was overwhelming and so strong that it is quite impossible to say that the verdict was unreasonable. We are agreed that there has been no substantial miscarriage of justice, and the appeal is therefore dismissed.

The offence in this case is a serious one, and it is necessary for a heavy sentence to be imposed as a deterrent. As far as the record goes, the appellant is not a member of the professional criminal class. There are no previous convictions against the appellant. Having regard to this, although the appellant has not appealed against sentence, nevertheless, we think that the sentence was too severe. Accordingly, we quash the sentence passed by the trial court, and in substitution therefore, sentence the appellant to seven years' imprisonment to run from the date of the original sentence.

Appeal dismissed; Sentence reduced.

NABIEU AMADU v. AIAH SIDIKI, AIAH SIDIKI v. NABIEU AMADU

Judicial Committee of the Privy Council (Lord Diplock, Viscount Dilhorne and Lord Salmon): December 5th, 1973
(P.C. App. No. 14/69)

[1] **Bailment—custody—effect of illegality—courts will not enforce transaction if possession of subject-matter is illegal:** If it is illegal to possess certain goods and such goods are made the subject-matter of a bailment, a court will not enforce the transaction (page 423, lines 29—33).

[2] **Civil Procedure—pleading—defence—illegality—must be pleaded if illegality not at root of claim but only derived from surrounding circumstances:** Although failure to plead the defence of illegality is of no consequence where the illegality is at the root of the plaintiff's claim, in a case in which the illegality is not relied upon to support the plaintiff's claim, but is present in the surrounding circumstances only, the defence must be pleaded so that the plaintiff may have adequate warning of it (page 424, line 41 — page 425, line 16).

[3] **Civil Procedure—pleading—matters which must be specifically pleaded—illegality as defence—must be pleaded if illegality not at root of claim but only derived from surrounding circumstances:** See [2] above.

The plaintiff brought an action against the defendant in the then Supreme Court claiming the return of a diamond or its value. The plaintiff allegedly found a diamond on the road and gave it

to the defendant, his guardian, for safe keeping. The defendant sold it but did not pay the proceeds to the plaintiff, and subsequently denied that he had been entrusted with anything. The plaintiff instituted the present proceedings and recovered judgment in the Supreme Court (Percy Davies, J.).

On appeal the defendant raised the question of illegality for the first time and contended that the plaintiff could not recover because possession of the diamond and dealing with it were unlawful. The Court of Appeal found that the transaction was illegal and could not therefore be enforced in the courts and ordered that the proceeds of sale in the defendant's bank accounts should be paid over to the Crown. The proceedings in the Court of Appeal are reported at 1967—68 ALR S.L. 136.

Both parties appealed further and the Board considered whether the defendant's original failure to plead illegality should be accorded significance in circumstances of manifestly illegal possession.

The appeals were dismissed.

Case referred to:

(1) *North Western Salt Co. Ltd. v. Electrolytic Alkali Co. Ltd.*, [1914] A.C. 461; (1914), 110 L.T. 852.

Legislation construed:

Minerals Act (Laws of Sierra Leone, 1960, *cap.* 196), s.66:
The relevant terms of this section are set out at page 424, lines 7—8.

s.67: The relevant terms of this section are set out at page 423, lines 35—39.

s.68: The relevant terms of this section are set out at page 423, line 40 — page 424, line 2.

The appellant did not appear and was not represented,
Yorke, Q.C., and *Marder* (both of the English bar) for the respondent.

LORD SALMON, delivering the judgment of the Board:

The plaintiff brought an action against the defendant in October 1966 claiming the return of what was described in the pleadings as "a piece of gem stone" or £44,000, its value. The defence was a bare denial of the allegations in the statement of claim. The action came on for hearing on January 18th, 1967 before Percy Davies, J. The plaintiff gave evidence to the effect that in February 1966 he had found "a piece of gem stone" on the road and had given it for safe keeping to his guardian, the

defendant; that later the defendant told the plaintiff that he had sold the stone for £44,000 but in spite of several requests by the plaintiff, the defendant failed to pay the proceeds of the sale to the plaintiff. The plaintiff then complained to his Paramount Chief. The plaintiff's evidence was corroborated by three witnesses (including the Paramount Chief) who testified that the defendant had admitted to them the relevant facts about which the plaintiff had given evidence. The defendant, supported by two witnesses, denied that he had ever been entrusted with anything by the plaintiff or that he had made any of the admissions deposed to by the plaintiff's witnesses. The learned trial judge accepted the evidence of the plaintiff and his witnesses and held that the defendant and his witnesses had lied. Accordingly he gave judgment for the plaintiff for the return of the stone or £44,000, its value.

The defendant appealed from this judgment on the grounds that it could not be supported by the evidence. He also sought to rely on the maxim *ex turpi causa non oritur actio*, although no defence of illegality had been raised on the pleadings nor argued at the trial.

The Court of Appeal accepted all the learned judge's findings of fact but came to the conclusion that the transaction between the plaintiff and defendant was clearly illegal and therefore could not be enforced in the courts. The appeal was accordingly allowed and an order made that the proceeds of the sale standing to the defendant's credit in certain banks should be paid over to the Crown. This order pleased neither the plaintiff nor the defendant and they both appealed to this Board. Their appeals were consolidated. The defendant however has decided, no doubt wisely, not to prosecute his appeal. Their lordships are of the opinion that the Court of Appeal were clearly right in allowing the appeal and dismissing the plaintiff's action on the ground that the plaintiff's claim could not properly be entertained by the courts since it was a blatant attempt to enforce an illegal transaction.

The Minerals Act (*cap.* 196) provides by s.67 that —

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

Section 68 provides that — "any person who, being found in possession of any mineral, does not prove to the satisfaction of

the Court that he obtained such mineral lawfully. . ." shall be guilty of an offence.

Section 71(1) provides that — "the Governor may issue a licence . . . authorising the person named therein to purchase minerals."

Section 66 provides that for the purpose of the above sections, ". . . 'minerals' shall mean any minerals to which the Governor in Council may by Order apply the said sections." The Governor in Council did apply them to diamonds. Accordingly if the stone which the plaintiff said he found in the road and took into his possession was a diamond, he was clearly in unlawful possession of it in breach of s.67. The plaintiff's guardian, the defendant, was a drag line driver employed in the Kono diamond mining area of Sierra Leone. There is certainly no evidence that his ward the plaintiff was the lessee of a mining lease or came within the descriptions of any of the other persons authorised to possess diamonds by s.67.

It is remarkable that at the trial the judge, counsel and all the witnesses bar one referred to the stone said to have been found on a road by the plaintiff as a "gem stone". It is, however, perhaps not surprising that the defendant was apparently just as anxious as the plaintiff to say nothing at the trial to suggest that the stone was a diamond. It was only "a piece of gem stone", unidentified but found in a diamond mining district and worth £44,000. The defendant no doubt foresaw correctly that if this stone was clearly shown to be a diamond he would have little chance of keeping the proceeds of sale even though the plaintiff's claim to those proceeds would fail. The evidence which did prove that the stone was a diamond and indeed that the plaintiff knew it, did not come from the defendant but from one of the plaintiff's own witnesses — possibly inadvertently. This was the second witness called by the plaintiff who deposed to the fact that, in his presence, the plaintiff told the Paramount Chief that he (the plaintiff) had had a lump of diamond and had given it to the defendant who took the diamond, sold it at Kenema for £44,000 and deposited the proceeds of the sale with two banks. This witness said that he then fetched the defendant and took him before the Paramount Chief and that the defendant said to the Paramount Chief: "I have sold the plaintiff's diamond and I have given him his own portion."

This clear, unequivocal and uncontradicted evidence proved

beyond doubt that the stone, the subject-matter of the action, was a diamond, and that accordingly the plaintiff was in illegal possession of it. This illegality was at the root of his claim since once the stone was proved to be a diamond, the plaintiff could not set up his claim either for the return of the diamond or for the payment of the proceeds of its sale without relying on illegal possession. In these circumstances, the fact that illegality was not pleaded nor argued at the trial is of no consequence. It would have been otherwise if the illegality had sprung from surrounding circumstances set up without warning by the defendant at the trial and with which the plaintiff had had no opportunity of dealing adequately. See for example *North Western Salt Co. Ltd.* v. *Electrolytic Alkali Co. Ltd.* (1). As it is, the courts are clearly precluded on grounds of public policy from entertaining this claim which on the evidence called by the plaintiff manifestly has its roots in illegality.

Their lordships will accordingly advise Her Majesty that both these appeals should be dismissed.

Appeals dismissed.