facts of this case, I would reject the submission of Mr Janneh, counsel for the respondent, that the underwriters here waived information about the unsuitability of the carriage of cargo of 34 cases of dry batteries on the deck of the ship and the hazard of subjecting them to the deleterious effect and vagaries of the weather and the corrosive effect of sea water during the sea voyage. Batteries of course grow mouldy and depreciate considerably in value and potency when subjected to dew and rain in particular. In *Carter* v *Boehm* (1766) 3 Burr 1905, Lord Mansfield gave his famous illustration:

"If the insurance be on a private ship of war from port to port, the underwriter needs not to be told of the secret enterprise it is destined upon, for from the nature of the contract he waives this information."

I would here reiterate my own home-spun illustration of the same point by referring to the redundancy of information where a cargo of ice blocks is being shipped from Iceland to Dubai; it would be tantamount to careless dissipation of that cargo to store it in the deck open to the excessive temperature of over 100º F during the course of the voyage. Commonsense and business efficacy dictate that on such an occasion, the precious cargo of ice blocks should be stored in the hold, or preferably in an air-conditioned or refrigerated storage room down below!

Likewise, in *Mann, MacNeal & Steeves* v *Capital & Counties Insurance Co* [1921] 2 KB 300, CA, policies were effected by brokers on a ship for a voyage from the United States to France and back. At the date of the insurance, her owners had engaged her to carry a large quantity of petrol in iron drums from New Orleans to Bordeaux, but this fact was not disclosed to the underwriters. The voyage to Bordeaux was completed without mishap, but on the return journey she was totally lost by an accidental fire. In answer to a claim on the policies, the underwriters pleaded non-disclosure of the engagement for carriage of the petrol to Bordeaux. It was proved that petrol in iron drums was an ordinary form of merchandise for inclusion as part of a general cargo to be carried across the Atlantic. Greer J in the court of first instance, held that there had been non-disclosure of a material fact and gave judgment for the underwriters. In the Court of Appeal, Bankes and Atkin LJJ, whilst refraining from overruling this finding of Greer J, held that the requirement of disclosure had been waived. Younger LJ also held that the requirement of disclosure had been

waived. Younger LJ also held that the fact withheld was immaterial. The court were therefore unanimous in allowing the appeal. It was, however, agreed that in the case of goods of an unusual and particularly dangerous kind, the duty of disclosure might arise.

In passing, it must be remarked that the expression "waiver" is a term of art in marine insurance; it bears a much wider meaning than in ordinary parlance; and it allows no "waiver" except where there has been an intentional act with full knowledge of the facts: see *Darnly (Earl of)* v *L C & D Railway* (1867) LR 2 HL 43. Such full knowledge cannot be said to have existed in all the cases cited in Arnould's classic work under the rubric "Waiver of Information," (10th ed), para 631. Nevertheless, waiver has been held to have been established in some of those cases.

As to the criticism in ground (2) about the judge's failure to apply the English Marine Insurance Act, 1906 to the facts of this case, I agree wholly with Mr Bittaye. That the said Imperial Act is applicable to The Gambia by virtue of section 13 of the Law of England (Application) Act, Cap 5, cannot be gainsaid, having regard to this court's positive judgment on the issue after full argument in *Jawara* v *Seagull Fisheries Co Ltd*, Court of Appeal November/December 1979 Cyclostyled Judgments. We are bound by our own judgments in *pari materia*. No valid reason has been advanced to us why this court should depart from that earlier binding judgment of this court; and we see none for departing therefrom. Accordingly, I would apply the said Marine Insurance Act, 1906, which was expressly affirmed and embodied in the Maritime Conventions Act, 1911 and subsequent enactments and is consequently applicable to The Gambia. It is material and relevant to this case.

Nothing urged by Mr Janneh, counsel for the respondent, to the contrary, convinces me that the said Act does not dispose of the appeal and this case generally in the appellant's favour. I am satisfied, on the balance of probabilities, that the policy of insurance herein dated 3 June 1984, exhibit 2, together with the super imposed "red passage" was breached by the respondent company, which shipped the said cargo of 34 cases of dry batteries on the deck of *M/V Bintang Bolong* and thereby contaminated them with chloride, sodium potassium, magnesium and calcium contained in the sea water which flooded the said cargo according to the accepted chemical analysis and the Lloyd's Survey, exhibit 12, as a result of which a total loss was suffered; whose scrap value has been quantified at D18,455 (or £3,691) as at the date of the judgment of the court below.

With respect, I concur wholly with the appellant's criticism of the learned trial judge's two main findings which were made the subject-matters of both grounds of appeal actually argued before us by the appellant's learned counsel, Mr Bittaye.

I would accordingly allow this appeal; set aside and quash the judgment of the court below dated 21 July 1992; enter judgment in favour of the defendant-appellant insurance company which shall be entitled to its costs both in the court below mutually agreed upon at D3000 and in this court fixed at D5000.

OMOSUN CJ. I agree.

NJIE J. I also agree.

Appeal allowed.

SYBB

MANJANG v DRAMMEH

PRIVY COUNCIL

(Privy Council Appeal No 10 of 1989,

on appeal from the Gambia Court of Appeal)

13 November 1990

LORD BRIDGE OF HARWICH, LORD OLIVER OF AYLMERTON, LORD JAUNCEY OF TULLICHETTLE, LORD LOWRY AND TELFORD GEORGES J

Landlord and conveyancing-Easement-Way of necessity-Essential characteristics-Plaintiff claiming right of way or easement of necessity to river-strip (land-locked land) across defendant's land-Refusal by trial court-Appellate court granting plaintiff right of way or easement of necessity on grounds of convenience equity and reasonableness in all the circumstances-Whether appellate court erred in granting claim-Whether available access by water albeit less convenient than across terra firma sufficient to negative any implication by way of necessity.

Held, *unanimously allowing the appeal*: the essential characteristics of easement of necessity are: first, a common owner of a legal estate in two plots; second, it has to be established that access between one of those plots and the public highway can be obtained only over the other plot; and third, there has to be found a disposition of one of the plots without any specific grant or reservation of a right of access. Given these conditions, it may be possible as a matter of construction of the relevant grant, to imply the reservation of an easement of necessity. In the instant case, none of these essential characteristics could be said to be satisfied on the evidence before the trial court. The plaintiff-respondent himself, the claimant of easement of necessity, could not fulfil the description of a common owner; for he had, at the time of the grant of the lease to the defendant-appellant in 1982, no title at all to the land occupied by him being a portion of the land-locked land known as river strip. Nor was there anything in the circumstances of the grant of the lease to the plaintiff himself in 1977 or in its terms from which there could possibly be inferred a reservation in favour of the lessors for the benefit of the river strip. Rather, the evidence clearly established that members of the public were able to and did regularly and without inconvenience obtain access to the river strip

from *The River Gambia*. Consequently, there was nothing at all from which a right of way or easement of necessity in favour of the river strip could reasonably be implied. The majority of the Court of Appeal erred in granting a right of way across the appellant's property or land simply because they considered that it would be convenient and not "inequitable or unreasonable in all the circumstances." *Nickerson* v *Barraclough* [1981] 1 Ch 426 at 440 cited.

Obiter per curiam. Although it is strictly unnecessary to rest a decision on this ground, their Lordships have been referred to a decision of the Court of Session in Scotland and to Canadian authorities which established that an available access by water, albeit perhaps less convenient than access across terra firma, is sufficient to negative any implication by way of necessity. *Menzies* v *Breadalbane* (1901) 4 F 59; *Fitchett* v *Mellow* 29 OR6; and *Hardy* v *Herr* (1965) 47 DLR (2d) 13 cited.

Cases referred to

(1) *Nickerson* v *Barraclough* [1981] Ch 426.

(2) *Menzies* v *Breadalbane* (1901) 4F 59.

(3) *Fitchett* v *Mellow* 29 OR 6.

(4) *Hardy* v *Herr* (1965) 47 DLR (2d) 13.

APPEAL by the defendant-appellant from the majority decision of The Gambia Court of Appeal (per Luke and Anin JJA - Ayoola CJ *dissenting*), allowing the appeal by the plaintiff-respondent and granting him a right of way or easement of necessity across the appellant's land, from a judgment of the Supreme Court (High Court) per Ejiwunmi J, dismissing the plaintiff-respondent's claim for a declaration and an injunction and entering judgment for the defendant for damages and an injunction restraining trespass by the plaintiff. The facts are sufficiently stated in the judgment of the Judicial Committee of the Privy Council delivered by Lord Oliver.

Name of counsel for appellant not disclosed.

Macauley for the respondent.

LORD OLIVER *delivered the judgment of the court*. This is an appeal from an order of the Gambia Court of Appeal (Luke and Anin

JJA and Ayoola CJ) dated 18 December 1987 allowing, by a majority, the respondent's appeal from a judgment given on 14 July 1987 in the Supreme Court of The Gambia (High Court) by Ejiwunmi J, whereby he dismissed the respondent's claim for a declaration and an injunction and entered judgment for the appellant for damages and an injunction restraining trespass by the respondent. By its order, the majority of the Court of Appeal purported to grant the respondent a right way of necessity for himself and his servants and licensees on foot across the appellant's land, No 63 Wellington Street, Banjul, granted an injunction restraining the appellant from interfering with the exercise of such right by the respondent and ordered the appellant to remove any obstruction of the way to a width of five feet and to restore a gateway on the appellant's land to its original position.

The interest of the appellant (hereafter called the defendant) in the land across which runs the right of way claimed by the respondent (hereafter called the plaintiff) dates from the year 1982. But he had, for some years prior to that, carried on business from adjoining premises, No 64 Wellington Street. That street runs parallel to but a short distance from *The River Gambia*, a tidal river over which it is not in dispute that the public have rights of navigation, and the intervening space has been divided into lots upon which a number of commercial buildings have been erected. Between the rear of the lots Nos 63 and 64 and the foreshore there is an area of land (conveniently referred to as "the river strip") which is and has for some years past been occupied by the plaintiff and from which he carries on business. The only direct access to Wellington Street from the river strip is across the land at No 63 and, at the date when the defendant first acquired an interest in that property, there was, according to his evidence, a gateway facing onto Wellington Street from which there ran a pathway some four to five feet wide between two buildings on the frontage of the plot leading towards the river strip.

The origins of the interest of the plaintiff in the land are obscure. At the trial it was his evidence that he was, at some time prior to 1976, in possession of No 63 as the sub-tenant of Messrs Maurel and Prom, who were the lessees of the property from the Government of The Gambia under a lease which expired in that year. It is not clear whether the lease of Maurel and Prom included that part of the river strip which lay behind No 63 but the plaintiff's evidence was that he had been in possession of the river strip for some twenty years prior to action brought - a claim which he was entirely unable to substantiate and which the trial judge rejected. The judge did, however, accept his evidence that he had occupied the river strip prior to 1976 - as he

found, without any legal title to do so - and that, between 1975 and 1976, he had erected a number of buildings on it. After the termination of Maurel and Prom's lease of No 63 and the consequent termination of the plaintiff's sub-tenancy, he remained in occupation of both that property and the river strip. As regards the former, he subsequently obtained a lease from the Government of The Gambia dated 2 February 1977 for a term of twenty-one years with an option to renew for a further twenty-one years. It is under that lease that the defendant currently holds No 63.

The river strip, however, was not included in the lease of No 63. Some nine months after the grant of that lease, the plaintiff appears to have made enquiry of the government regarding this land and received the answer that it had been decided to allocate it to the Gambia Ports Authority. The plaintiff was advised that the authority had been asked to permit him to erect a temporary store on the land and to retain it there free of rent until the authority were ready to reclaim the area when he would be given one month's notice to quit without compensation. It was requested that he get in touch with the authority. He did not, however, do so until some six years later but merely continued in possession. On 1 December 1983, the Gambia Ports authority wrote to him offering to let the area to him for a term of twenty years and a lease of the land was finally granted to him on 5 February 1986.

The dispute between the parties dates from the summer of 1982 when, the plaintiff having defaulted in payment of the judgment debt, execution was levied and his interest in No 63 under the 1977 lease was purchased by the sheriff at public auction, where it was purchased by the defendant. The property was subsequently assigned to the plaintiff by a deed dated 24 August 1982. Proceedings followed to obtain possession from the plaintiff and his sub-tenant and a possession order was made on 17 January 1983. An appeal to the Court of Appeal was dismissed on 1 December 1983. Thereafter the defendant set about developing the property by building across the frontage.

On 30 May 1983, the plaintiff commenced the proceedings from which this appeal arises. The primary case argued on his behalf at the trial was that he was entitled to an easement by prescription based upon twenty years uninterrupted user prior to action brought. The evidence adduced in support of this claim, however, was obviously hopelessly inadequate. All other considerations apart, the plaintiff had to face the difficulty, first, that his own case was that up to 1976 he

was the tenant of both the dominant and servient tenements; and, secondly, that he could not, in any event, possibly prescribe against his own landlord. His alternative claim, which was not originally pleaded but was raised by counsel in argument, was that the river strip was land-locked land and that he was entitled to a way of necessity. Perhaps not surprisingly having regard to the history already referred to, that claim does not appear to have been pressed with any degree of enthusiasm. In the result the trial judge dismissed the plaintiff's claim and entered judgment for the defendant on his counterclaim for an injunction and damages.

From this judgment, the plaintiff, appealed to the Court of Appeal. Counsel for the plaintiff does not appear to have attempted to revive or reiterate the claim to an easement by prescription and the argument before the court centred on the wholly irrelevant question of whether his status on the river strip was that of a trespasser or a licensee. What appears finally to have swayed the balance in favour of the plaintiff was counsel's suggestion that the court should "consider granting … an easement of necessity", an invitation to which the majority of the court acceded. Ayoola CJ delivered a strong dissenting judgment pointing out the essential characteristics of such an easement, none of which could be said to be satisfied on the evidence before the court.

Their Lordships have felt no hesitation in upholding the views of the Chief Justice. It seems hardly necessary to state the essentials for the implication of such an easement. There has to be found, first, a common owner of a legal estate in two plots of land. Secondly, it has to be established that access between those plots and the public highway can be obtained only over the other plot. Thirdly, there has to be found a disposition of one of the plots without any specific grant or reservation of a right of access. Given these conditions, it may be possible as a matter of construction of the relevant grant (see *Nickerson* v *Barraclough* [1981] 1 Ch 426 440) to imply the reservation of an easement of necessity. The plaintiff himself clearly could not fulfil the description of a common owner, for he had, at the time of the grant to the defendant in 1982, no title at all to the river strip. Nor was there anything in the circumstances of the grant of the lease to the plaintiff himself in 1977 or in its terms from which there could possibly be inferred a reservation in favour of the lessors for the benefit of the river strip which was subsequently allocated for use by the Ports Authority.

But all other considerations apart, the evidence clearly established that members of the public were able to an did regularly and without

inconvenience obtain access to the river strip from the river and, indeed, a former business tenant of No 63 gave evidence that the majority of his customers came that way. Although it is strictly unnecessary to rest a decision on this ground, their Lordships have been referred to a decision of the Court of Session in Scotland and to two Canadian authorities which established that an available access by water, albeit perhaps less convenient than access across terra firma, is sufficient to negative any implication of a way of necessity: see *Menzies* v *Breadalbane* (1901) 4F 59; *Fitchett* v *Mellow* 29 OR 6; and *Hardy* v *Herr* (1965) 47 DLR (2d) 13).

In the instant case, as Mr Macaulay for the plaintiff was ultimately driven to admit, there was nothing at all from which a way of necessity in favour of the river strip could reasonably be implied and the Court of Appeal quite plainly had not, as the majority seemed to have thought they had, any jurisdiction to "grant" a right of way across a litigant's land simply because they considered, as they evidently did, that it would be convenient and was not "inequitable or unreasonable in all the circumstances."

Their Lordships would accordingly allow the appeal and restore the order of the trial judge. The plaintiff must pay the defendant's costs before the Board and in the Court of appeal.

Appeal allowed.

SYBB

WEST AFRICAN ENTERTAINMENT CO v BRIAN PAUL

COURT OF APPEAL, BANJUL

(Civil Appeal No 4/93)

21 December 1993

ANIN P, CHOMBA JA AND NJIE AG JA

Evidence-Admissibility-Untested evidence-Exclusion of-Evidence of defendant not tested by cross-examination-Defendant offering no reason for failing to undergo cross-examination-Whether untested evidence to be expunged from record in every case.

Practice and procedure-Pleadings-Contents-Pleadings to contain facts to be relied upon-Defendant pleading defence of bona fide purchaser for value without notice-Effect of pleading in absence of evidence by defendant-Purpose of pleadings-Trial court debarred from making finding on fact not pleaded.

Detinue and conversion-Action-Proof-Factors to be proved in claim for detinue different from claim in conversion-Plaintiff in claim for detinue not required to prove ownership of chattel detained by defendant.

Held, *dismissing the appeal (per Chomba JA, Anin P and Njie Ag JA concurring) for the following reasons*: (1) there is no hard and fast rule exclusively requiring that evidence which is untested through cross-examination should, in every case, be expunged from the record; each case has to be resolved on its own facts. In the instant case, since no reason was offered for the defendant's failure to submit to cross-examination, his untested evidence should have been totally ignored by the trial judge or expunged from the record.

(2) Order 23, r 3 of the Rules of the Supreme Court (High Court), Schedule II, Cap 6:01 provides that every pleading shall contain facts on which the party pleading relies, but not the evidence by which they are to be proved. Therefore, a pleading is no more than an allegation. In the absence of proof or evidence in support, it remains a mere pleading. In the instant case, in the absence of the defendant's evidence, his pleading that he was a bona fide purchaser for value without notice, was an unsubstantiated assertion or allegation. The trial judge therefore erred in relying on that pleading.

(3) In a claim in detinue, the plaintiff must prove first, that he is entitled to immediate possession of the chattel; and second that the defendant has detained that chattel after a proper demand had been made for its restoration to the plaintiff. However, a claim in conversion involves two concurrent elements: (a) a dealing with goods in a manner inconsistent with the right of the person entitled to them; and (b) an intention in so doing to deny that person's right or to assert a right which is inconsistent with such right. In the instant case, the plaintiff's claim was in detinue and not conversion because on the evidence, he claimed from the defendant's immediate possession of the items and the defendant continued to detain those items after that demand.

(4) Pleadings serve the purpose of determining what issues are to be proved by the parties at the trial. In the absence of pleading of a particular issue, a trial court is debarred from making a finding on such issue not pleaded. In the instant case, there was no issue as to the ownership of the disputed items; the trial judge therefore erred in holding that the plaintiff company had to prove ownership of the items claimed.

Cases referred to:

(1) R v *Stretton & McCallion* (1988) 86 Cr App R 7.

(2) Atuahene v *Commissioner of Police* [1963] 1GLR 448.

(3) Farrel v *Secretary of State for Defence* [1980] 1 WLR 172; [1980] All ER 166, HL.

APPEAL from the judgment of the High Court, dismissing the plaintiff's claim in detinue. The facts are sufficiently stated in the judgment of Chomba JA.

Ida Drameh (*Ms*) for the appellant.

H Roche Miss for the respondent.

CHOMBA JA. The appellant and respondent in this appeal were the plaintiff and defendant respectively at the trial in the court below. For the sake of convenience I intend to refer to them as such throughout this judgment.

The facts of the appeal lie in a short compass. They are that in 1984 the plaintiff company imported one hundred chairs and some tables from Italy. It would appear that the plaintiff did not need immediate use of all these pieces of furniture. Therefore, through its managing director, One Francisco Cianci, an Italian national resident in The Gambia, the plaintiff readily loaned 30 of the chairs and eight tables to one Salerno Giancarlo, another Italian, who was described by Francisco Cianci, as a friend of his. Francisco Cianci was incidentally the only plaintiff's witness at the trial. Salerno Giancarlo was then running a restaurant called Snoppy and required these pieces of furniture for use in that restaurant.

Some time in 1989, Francisco Cianci learned that Salerno Giancarlo had left The Gambia. He got concerned about the whereabouts of the plaintiff's 30 chairs and eight tables that had been loaned to Salerno Giancarlo. He visited Giancarlo's restaurant and found that those items were not there. In due course he traced them to a hotel known as Novotel owned by the defendant. Cianci immediately laid claim to the chairs and tables and asked the defendant to let him have them back. The defendant refused to surrender them. At one time Cianci even involved the police in his endeavour to recover those pieces of furniture but to no avail. Cianci gave the value of the 30 chairs as sixteen thousand dalasis (D16,000) and that of the eight tables as four thousand dalasis (D4,000). He described the 30 chairs as garden chairs, metallic white in colour with red seats and backs.

In his pleading in defence to the plaintiff's claim, as well as in his evidence-in-chief, the defendant asserted that the chairs and tables had been publicly advertised for sale at a supermarket in Bakau. He bought them in consequence from a man he identified as Salerno Ciancarlo, an Italian. In purported evidence of that purchase, he produced a receipt which was tendered without objection and was marked exhibit D1. Succinctly put, the defendant's shield to the plaintiff's claim was that he, the defendant, was a bona fide purchaser for value without notice of any defect in the seller's title.

It is worthy of note to mention at this stage that on 17 January 1992, after he had given his evidence-in-chief, the defendant was asked only one question in cross-examination and that question elicited the answer: " I cannot remember specifically all the items I bought from Mr Giancarlo."

For some undisclosed reason, the court then adjourned the hearing to 24 January 1992. The trial record reflects that the next hearing date

was in fact 4 February 1992, instead of 24 January. The defendant being absent that day, the hearing was adjourned further to 26 February 1992. In fact the case did not come up that day, but did so on 19 March 1992 when again the defendant made no appearance. Another adjournment was therefore necessitated to 6 May 1992. Again the defendant failed to appear. One further adjournment was ordered to 25 May 1992. On the last mentioned date Mr Darboe, the defendant's counsel, announced the closure of the defence case. No reason was given for that sudden and unusual anticlimax to the hearing.

Consequently, Miss Ida Drameh, the plaintiff's counsel at the time, and Mr Darboe made their closing submissions. I shall undertake an outline of these at a later stage, but suffice it to say at this juncture that the essential aspects of those submissions were basically the same as those made before us save, of course, in as far as those submissions make comment on the judgment of the court below.

Meanwhile, let me advert briefly to the salient aspects of the judgment of the learned trial judge. Soon after doing so, I shall set out the grounds of complaint which gave birth to the present appeal. After reviewing the evidence given by both sides to the trial, the learned trial judge was constrained to make observations on the circumstances leading to the inconclusiveness of the defendant's evidence. He stated at pages 22 and 23 of the record of appeal:

"It is pertinent to mention that on 17 January 1992, the cross-examination of the defendant started and was adjourned to 24 January 1992 for further cross-examination. The defendant did not turn up on about four other occasions when this case was adjourned for his cross-examination to continue. On 25 May 1992, Mr A M N O Darboe, of counsel, for the defendant, intimated that he had closed the case for the defence."

The judge then delved into an evaluation of the evidence before him. His dicta evince that he considered that ownership and identification of the 30 chairs and eight tables were in issue. This is what he stated:

"The claim before the court is that the plaintiff owns the chairs and tables, the subject-matter of the suit. The plaintiff asserted that the said chairs were part of hundred which were imported from Italy in 1984. I have no evidence before me to that effect. One would have thought that the assertion could have been proved by production of the customs entry or the invoice after payment for the chairs. In the

absence of such document of proof, I am at a loss to know who the owners of the chairs are."

The second conspicuous aspect which emerges from the judgment of the trial judge is that he held by implication that the plaintiff had failed to demolish defendant's defence of being a bona fide purchaser for value without notice. This is apparent from the following passage from the judgment:

"I agree with the defence counsel that the fact that a defendant does not give evidence or that his evidence is subsequently expunged from the record is itself not a ground that entitles the plaintiff to judgment. The evidence before the court must justify the judgment in the case. It is clear from the defence exhibit 1, that he bought the chairs from a third person, one Mr Salerno Giancarlo on 19 September 1988. Having regard to this, the evidence of the plaintiffs witness taken at its highest shows that he might have a cause of action against a third person, but certainly not the defendant. The evidence and pleadings no doubt show that the defendant bought without notice."

Towards the end of his judgment he added: "On a consideration of the evidence before the court it is obvious that it falls far short of the standard required for proof on a preponderance of probabilities." In the ultimate he gave judgment in favour of the defendant and dismissed the plaintiff's claim.

Miss Ida Denis Drameh argued three grounds of appeal, viz: "(i) the learned trial judge was wrong in relying on the pleadings and the incomplete evidence of the defendant which was expunged from the record;

(ii) the learned trial judge was wrong in failing to consider the credibility and weight to be attached to the evidence of the plaintiff's case;

(iii) the learned trial judge was wrong in holding that there were no specifically identifiable chairs and tables or that the failure of the plaintiff to tender the customs entries and invoices of the said items amounted to a failure to prove the plaintiff's case to the requisite standard."

The essence and effect of Miss Drameh's submissions before us is that the learned trial judge ought to have found in favour of the plaintiff because the evidence in support of the claim was uncontroverted. As

for the defendant, she underscored her submission at the trial that when the evidence of a witness is not subjected to cross-examination, as was the case with the defendant's evidence, it ought to be expunged from the record. She added that since at the trial both the defendant's counsel and herself were agreed that the defendant's evidence ought to be expunged from the record, the trial judge erred in relying on it. In support of her contention in this regard, she submitted to us an extract from *Phipson on Evidence*, (11th ed). She particularly drew our attention to the passage occurring at paragraph 1543 under the rubric *"Death, etc, before cross-examination*", and especially the following sentences:

"But absence from the country, or temporary illness, has been held insufficient, the proper course being to adjourn the trial or issue a commission: though Farwell J rejected *in toto* the evidence of a plaintiff who fainted and was unable to be cross-examined. So, the court has refused to act on the affidavit of a witness who had absconded before cross-examination."

In the result Miss Drameh contended that the defendant had failed to refute the evidence of the plaintiff's witness. She proceeded to condemn the trial judge for having relied, in evaluating the facts of the case, on the unproved pleadings of the defendant. The judge was further challenged on the ground that he had adopted Mr Darboe's submission that there was no evidence that the chairs and tables in dispute had been imported from Italy, as no customs documents had been exhibited in support. Miss Drameh contended further that the oral testimony of the plaintiff's witness was on record and therefore it was wrong for the judge to have held that there was no evidence on the point. Buttressing this argument, she said that where the law does not prescribe the mode of proving a particular issue, the sworn testimony of a witness would In response to the submission of Miss Drameh, Miss Roche argued on behalf of the defendant that the trial judge did not rely on the pleadings or the uncompleted evidence of the defendant. She tacitly agreed with the contention that the defendant's evidence was no evidence at all, as it had not been subjected to cross-examination. However, she spiritedly argued that what the trial judge considered was the plaintiff's evidence which he found completely unsatisfactory. In particular, she endorsed the judge's finding that the evidence adduced in support of the claim fell far short of the standard of proof required on a balance of probabilities. In her view, the evidence in support of the plaintiff's case did not identify the chairs and tables with particularity. She further submitted that the action at the trial having been one of conversion, it was incumbent on the

plaintiff to prove ownership, but the plaintiff's evidence to that end was deficient. Suffice it to add that in her submissions she relied on section 45(e) of the Customs Act, Cap 86:01, *Bullen and Leake* (12th ed), at page 345, para 2, and *Clerk and Lindsell on Torts* (13th ed), para 1079.

It is evident from the preceding resume of the judgment of the court below that the learned trial judge considered that the plaintiff's evidence fell short of establishing ownership of the chairs and tables and short of identifying those pieces of furniture. In short, the learned trial judge presumed that identification of that furniture and ownership of the same were in issue. It is also evident that the judge did not oblige to the uncontested submission that the untested evidence of the defendant was no evidence at all and therefore that it ought not to have been acted upon.

I shall deal first with the last of these two aspects. Miss Drameh was categoric in her submission - and the defendant's counsel acquiesced in the same - that when evidence is not tested under cross-examination, the law requires that it be expunged from the record. The trial judge was obviously not persuaded by the contention because he did act on the defendant's evidence, as I have earlier on shown. What is the position of the law in regard to such untested evidence?

Granted that according to the extract submitted by Miss Drameh from *Phipson on Evidence*, to which I have already referred, Farwell J, in a case cited by the learned author of that book, simply as 45 S J 569, did totally reject the untested evidence of the plaintiff in that case, the footnote against that case adds the Latin epithet *sed quaere*, suggesting that the decision was of doubtful validity. In any event, the same passage referred to us, but as it occurs in *Phipson on Evidence* (14th ed), goes further and cites the criminal case of *R* v *Stretton & McCalllion* (1988) 86 Cr App R 7 in which the Court of Appeal of England held that where a complainant in a criminal trial became ill and unable to continue after some cross-examination, the judge had a discretion to permit the trial to continue and to consider the complainant's evidence, with an appropriate warning to the jury. Coming nearer home, in the Ghanaian case of *Atuahene* v *Commissioner of Police* [1963] 1 GLR 448, part of the headnote reads:

"Held (i) where a witness gives evidence for the prosecution but is not available for cross-examination by the defence, the trial court should either expunge his testimony from the record or insist upon his

appearance in the court. The court is not entitled to act upon his evidence."

The brief facts of that case, in as far as they are relevant to the question of treatment of untested evidence, were that the appellant, Atuahene, who had already served his prison sentence, had been convicted of fraud by false pretences. A witness for the prosecution who had given very damaging evidence against the appellant in examination-in-chief, was allowed to leave Ghana and go to Russia before he was cross-examined. This notwithstanding, the trial magistrate heavily relied on that witness's evidence in convicting the appellant. On appeal to the High Court, the State intimated that it would not support the conviction. The question of treatment of that witness's untested evidence was therefore not argued. Nonetheless the High Court per Akainyah J proceeded to write a reasoned judgment in the process of which he arrived at the decision partly encapsulated in the headnote to which I have just referred. To this end he stated at page 453:

"In my view that finding was a fatal misdirection because the magistrate failed to direct himself that in the absence of cross-examination due to circumstances beyond the control of the appellant, the incomplete evidence of Mr Addo was no evidence at all. It seems to me that the learned magistrate considered himself bound to follow suggestions made by the state attorney. The court is in no way bound to follow suggestions put forward by the prosecution."

It will be seen therefore from the foregoing review of the few pertinent authorities to which I have made reference, that there is no hard and fast rule of law exclusively requiring that evidence which is untested through cross-examination should, in every case, be expunged from the record. What emerges from the review of the authorities is that each case has to be resolved on its own peculiar facts. That said, I must now consider the case on hand.

In the present case, the defendant answered only one question under cross-examination as reflected by the trial record. The trial was then adjourned for his further cross-examination. According to trial judge's note, on four successive occasions the trial was reconvened for the purpose of the defendant being cross-examined, but he proved elusive on all those occasions. The record does not show any plausible reason at all for his failure to submit to cross-examination. Even when his counsel, Mr Darboe, abruptly closed the defence case on 25 May 1992, no reason was offered for the taking of that step. We are

therefore left to speculate about the real reason. My own speculation is not favourable to him. In my view he is in no better position than that of the witness mentioned on *Phipson on Evidence* (supra) who absconded before he could be cross-examined on the contents of his affidavit.

In the event, I am of the very firm view that this is a proper case in which the untested evidence of the defendant should have been totally ignored, or, to use Miss Drameh's expression, should have been expunged from the record. Regrettably, as we have seen earlier on in this judgment, the learned trial judge did act on that evidence in arriving at his finding that the defendant was a bona fide purchaser for value without notice of the defect in the title of Giancarlo, the alleged seller of the tables and chairs. That finding by the trial judge amounted to a serious misdirection. In as much as that misdirection influenced the learned judge's final conclusion, I hold that the conclusion is unwholesome. However this is not the end of the matter.

As noted above, the trial judge held that the plaintiff had not established its ownership of the 30 chairs and tables. He further held that the evidence of the plaintiff's witness, Francisco Cianci, had failed to identify the furniture claimed by the plaintiff. In short, the learned judge presumed that the ownership and identification of the chairs and tables were in issue. Was that presumption sound?

In resolving this question, I intend also to deal with the learned judge's finding that "the evidence and pleadings no doubt show that the defendant bought without notice." Let me straightaway comment on that finding. I have already in an earlier part of this judgment shown that the defendant's evidence should have been totally ignored or expunged from record. Therefore in dealing with this finding by the trial judge, I shall consider only that part of it dealing with the pleadings of the defendant.

It is opportune at this moment to reproduce the relevant pleading which raised the defence of bona fide purchaser for a value without notice. It is to be found in the fifth paragraph of the statement of defence which reads: "The defendant will at the trial of this suit contend that he was a bona fide purchaser for value without notice of any defect in the title of the vendor." Our Order 23, r 3 of the Rules of the Supreme Court (High Court), Sched II, Cap 6:01 provides "that every pleading shall contain facts on which the party pleading relies, *but not the evidence by which they* are *to be proved*." (The emphasis is mine). It can be said therefore that a pleading is no more than an

allegation. It has to be proved. In the absence of proof or evidence in support, it remains a mere allegation, unproven.

In the instant case, since the defendant's evidence, as shown, was inconsequential, his pleading that he was a bona fide purchaser without notice did not enhance his case any higher than making an unsubstantiated assertion or allegation. The learned trial judge therefore fell into error in partly relying on that pleading. I come to this conclusion not unmindful of Miss Roche's submission, which does not find favour with me, that the judge did not rely on the defendant's pleading.

I have already posed the question whether the learned trial judge's presumption making issues out of ownership and identification of the chairs and tables was sound. In answering this question, it is convenient to refer to the submission of the learned counsel on both sides. Miss Drameh referred to the present case as one of detinue, but, although she did not say so in as many words, Miss Roche disagreed and called the action one of conversion. The learned author of *Windfield and Jolowicz on Tort,* (9th ed), states at page 415 that if A unjustly detains B's goods, B's remedy is detinue. At page 418 he explains that the plaintiff in a case of detinue must prove first that he is entitled to immediate possession of the chattel and that if there is defect in his right to immediate possession he must fail; and secondly that the defendant has detained that chattel after a proper demand had been made for its restoration to the plaintiff. At page 422 of the same book the author defines conversion in the following terms: "Conversion may be defined as any act in relation to goods of a person which constitutes an unjustifiable denial of his title to them." He goes on:

"Conversion involves two concurrent elements: (a) dealing with goods in a manner inconsistent with the right of the person entitled to them and (b) an intention in so doing to deny that person's right or to assert a right which is inconsistent with such right."

On the facts of the present case, it is quite clear that the plaintiff's witness, Francisco Cianci, claimed from the defendant immediate possession of the thirty chairs and eight tables, and that the defendant continued to detain these items after that demand. This case therefore fails squarely with the ambit of detinue, and not conversion. Had the plaintiff chosen to proceed against Salerno Giancarlo, the action might well have been one of conversion because it is evident from all the circumstances of the case that Salerno Giancarlo, in one way or

another, dealt with the 30 chairs and eight tables in a manner inconsistent with the title of the plaintiff.

It follows from this that Miss Roche's further submission that the plaintiff's evidence fell far short of proving ownership of the chairs and tables is untenable. It was misconceived since the action under review is one of detinue and not conversion. The learned trial judge seems to have unwittingly fallen into the same misconception about the nature of the action. Hence his expectation of the plaintiff to prove ownership.

In any event, as I shall presently show, ownership was not an issue at the trial of this action. Being well aware that the Rules of the Supreme Court of England and Wales, as contained in *The White Book*, are not applicable to our jurisdiction because we have our own corresponding rules; where, however, they offer persuasive guidelines and are in conformity with our practice, it is, in my view, fitting to apply them here. It is with this in mind that I proceed to pray in aid a passage which occurs as part of Order 18, rule 7/1 of *The 1985 White Book*. The passage is under the headline "Scope of the Rule" and reads as follows:

"Pleadings continue to play an essential part in civil actions and their primary purpose is to define the issues and thereby to inform the parties in advance of the case they have to meet and so enable them to take steps to deal with it …"

There then follows a citation of the case of *Farrel* v *Secretary of State for Defence* [1980] 1 WLR 172, HL in which Edmund-Davies, LJ stated: "Failure to plead negligence against a specified person precludes the court from finding that person guilty of negligence." The relevance of this authority just quoted is that it shows that pleadings serve the very important function of determining what issues are to be proved by the parties at the trial and therefore those to be resolved by the court. The dictum of Edmund-Davies LJ crowns it all when he effectively states that in the absence of pleading of a particular issue, the court is debarred from making a finding on such issue not pleaded. Perusal of the defendant's statement of defence unveils no issue as to ownership, or indeed, as to identification of the chairs and tables. If therefore the plaintiff company did not prove these two supposed issues at the trial, it can be excused because it was not forewarned, through the pleading of the defendant that it was going to meet those issues.

Notwithstanding my determination that identification was not an issue, in fact, a close examination of the evidence of the plaintiff's witness, Francisco Cianci, will show that it did deal with that issue. He said the chairs were garden chairs and their colour was metallic white, with red on the seats and the backs; indeed he testified that the chairs and tables he was concerned about were none other than those in the possession of the defendant the return of which he had demanded and which the latter continued to detain, the demand notwithstanding. To my mind that evidence was, prima facie, descriptive enough in the circumstances to identify the pieces of furniture at issue.

In the event, not only do I come to the conclusion that the learned trial judge's presumption that the plaintiff had to prove ownership and identify the furniture claimed was uncalled and unsound in law, but I must also add that even if the plaintiff had to prove identification, there was before the court, prima facie enough evidence of that issue.

To this end, I must agree with the submission of Miss Drameh that in the absence of a requirement by the law to prove an issue in a prescribed manner, proof of such issue by sworn oral testimony would suffice. In as far as the plaintiff's witness testified that the 30 chairs and tables were among the furniture the plaintiff had ordered from Italy in 1984 and since he had gone even beyond that and described which chairs and tables he was talking about, the trial judge's observation that there was no evidence before the court in that regard was wide off the mark.

Having come to the conclusion that the purported evidence of the defendant was no evidence at all, that ownership and identification were not issues - though the latter aspect had in fact been satisfied by the evidence of Francisco Cianci - and further as I have shown that the oral testimony in support of the claim had sufficiently proved the fact that the chairs and tables had been imported by the plaintiff from Italy in 1984, as well as having held that the defendant had not proved his defence that he was a bona fide purchaser without notice, I must inevitably conclude that the defendant is left with no leg to stand on for the purpose of this appeal. There is therefore no need to consider any other submissions by counsel which I may not have specifically dealt with.

For the foregoing reasons, I would allow this appeal and overrule the judgment of the court below.

ANIN P. I agree.

NJIE AG JA. I also agree

Appeal dismissed.

SYBB

GAMBIA PUBLIC TRANSPORT CORPORATION v CAMARA

COURT OF APPEAL BANJUL,

(Civil Appeal No 26/93)

21 December 1993.

ANIN P, CHOMBA JA AND NJIE AG JA

Contract-Breach of contract-Public Transport Corporation-Commencement of suit against-Limitation period-Breach of conditions precedent-Whether trial court vested with jurisdiction to waive statutory period of limitation-Public Transport Corporation Act, 1990, Cap 70:02, s 37(1) and (2).

It is provided by the Public Transport Corporation Act, Cap 70:02, s 37(1) and (2) that:

"37 (1) When any suit is commenced against the Corporation for any act done in pursuance or execution, or intended execution of any Act or law, or of any public duties or authority, or in respect of any alleged neglect or default in the execution of that Act, law, duty or authority, that suit shall not lie or be instituted in any court unless it is commenced within twelve months next after the act, neglect or default complained of, or, in the case of the continuance of injury or damage, within twelve months next after the ceasing thereof.

(2) No suit shall be commenced against the Corporation until one month at least after written notice of intention to commence the same shall have been served upon the Corporation by the intending plaintiff and the relief which he claims."

Held, *allowing the appeal (per Anin P, Chomba JA and Njie Ag JA concurring)*: on its plain, literal and grammatical meaning, section 37(1) and (2) of the Public Transport Corporation Act, Cap 70:02 imposes, as a statute of limitation, two mandatory conditions precedent to the institution of legal action against the defendant corporation: (i) the plaintiff must notify the defendant in writing his intention of suing not later than a month before filing the action; and (ii) claims falling under the section like the instant claim for breach of contract of employment, must be commenced within one year from the date when the alleged act complained of took place. The trial court has no jurisdiction to waive either condition. Since the act of the

defendant complained of by the plaintiff took place on 17 January 1990 and the plaintiff's action was filed on 21 February 1991, the limitation period of one year within which to institute the action was breached. The trial judge therefore erred in dismissing the defendant's preliminary objection to the incompetency of the action. *Bojang* v *Forster*, Court of Appeal, 1 June 1989, Cyclostyled Judgments May-June 1989, 126 applied.

Cases referred to:

(1) Bojang v *Forster, Court of Appeal*, 1 June 1989, Cyclostyled Judgments May-June 1989, 126.

(2) Sanda v *Kukawa Local Government* (1991) 2 NWLR 279.

(3) Omotayo v *Nigerian Railway Corporation* (1991) 7 NWLR 471.

(4) Spillers v *Cardiff Assessment Committee* [1931] 2 KB 212.

(5) New Plymouth Borough Council v *Taranaki Electric Power Board* [1935] AC 680, HL.

(6) Sutters v *Briggs* [1922] 1 AC 1.

(7) Asante v *Tawiah* [1949] WN 40

(8) Republic v *Adansi Traditional Council*; *Ex parte Akyie II* [1974] GLR 126, CA.

(9) A' Court v *Cross* (1825) 3 Bing 329.

(10) R B Policies at Lloyd's v *Butler* [1950] 1 KB 76.

(11) Brown v *Shaw* (1879) 1 Ex D 425.

(12) Tennant v *Rawlings* (1879) 4 CPD 133.

(13) McAllister v *Rochester (BP)* (1880) 5 CPD 194.

(14) Soho Square Syndicate v *Polland & Co* 1 Ch 638.

(15) East India Co v *Paul* (1849) 7 Moo PC 85.

(16) Wright v *John Bagnall & Sons* [1900] 2 QB 240.

(17) Lubovsky v Snelling [1944] KB 44.

(18) Board of Trade v *Cayzer, Trivine & Co* [1927] AC 610, HL.

APPEAL from the decision of the High Court, dismissing the preliminary objection raised by the defendant to the plaintiff's claim for breach of contract of employment on the grounds that the action was statute-barred. The facts are sufficiently stated in the judgment of Anin P.

Sam George (with him *ANMO Darboe*) for the appellant.

M P Mendy for the respondent.

ANIN P. The argument of this unpretentious sounding appeal has thrown up for decision a diversity of issues, eg the competency of an action commenced outside the prescribed limitation period in the absence of statutory discretionary power in the trial court to exclude a mandatory statutory bar; the constitutionality or validity of such bar; the rationale or public policy and equitable considerations behind statutes of limitation like the instant enactment in question, ie section 37(1) of the Public Transport Corporation Act; and the compatibility of such a statute with entrenched fundamental human rights provisions of the Constitution.

In this appeal, Mr Mendy, of counsel for and on behalf of the respondent (hereafter called the plaintiff), canvassed the incompatibility of the said statute with the 1990 Constitution; while Mr Darboe, counsel for the appellant (hereafter called the defendant), canvassed the opposite arguments and criticized the learned judge Agidee J for upholding Mr Mendy's identical arguments in the court below.

In my considered view, on a proper appraisal of the grounds of appeal filed and counsels' rival arguments, this appeal falls to be determined within a narrow compass of admitted facts and disputed law, which will be disposed of first before the other incidental issues are commented upon in passing.

The gravamen of the argument of counsel for the defendant is that Agidee J erred in his ruling dated 15 June 1993 when he overruled the preliminary objection raised to the competency of the plaintiff's action for the wrongful termination of his contract of employment by the defendant herein which was filed outside the mandatory limitation

period; and in the absence of statutory power in the trial court to exclude the prescribed mandatory limitation period.

The amended statement of claim pleaded that the plaintiff (who was born on 19 February 1940) was employed by the defendant on 28 April 1978 as Internal Auditor of The Gambia Public Transport Corporation. In the terms of contract of employment spelled out in his letter of appointment, it was stated in paragraph 3(ii) that: "an officer will normally retire at 55 years of age or such earlier age as may be in accordance with pension fund condition."

By a letter dated 8 January 1990 from the defendant to the plaintiff, ie the plaintiff said contract, it was alleged, that his contract was "unlawfully terminated in that he was compelled to take early retirement from the services of the corporation when he has five years and one month to reach the normal retirement age." By his action, the plaintiff claimed, inter alia, a declaration that he had been wrongfully dismissed and D130,235 special damages, general damages and interest.

The amended defence admitted the above averments about the plaintiff's age, date and duration of employment and engagement as the company's internal auditor; but it reiterated that the company reserved the right under its service rules "to retire an employee at the age of 45 or above if his work or conduct is found unsatisfactory." While denying the reason for the company's written directives as pleaded in the claim, the defendant disclosed that the said written letter dated 8 January 1990 requested the "plaintiff to take an early retirement with effect from 16 January in conformity with rule 215 (iv) of the corporation's said service rules". It disclosed further that the plaintiff received full retiring benefits for his period of employment in accordance with the said rule 215 (iv). Then followed in paragraph (8) the pleading which forms the pith and marrow of this litigation:

"The defendant further contends that the plaintiff's action is in law unmaintainable against the defendant in that the action was not commenced within one year from the date when the alleged act took place. The defendant relies on section 37 of the Public Transport Corporation Act (No 14/1976) now Cap 70:02 of the Laws of The Gambia 1990 edition.

The learned judge heard submissions from both learned counsel for the rival parties on this preliminary objection to the competency of the suit on the expressed ground that "it was statute-barred on the date of

the writ", ie 23 February 1991; whereas the act complained of (ie the said letter of termination of the contract of employment) took place on 17 January 1990, that is, more than a year earlier. He then reproduced faithfully and verbatim counsel's rival submissions. His *ratio decidendi* and ruling thereon are best set out here in full:

"Therefore the preliminary objection, the defendant's counsel is raising at this stage, ought to have been raised before the trial commenced. The defendant's counsel had not thought it necessary to raise it before and after pleadings were ordered and until the plaintiff was close to the end of his testimony-in-chief.

I have read the statutes referred to by both counsel. I am amazed that by section 37(2) of the Gambia Public Transport Corporation Act as amended, an intending litigant who wants to sue the corporation must give the corporation a notice of his intention, at least one month before filing the suit while it is silent on the aspect of the notice The Gambia Public Transport Corporation is to give people they intend to sue. They are protecting themselves to the detriment of others. This is inequitable and this court is also a court of equity and where the common law and equity conflicts the law is obnoxious and anachronistic in its entirety.

My further view is that having regard to the point conceded to by Mr George to wit: section 37(2) is a condition precedent to section 37(1) of the Gambia Public Transport Corporation Act as amended, the Limitation Act, if at all, must follow from the date when the notice is given. The notice of the intention to sue was given by the plaintiff to the defendant on 15 February 1990.

Having regard to the foregoing, I overrule the objection by counsel for the defendant. The trial of the case is to proceed to finality."

In this appeal, learned junior counsel for the defendant criticised severely each reason advanced by the learned judge in support of his above ruling when arguing his two grounds of appeal which are in the following terms:

"GROUNDS OF APPEAL

(1) The learned trial judge erred in law in holding that it will be inequitable not to allow the plaintiff-respondent to prosecute his claim against the defendant-applicant in that the plaintiff-respondent's claim is defeated by *statute* and not *common law*.

(2) The learned trial judge was wrong in his interpretation of section 37 of The Gambia Public Transport Corporation Act when he held that time for instituting an action against the defendant-applicant-appellant begins to run from the date of service of notice of intention to commence such an action."

Mr Darboe submitted that the plaintiff was sent on compulsory retirement on 17 January 1990; and his employer was served with notice of intention to institute proceedings which were duly instituted on *21 February 1991*. Action was in the event instituted well outside the limitation period which elapsed on *16 January 1991*. Mr Darboe firstly contended that equity cannot override statute; and the learned judge erred in law in holding otherwise and in saving the statute-barred action by the invocation of equitable principles in his said ruling. Secondly, Mr Darboe relied on the statutory provisions which made it obligatory for any suit falling within the ambit of section 37(1) of the Act in question to be commenced at least within a month of a written notice of intention to commence same shall have first been served on the defendant by the plaintiff herein. He reiterated that in this case, the plaintiff failed to fulfil both statutory mandatory condition precedent; neither the stipulated written notice of intention to sue having been served within the limited time ie "of one month at least" under section 37(2); nor the action timeously filed within the one year limitation period itself under section 37(1) of the Act.

Mr Darboe next submitted that "the operative commencement date is the date of the occurrence of the cause of action by virtue of the provision in section 37(1) of Gambia Public Transport Corporation Act." For this submission, he cited this court's judgment on an analogous statutory provisions in Civil Appeal 36/88; *Bojang* v *Forster*, dated 1 June 1989, unreported: see the Cyclostyled Judgments of The Gambia Court of Appeal for May/June 1989 pages 126-130 especially at pages 127-130. Reliance was also placed on two Nigerian cases of persuasive authority: *Sanda* v *Kukawa Local Government* (1991) 2 NWLR 279 and *Omotayo* v *Nigerian Railway Corporation* (1991) 7 NWLR 471, coincidentally the latter being a similar compulsory retirement case, where in each case the remedial writ was taken outside the limitation period and it was accordingly held on appeal that the trial courts lacked jurisdiction to entertain the suits.

In reply thereto, Mr Mendy counsel for the defendant, emitted what can only be described with respect to him, as legal howlers: "the enactment in question, section 37(1) of Cap 70:02 is unconstitutional,

it being a law which tends to limit the fundamental rights of the individual"; "the salient question in this case is not whether equity can override statute, but rather whether a statute can override a fundamental right provided under the 1970 Gambian Constitution"; "it follows", in his contention, "that section 37(1) of Cap 70:02 is obnoxious, inconsistent with the Constitution, null and void and of no effect whatsoever"!

Finally, Mr Mendy asserted that "if the enactment in question is applied in its full rigour, as was being canvassed by the defendant's counsel, then the vested right of the plaintiff-and his vested human rights in particular under The Gambia Constitution-would have been trampled over"! Mr Mendy next invited us to dismiss the appeal as insupportable and to endorse the learned judge's ruling as wholly correct in law and unexceptionable. And Mr Mendy, without backing up his submission with any authorities, next argued that section 37(1) of Cap 70:02 "does not include acts done by a master to a servant within the master-servant contractual relationship; neither do they fall within its ambit and scope." "It is only the public acts of the corporation, " he asserted, " that are covered; but not its contractual acts affecting servants of the corporation."

I am afraid, speaking for myself, these unsupported assertions of Mr Mendy's are fallacious; and I hold them to be unfounded in law or, as he prefers, in equity also. Learned senior counsel (Mr Sam George) for the defendant waived his right of reply. I can understand why.

Evaluation and analysis of the rival arguments and the ruling appealed against

I now turn to my evaluation of the rival arguments and the ruling appealed from. To start with, I reproduce the various enactments referred to in this case, ie sections 37(1) and 38 of Cap 70:02 and sections 28(1) and 20(5) of the 1970 Constitution. Section 37(1) and (2) of the Public Transport Corporation Act (No 14 of 1976) (now Cap 70:02 of the Law of The Gambia, 1990 ed) is in the following terms:

"37(1) When any suit is commenced against the Corporation for any act done in pursuance or execution, or intended execution of any Act or law, or of any public duties or authority, or in respect of any alleged neglect or default in the execution of that Act, law, duty or authority, that suit shall not lie or be instituted in any court unless it is commenced within twelve months next after the act, neglect or default

complained of, or, in the case of the continuance of injury or damage, within twelve months next after the ceasing thereof."

(2) No suit shall be commenced against the Corporation until one month at least after written notice of intention to commence the same shall have been served upon the Corporation by the intending plaintiff and the relief which he claims."

"38(1) The provisions of this Act shall not apply to any action or arbitration for which a period of limitation is prescribed by or under any other enactment, or to any action or arbitration to which the State is a party and for which if it were between private persons, a period of limitation would be prescribed by any such other enactment."

It is also respectively stated by sections 28(1) and 20(5) of the 1990 Constitution that

"28(1) if any person alleges that any of the provisions of sections 13 to 27 (inclusive) of this Constitution has been, is being or is likely to be contravened in relation to him (or, in the case of a person who is detained, if any other person alleges such a contravention in relation to the detained person), then, without prejudice to any other action with respect to the same matter which is lawfully available, that person (or that other person) may apply to the Supreme Court for redress."

"20(5) No person who shows that he has been tried by a competent court for a criminal offence and either convicted or acquitted shall again be tried for that offence or for any other criminal offence of which he could have been convicted at the trial for that offence, save upon the order of a superior court in the course of appeal or review proceedings relating to the conviction or acquittal."

It has been well and correctly stated in *Maxwell on The Interpretation of Statutes* (10th ed) by Granville Sharp and Brian Galpin at page 4 that: "When the language (of the statute) is not only plain but admits of but one meaning the task of interpretation can hardly be said to arise." Likewise Vattel, the renowned (eighteenth century Swiss Jurist) stated: "It is not necessary to interpret what has no need of interpretation ("*Absoluta sententia expositore non indiget*") see Vattel's 9 Inst 538. In my judgment, all the words quoted in the above enactments under consideration are plain, unambiguous and in need of no interpretation or construction. They must be applied and enforced in accordance with their plain, literal meaning without any resort to the erroneous suggestions of learned counsel for the plaintiff for

expediency or equitable considerations. Broad equity in this case cannot override and will not certainly be allowed to defeat positive enactments of limitation and two clear statutory conditions precedent to the filing of an action in court. Lord Hewart CJ rightly observed in *Spillers* v *Cardiff Assessment Committee* [1931] 2 KB 212:

"It ought to be the rule and we are glad to say that it is the rule that words are used in an Act of Parliament correctly and exactly and not loosely and inexactly. Upon those who assert that the rule has been broken, the burden of establishing their proposition lies heavily."

This famous dictum of Lord Hewart CJ was approved and applied by Lord Macmillan in *New Plymouth Borough Council* v *Taranaki Electric Power Board* [1935] AC 680 at 682, HL.

In this case where the legal issues are not open to serious doubt (at least in my considered judgment) "this court's duty is to express a decision, and leave the remedy (if any is called for) to others." See *Sutters* v *Briggs* [1922] 1 AC 1 at 8 per Lord Birkenhead LC. What is in issue according to the plain, literal, grammatical meaning of section 37(1) and (2) Cap 70:02 (supra) is the enforcement of an ordinary statute of limitation which imposes in a very clear language two statutory *mandatory* conditions precedent to the institution of a legal action in the eventualities stated therein which have come to pass. Firstly, the intending plaintiff must under 37(2) notify the defendant in writing his intention of suing not later than a month before filing his writ of summons; and secondly, in the cases falling under section 37(1) like the present one, the contemplated action must be commenced within one year of the date when the alleged act complained of took place. No jurisdiction has been conferred on the court to waive either condition.

Incidentally, the defendant's learned senior counsel pleaded this statute of limitation distinctly in paragraph (7) of the amended statement of defence. No reply was filed thereto by the plaintiff's counsel even though the trial court granted them leave to do so within seven days on their counsel's application in court on 11 March 1992. On the pleadings, it would seem that the plaintiff's learned counsel (Mr Mendy) found the objection pleaded in bar of his action unreasonable. Be that as if may, that legal issue was no longer in issue at the close of the pleadings; and the learned judge should have so held in his ruling.

Turning to the rival legal arguments of both counsel in this appeal, I have no doubt whatsoever in my mind that the preliminary objection

taken to the incompetency of the action on the ground of the breaches of both aforementioned statutory condition precedent is sound. The facts of the plaintiff's breaches of both mandatory conditions precedent were neither disputed nor even in issue on the pleadings. The dates of the relevant documents speak for themselves: the "act" of the defendant in sending the letter of termination of the plaintiff's contract of employment referenced GPTC/100/54/01/ (90) dated 17 January 1990 constituted the complaint in the plaintiff's action filed on 21 February 1991. This "act" was taken more than a year and 35 days before the writ; in other words the action started outside the fixed maximum limitation period of one year. About this matter of dates, the parties were *ad idem*. The plaintiff in the amended statement of claim of 21 February 1992 based inferentially the claim upon those very dates; and the defendant did not challenge in a reply the positive statements contained in these amended pleadings. Both learned counsel rightly argued the preliminary objection question on the basis of their tacit agreement as to the material dates of commencement and termination of the one year limitation period, ie from 17 January 1990 to 16 January 1991. No challenges having been made to the sworn testimony of the plaintiff as to these dates during cross-examination, they must therefore be taken as conclusive.

Furthermore, Mr Mendy was wrong in his answer to Mr Darboe's contention in the court below that the operative period was the date when the action was instituted, ie 17 January 1990. Mr Mendy retorted erroneously that time only started to run from date of notice of intention to sue as given by the plaintiff to the defendant, ie 15 February 1990. The statute of limitation clearly gives the accrual of the act or cause of action as the starting date.

After his recapitulation of the rival arguments, the learned judge simply opted for Mr Mendy's arguments without stating any reason for his preference or else any authorities in support. It is unfortunate that in the event, the learned judge followed Mr Mendy and slipped into several errors of law. Firstly, he obviously erred in law by holding that the preliminary objection being raised to the competency of the action ought to have been raised "before the trial commenced." The pertinent well-known authority of the Privy Council binding on both this court and the court below, will be found in *Asante* v *Tawiah* [1949] WN 40; conveniently reproduced in Olisa Chukura's Privy Council Judgments at page 432. Viscount Simonds LC, delivering judgment stated:

"If it appeared to an appellate court that an order against which an appeal was brought had been made without jurisdiction, it could never

be too late to admit and give effect to the plea that the order was a nullity." (The emphasis is mine).

See also my judgment to the same effect in the Ghana Court of Appeal decision in *Republic* v *Adansi Traditional Council*; *Ex parte Akyie II* [1974] GLR 126 at 127.

In the second place, as has already been stressed by me, the statute of limitation was in fact pleaded, and not waived by learned senior counsel (Mr Sam George) in paragraph (7) of the amended statement of claim and subsequently argued by his learned junior counsel, Mr Darboe. The learned judge therefore erred in his holding that the "the plaintiff's counsel *had not thought it necessary to raise it before and after the pleadings* were ordered and until the plaintiff was closed to the end of his testimony in chief." (The emphasis is mine). The plaintiff's amended statement of claim is dated 21 February 1992; while the further hearing of the plaintiff's case was in fact "adjourned to 25 February 1992 after it had commenced on 15 June 1992." With respect, the learned judge erred both factually and legally in the view he took of his second holding.

In the third place, the learned judge seriously erred in law by ignoring or refusing to apply (as he should have done) the statute of limitation by expressing his amazement that section 37(2) of the Gambia Public Transport Corporation Act enacts that an intending litigant who wants to sue the corporation must file a notice of his intention at least one month beforehand; while it is silent on the aspect of the notice the Gambia Public "Transport Corporation is to give people they intend to sue." In the words of the judge: "They are protecting themselves to the detriment of others. This is inequitable and this court is also a court of equity and where the common law and equity conflicts, the law is obnoxious and anachronistic in its entirety."

With the greatest respect to the learned judge, I fail to see the alleged "inequity" in the legislative arrangement alluded to. On the other hand, one can easily surmise the practical advantage of an employer like the defendant being notified well in advance of a contemplated suit against it thereby being enable to take avoiding action to frustrate such litigation through an offer of amends or *ex gratia* settlement out of court if it so wishes. After all, it is in the public interest that there should be an end to litigation (*interest rei republicae ut finis litium*) a maxim which incidentally is often given as one of the underlying principles of statutes of limitation in jurisprudence: see for example dicta of Best CJ in *A' Court* v *Cross* (1825) 3 Bing, 329, 332, 333; and

dictum of Streatfield J in *R B Policies at Loyd's* v *Butler* [1950] 1 KB 76 at 81 and 82. Furthermore, it is stated in *Maxwell on The Interpretation of Statutes* (10th ed), page 387, (and I acknowledge it to be the true state of the general law) that:

"Where the act or thing required by the statute is a condition precedent *to the jurisdiction* of the tribunal, compliance cannot be dispensed with, and if it be impossible the jurisdiction fails. *It would not be competent to a court to dispense with what the legislature had made the indispensable foundation of its jurisdiction."* (The emphasis is mine.)

For instance, under the (repealed) English County Courts Act, 1875 (c 50), which empowered a party to move the appellate court or a judge in chambers for a new trial "within eight days after the decision", the time could not be extended by either court or judge until later statutes reformed the procedural rules and provided for applications for the enlargement of time for the filing of such a motion within a further extra limitation period: see for example, *Brown* v *Shaw* (1879) 1 Ex D 425 and *Tennant* v *Rawlings* (1879) 4 CP D133.

Of course, it is common knowledge that later English and Gambian procedural reforms in pleading and practice nowadays enjoin on parties expressly the duty of pleading statutes of limitation if it is sought to rely on them by way of defence to actions or arbitrations. The relevant maxim in *Coke's Institutes* 351 which sanctions the non-observance of a statutory provision is *cuilibet licet renunciere juri pro se indulta sunt*. (Everyone has liberty to renounce these which are granted in his own benefit. Everyone has a right to waive and to agree to waive the advantage of a law or a rule made solely for the benefit and protection of the individual in his *private* capacity, which may be dispensed with without infringing any public right *or public policy*: see *McAllister* v *Rochester* (*BP*) [1880] 5 CPD 194. Again as was pointed out by Farwell J (as he then was), in *Soho Square Syndicate* v *Pollard* & *Co* [1940] Ch 638 at 644:

"Where in an Act there is no express prohibition against contracting out of it, it is necessary to consider whether the Act is one which is intended to deal with private rights only, or whether it is an Act which is intended, as a matter of public policy, to have a more extensive operation."

It should be understood that a person may agree to waive the benefit of a statute of limitations: see *East India Co* v *Paul* (1849) 7 Moo PC

85; *Wright* v *John Bagnall* & Sons [1900] 2 QB 240; and *Lubovsky* v *Snelling* [1944] KB 44.

Furthermore, general statutes of limitation are in consonance with public policy interest in preventing cases, especially civil and commercial, from hanging over peoples' heads like the Sword of Damocles in classical mythology. As time passes, witnesses who can be called to describe an event may have died or left the scene; and thereby a defendant might have lost vital evidence to disprove a stale claim. On this view, limitation statutes have been enacted to ensure that litigation is not started so long after the event that adjudication on the *merits* becomes either impossible or impracticable: see per Lord Atkinson in *Board of Trade* v *Cayzer, Irvine & Co* [1927] AC 610, 628, HL. Again it should not be forgotten that "equity follows the law" so runs the maxim. See further Keeton's *Introduction to Equity* (4th ed) pages 81-82. The general constitutional rule is well encapsulated in this passage in *Maxwell op cit*: "The will of the legislature is the supreme law of the land, and demands perfect obedience" (10th ed), at page 260.

In conclusion, I hold that both grounds of appeal are sound for the foregoing reasons. I also hold that the learned trial judge's reasons and ruling to the contrary are, with the greatest respect, absolutely without merit in logic or law. The preliminary objection to the plaintiff's action based on the above statute of limitation is, indeed, unanswerable. I further support my conclusion by reliance on all the above-mentioned authorities cited by learned counsel for the defendant, especially on this court's unanimous judgment on an analogous statute of limitation in the case of *Bojang* v *Forster*, Civil Appeal, No 36/88 dated 1 June 1989 *(coram* Ayoola CJ, Olatawura JA and Sillah J), Cyclostyled Judgments for May/June 1989 at pages 126-130, unreported.

Section 70(1) of the Ports Act, Cap 68:01 contains the following analogous provision:

"Where any suit is commenced against the [Ports] Authority for *any act done* in pursuance or execution, or else intended execution of *any Act* or law…such suit *shall not lie or be instituted unless it is commenced within twelve months next after the act*…" (The emphasis is mine.)

In *Bojang's* case (supra) the writ of summons by which the plaintiff commenced the action for the alleged act for damages for personal injuries sustained as a result of the defendant's negligence in the

course of his employment was issued on 12 March 1985, outside the limitation period. It was held, inter alia, that:

"(i) action was statute-barred and would not be revived by the court since it [then] had no residuary discretionary statutory power to enlarge the limitation period or else waive this statutory bar;

ii) secondly, per Ayoola CJ, in his lead judgment, "the learned judge was clearly in error in approaching the matter on an assumption that he had a discretion to allow the action to proceed even if it was instituted outside the limitation period: "where the action is instituted outside the limitation period fixed by section 70(1) of the Ports Act, the court has no discretion to allow the case to proceed."

Bojang's case is on all fours with the instant one; and I would accordingly apply its *ratio decidendi* to this appeal.

In the event, I would allow this appeal from the said ruling of Agidee J; and I would dismiss the suit on the ground that it is statute-barred. The defendant is entitled to its costs in the court below fixed at D2500 and in this court fixed at 5000.

CHOMBA JA. I agree

NJIE AG JA. I also agree.

Appeal allowed.

IN RE CHAM (DECD); CHAM v CHAM

SUPREME COURT (HIGH COURT), BANJUL

(Civil Suit No 195/86 (No 14)

20 March 1990

NJIE J

Registration of birth and deaths-Births-Registration-Illegimate child-Notice of birth-Names of both father and mother appearing under informant column of birth certificate-Entry raising presumption of child being illegitimate child of parents under Cap 41:01, s 19-Effect of registration under Cap 41:01-Births, Deaths and Marriages Registration Act, Cap 41:01, s 19.

It is provided by the Births, Deaths and Marriages Registration Act, Cap 41:01, s 19 that:

"19. In the case of an illegitimate child, no person shall, as father of such child, be required to give information concerning the birth of such child, and the Registrar or Deputy Registrar shall not enter in the registrar the name of any person as father of such child, unless at the joint request of the mother and of the person acknowledging himself to be the father of such child, and such person shall in such case sign the registrar, together with the mother."

Held, *dismissing the claim as a beneficiary of the estate of the deceased*: a birth certificate issued under the Births, Deaths and Marriages Act, Cap 41:01 is evidence of the birth of a child. It also raises a presumption that the facts stated thereon are true. In the instant case, the fact that both the names of the father and mother appear under the informant column of the birth certificate tendered in evidence by the plaintiff, raises the presumption under section 19 of the Act, that the child named therein was the illegitimate child of his parents. And the defendant has failed to rebut that presumption. The person whose name appears on the birth certificate could well have been the father of the plaintiff. However, the plaintiff has not shown, on the balance of probabilities, that he is the legitimate son of his parents whose names appear on the birth certificate.

ACTION for a declaration that the plaintiff is beneficially entitled under the estate of the deceased father who died intestate; and for an

order requiring the defendant to distribute and vest in the plaintiff his share in the estate of the deceased. The facts are sufficiently stated in the judgment of the court.

A A B Gaye for the plaintiff.

Alhaji A M Drameh for the defendant.

NJIE J. The plaintiff's claim as per his writ of summons is for a declaration that he is "beneficially entitled under the estate of the deceased who died intestate on the 14 April 1985." The deceased is one Abdoulie Cham who died intestate. And the plaintiff also claims for an order requiring the defendant to distribute and vest in the plaintiff his share in the deceased's estate.

On 21 January 1986 letters of administration of the estate of Abdoulie Cham deceased were granted by the Supreme Court (High Court) to the defendant who is the mother of the deceased. And the main issues for the consideration of this court, as I see it, are these: (i) is the plaintiff the son of the said Abdoulie Cham (deceased); and (ii) if the answer is in the positive, then, is the plaintiff entitled to any share in the estate of the said deceased?

Exhibit A is a certified copy of birth being an extract from the Register of Births kept at the Medical and Health Department, and is sufficient evidence in any court of law of the contents of any register of births: see section 11 of the Births, Deaths and Marriages Registration Act, Cap 13 (now Cap 41:01 of the Laws of The Gambia, 1990). The plaintiff claims that exhibit A is his certificate of birth. It discloses the name of the child as Momodou and his parents Abdoulie Cham and Isatou Njie, the father and mother respectively. Under signature, description and residence of informant are the names: Isatou Njie, mother 3 Lancaster Street; A M Cham father 36 Primet Street. The child Momodou was born on 19 February 1948. Nowhere in his evidence did the plaintiff state his age or place or date of birth, even though it would be of little assistance had that information come from him. It is the plaintiff's case that the facts stated in exhibit A are accurate and that he is the son of Abdoulie Cham (deceased) and Isatou Njie.

It is pleaded in paragraph (3) of the amended statement of defence, and the defendant in her evidence said that the father of the plaintiff was one Kebba Cham. No evidence was led on the averments contained in paragraphs (5) and (6) of the amended statement of

defence. I do not wish to reproduce them; they disclose a skeleton in the cupboard.

But how much reliance can one place on the evidence of the defendant that Kebba Cham and not Abdoulie Cham was the father of the plaintiff? Incestuous relationships are not unknown, and the defendant would hardly have been present if and when her son and her daughter had any sexual relationship. Had the defendant led evidence on the facts alleged in paragraphs (5) and (6) of the amended statement of defence and had Isatou Njie, the plaintiff's mother, who is still alive, given evidence, the court would have been greatly assisted. It is common ground that Isatou Njie is the mother of the plaintiff and that Isatou Njie and Abdoulie Cham are the children of the defendant. I have earlier indicated that the plaintiff relied on exhibit A, and that exhibit A is a certified copy and sufficient evidence in any court of law of the contents of any register of births, and a creature of a statute.

By section 16 of the Births, Deaths and Marriage Registration Act, Cap 13 (hereinafter called the Act): "The father of any child *born in wedlock*" is enjoined to give notice of the birth of his child verbally or in writing to the Registrar." (The emphasis is mine) And by section 17, the mother of a *child born in wedlock* shall give notice of the birth of her child in the absence of the father or putative father of her child under certain circumstances. The clear meaning I can deduce from the foregoing sections of the Act is that where the parties are married notice of the birth of a child of that marriage must be given to the registrar by the father, and *only* in certain circumstances does the duty to give notice shift on to the mother. The primary duty to give notice of the birth of such child lies on the father.

In the case in hand, looking at exhibit A, notice was given by both Isatou Njie, mother, and A M Cham, father. However, it is provided by section 19 of the Act that:

"In the case of an *illegitimate child,* no person shall, as father of such child, be required to give information concerning the birth of such child, and the Registrar or Deputy Registrar shall *not* enter in the register the name of any person as father of such child, *unless* at the joint request of the mother and of the person acknowledging himself to be the father of such child, and such person shall in such case sign the register, together with the mother." (The emphasis is mine).

A certificate under the Act, as I understand it, is evidence of the birth of a child, and I so hold. It also raises a presumption that the facts

stated thereon are true, as there is a penalty for the felony of inserting or causing to be inserted a false entry in the register or causing to be inserted a false entry in the register or certificate, namely, imprisonment for seven years. The possibility of causing a false entry to be made in the register has not escaped the legislators: see section 7 (*c*) of Cap 13: The reliance placed on exhibit A is therefore exaggerated, and the fact that both names Isatou Njie and A M Cham appear under informant column of the certificate exhibit A, raises the presumption under section 19 of the Act that the child Momodou was the illegitimate child of his parents Isatou Njie and Abdoulie Cham.

I am therefore unable to make any other pronouncement on the paternity of the plaintiff other than that contained in exhibit A. The efforts on the part of the defendant to rebut the presumption have not been successful. I hold that Abdoulie Cham could well have been the father of the plaintiff. I also hold in the light of exhibit A and section 19 of Cap 13 that the plaintiff has not shown on the balance of probabilities that he is the legitimate son of the said Abdoulie Cham (deceased intestate) to be beneficially entitled to his estate on his intestacy.

Accordingly for the above reasons this action fails and is dismissed with costs. It is so ordered.

Action dismissed.

SYBB

CLARKE & GARRISON v ATTORNEY-GENERAL

SUPREME COURT (HIGH COURT), BANJUL

(Misc Application No 13/92)

25 June 1992

AYOOLA CJ

Constitutional law-Constitution-Fundamental human rights and freedoms-Interpretation-Need for generous and purposive construction-Constitution, 1970, s 20(1).

Constitutional law-Constitution-Fundamental human rights and freedoms-Right to fair hearing within a reasonable time-Effect of section 20(1) of Constitution-Factors to be considered in determining "reasonable time"-Whether need to prove mala fide on part of prosecution in seeking declaration under section 20(1)-Constitution, 1970 (No 1 of 1970), s 20(1).

It is provided by Constitution, 1970, s 20(1) that:

"If any person is charged with a criminal offence, then, unless the charge is withdrawn, the case shall be afforded a fair hearing within reasonable time by an independent and impartial Court established by law."

Held, *granting the application for declaration brought under section 20(1) of the Constitution, 1970*: on a generous and purposive construction of section 20(1) of the 1970 Constitution, the benefit of that section should accrue to any person firmly accused of a criminal offence whether or not he has been charged before a court. The right guaranteed by section 20(1) demands that an accused person should be offered for trial within a reasonable time and that the allegation against him be proved by evidence and the defence he chooses to put forward be heard and verdict returned within a reasonable time.

In determining what is "a reasonable time" the court is to be guided by the following principles or factors: (i) the length of delay; (ii) the reasons given by the prosecution to justify the delay and the consequences for the delay; (iii) the responsibility of the accused for asserting his rights; and (iv) prejudice to the accused. The court must also have regard to the past and current problems which affect the

administration of justice in the country. And what is "reasonable time" cannot be prescribed but must be determined from case to case regard being had to the circumstances of each case. Where there is delay which cannot be justified be any good reason, the absence of *mala fide* on the part of the prosecution, will not make such delay reasonable. An applicant for a declaration under section 20(1) does not need to allege and prove *mala fide* to succeed.

On the facts of the instant case, there is no good reason for the delay and the applicants have in no way contributed to or occasioned the delay and it is inherently prejudicial to them. *Barker* v *Wingo* (1972) 407 US 514, SC; *Bell* v *Director of Public Prosecutions of Jamaica* [1985] of All ER 585, PC *and Mungroo* v *R* [1991] 1 WLR 135, PC cited.

[Editorial note. The provision in section 20(1) of the Constitution 1970 (No 1 of 1970), is the same as section 19(5) of the Constitution, 1997.]

Cases referred to:

(1) Bell v *Director of Public Prosecutions* [1985] 2 All ER 585; [1985] AC 937; [1985] 3 WLR 73, PC.

(2) Barker v *Wingo* (1972) 407 US 514, SC.

(3) Republic v *Taabere* [1985] LRC (Crim) 8.

(4) R v *Grays Justices; Ex parte Graham* [1982] 3 All ER 653.

(5) Mungroo v *R* [1991] 1 WLR 1351, PC.

APPLICATION by originating notice of motion for a declaration and orders pursuant to section 20(5) and in the alternative section 20(1) of the Constitution, 1970. The facts are sufficiently stated in the judgment of the court.

Macaulay QC (with him *Ida Drammeh (Ms)* for the applicants.

Onadeko, Director of Public Prosecutions (with him *F B Bensouda (Mrs)*, Ag Principal State Counsel) for the respondent.

AYOOLA CJ. The applicants in these proceedings, commenced by originating notice of motion, pray the court:

"to make such orders, issue such writs and give such directions as it may consider appropriate for the purpose of enforcing and securing the enforcement of the provisions of section 20(5) and in the alternative section 20(1) the 1970 Constitution of the Republic of The Gambia in relation to the applicants because such provisions have been contravened, are being contravened, and/or are likely to be contravened in relation to them."

They have not sought any specific relief such as an injunctive relief or an order to quash any proceedings in relation to them. Instead, they have prayed the court to exercise the powers conferred on it by section 28(2) of the Constitution, leaving the terms and nature of whatever order or directives the court deems fit to make in the exercise of its constitutional power to formulate. Section 28 of the Constitution of the Republic of The Gambia, 1970 provides that:

"28 (1) If any person alleges that any of the provisions of sections 13 to 27 (inclusive) of this Constitution has been; is being or is likely to be contravened in relation to him (or, in the case of a person who is detained, if any other person alleges contravention in relation to the detained person), then, without prejudice to any other action with respect to the same matter which is lawfully available, that person (or that other person) may apply to the Supreme Court for redress.

(2) The Supreme Court shall have original jurisdiction-

(a) to hear and determine any application by any person in pursuance of subsection (1) of this section; and

(b) to determine any question arising in the case of any person which is referred to it in pursuance of subsection (3) of this section, and make such orders, issue such writs and give such directions as it may consider appropriate for the purpose of enforcing or securing the enforcement of any provision of sections 13 to 27 (inclusive) of this Constitution."

The amplitude of the powers conferred on the Supreme Court is such as to enable an applicant not to circumscribe it by naming an order or writ which the court should make or issue. Where, however, the circumstances are clear as to the relief which the applicant should seek: for instance, that a person detained be released from detention or that some proceedings be quashed, the applicant should be specific as to the relief he seeks.

The two applicants are of American nationality. Robert Connel Clarke is described as a scientist by profession and James Garrision as a carpenter by trade. On 4 February 1990, they were arrested on charges of being in possession of dangerous drugs contrary to section 23(1) of the Dangerous Drugs Act; cultivation of the plant cannabis sativa contrary to section 9(1) *(c)* of the said Act; and conspiracy to commit a felony. On 8 February 1990, they were taken before the Kanifing Magistrates' Court on these charges and were remanded in custody by the magistrate until 15 February 1990. On 15 February 1990 they appeared before the magistrate at the Kanifing Magistrates' Court where on being arraigned they pleaded not guilty to the charge. They were remanded in custody until 22 February 1990. On that day they were further remanded in custody without a date being set for their reappearance in court. Thus matters stood until 2 April 1990 when the respondent, the Attorney-General, filed an information in the Supreme Court containing the counts of conspiracy to commit felony, possession of dangerous drugs and cultivation of the plant cannabis sativa.

On the information, the particulars of offence charged in the third count thereof disclosed that the allegation made by the Attorney-General was that the two applicants and three other persons "on or about the month of January 1990 at Gunjur in the Western Division cultivated the plant cannabis sativa commonly known as "Jamba." Apparently hearing of the case commenced before the Supreme Court. However, on 26 June 1990 after about twenty witnesses have been called by the prosecution and their evidence taken, the prosecution terminated the proceedings by entering a *nolle prosequi*.

The applicants were then discharged but, it would appear their woes did not end there, for on 27 June 1990 the applicants were charged before the Kanifing Magistrates' Court on a three count charge which did not include a count relating to cultivation of cannabis sativa. They were convicted on 24 September 1991 and each sentenced to a fine of D5,500 on each of the counts. The Attorney-General applied to the Supreme Court for a review of the sentence and the applicants appealed against conviction. On 11 November 1991 after the Supreme Court had ordered that the applicants' passports be returned to them and their sureties relieved of their obligations, the applicants were arrested and detained. It was not stated on the affidavit who by. The applicants' affidavit, however, disclosed that they were charged by the Gendarmes with what has been described as "the cultivation charge" and taken before the Brikama Magistrates' Court. After a number of appearances, the prosecution indicated that they were not able to

proceed with the case and the applicants were discharged on 7 January 1992 by the magistrate.

On 29 January 1992 the respondent, so it was alleged, applied to register a fresh charge against the applicants for the offence of cultivation of the plant cannabis sativa contrary to the Dangerous Drugs Act. The magistrate in the Brikama Magistrates' Court, upon being informed by the State counsel appearing, that the respondent could not in proceed with the said charge if registered, did not permit the case to be registered. The applicants allege by their affidavit that the plant cannabis sativa, which was exhibited both at the Supreme Court and at the Magistrates' Court at Kanifing, was destroyed by the order of the magistrate upon the conviction of the appellants and also that they are now on Gendarme bail "having been charged with the offence of cultivation of the plant cannabis contrary to the Dangerous Drugs Act." They allege that they have been reporting on bail regularly, but have not been taken to court since 29 January 1992.

Perhaps I should mention some of the agreed facts which I have hitherto omitted in my summation of the facts. These are that the proceedings commenced before the Kanifing Magistrates' Court were not terminated in any way; that the applicants' application to have the "cultivation charge" before the Kanifing Court transferred to the Supreme Court was not heard; and that the applicants have been arrested on the cultivation charge on three occasions; viz 4 February 1990; 2 April 1990 and 7 January 1992.

It was on these facts that the applicant have brought their motion praying as earlier stated. The submission by Mr Macaulay, QC, in support of the motion are that the applicants having been arrested on 4 February 1990 were entitled to be taken without undue delay to a court. Counsel argued that the elements and other statutory material necessary to prove the offence constitutes the case against an accused person and not the charge even though the case against him necessarily involves a charge. It was submitted that the charge does not by itself constitute the case. It is the case which must be heard within a reasonable time. It was submitted that the facts that there were series of charges brought against the applicants does not mean that the case against them had been begun. Further, counsel for the applicants submitted, that the case against the applicants has been repeatedly presented to the court without adducing any evidence and consequently it cannot be said that the case had received a hearing at all, *a fortiori* a fair hearing. Finally, it was submitted that the length of the delay in all the circumstances and the user of the court processes

by the prosecution were tantamount to an abuse of process of the court. Learned counsel for the applicants relied on *Bell* v *Director of Public Prosecutions* [1985] 2 All ER 585 and the American case of *Barker* v *Wingo* (1972) 407 US 515, SC.

The learned Director of Public Prosecutions submitted that since the Kanifing Magistrates' Court before which the applicants were charged had no jurisdiction to try the offence, the applicants were not jeopardised in law by the possibility of their being tried at the Brikama Magistrates' Court of the cultivation charge. He argued that it would have been oppressive had the applicants been tried in two separate courts, namely, Kanifing Magistrates' Court and Brikama Magistrates' Court, for offences arising from the same facts. He further submitted that it is for whoever is claiming that he is being denied a fair hearing within a reasonable time to allege and prove *mala fide* on the part of the prosecution, among other things, and that it will not suffice merely to rely on same. In this case, it was finally submitted there was no infringement of section 20(1) of the Constitution.

The right which the applicants say has been infringed as regards them is contained in section 20(1) of the Constitution which provides as follows:

"If any person is charged with a criminal offence, then, unless the charge is withdrawn, the case shall be afforded a fair hearing within reasonable time by an independent and impartial Court established by law."

The three elements which constitute that right are that: (i) there must be a hearing within a reasonable time; (ii) such hearing must be fair; and (iii) it must be by an independent and impartial court established by law. There are obviously necessary overlaps to these elements. For instance, a hearing cannot be said to be fair even if it is before a court which is not independent and impartial. Also a hearing may be inherently unfair, depending on the circumstance, if it is not heard within a reasonable time. Notwithstanding the overlaps, if any one or more of these elements is or are contravened there would have been an infringement of the right protected by section 20(1). Needless to say, of course, that there may be a speedy hearing which may not be a fair hearing. Fairness of a hearing is not measured by time only. There is no question in this case as regards the third of the three elements stated above. So, the only question is whether the right of a hearing of the case against the applicants within a reasonable time has been infringed.

The question is simple; but some degree of complexity is brought into the matter by the fact that at the time the applicants alleged an infringement of their right to a speedy hearing of the case against them, no charge as regards them, other than the one pending before the Kanifing Magistrates' Court which obviously has no jurisdiction to try the charge, has been preferred against them and pending in any court on the cultivation charge.

A reading of section 20(1) may lead to the conclusion that the right to speedy hearing attaches to a person who has been charged before a court with a criminal offence and against whom a "case" has been initiated in one of the three ways in which criminal proceedings can be instituted in this jurisdiction pursuant to section 69(1) of the Criminal Procedure Code. On that strict and narrow reading of section 20(1), unless in this matter significance is attached to the cultivation charge undisposed of and still pending before the Kanifing Magistrates' Court, the applicants, it would appear, are not persons to whom section 20(1) would apply. In that event, the applicants would be unable to claim the protection of section 20(1), at this stage, and would be outside the protection afforded by that sub-section until they are charged to court, notwithstanding whatever pre-trial constraints and anxiety they might be subjected to.

In the Kiribati case of *Republic* v *Taabere* [1985] LRC (Crim) 8 which touched on section 10 (1) of the Constitution of Kiribati, similarly worded as our section 20(1), rejecting the submission that on the wording of that section time does not necessarily run from the day the information is laid but from the date of the alleged offence if the offenders were then known, Jones CJ said at p 9:

"I cannot read anything significant into this wording and the later wording `*the case* shall be afforded a fair hearing' persuades me that the section means time to run from the date of the charge, since there is no `case' before the charge."

Jones CJ thus applied the strict construction approach. However, at the end, he adverted to the length of time since the offence was committed and since the charge was first laid in coming to a conclusion that there was unreasonable delay in that case.

The English Courts have had occasion in several cases to deal with the question of delay in bringing criminal proceedings. The issue arose in those cases in different forms; but most of them have in common the need to pronounce on the circumstances in which delay in bringing

criminal proceedings will lead the court to regard such proceedings as vexatious and an abuse of process of court. England has no Bill of Rights provided for in a written constitution and the English Courts are not concerned with interpreting the text of a written constitution. Although, therefore, decisions of English Courts are helpful for their exposition of the common law approach, developed case by case, to the problem of denial of speedy trial, the limited guide they offer must be noted. I refer to one of the authorities. In *R* v *Grays Justices; Ex parte Graham* [1982] 3 All ER 653 May LJ (in the English Queen's Bench Division) said at p 658: "…delay of itself, with nothing more, if sufficiently prolonged, could in some cases be such as to render criminal proceedings brought *long after the events* said to constitute the offence both vexatious and an abuse…" (The emphasis is mine).

In that particular case, the court held that in all the circumstances, the delay between the alleged *commission of the offences* and the *bringing of proceedings* against the applicant was not sufficient to render the proceedings vexatious or an abuse of process.

Of more direct relevance to this case is *Bell* v *Director of Public Prosecutions* [1985] 2 All ER 585 in which the Judicial Committee, in passing, (at 590 (h-j), 591 (f) in relation to an alleged infringement of section 20(1) of the Jamaica (Constitution) Order-in-Council 1961 Sch 2, mentioned as relevant the period of delay *between arrest and trial*. Section 20(1) of the Jamaican Constitution is similarly worded as our section 20(1).

The American case of *Barker* v *Wingo* (1972) 407 US 514 US, SC concerned the right to speedy trial guaranteed by the Sixth Amendment to the United States Constitution. It was not an issue in that case whether the reasonable period consistent with constitutional standards during which an accused must be afforded his right to a speedy trial starts to run from time of commission of the offence, date of arrest or date of arraignment before a court, but it seemed obvious from the opinion of the United States Supreme Court that it was assumed that the relevant date was the date of arrest.

In the more recent case of *Mungroo* v *R* [1991] 1 WLR 135, PC Mungroo was arrested on 17 July 1981 and served with a provisional charge of forgery of a cheque. He was given bail. The information relating to the charge was not laid until 4 May 1983; and in September those proceedings were discontinued, the magistrate and the defendant being informed that a new charge would be brought. In relation to the same matter, he was charged in February 1985 with swindling by

employing fraudulent pretences, and in March he pleaded not guilty to that charge. Defence counsel applied for a stay of the proceedings on the grounds that the delay between July 1981 and March 1985 constituted an infringement of the defendant's right to trial within a reasonable time afforded by section 10(1) of the Constitution of Mauritius which provided that:

"Where any person is charged with a criminal offence, then, unless the charge is withdrawn, the case shall be afforded a fair hearing within a reasonable time by an independent and impartial court established by law."

The magistrate held that the delay had stemmed from the complex nature of the inquiry conducted by the police and dismissed the motion. The defendant was convicted and the Supreme Court dismissed his appeal against conviction, holding that the delay had resulted from the complexity of the investigations and that the prosecution of the defendant was not unconstitutional. Although Mungroo's appeal to the Privy Council was dismissed by reason of the fact that there was good reason for the delay, the Privy Council held that in determining whether the defendant had been denied his right under section 10(1) of the Constitution to a fair hearing within a reasonable time, the court had to have regard to the period of delay *between his arrest* in July 1981 and the commencement of his trial in March 1985 and to the reasons for that delay and the consequences thereof. It was held in that case, rejecting the view that in section 10 a person is "charged" when he is "arraigned" and must be tried within a reasonable time after the preferment of the information, that a person had been charged with a criminal offence within section 10 of the Constitution of Mauritius (similar to our section 20) when he was arrested. Expatiating on the right to a trial "within a reasonable time" Lord Templeman said at 1352:

"The right to a trial within a reasonable time secures, first, that the accused is not prejudiced in his defence by delay and, secondly, that the period during which an innocent person is under suspicion and an accused suffers from uncertainty and anxiety is kept to a minimum."

In my judgment, any reading of section 20(1) which will confine the protection afforded by that subsection only to persons charged before a court and from the date of his being so arraigned must be rejected. The right to speedy trial is a right which accrues to an accused person from the time a decision to prosecute him has been manifested by his arrest with the attendant possibility of incarceration or other

constraints however minimal on his liberty, notwithstanding that he might be released on bail. From that moment, the prosecuting agency has a duty unless the decision to prosecute is rescinded, to offer the accused for trial leading to a verdict. Delay to offer an accused for trial within a reasonable time is itself an infringement of his right to have the case against him heard within reasonable time. In my judgment, a generous and purposive construction to support that conclusion ought to be put on section 20(1). Doing that, I hold that normally, the benefit of that sub-section should accrue to any person firmly accused of a criminal offence whether or not be has been charged before a court. The right guaranteed by section 20(1) demands that an accused person should be offered for trial within a reasonable time and that the allegation against him be proved by evidence and the defence he chooses to put forward be heard and verdict returned within a reasonable time.

What, then, is a "reasonable time" measured from the time a firm accusation, other than mere suspicion, has been made for the purpose of section 20(1)? This, happily, is an area in which the authorities offer some guidance and it is not difficult to summarise the principles that have emerged. First, as suggested in *Barker* v *Wingo,* the four factors which the court should assess in determining whether an accused has been deprived of his right to speedy hearing are: (1) length of delay; (ii) the reasons given by the prosecution to justify the delay; (iii) the responsibility of the accused for asserting his rights; and (iv) prejudice to the accused. Secondly, as was held in *Bell* v *DPP* in considering whether a reasonable time has elapsed, regard must be had to the past and current problems which affect the administration of justice in the particular country. (See also *Mungroo* v *R* [1991] 1 WLR 1351.) Thirdly, what is "reasonable time" cannot be prescribed but must be determined from case to case regard being had to the circumstances of each case. Fourthly, when delay amounting to an infringement of a constitutional right is alleged, the courts must have regard to the reasons for the delay and to the consequences of the delay: see *Mungroo* (supra).

In the present case, on the agreed facts, not only were the appellants arrested on several charges which included the cultivation charge (contrary to section 9 (1)*(c)* of the Dangerous Drugs Act) on 4 February 1990 but they were taken to court on those charges on 8 February 1990. Those proceedings have not been determined. On 2 April 1990 and 27 June 1990 or thereabout, the prosecution proceeded in the Supreme Court and in the Kanifing Magistrate' Court respectively with charges obviously arising from the same set of facts.

They included the cultivation count in the former and excluded it in the latter. The former was determined by *nolle prosequi* while the latter ended in conviction of the applicants. The cultivation charge charged re-emerged on 7 January 1992 before the Brikama Magistrates' Court where the applicants were discharged on 29 January 1992, upon the prosecution not being ready to proceed with the case. It was after that discharge that they were made to continue on bail by the Gendarmes.

On these facts, it seems manifest that there was obvious delay in affording the applicants a hearing of the case against them on the cultivation charge. The only question was whether the delay was reasonable.

The reasons which may make delay reasonable are numerous. No useful purpose can be served by even attempting to enumerate them since no list of such can be exhaustive. It suffices that the only reason proffered by the learned Director of Public Prosecutions was that it would have been oppressive to have had the hearing of the cultivation charge and the other set of charges going on simultaneously in two separate courts. While such sense of consideration for the interest of the applicants would have carried weight had such reason been adduced before one of the courts in which the applicants could have been charged as reason for a request for a stay of one of the proceedings, it should hardly carry any weight where, as in this case, the applicants did not request such a stay and they were afforded no opportunity whatsoever of electing whether they wanted such or not. Besides, the hearing at which all the charges could have been heard together at the Supreme Court was aborted by the prosecution. There is, in my judgment, no good reason for the delay. The applicants have in no way contributed to or occasioned the delay and it is inherently prejudicial to them.

The learned Director of Public Prosecutions has, however, submitted that, in any event, the applicants must allege and prove *mala fide*. While prejudice to the accused is one of the factors which the court can take into consideration in assessing whether hearing of a case against him has been delayed beyond a reasonable time, allegation of *mala fide* on the part of the prosecutor is not an indispensable factor. Where there is bad faith and it is established as a cause of the delay that is only relevant in showing that the delay is unreasonable. Where there is a delay which cannot be justified by any good reason the absence of *mala fide* will not make such delay reasonable. English Courts faced with allegation of denial of speedy trial in criminal

proceedings, have had to look for vexation, oppression and abuse of office on the part of the prosecution because those are factors which must exist for them to be able to invoke their inherent jurisdiction to exercise a discretion to decline to hear such proceedings. Courts in a jurisdiction, such as ours, where there is a Bill of Rights containing provisions such as in section 20(1) are not constrained to look for circumstances of vexation, oppression and abuse of office in order to protect an accused against an infringement of his right to speedy trial. I hold that the applicants do not need to allege and prove *mala fide* in order to succeed in this matter.

In all the circumstances of this case, I feel no hesitation in coming to the conclusion that the applicants' right to have the case against them afforded a fair hearing within a reasonable time has been infringed. No bad faith has been alleged and I do not find any proved against the prosecuting agencies. The conclusion that there has been an infringement of section 20(1) becomes even stronger if regard is had to the fact that the cultivation charge has been pending before the Kanifing Magistrates' Court since January 1990 and is still pending. Assuming that that court is devoid of territorial jurisdiction to try the charge, the case could have been, but was not, transferred to a court which has jurisdiction to hear it pursuant to section 62(1) of the Criminal Procedure Code, Cap 12:01. Also making the conclusion much stronger, quite apart from the length of time, between the commission of the alleged offence till now, are the various steps which the prosecution took on the cultivation charge which tended to portray a reluctance to have or a lack of seriousness in having that particular charge dealt with at all or within any reasonable time. I agree with learned senior counsel, Mr Macaulay, in his submission that the charge itself cannot constitute the case against a person and that serially preferring a charge against a person on the same facts not only is not tantamount to affording the case a hearing but is oppressive. These to my mind are rather obvious statements, but they need to be emphasised in order to meet any contention that by their being promptly charged to court, with subsequent charges being made from time to time, the rights of the applicants under section 20(1) has not been infringed.

I now turn to the question of the order to make. Mr Macaulay has suggested the following: (i) a declaration that the applicants' right to a fair hearing within a reasonable time has been infringed in relation to any charge of cultivation of *cannabis sativa* in Gunjur on or about January 1990: (ii) an order that the applicants be discharged and not tried again on the original or any other charge or information in a

magistrates' court or the Supreme Court respectively on the offence referred to in the declaration; and (iii) an order that the applicants be discharged out of the custody of the Gendermes and be not taken into custody again on such charge of cultivation; and (vi) an order that the bail of the applicants be revoked and they be not taken into custody again.

Before I consider those suggested reliefs, I would advert briefly in relation to the third and fourth of them to section 15(4) of the 1970 Constitution which provided as follows:

"Where any person is brought before a court in execution of the order of a court in any proceedings or upon suspicion of his having committed or being about to commit an offence, he shall not be thereafter further held in custody in connection with those proceedings or that offence save upon the order of a Court."

The agreed facts in this case show that on several occasions, the applicants have been brought before a court upon suspicion of their having committed the offence of cultivation of *cannabis sativa.* One such charge is pending. On several other occasions they have been discharged by the courts in regard to that same offence. It would be manifestly in breach of section 15(4) for them to have been held in custody for however brief a period either in connection with those proceedings or in connection with that offence save upon the order of a court. No order of court has been shown to exist. In the result, their being put in custody being in contravention of section 15(4), the condition subjoined to their release by their being put on bail could not have been valid unless a court had ordered their being put in custody.

This, in my judgment, is a fitting occasion to make a declaration as suggested by Mr Macaulay and to make orders prohibiting the applicants from being prosecuted for the same offence and revoking the condition of bail restricting their liberty. In the result, I would grant a declaration that the applicants' right to a fair hearing within a reasonable time guaranteed by section 20(1) of the Constitution has been infringed in relation to any offence of cultivation of the plant cannabis sativa contrary to section 9(1) *(c)* of the Dangerous Drugs Act at Gunjur in the Western Division or about the month of January 1990. I would therefore order as follows:

(i) that any such charge as contained in the declaration above now pending before any subordinate court be terminated forthwith by the discharge of the applicants;

(ii) that the applicants be not tried again in any court on the offence referred to in the declaration;

(iii) that the applicants be unconditionally discharged from the custody of The Gambia Gendarmerie and be not taken in custody again on the offence referred to in the declaration; and

(iv) that any condition appended to the release of the applicants from custody by the Gambia Gendarmerie be and is revoked forthwith.

Application for declaration

and orders granted. SYBB

HESSE, ANDRE & CO v GHANEM TRADING & Co Ltd & Another

SUPREME COURT (HIGH COURT), BANJUL

(Civil Suit No 88/92 H No 1)

18 March 1993

ADIO J

Sale of goods-Credit sale-Letters of credit-Nature of-Liability for-Person issuing letters of credit and person unjustly enriched by irrevocable letters of credit jointly and severally liable for payment of goods.

Held, *giving judgment for the plaintiffs*: a letter of credit is in the nature of negotiable instrument whereby a person requests another to advance money or give credit to a third person and promises to repay the person making the advancement. In the instant case, the plaintiffs, on the evidence, demanded for the opening of letters of credit before shipment of the goods; and it was after they had received an assurance that an irrevocable letters of credit had been issued by the second defendant in their favour, at the request of the purchaser, the first defendant, that the goods were shipped to both defendants. The first defendant who had unjustly been enriched by the opening of the irrevocable letters of credit and the second defendant are both jointly and severally liable for the payment of the goods.

Cases referred to:

(1) *Attorney-General of Kwara State* v *Commissioner for Local Government, Kwara State*, Supreme Court of Nigeria, Appeal No SC 24/1987, 29 January 1993.

(2) *Osawura* v E*zeiruka* (1978) 6-7 SC 135.

(3) *Attorney-General of Bendel State* v *Aideyam* (1989) 4 NWLR (Part 118) 646.

ACTION for the recovery of payment and interest thereon for goods sold and delivered to the first defendant, upon the basis of letters of credit issued by the second defendant at the request of the first

defendant. The facts are sufficiently stated in the judgment of the court.

Baba Aziz for the plaintiffs.

S J B Mahoney for the first defendant.

Samba (Ms) for *Sosseh* for the second defendant.

ADIO J. The plaintiffs' claim against the defendants jointly and severally is for:

(a) the recovery of the sum of DM 87593.40 being the value of one container of suiting materials and cotton brocade sold and delivered by the plaintiffs to the first defendant payment whereof the second defendant undertook to make by letters of credit, which sums the defendants have failed to pay despite repeated demands;

(b) interest on the said amount at the rate of 27 per sent per annum from the date of delivery of the said goods to the defendants until the date of judgment; and

(c) costs.

The plaintiffs are a German company carrying on business at Rathaustrabe, Germany. One Loew Hans Joachim - sales manager of the company, gave evidence in support of the plaintiffs' claim. According to this witness, his company received instructions from the first defendant for the purchase of some textile goods. An indent sheet was accordingly made and the sales order was signed by Mr Raif Diab for the first defendant. A pro forma invoice was sent to the first defendant company so that it could open letters of credit based on the pro forma. The pro forma invoice was admitted in evidence as exhibit P1. The first defendant wrote to the plaintiffs asking them to amend the pro forma which they did. The letter written by the first defendant was admitted in evidence as exhibit P2. According to the witness, their terms and conditions were that letters of credit must be opened and payable sixty days after the issuing of bill of lading. In the instant case, they received letters of credit from Bank for Commerce and Credit International BCCI in London on the application of Boule & Co Ltd, the second defendant. This document was admitted in evidence and marked exhibit P3.

After shipment of the goods, the plaintiffs witness stated that they issued documents based on the condition of the letters of credit and sent them to their bank. A letter was received from their bank that the author of the letters of credit had accepted that payment would conform with the terms in the letters of credit, ie the second defendant undertook to pay on the maturity date of the letters of credit. The documents received from the plaintiffs' bank were admitted in evidence as exhibit P4A and P4B. The plaintiffs stated further that they supplied the goods as requested. The bill of lading and all the other documents were sent to the bank. The originals were with the bank but by agreement of all the parties copies were admitted in evidence and marked exhibit P5. The witness also said that apart from the letters of credit, they also sent the commercial invoice, package list and the insurance policy. The commercial invoice was admitted in evidence and marked exhibit P6. The witness concluded his evidence by stating that they have not been paid by BCCI in accordance the letters of credit. The witness added that before the date of maturity they learnt that BCCI had gone bankrupt. Consequently, they contacted the first defendant who promised to pay on due date. To date, the plaintiffs have not been paid and they are claiming the full amount of the commercial invoice and interest for delayed payment which is DM 87,593.40.

On cross-examination, the witness emphasized that they had sent the document for BCCI through their own bank which is Deutsche Bank as they could not do so directly; they had to send it through their own bank. He was not sure of who received the goods in Banjul, but according to the letters of credit the second defendant is the one to pay. They did not send to the second defendant because they did not know them; they knew them when first defendant referred them to the second defendant. At that stage, the matter was referred to their solicitor. The witness concluded by stating that the arrangement between bank and bank is that the Deuche Bank should pay them and debit BCCI's accounts in Frankfurt. This was no longer possible because BCCI went bankrupt. During cross-examination of the plaintiff's witness exhibit D1 was tendered by the second defendant to show that a copy of the bill of lading was endorsed to the first defendant on 18 June 1991. This document is the same as exhibit P5 apart from the endorsement to the first defendant.

On the facts, the first defendant did not call any evidence and the second defendant called a witness who gave a short evidence to the effect that he had endorsed the bill of lading, exhibit D1, to the first defendant and that it was the first defendant who collected the goods.

According to the witness, he delivered the document to the first defendant and after a period (using his own words) the defendant paid the cost of the goods and his own commission, it follows that the goods arrived in The Gambia and it was collected by the defendants. Although the first defendant company did not call any evidence, I still must have regard to his pleadings and the foundation laid for its defence that it did not collect the goods, but it was the second defendant. On the issue of who received the goods in The Gambia, both first and second defendants cannot be correct because they contradict each other, certainly both of them may not be speaking the truth. On the totality of the facts, I prefer the evidence of the plaintiffs to that of the defendants.

In law what is the position of the second defendant to the plaintiff? The first defendant is the buyer; the second defendant applied for the letters of credit which formed the basis of the plaintiffs supplying the goods. Performance of the contract was dependent on the opening of the letters of credit hence the plaintiffs demanded for it and the first defendant requested the second defendant to make it available and the second defendant did. The letters of credit raised is confirmed and irrevocable. What is the meaning of this document, exhibit P3, and what are the submissions of counsel on this point? Learned counsel for the first defendant, Mr Mahoney, submitted that as the second defendant was the applicant for the confirmed irrevocable letters of credit in this transaction, he should pay because the letters of credit in like money. On the other hand, learned counsel for the second defendant, Mr Sosseh, submitted that in such circumstances, if there is a litigation resort should be to the buyer who is the first defendant first before calling on the applicant for the letters of credit, ie the second defendant. It is the submission the of plaintiffs' counsel that both first and second defendants are liable since the goods arrived in The Gambia and the arrival was notified to both the first and second defendants.

The learned author of *Black's Law Dictionary* (Abridged 5th ed) at p 470 defines letters of credit as follows:

"A written instrument, addressed by one person to another, requesting the latter to give credit to the person in whose favour it is drawn. A letter of credit is in the nature of a negotiable instrument, and *is a letter whereby a person requests another to advance money or give credit to a third person, and promises to repay person making the advancement. A letter authorising one person to pay money or extend credit to another on the credit of the writer*. (The emphasis is mine).

The learned author went further:

"Confirmed letter" - Type of Letter of Credit in which local bank gives its guarantee that seller's draft will be honoured if the bank which issues the letter fails to honour its `Irrevocable Letter'. *Type of letter of credit in which issuing bank guarantees that it will not withdraw the credit or cancel the letter before expiration."* (The emphasis is mine).

The learned author of *Paget's Law of Banking* (9th ed), at p 529 under the rubric "Bankers Commercial Credit" at pages 534-535 stated thus:

"The terms `irrevocable' and `confirmed' were for long taken as synonymous, but they are today generally accepted in the meaning attached to them here, in *M A Sassoun & Sons Ltd* v *International Banking Corporation,* Lord Sunmer said that there was no distinction from a legal point of view between an irrevocable credit and a confirmed credit, and that both were concluded contracts; but he was presumably *referring to the legal effect of each, which,* as *regards the beneficiary, is the same, in the sense that he has the irrevocable promise of the confirming banker.* An irrevocable credit is confirmed if to it is added the "confirmation of another banker", by which that banker also binds himself irrevocably. A banker is not bound to give notice of revocation of a revocable credit, but he could generally do so as a matter of courtesy." (The emphasis is mine).

It is therefore clear that the second defendant does not need to be a party to the contract of buying and selling between the plaintiffs and the first defendant before he could hold himself liable on the contract. By the application for the irrevocable letters of credit in the first defendant's favour, he asked the plaintiffs to advance money or give credit to the first defendant and so promised to pay the person making the advancement who are the plaintiffs. That is settled law.

The documents relating to the goods: exhibit P1, proforma invoice; exhibit P2, letter written by the first defendant to the plaintiffs on restructuring the order; exhibit P3, P5, letters of credit; and exhibit D1, letters of credit notified to both defendants, are clear indications that the first defendant was aware of the shipment of the goods and their arrival in The Gambia. Exhibits P1, P3, P5 and P6 (invoices from the plaintiffs to the second defendant) and D1 were addressed to the second defendant and therefore he too was aware of the shipment of the goods and their arrival in The Gambia.

The first defendant did not call any evidence; but the second defendant called evidence, and amongst other things, stated that he had endorsed exhibit D1 to the first defendant to collect the goods. The first defendant too stated in its pleadings that the second defendant collected the goods. I do not accept the evidence of both of them. I prefer the evidence of the plaintiffs that both of them must have received the goods and I do so hold.

What is the legal implication of the first defendant exercising its right not to call any evidence? On the pleadings, the first defendant admitted placing order for the goods. On the pleadings, the second defendant said the first defendant collected the goods. On the pleadings, the first defendant said the second defendant collected the goods. It decided to be silent on the facts before the court which require it to explain its position. It is trite law that, although a party to a suit is not obliged to testify on his behalf, where a party's case before a court of justice is such that he is expected to swear to its truth and be cross-examined thereon and he fails to submit to this, that is a point that can go against his credit and be a good ground for rejection of his case. The onus of proof in civil cases, quite unlike in criminal cases in which the onus of proof is all through on the prosecution, is not static but keeps shifting from the plaintiff to the defendant. In *Attorney-General of Kwara State* v *Commissioner for Local Government, Kwara State* Appeal No SC 241/1989, delivered on 19 January 1993, unreported Nnaemeka-Agu JSC, delivering the lead judgment of the Supreme Court stated further:

"The Supreme Court (of Nigeria) had stated a number of times that the onus of proof in civil cases, quite unlike in criminal cases in which the onus of proof is all through on the prosecution, is not static but keeps shifting from the plaintiff to the defendant."

He cited *Osawaru* v *Ezeiruka* (1978) 6-7 SC, 135 and *Attorney-General of Bendel State* v *Aideyam* (1989 4 NWLR (Part 118) 646. In the circumstances, I place little weight on the first defendants' defences and I hold that it is liable jointly with the second defendant to pay the value of the goods.

Alternatively, as all the relevant documents were addressed to the second defendant, he is liable for the goods. He received all the shipping documents including the bill of lading, etc. Bill of lading is the key to the warehouse as submitted by learned counsel for the first defendant. I entirely agree with him. In the case of the first defendant company it too is liable in quasi -contract.

What is a quasi-contract? The learned author of *Blacks Law Dictionary* (*5th ed)*, at page 650 defines it thus:

"An obligation which law creates in absence of agreement: it is invoked by courts where there is unjust enrichment. Function of "quasi contract" is to raise obligation in law where in fact the parties made no promise, and it is not based on apparent intention of the parties." (The emphasis is mine).

Quasi-Contract in its simplest forms are as follows:

(i) the defendant converted the plaintiff's horse and sold it to B. Under the theory of the quasi-contract, the court will imply an agreement on the part of the defendant to pay the plaintiff either the value of the horse at the time it was taken, or the value realised in the sale to B, depending upon which value is higher and the extent defendant is in default;

(ii) the plaintiff pays the property taxes on a parcel of land he mistakenly believes to be within his boundaries. The land belongs to the defendant, the adjoining landowner. The plaintiff may seek a quasi contractual recovery to be reimbursed for the amount of the money paid to the defendants' benefit in order to avoid defendants' unjust enrichment; and

(iii) the plaintiff repaired a fence on defendants' property under a contract that was unenforceable because of the Statutes of Frauds. The plaintiff may sue in quasi-contract, either for the market value of the materials used and services rendered to make the repair or for the increased market value of defendants' property in its repaired condition."

It follows that modern quasi-contract actions may arise where there is no agreement between the parties, but the defendants' tortious conduct has resulted in his unjust enrichment at the expense of the plaintiff or when the plaintiff mistakenly confers some benefit on the defendant. Quasi-contract action also may be used when there is an express agreement between the parties that has become unenforceable.

A letter of credit had been defined as in the nature of a negotiable instrument and it is a letter whereby a person requires another to advance money or give credit to a third person and promises to repay the person making the advancement. A letter authorising one person to pay money or extend credit to another on the credit of the writer.

There is evidence before the court, which was unchallenged, that the plaintiffs demanded for the opening letters of credit before shipment of the goods; and it was after they (plaintiffs) had received an assurance that an irrevocable letters of credit had been issued before they shipped the goods. The first defendant company had unjustly enriched himself by the opening of the irrevocable letters of credit issued at its request by the second defendant for which it got some benefit. It is too late in the day to disassociate itself from the transaction. I find the first liable also on this ground.

In the instant case there need not be an express agreement between the plaintiff and the second defendant to render the second defendant liable on the irrevocable and confirmed letters of credit he applied for in favour of the first defendant. *A fortiori* the fact that all the shipping documents were addressed to the second defendant did not absolve the first defendant from liability since I have already found that both the first and second defendants collected the goods.

In the result and for all the reasons already given in this judgment, I find the two defendants jointly and severally liable to the plaintiffs in the sum of DM87,593.40 being the value of one container of suiting materials and cotton brocade sold and delivered by the plaintiffs to the first defendant whereof the second defendant undertook to make by an irrevocable and confirmed letters of credit which sum the defendants had failed to pay. I also award interest on the said amount at the rate of 27 per cent per annum from 18 June 1991 - (the date when bill of lading exhibit D1 was endorsed to the first defendant for collection of the goods by the second defendant) till date of judgment which is 18 March 1993.

There were twelve appearances, today inclusive. Costs assessed at D2,250 which is inclusive of the out of pocket expenses of D251.75.

Judgment for the plaintiffs.

SYBB

AGRO INDUSTRIAL CO (GAMBIA) LTD v

GRATTE BROS INTERNATIONAL LTD

COURT OF APPEAL, BANJUL

(Civil Appeal No 6/90)

14 June 1991

ANIN, DAVIES AND AKANBI JJA

Contract-Construction contract-Principal contract-Incorporation into sub-contract-Parties entering into sub-contract to carry out construction contract in accordance with terms of principal contract-Whether all relevant terms of principal contract necessarily incorporated into sub-contract-General principle regarding stipulation to be implied into a contract.

Practice and procedure-Pleadings-Material fact not pleaded-Effect-Party considering as relevant evidence led on material fact not pleaded-Duty of party to seek amendment of pleadings to bring it in line with evidence on record-Effect of failure to do so.

Courts-Appeal-Findings of fact-Appellate court treatment of findings of fact by trial court-Circumstances in which appellate court may interfere with findings by trial court.

Held, *dismissing the appeal (per Akanbi JA, Anin and Davies JJA concurring*): (1) an agreement by a sub-contract or to carry out work in accordance with the terms of the principal contract, does not necessarily incorporate all the relevant terms of the principal contract into the sub-contract. As a matter of general principle, no stipulation is to be implied into a contract unless it must be taken, on the evidence, to have been the presumed intention of the parties and where it is necessary to give the transaction the efficacy that both parties must have intended it to have. In the instant case, it is true that the items to be supplied and the work to be carried out by the defendant-appellant under the principal contract, exhibit A, to which the plaintiff is not a party, are a part of what the plaintiff was under a contractual obligation to perform in accordance with the terms of the agreement, exhibit B, reached with the defendant. However, neither party can sue an exhibit A to derive advantage therefrom unless the contract between them, ie exhibit B so stipulates. And there is nothing in the

pleadings or the documents tendered to suggest that there was any intention to incorporate any of the terms of exhibit A into the contract, exhibit B. *Chandler Bros Ltd* v *Boswell* [1936] 3 All ER 179, CA; *Mc Clelland Ltd* v *Northern Ireland General Health Services Board* [1957] 2 All ER 129 at 132; and *Atuwo* v *Agip Ghana Ltd* (1965) ALR (Comm) 195 cited.

(2) The parties are bound by the pleadings and any material fact not pleaded, if received in evidence, must be ignored as going to no issue. Where a party has let up that kind of evidence, which he considers relevant to his case, he has to seek amendment of his pleadings so as to bring it in line with the evidence on record. If that is not done, the evidence tendered will worthless.

(3) It is not within the providence of the appellate court to ascribe probative value to the evidence of witnesses. That is the function of the trial court which has had the advantage of seeing and hearing the witnesses. Therefore the appellate court will not disturb such findings or substitute its own view for that of the trial court unless such findings are shown to be perverse or unsupportable by evidence. In the instant case, the appellate court cannot find as worthless the evidence of the witness believed by the trial judge; neither would the court disagree with the finding by the trial judge that the contract by the parties were a lump sum contract and not a measure and value contract.

Cases referred *to*:

(1) Chandler Bros Ltd v *Boswell* [1936] 3 All ER 179, CA.

(2) Atuwo v *Agip Ghana Ltd* (1965) ALR (Comm) 195.

(3) Moorcock (The) (1886-90) All ER Rep 532.

(4) McClelland v *Northern Ireland General Health Services Board* [1957] All ER 129, HL.

(5) Thorp v *Holdsworth* (1876) 3 Ch D 637.

(6) Tildesley v *Harper* (1878) 7 Ch D 403.

(7) Abrath v *North Eastern Rly* Co (1883) 11 QBD 440.

APPEAL from the judgment of the Supreme Court (High Court), entering judgment for the plaintiff for the sum of money being balance under a contract for electrical works and installations and supply of equipment and services. The facts are sufficiently stated in the judgment of Akambi JA.

E Cotran QC (with him *AAB Gaye*) for the appellant.

M N Bittaye for the respondent.

AKANBI JA In its statement of claim which supersedes the writ, the plaintiff's claim read as follows:

"(1) £101,419.97 as the balance due under the agreements, or, in the alternative;

(2) £101,419.97 upon a *quantum meruit*; and

(3) interest at the banking rate of 26 per cent per annum from 5 July 1988 to the date of judgment."

The facts which gave rise to the action may be summarised thus: the defendant, a company in The Gambia, entered into agreement with plaintiff-company whereby the plaintiff was to carry out some electrical works, installations and provide materials, equipments and services for the replacement of the "AFL Systems" at Yundum Airport. The contract price according to exhibit F was £305,000. Out of this amount, the plaintiff was paid a total sum of £221,709.99.

At the trial Mr Martin Gratte, a director of the plaintiff's company, testified as the second plaintiff's witness. Three other witnesses testified in support of the plaintiff's claim. Only the managing director of the defendant, Mr Sami Tamin, testified for the defendant. At the close of the case for the parties and the addresses of their counsel, the learned trial judge in a considered judgment delivered on 27 March 1990, entered judgment for the plaintiff in the sum of £101,419.76. with interest at thirteen per cent per annum from 7 July till the date of judgment.

Dissatisfied with the decision, the defendant filed initially only one ground of appeal - the omnibus ground. At the hearing, leave was sought and obtained to argue eight additional grounds of appeal. The nine grounds read as follows:

"(1) The decision is against the weight of the evidence.

(2) The learned trial judge wrongfully placed the onus of proof on the defendant in regard to the question whether the installation works, agreed materials and equipment and services were properly carried out and completed by the plaintiff, ie in regard to issue (1) in the case, particularly having found that the evidence submitted by the plaintiff as to whether all materials and equipment under the contract were in fact supplied rather inconclusive.

(3) The learned trial judge misdirected himself in finding that there was nothing to indicate that this was a measurement and valuation contract; the matter was raised both in the evidence of the defendant and in its documents and was fully argued by counsel for the defendant. Furthermore, although the words "measure and value" were not used in the defence, it was generally pleaded that the defendant denied the sum claimed was a fixed price.

(4) The learned trial judge wrongfully found on the totality of the evidence that the plaintiff at the request of the defendant carried out additional installation works, provided more materials, equipments and services which altogether came to the additional sum of £18,129.75, ie the learned trial judge wrongfully held for the plaintiff on issue (2).

(5) The plaintiff in exhibiting exhibit B missed out the last page, ie the schedule of prices which supports the defendant's case on the issue whether this was a measure and value contract. The defendant will seek the inclusion of this schedule as part of exhibit B for the purposes of this appeal.

(6) The learned judge erroneously evaluated: (a) the evidence, both oral and documentary; and (b) the issue raised in the pleadings, evidence and submission of counsel.

(7) The learned trial judge misinterpreted exhibit C (the defendant's letter of 19 July 1988) and wrongly held that the plaintiff's reply of 10 August 1988, exhibit P) was a proper answer in exhibit C.

(8) The learned trial judge wrongly held that the malfunctioning of equipment was not an issue raised in the case; that issue arose from (a) the oral evidence; and (b) the documentary evidence admitted, and ought to have been dealt with by the learned trial judge.

(9) The learned trial judge erred in not dealing with the principal issue in the case, namely, that by handing over to the Civil Aviation Authority, the defendant was thereby deprived of the opportunity of checking what the plaintiff had done."

I may observe, even at this early stage, that ground (5) is no ground of appeal at all. It is a mere information that the schedule of prices annexed to exhibit B, which is said to support the defendant's case in certain respects, was not included in the record and it was necessary that it should be so included in the record of appeal. However, on advice, proper application was made to the court, to make the schedule part of the record. The application not having been opposed, was granted. In any case, ground (8) cannot be considered as a complaint against the judgment being appealed from. I shall say more on this later on in the judgment.

Before delving deep into the grounds of appeal or preferring any argument thereon, learned counsel for the appellant, Mr Cotran, I supposed by way of introduction, took us through the whole gamut of the head contract between the Ministry of Works and Communications (referred to simply as the employer) of the one part and the defendant in this case (referred to as the contractor) of the other part in the said head contract; apparently in order to establish that this head contract was the basis of the contract between the plaintiff and the defendant in these proceedings. Counsel laboriously drew out attention to the several pages of this head contract (exhibit A) particularly to those paragraphs relating to the obligations and functions imposed by the said agreement on the engineer - the Civil Aviation Authority-which had the responsibility of supervising and ensuring that the work of refurbishing and installing the runway lighting and ancillary equipment within the Control Tower at the airport was properly carried out.

Learned counsel also drew attention to the bills of quantities in the said head contract, and related the materials and quotations therein to be supplied to those set out in exhibit B, which the defendant as "sub-contractor" had agreed to supply for the purpose of executing the contract between it and the plaintiff; and contended that the defendant had, in fact, for the purpose of the execution of the contract, "stepped into the shoes of the contractor" in the head contract. What is more, he argued, that it was evident from exhibit A, especially those paragraphs relating to the method of supply of the items and payment, that the contract between the plaintiff and the defendant was not a "fixed price contract" but a "measure and value contract." The point was also made

that the plaintiff only fulfilled part of the bargain in that some of the items agreed to be shipped were not brought into the country and in exhibit H, the final account submitted by them, reflected that position. The result was that the work remained uncompleted at the time the managing director of the plaintiff-company returned to the United Kingdom. Indeed, no final certificate of completion of the work was issued and no handing over was made to the defendant. In those circumstances, it was submitted, the plaintiff was not entitled to any further payment on the contract.

In my view, the relevance or otherwise of exhibit A to the contract made by the parties in this case will depend on the state of the pleadings of the parties, for it is trite to say that parties are bound by their pleadings.

It is clear to me from an examination of the pleadings of the parties, that the plaintiff did not plead or base its case on exhibit A; and the statement of defence was no more than mere denials of the claim. It made no reference to and contained no averments tending to suggest that exhibit A was part of the contract between it and the plaintiff. I also note that the various documents exhibits B, B1, E, H, N, O and P to which references were made, contained no stipulations tending to incorporate the terms of exhibit A into the contract between the plaintiff and the defendant in this case.

In *Halsbury's Laws of England* (4th ed), Vol 4, para 1271, the following appears:

"An agreement by a sub-contractor to carry out work in accordance with the terms of the principal contract does not necessarily incorporate all the relevant terms of the principal contract into the sub-contract."

And in the case of *Chandler Bros Ltd* v *Boswell* [1936] 3 All ER 170, the Court of Appeal in England refused to imply in a sub-contract a term not therein expressly stated even though the sub-contractor had knowledge of the terms from the "principal contract." Indeed, as a matter of general principle "no stipulation is to be implied into a contract unless it must be taken, on the evidence, to have been the presumed intention of the parties and where it is necessary to give the transaction the efficacy that both parties must have intended it to have." See *Atuwo* v *Agip Ghana Ltd* (1965) ALR (Comm) 195; *The Moorcock* (1886-90) All ER Rep 532; *McClelland* v *Northern Ireland General Health Services Board* [1957] All ER 129 at 132, HL.

In the instant case, true it is that the items to be supplied and the work to be carried out by the defendant under the head contract, exhibit A, are a part of what the plaintiff was under a contractual obligation to perform in accordance with the terms of the agreement in exhibit B; but it is no less true that the plaintiff in this case is not a party to exhibit A and therefore can neither sue on it nor to derive advantage therefrom unless the contract between it and the defendant so stipulates.

But as I noted before, there is nothing in the pleadings or the documents tendered to suggest that there was any intention to incorporate any of the terms of exhibit A into the contract between the parties to this dispute. That being so, the tortious exercise of going through exhibit A and treating it as if it were part and parcel of the agreement between the contracting parties in this case, in my view, was quite unnecessary and unwarranted.

This case has therefore to be decided primarily on the basis of the issues joined on the pleadings and all relevant documents evidencing the contract between the parties. And it is important to note that paragraphs (3) and (4) of the statement of claim expressly set out the nature of the agreement between the parties and the documents which in so far as the plaintiff is concerned, formed the basis of the entire contract. Paragraph (3) reads as follows:

"(3) Subsequent to the said agreement, the defendant at various times requested and the plaintiff carried out additional installation works, provided more materials, equipments and services which altogether came to the additional sum of £18,129.75.

PARTICULARS

THE said agreements between the parties were made partly in writing, partly orally and partly by conduct.

(i) In so far as they were in writing, the said agreements were contained in or to be inferred from the following documents or some or one of them.

(a) Agro Industrial Company (Gambia) Ltd quotation dated 23 May 1987 to the Director of Civil Aviation.

(b) Letter dated 31 July 1987 from the plaintiff.

(c) Letter dated 8 September 1987 from the plaintiff.

(d) Letter dated 17 February 1988 from the plaintiff.

(e) Letter dated 19 February 1988 from the defendant.

(f) Letter dated 10 August 1988 from the plaintiff

(ii) In so far as they were oral, the said agreements were made at interviews, discussions or over the telephone covering the period between February 1988 and August 1988 between MARTIN D GRATTE acting on behalf of the plaintiff and SAMI B TAMIN acting on behalf of the defendant.

(iii) In so far as they were by conduct, the conduct consisted of or is to be inferred from the following:

(a) At all material times the defendant well knew of all the installations works, services, materials and equipments being provided by the plaintiff.

(b) Further or in the alternative, by its silence and conduct, with the full knowledge that the plaintiff was carrying out the installation works, providing services, materials and equipments, the defendant permitted and induced the plaintiff to believe as in fact it did believe, that the defendant had agreed to and accepted the same.

(iv) On or before 31 August 1988 the plaintiff completed all the installation works, supplied all the materials, equipments and services in connection with the replacement of the AFL Systems at Yundum International Airport and handed it over to the Civil Aviation authority for and on behalf of the defendant."

The defendant unfortunately pleaded no other document. Nor did it aver that those documents pleaded by the plaintiff were not the only contractual documents between the parties. The response it gave to the above averments can be found first in paragraph (3) of the statement of defence which reads thus:

"Paragraph (3) of the statement of claim and the particulars are denied. The defendant avers that there was only one agreement and further avers that all works done by plaintiff were part and parcel of one agreement."

Again unfortunately, no details or particulars of the one agreement pleaded by the defendant were given and it will be stretching one's imagination too far to say which agreement was being referred to in that paragraph. It does not appear to have been appreciated that the effect of a traverse in the defence is not only to contradict an allegation of fact in the statement of claim, but also to answer the point of substance in the statement of claim; hence it is said that pleadings must not be vague, general or evasive: see *Thorp* v *Holdsworth* (1876) 3 Ch D 637; and also *Tildesley* v *Harper* (1878) 7 Ch D 403.

As regards paragraph (4) of the statement of claim, the defendant in paragraph (4) of the statement of defence also averred thus:

"(4) Save as to admit that the plaintiff handed over the works to the Civil Aviation Authority, the defendant cannot admit or deny the date mentioned in paragraph (4) of the statement of claim. The defendant further denies that the said handing over to the Civil Aviation Authority was done by the plaintiff on behalf of the defendant. The defendant avers that the said handing over to the Civil Aviation Authority aforesaid was without its knowledge, consent and/or approval."

Here again, I may observe that the averment that the defendant cannot admit or deny the date of handing over the works to the Civil Aviation Authority mentioned in paragraph (4) of the statement of claim, is equally evasive and may be treated as an admission of the date of handing over to the said authority.

However that may be, the defendant's counsel, Mr Cotran, has attacked the judgment of the trial court for various reasons. He said that the finding of the trial judge that the work was completed and had been handed over could not be correct having regard to the documentary evidence exhibits J, K and L, the "certificates of value and invoice of goods shipped into the country and paid for by the defendant." He pointed out that these exhibits showed that the materials brought in by the plaintiff company fell short of what was agreed upon to be supplied under the contract and that the logical inference to be drawn is that the work had not been completed before the managing director of the plaintiff company left for the United Kingdom.

What is more, it was argued that by failing to hand over the work to the defendant on completion, the defendant was denied the

opportunity of measuring and evaluating the work done in accordance with the terms of the agreement. Exhibit O provided some proof that the Civil Aviation Authority refused to give completion certificate, because certain outstanding materials had not been supplied. Learned counsel went on to say that, contrary to the finding made by the trial judge, exhibit P, which was a reply from the plaintiff to the defendant on the question of under-shipment of materials, did not provide answer to the defendant's complaint. If anything, he said exhibit P confirmed that the plaintiff admitted that items (1) and (5) listed under the heading "Electronic Tools" had been short shipped" and the plaintiff had promised to make them available.

It was accordingly submitted that having regard to the factual situation highlighted above, the learned trial judge ought to have found that the plaintiff's claim had not been established and that the contract was a value and measure contract.

In his reply to the submissions, Mr Bittaye learned counsel for the respondent, the plaintiff, said that the conclusion reached by the learned trial judge that the work was duly completed by the plaintiff cannot be faulted. He emphasized that the learned trial judge did not base his finding solely on exhibits O and L but also on the oral evidence of Malick Cham, the plaintiff first witness, who categorically stated that the plaintiff did the electrical work of the contract. Learned counsel reiterated that exhibit B formed the basis of this contract and that paragraph (4) of the statement of defence did not raise any issue of undershipment of any goods in so far as the nature of the contract is concerned, exhibit F showed, that it was lump sum or fixed contract. Learned counsel also drew attention to exhibit H in which it was made clear that had taken possession of the A F L equipments on 26 June 1988 and the defendant never contested that situation. He went on to say that exhibit N, to which reference was made, never complained of any work done but rather of equipment supplied not operating satisfactorily.

I must emphasise again that parties are bound by the pleadings and any material fact not pleaded, if received in evidence, must be ignored as it would go to no issue. The plaintiff in this case, pleaded oral agreement and documentary agreement mentioned in paragraph (3) of the statement of claim, that is exhibit B, letter dated 31 July 1987; exhibit E letter dated 17 February 1988; exhibit F letter dated 19 February 1988; exhibit P letter dated 10 August 1988; and exhibit D, letter dated 8 July 1987 and Agro Industrial Company quotation to Director of Civil Aviation. In my view, those are the only documents

relevant for consideration in this appeal. Exhibit B was the provisional offer made by the plaintiff but it would appear that after some exchanges of correspondence, a firm offer was eventually communicated by exhibit E and the contract price was fixed at £305,000. Exhibit E stated that all terms and conditions in exhibit B would still apply. The acceptance or the offer contained in exhibit E was conveyed by exhibit F which the defendant addressed to the plaintiff. The letter, signed by Mr Sami B Tamin for Agro Industrial Co (G) Ltd, read as follows:

"Dear Sirs,

Re: Yundum Airfield Lighting - The Gambia

We thank you for your revised prices as per FAX message Ref: JAL/PB/17 1581/E dated 17 February 1988. We discussed the above-named fax with Martin and we accepted your offer less £2,500 (two thousand five hundred pounds). The total contract price is therefore £305,000 (three hundred and five thousand pounds only. Please confirm the above by fax."

Letters of credit were in consequence opened in favour of the plaintiff in accordance with these arrangements and at the end of it all, the plaintiff wrote exhibit H, demanding balance of payment due on the contract. The amount claimed was based on the agreed contract sum of £305,000; and after, giving credit for sums paid for materials shipped and the cost of installation, a sum of £86,206.99 was said to be outstanding and to it was added, the contract variation sum and expenses making up the sum of D101,419.76, the subject-matter of the claim.

Counsel for the defendant-appellant has tried to demonstrate to us that some of the items alleged to have been shipped were never brought into the country and that certain amount included in the account as shipping costs were never paid for. As a matter of fact, Mr Cotran went on to say that the plaintiff company was in fact over-paid. But when it was pointed out that the appellant, ie the defendant, did not counter-claim, he abandoned that line of argument but pressed on that the plaintiff did not supply all the materials it had contracted to supply and this is evidenced by exhibits J, K and L.

I have gone through the pleadings over and over again and nowhere in the pleadings was issue joined specifically on whether or not the

plaintiff under-supplied any materials or equipments. In paragraph (5) of the statement of claim, the plaintiff averred that:

"The defendant has made several part payments to the plaintiff totalling a sum of £221,709.99 leaving an outstanding balance of £101,419,76 which remains due and owing by the defendant to the plaintiff."

The defence was simply put thus: "Save to admit that the defendant has made payments to the plaintiff paragraph (5) of the statement of claim is denied."

It is evident that the defendant was characteristically evasive as to how much had been paid or not paid. Significantly the first defendant witness, Mr Sami Tamin, the managing director of the defendant company, said under-cross-examination, that: *"£220,000 was paid in form of advance payment on account.* Contract sum was as his quotation stated £305,000. This was provisional quotation. It was not a lump sum contract. There was no contract document between us as such. Gratte gave us quotation and we agreed." (The emphasis is mine). Clearly there was no averment in the pleadings of the parties that any payment made to the plaintiff company was in form of an advance. The straight issue between the parties was whether or not the plaintiff carried out the work at the airport for the agreed sum of £305,000 (including the additional installation work) as pleaded and whether the plaintiff had been fully paid for the work done. As a matter of law and on the pleadings, the burden of establishing that the work had been done in terms of the agreement between the parties is on the plaintiff: see *Abrath* v *North Eastern Rly Co* (1883) 11 QBD 440. That, the trial judge found, the plaintiff had done by adducing oral and documentary evidence as was pleaded.

The contention of the defendant-appellant was not that the plaintiff-respondent had been fully paid but that on completion of the work, it was not handed over to the defendant but to the Civil Aviation authority and even at that, it was done without that the defendant's consent or approval.

A further criticism of the judgment was that the learned trial judge wrongly held that the complaint about the malfunctioning of the equipments was never in issue. Learned counsel for the defendant-appellant stated that it was a live issue and that it arose from both the oral and documentary evidence tendered at the trial. That being so, he argued, the trial judge was wrong not to have dealt with that issue. It is

important to note that the issue of malfunctioning was never pleaded and I suppose it could not have been since the stance of the appellant had all the time been that there was no proper handing over of the work. But ironically, the alleged complaint of `malfunctioning' came from the Civil Aviation Authority. In any case, none of the documents tendered at the trial contained the procedure for handing over after due completion of the work.

Learned counsel for the appellant also submitted that it is trite law that evidence of matters which arose after pleadings had closed, may be received once such evidence bear relationship to the issues raised. And it is said that exhibit N, N2, M and M1 belong to such class of evidence.

I have already said that any evidence led on facts not pleaded must be discountenanced as such evidence would go to no issue. I suppose the course open to anyone who has let up that kind of evidence, which he considers relevant to his case, is to seek amendment of his pleading so as to bring it in line with the evidence on record. If that is not done the evidence tendered will be worthless.

I would now revert to the contention that the learned trial judge wrongfully placed the onus of proof (as regards whether the work, for agreed materials and services were properly carried out) on the defendant. Mr Bittaye, for the respondent (the plaintiff) said that nowhere in the judgment of the trial judge did he say that the onus to establish that the work was satisfactorily done, should be placed on the defendant-appellant. I agree. It is clear from the following findings of the learned trial judge that his conclusion was not founded on any failure of the appellant to discharge any onus, but on the fact that though exhibits J,K and L were found to be inconclusive, there was evidence of Malick Cham, the Ag Director of the Civil Aviation Authority, that the plaintiff carried out the electrical works of the contract. What is more, the appellant's managing director, the first defendant witness, admitted that they had been fully paid for the work.

Counsel for the defendant-appellant has, however, submitted that the evidence of Mr Tamin is worthless, and that if the trial judge had properly evaluated his evidence, he would not have attached any weight to his evidence as, according to him, it is odd that the witness spoke all through from memory. He, however, conceded that Momodou Sanneh was not cross-examined on the evidence that items under the variation clauses were supplied by the plaintiff. Nor was

Malick Cham cross-examined when he said that "Gratte Brothers did the electrical works on the contract".

It is not within the province of the appellate court to ascribe probative value to the evidence of witnesses. That is the function of the trial court which has had the singular advantage of seeing and hearing the witnesses. Consequently, an appellate court will not disturb such findings or substitute its own view for that of the trial court unless such findings are shown to be perverse or unsupportable by evidence. I am therefore unable to agree with the appellant's counsel that the evidence of the witnesses which the trial judge believed is worthless.

In conclusion, therefore, I agree with the learned trial judge that this contract was a lump sum contract and not a measure and value contract. His findings that neither the fact of completion of the contract nor the "regularity" of the plaintiff handing over of the A F L equipment to Civil Aviation Authority was not strictly contested in the statement of defence; the bone of contention was that the invoice submitted according to exhibit O was not in accordance with the agreement between them. From all I have said above, I cannot but agree with the learned trial judge that on the totality of the evidence led, the plaintiff company had proved, on a preponderance of probabilities, that it has carried out the agreed installation works and provided the agreed materials, equipment and service which made it possible for the appellant to be paid the money due on exhibit A, the head contract. I may add, in passing, that although the appellant claimed to have carried out some work on its own, it is clear to me the evidence given in that respect is worthless as it is never pleaded by the defendant-appellant.

The result of all I have said is that this appeal fails *in toto* and it is dismissed with costs assessed at D7,500.

ANIN JA. I agree.

DAVIES JA. I also agree.

Appeal dismissed.

SYBB

CATES v GAMBIA UTILITIES CORPORATION

COURT OF APPEAL, BANJUL

(Civil Appeal No 6/91)

3 December 1991

ANIN JA, AYOOLA CJ AND AKAMBI JA

Practice and procedure-Pleadings-Material fact not pleaded-Effect-Appointment of plaintiff terminated by defendant for misconduct-Duty of defendant to specifically plead misconduct as ground for termination of appointment-Trial judge relying on facts of misconduct as justification for termination of appointment-Facts relied upon by trial judge not pleaded by defendant-Whether trial judge erred in considering question of misconduct.

Contract-Breach of contract-Notice of termination of appointment-Right to-Employer entitled to give employee a month's notice to terminate employment or a month salary in lieu of notice-Employer electing to terminate employment as disciplinary measure for misconduct instead of giving notice or salary in lieu of notice-Employer bound to comply with disciplinary procedure for misconduct stipulated by agreement of the parties.

Contract-Breach of contract-Damages-Assessment-Measure of damages where contract expressly providing for payment of wages in lieu of notice for wrongful dismissal-Measure of damages in other cases.

Held, *allowing the appeal (per Ayoola CJ, Anin and Akambi JJA concurring*): (1) the defendant having terminated the plaintiff's appointment for misconduct, was in duty bound, as a matter of pleadings, to have specifically pleaded misconduct as a ground of termination and set out the particulars of such misconduct. Without such particulars, the plaintiff, ie the appellant, will not be able to meet the charge of misconduct. Since matters relied upon by the trial judge as facts of misconduct justifying the termination of the plaintiff's appointment were not raised by the pleadings and therefore the appellant had no fair notice of them, the trial judge erred in considering the question of misconduct. *Blay* v *Pollard* & *Morris* [1930] 1 KB 628 at 634; *Tomlinson* v *LMS* [1944] 1 All ER 537 at

541; and *Agro Industrial Co* (*Gambia) Ltd* v *Gratte Bros International Ltd* [1960-1993] GR 467, CA cited.

(2) The contention by the defendant that it had a right, in any case, to terminate the plaintiff's appointment by giving him a month's notice or salary in lieu thereof would be rejected because the defendant did not act on those terms. It had elected to terminate the appointment as a disciplinary measure and it was in duty bound to comply with the procedure stipulated by the agreement of the parties.

(3) Where it is an express term of the contract that a servant who is dismissed without notice is to be paid his wages for a certain period in lieu of notice, or where there is a usage to that effect, the measure of damages for the breach is the amount of such damages for the breach, ie the amount of such wages, which is to be regarded as liquidated damages. In any other case, the damages are to be measured by the amount of wages which the servant has been prevented from earning by reason of his wrongful dismissal. In the instant case, the plaintiff's appointment has been terminated without justification and without notice and therefore the damages to which he is entitled must be what he would have earned during the period of notice, ie a month's salary together with other entitlements such as leave pay.

Cases referred to

(1) *Tomlinson* v *London, Midland & Scottish Ry Co* [1945] 1 All ER 537,CA

(2) *Blay* v *Polland & Morris* [1930] 1 KB 628.

(3) *Agro Industrial Co (Gambia) Ltd* v *Gratte Brothers International Ltd*, Court of Appeal, Civil Appeal No 6/90, 14 June 1991; [1960-1993] GR 467.

(4) *Nigeria Produce Marketing Board* v *Adewunmi* [1972] NSCC 662.

APPEAL from the decision of the Supreme Court (High Court), dismissing the plaintiff's claim for damages for wrongful termination of his employment with the defendant corporation. The facts are sufficiently stated in the judgment of Ayoola CJ.

SHA George for the appellant.

GBS Janneh for the respondent.

AYOOLA CJ. This is an appeal from the decision of the Supreme Court (High Court) (Agidee J), dismissing the claim of Melville Cates for damages for wrongful termination of his employment with the Gambia Utilities Corporation, the respondent (hereafter called the defendant). The basis of the plaintiff's claim as pleaded by him in paragraph (3) statement of his claim was that:

"Contrary to the (corporation's) service rules, and the practice of natural justice, the employment of the plaintiff was wrongfully terminated by the managing director of the defendant corporation on the grounds of suspicion." The defendant by paragraph (5) of its statement of defence denied paragraph (3) of the statement of claim and averred on its own that: "the plaintiff's employment was terminated under the terms and conditions of the said contract of employment." The defendant further averred that "the plaintiff by the said termination letter was given one month's salary in lieu of one month's notice to terminate his employment in accordance with the terms of the said contract of employment."

The pleadings as they thus stood were grossly lacking in particularity. On the plaintiff's side, there was no averment concerning the terms of the service rules which were said to have been breached and in what regard; nor was there any averment of the circumstances that had called for the observance of the rules of natural justice. On the defendant side, there was neither allegation nor particulars of misconduct. It was with these rather vague pleadings that the action went to trial.

At the trial, the plaintiff gave evidence of his employment and his progress in the defendant's service up to the termination of his appointment. He said that throughout the period of his working with the defendant company, he had never had any adverse report; and he was therefore dismayed to get a letter of termination of appointment dated 3 November 1989 (exhibit F). He tendered in evidence the petition (exhibit G) which he wrote in protest against his termination and a subsequent reminder (exhibit H). Despite opposition to both on the grounds of irrelevancy, they were admitted in evidence. Cross-examined, the plaintiff said:

"Before my services were dispensed with by the Gambia Utilities Corporation (GUC), I had occasion to go to Kotu Power Station in the night to find out certain things about which I had suspicion. I went to the Kotu Power Station by 1.30 am. It is true that for some time now,

there had been some acts of sabotage going on at the Kotu Power Station."

The only witness for the defence gave evidence of the termination of the plaintiff's appointment, which was not in dispute; and that employees of the corporation had working hours, which she did not state. In cross-examination, she said that: " the plaintiff was not terminated illegally but termination of his appointment was one of the punishment meted out to the plaintiff."

In his closing address, counsel for the defendant came out clearly to treat the termination as one for misconduct. He then submitted, as the record shows, that:

"the termination of the plaintiff was not wrongful because there is enough justification on the evidence for the plaintiff to have been dismissed. The plaintiff's appointment was rightly terminated for disobeying lawful orders and for acting contrary to the manifestly lawful orders of his employer. The plaintiff breached the company's orders by going to the premises of the Kotu Power Station) at an unholy hour of the morning."

He was recorded as submitting further that: "a breach of the disciplinary rules of the company is no bar for the court to enquire as to whether the termination was justified or not."

Counsel for the plaintiff in his closing address at the trial did point out that there had been no allegation made against the plaintiff in the statement of defence that he had committed a breach of the orders of the company.

The addresses having taken this turn, particularly on the defendant's side, it was hardly surprising that the learned trial judge treated the case as one of termination of the plaintiff's appointment as a disciplinary measure. After referring to the relevant clauses of the defendant General Orders and Conditions of Service (exhibit A) which dealt with discipline (chapter 7 thereof), he held that the defendant had complied with chapter 7 of the General Orders and had given the plaintiff a fair hearing. He found as a fact that the plaintiff's entry into the premises of the Kotu Power Station at 1.30 am was clearly unauthorized and in breach of the corporation's order. He concluded that the plaintiff appointment was not wrongfully terminated and dismissed his claim.

The two grounds argued in this appeal are: (i) that the learned judge erred in law when he admitted and based his judgment on matters which were not pleaded; and (ii) that the judgment is against the weight of evidence. Mr George, counsel for the plaintiff, pinpointed the absence in the pleadings of facts on which the learned judge based his judgment and absence of evidence of those facts. Mr Janneh, counsel for the defendant, in the face of these strong submissions, was driven to shift grounds again when he seemed to submit that the plaintiff's appointment was not determined for misconduct but in exercise of the contract term which permitted the defendant to terminate the appointment by giving notice or salary in lieu thereof. Such term, it was said, was contained in the letter of appointment, exhibit 1.

It is too late in the day to permit such shifting of grounds, and, indeed, such shift cannot be supported by the facts disclosed by the record. Earlier reference had been made to the defendant counsel's closing address at the trial in which the termination was treated as one for misconduct, and the evidence of the defendant witness was that the appointment was terminated as a punishment. Besides, the letter of termination itself suggested that the determination was for misconduct. That the plaintiff was offered one month salary in lieu of notice, does not take the termination outside the pale of disciplinary measure since "termination" which is one of the punishment meted for misconduct, was defined in the General Orders as meaning: "Service dispensed with on giving one month's notice or salary in lieu together with any entitlement from the Pension Fund."

The defendant having terminated the plaintiff's appointment for misconduct, was in duty bound, as a matter of pleadings, to have specifically pleaded misconduct as a ground of termination and set out the particulars of such misconduct. Without such particulars, the plaintiff, ie the appellant, will not be able to meet the charge of misconduct: see *Tomlinson* v *London, Midland & Scottish Rly Co* [1947] 1 All ER 537 at 541, CA. The Law Reports are replete with decisions and dicta emphasising the functions and importance of pleadings, particularly having regard to the adversarial system of civil proceedings in common law jurisdictions. One of the cardinal objects of pleadings is to bring the parties to an issue. Another is to enable the parties to have a fair notice of each other's case: In *Blay* v *Pollard & Morris* [1930] 1 KB 628 at 634 it was said per Scrutton LJ that:

"Cases must be decided on the issues on the record; and if it is desired to raise other issues they must be placed on the record by amendment.

In the present case the issue on which the judge decided was raised by himself without amending the pleadings and in my opinion he was not entitled to take such a course."

In the recent case of *Agro Industrial Co (Gambia) Ltd* v *Gratte Bros International Ltd,* Civil Appeal No 6/90, 14 June 1991 and reported in [1960-1993] GR 467 *ante,* this court had occasion to emphasise, once again, that parties are bound by the pleadings and that any fact pleaded, if received in evidence, must be ignored as it would go to no issue. Sir Jack Jacobs in his contribution: "The Present Importance of Pleadings" in 1960 *Current Legal Problems* 171 at 174 (cited and quoted from *Bullen & Leake & Jacob Precedents of Pleadings,* (12th ed), at pp 8 and 9), emphasised the functions of pleadings and the limited role of the court in our adversarial system of proceedings and said:

"It is no part of the duty or function of the court to enter upon any inquiry into the case before it other than to adjudicate upon the specific matters in dispute which the parties themselves have raised by their pleadings. Indeed, the court would be acting contrary to its own character and nature if it were to pronounce upon any claim or defence not made by the parties. To do so would be to enter into the realms of speculation … Moreover, in such event, the parties themselves, or at any rate one of them, might well feel aggrieved; for a decision given on a claim or defence not made, or raised, by or against a party is equivalent to not hearing him at all and may thus be a denial of justice. The court does not provide its own terms of reference or conduct its own inquiry into the merits of the case but accepts and acts upon the terms of reference which the parties have chosen and specified in their pleadings. In the adversary system of litigation, therefore, it is the parties themselves who set the agenda for the trial by their pleadings and neither party can complain if the agenda is strictly adhered."

The rules as to pleadings were formulated not as technical rules but as a vehicle of ensuring justice. Where there is a breach of such rules and injustice has thereby been occasioned, the court will not be remiss in remedying such injustice.

In the present case, the matters which the learned judge dwelt upon as facts of misconduct justifying the termination of the appellant's appointment were not raised by the pleadings. The appellant had no fair notice of them and, indeed, the attitude which the defence took at the trial by the objections raised to documents tendered to show clean record was that such was not relevant. In my view, the learned judge

ought not to have considered the question of misconduct as it was not raised by the pleadings.

The matter which rightly fell to be decided, having regard to the pleadings, was whether or not the defendant had complied with the disciplinary procedure sanctioned by the General Orders. The learned judge held that there has been such compliance and the submissions of Mr George, learned counsel for the plaintiff, had been directed at showing that there was no evidence of such compliance. Mr Janneh, learned counsel for the defendant, did not agree that the procedure had not been complied with.

The relevant clause 1 of chapter 7 of the General Orders is as follows:

"An officer who commits any offence meriting disciplinary action will be requested in writing by his head of department to submit his written explanation of the incident. If this is not received within five days it will be taken as an admission of guilt without any extenuating circumstances."

It is manifest that this initial step had not been taken by the defendant before the letter of termination was written. Although the learned judge said that "hearing can properly be accorded either before or after a decision." Clause 1 of chapter 7 of the rules binding the parties, had stipulated that hearing must be before the decision was taken. Of what use, one may ask, is a hearing after the appointment (ie the contract) had already been ended? There is, to my mind, no need to belabour this obvious point. The conclusion by the learned judge that the defendant had complied with clause 1 of chapter 7 is not supported by the evidence. Besides, the evidence has not really disclosed any discernible misconduct nor had any been alleged in the pleadings. In the result, the termination of the appellant's appointment as disciplinary measure was without justification and was therefore wrongful to that extent.

The defendant has, however, contended that it had a right, in any case, to terminate the appointment by giving the plaintiff one month's notice or salary in lieu thereof. As earlier observed, the defendant was not acting on those terms. It had elected to terminate the appointment as a disciplinary measure and it was in duty bound to comply with the procedure stipulated by the agreement of the parties.

In my judgment, the learned judge was wrong in holding that the termination of the plaintiff appointment was not wrongful. I would

hold that it was wrongful and that the defendant should have been found liable. I would allow the appeal and set aside the order dismissing the appellant's claim.

I now turn to the question of damages to be awarded. The normal measure of damages in action for wrongful dismissal is the amount that the plaintiff would have earned had the employment continued according to contract. Where, however, the defendant on giving the prescribed notice, has a right to terminate the contract before the end of the term, the damages awarded, apart from other entitlements, should be limited to the amount which would have been earned by the plaintiff over the period of notice, bearing in mind that it is the duty of the plaintiff to minimize the damage which he sustains by the wrongful dismissal: see *Nigeria Produce Marketing Board* v *Adewunmi* [1972] NSCC 662 at 665. Also, in *Halsbury's Laws of England*, Vol 25, (3rd ed), para 995 it was stated that:

"Where it is an express term of the contract that a servant who is dismissed without notice is to be paid his wages for a certain period in lieu of notice, or where there is a usage to that effect, the measure of damages for the breach is the amount of such wages, which is to be regarded as liquidated damages… In any other case, the damages are to be measured by the amount of wages which the servant has been prevented from earning by reason of his wrongful dismissal …"

In the present case, the letter of appointment (exhibit I), forms part of the contract of employment between the parties. It contained a term relating to period of notice or payment of salary in lieu of notice. Since the plaintiff's appointment has been determined without justification and without notice, the damages to which he is entitled must be what he would have earned during the period of notice, ie a month's salary, together with other entitlements such as leave pay. There is no evidence of leave pay accruing or the amount of such. In the result, the award of damage, would be limited to one month's salary, ie D800.

For these reasons, I would allow the appeal, set aside the order dismissing the plaintiff-appellant's claim and in place thereof, enter judgment for the plaintiff- appellant in the sum of D800. Counsel should be heard on issue of costs both in this court and in the court below.

ANIN JA. I agree.

AKAMBI JA. I also agree.

Appeal allowed.

SYBB

CHAM v LUIS DIAZ

DE LUSADA CONSTRUCTION LTD

COURT OF APPEAL

(Civil Appeal No 11/91)

11 June 1992

ANIN P, DAVIES AND AKANBI JJA

Practice and procedure-Application-Interlocutory or final-Test-Nature of application or nature of order-Order refusing application to set aside judgment in default of defence-Whether interlocutory or final.

Held, *dismissing the appeal (per Davies JA, Anin P and Akanbi JA concurring)* in determining whether an application is final or interlocutory, regard must be had to the nature of the application and not to the nature of the order which the court eventually makes. Applying this test to the instant case, and looking at the application made by the plaintiff-appellant for setting aside the judgment in default of defence, if the application had been granted, the matter would have been proceeded with by the court and the order made would have been interlocutory; the same rule applies if the application had been refused. The order of refusal is therefore interlocutory. Counsel for the plaintiff-appellant should have sought leave to appeal against the trial judge's order refusing to set aside the judgment in default of defence granted against the plaintiff-appellant. There is therefore no appeal properly before the court and the purported appeal would be struck out. *Salter Rex & Co* v *Gosh* [1971] 2 All ER 865 per Lord Denning MR at 866, CA applied.

Cases referred to:

(1) Manneh v *Njie,* 1987 Gambia Court of Appeal.

(2) Standard Discount Co v *La Grange* (1877) 3 CPD 67.

(3) Salaman v *Warner* (1891) 2 QBD 734, CA.

(4) Bozson v *Altrincham Urban District Council* [1903] 1KB 547.

(5) Salter Rex & Co v *Gosh* [1971 2 All ER 865, CA.

(6) *Steinway & Sons* v *Broadhurst-Cleg*. *The Times* 25 February 1983, CA.

APPEAL against the refusal by the Supreme Court (High Court) per Agidee J, to set aside a judgment in default of defence entered against the defendant-appellant. The facts are sufficiently set out in the judgment of Davies JA.

O Darboe for the appellant.

F E Mbai for the respondent.

DAVIES JA. The respondent company (hereafter called the plaintiff) brought an action against the appellant (hereafter called the defendant) in the Supreme Court (High Court), claiming damages against the latter for wrongful attachment of its motor vehicles and caterpillars. The defendant failed to file a defence to the action having been ordered by the court to do so. The plaintiff's counsel then applied to the court by an ex parte motion for judgment in default of statement of defence. The application was made pursuant to order 24A, r 2 of the Rules of the Supreme Court (High Court) which provides:

"If a defendant, having been ordered by the Court to file a defence, does not do so within the time allowed by the order, the plaintiff may, at the expiration of that time, apply by motion to the Court to enter judgment for him with costs upon his claim for want of defence and on the hearing of such application, the Court may, if no defence shall have been delivered, enter judgment accordingly or make such other order on such terms as may be just."

The application was granted by Agidee J who entered judgment for the respondent in the terms contained in his order dated 11 April 1991. Counsel for the defendant in consequence of the judgment dated 11 April 1991, applied to the court for an order setting aside that judgment. The application was heard by Agidee J. The learned judge dismissed the application on 18 July 1991.The appeal before this court arises out of the dismissal of the defendant's application.

Counsel for the plaintiff filed notice of his intention to rely on a preliminary objection to the hearing of the appeal. The grounds of his objection are:

"(1) the decision appealed against being an interlocutory decision, leave to appeal was required by section 96 of Constitution and section 3*(b)* of The Gambia Court of Appeal Act; and

(2) leave to appeal was neither sought nor granted."

Counsel for the plaintiff, in support of his objection, submitted that the order of Agidee J, dismissing the defendant's application to set aside the judgment of 11 April 1991, was interlocutory as it did not finally dispose of the matter in dispute between the parties. He cited several English authorities and a local authority, *Manneh* v *Njie,* a judgment of The Gambia Court of Appeal delivered in 1987. I ought to say at this junction that *Manneh's* case did not decide the issue as to whether the order in that purported appeal was interlocutory or final. The order was undoubtedly interlocutory having stated that: "ruling would be adjourned *sine die*." The court *suo motu* took the point that leave to appeal should have been obtained before the appeal was filed.

Both counsel in their submissions stated that the test in determining whether an order was interlocutory or final, was whether or not the order made finally disposed of the rights of the parties. If the answer is in the affirmative, then it is final; otherwise it is interlocutory. In short, the court must look to the order made in deciding the issue.

Prior to 1971, several tests appeared in practitioner's books on civil procedure aimed at determining whether an order was final or interlocutory. I will refer to three of such cases. In *Standard Discount Co* v *La Grange* (1877) CPD 67 the test was stated as:

"No order, judgment, or other proceeding can be final which does not at once affect the status of the parties, for whichever side the decision may be given; so that if it is given for the plaintiff it is conclusive against the defendant and if it is given for the defendant it is conclusive against the plaintiff."

In *Salaman* v *Warner* (1891) 2 QBD 734, CA the test stated was: "an order is an interlocutory order unless it is made on application of such a character that whatever order had been made thereon must finally have disposed of the matter in dispute." Lord Alvestone CJ in *Bozson* v *Altrincham Urban District Council* [1903] 1KB 547 stated the test as :

"Does the …order as made finally dispose of the rights of the parties? If it does, then I think it is to be treated as a final order; but if it does not it is then, in my opinion, an interlocutory order."

The above tests were reviewed in *Salter Rex & Co* v *Gosh* [1971] 2 All ER 865 decided by the English Court of Appeal (per Lord Denning MR, Edmund Davies and Stamp LJJ). The issue for determination was whether the order which had been made by a county court judge was final or interlocutory and the test to be applied in determining that issue. The headnote to the report reads:

"In determining whether an application is final or interlocutory, regard must be had to the nature of the application and not to the nature of the order which the court eventually makes. Since an application for a new trial if granted would clearly be interlocutory, so equally when it is refused it is interlocutory. Accordingly an appeal against a refusal to grant a new trial is an interlocutory appeal."

Lord Denning MR in delivering the judgment of the court said at page 866 of the report:

"There is a note in the Supreme Court practice 1970 under RSC Ord 59, r 4 from which it appears that different tests have been stated from time to time as to what is final and what is interlocutory. In *Standard Discount Co* v *La Grange* and *Salaman* v *Warner*, Lord Esher MR said that the test was the nature of the *application* to the court and not the nature of the *order* which the court eventually made. But in *Bozson* v *Altrincham Urban District Council*, the court said that the test was the nature of the *order* as made. Lord Alverstone CJ said that the test is: `Does the judgment or order, as made, finally dispose of the rights of the parties? Lord Alverstone CJ was right in logic but Lord Esher MR was right in experience. Lord Esher MR's test has always been applied in practice. For instance, an appeal from a judgment under RSC Ord 14 (even apart from the new rule) has always been regarded as interlocutory and notice of appeal had to be lodged within 14 days. An appeal from an order striking out an action as being frivolous or vexatious, or as disclosing no reasonable cause of action, or dismissing it for want of prosecution-every such order is regarded as interlocutory: see *Hunt* v *Allied Bakeries Ltd.* So I would apply Lord Esher MR's test to an order refusing a new trial. I look to the application for a new trial and not to the order made. If the application for a new trial were granted, it would clearly be interlocutory. So equally when it is refused, it is interlocutory. It was so held in an

unreported case, *Anglo-Auto Finance (Commercial*) *Ltd* v *Robert Dick* and we should follow it today.

The question of `final' or `interlocutory' is so uncertain, that the only thing for practitioners to do is to look up the practice books and see what has been decided on the point. Most orders have now been the subject of decision. If a new case, we must do the best we can with it. There is no other way."

It is stated in the *Supreme Court Practice of England 1985* under Order 59, r 1, sub-rule 15 that in deciding whether a matter is final or interlocutory, the Court of Appeal (in England) applies the *Salter-Rex* test, to which it is now firmly committed. It no longer applies the *Bozson* test. I would follow the practice in the Court of Appeal in England.

Applying the *Salter Rex* test to the instant case, and looking at the application made for setting aside the judgment in default of defence, if the application had been granted the matter would have been proceeded with by the court and the order made would have been interlocutory; the same rule applies if the application had been refused. The order of refusal is therefore interlocutory. In *Steinway & Sons* v *Broadhurst-Clegg, The Times* 25 February 1983, the Court of Appeal in England held that an order giving judgment in default of defence or an order refusing to test aside a judgment in default of defence was interlocutory. Counsel for the plaintiff should have sought leave to appeal against the trial judge's order refusing to set aside the judgment of 11 April 1991. Therefore, there is no appeal properly before this court. The purported appeal is struck out.

ANIN P. I agree with the result just reached.

AKANBI JA. I also agree.

Appeal struck out.

SYBB.

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