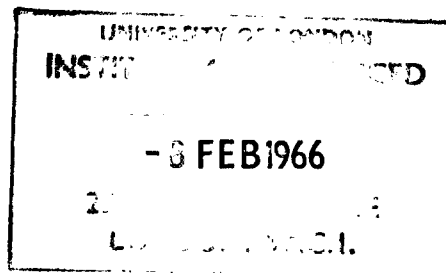


P.C.
~~G.H.R. G.T.~~



Judgment
12, 1965

IN THE PRIVY COUNCIL

80945

No. 26 of 1964.

ON APPEAL
FROM THE GAMBIA COURT OF APPEAL

BETWEEN

SOLO DABO (Defendant)

Appellant

- and -

ABDULLA MOUSA (Plaintiff)

Respondent

CASE FOR THE RESPONDENT

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Record

1. This is an appeal from a Judgment of the Gambia Court of Appeal (Ames, P., Dove-Edwin and Luke JJ.A.) dated the 2nd December 1963 dismissing the Defendant Appellant's Appeal from a Judgment of the Supreme Court of the Gambia (Wiseham C.J.) dated the 25th June 1963.

P.64

P.46

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2. The Respondent by his Statement of Claim sought to recover £19,200 which he said he had given to the Appellant for delivery to his (the Respondent's) nephew at Bo. in Sierra Leone but which the Appellant had neither so delivered nor returned to the Respondent. The Appellant had executed an undertaking on the 2nd July 1962 declaring and admitting that he had received the money for delivery as above. On the 8th March 1963 the Appellant executed a further undertaking, at Bathurst, Gambia, confirming the undertaking of the 2nd July 1962, which the Plaintiff said he had mislaid.

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3. The Appellant by his Defence denied the jurisdiction of the Supreme Court of the Gambia. In the alternative he denied executing either of the undertakings and denied that he owed the Respondent £19,200 or any other sum. He pleaded illegality in respect of any dealings between himself and the Respondent, which might be directly or indirectly connected with the claim. The learned Chief Justice found for the Respondent and awarded him £19,200 and costs. This was upheld by the Gambia Court of Appeal.

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Record

4. On the hearing of the action the Appellant took two preliminary points. The first point arose from the fact that there was an alteration in the return day stated on the face of the Writ. The Defendant relied upon the Rules of the Supreme Court, Second Schedule, Order 2, r,4 which provides: "Any alteration of the writ without leave of the Court shall render the writ void." He said that that alteration was made without the leave of the Court and that the writ was therefore void.

P.5 5. The learned Chief Justice ruled against this submission. He said: 10

1.15/20 "Rule 17 Cap. appears to cover the alteration in the writ, which I am not sure at all may have been altered before or after my signature, as to day and date - but it does not affect the substance of the document and is not calculated to mislead - and the writ is not void. The objection is taken at this stage of the hearing long after the defence statement has been filed"

By "Rule 17 Cap." The learned Chief Justice appears to have intended a reference to the Interpretation Ordinance c.l. s.17 which reads: 20

"Save as is otherwise expressly provided, whenever any form is prescribed, an instrument or document which purports to be in such form, shall not be void by reason of any deviation therefrom which does not affect the substance of such instrument or document or which is not calculated to mislead"

P.64 6. The point was argued again before the Gambia Court of Appeal, as the Appellant's first ground of appeal. The Learned President with whom the two Justices of Appeal agreed rejected the point. He said: 30

"The alteration was initialled by the Registrar. The point was taken in the Court below and overruled. The alteration was made before service. It was not shown that it was made after the writ was issued. The objection in the Court below was not taken when the Appellant appeared on the return day, when the filing of a defence was ordered. The defence was filed without mentioning it. I think it is an instance when the doctrine: "omnia praesumuntur rite esse" applies." 40

7. The second point went to the Jurisdiction of the Gambia Court. The Appellant submitted that both parties resided out of the Jurisdiction (although it appeared that the Appellant was domiciled in Gambia) and that therefore the Supreme Court had no jurisdiction to hear the case. The Supreme Court Ordinance C.5. contains the following:

"Section 15. The Supreme Court ... shall, within the Colony, possess and exercise all the jurisdiction, powers and authorities which are vested in or are capable of being exercised by Her Majesty's High Court of Justice in England ..."

10 "Section 2. 'Cause of action' in suits founded on contract shall not necessarily mean the whole cause of action, but a cause of action shall be deemed to have arisen within the jurisdiction if the contract was made therein, though the breach occurred elsewhere, and also if the breach occurred within the jurisdiction. Though the contract may have been made elsewhere"

8. The learned Chief Justice rejected this submission, basing his objection on the fact that the Statement of Claim revealed a fresh undertaking executed in Bathurst. Later, when the learned Chief Justice came to give his judgment, he referred to the Bathurst undertaking of the 8th March 1963 as a promissory note, and he referred to the issue of jurisdiction thus:

P.5.1.32
P.6.1.3.
P.46.1.30

"The preliminary objection as to jurisdiction was disposed of at the outset of the trial, because if the promissory note was executed in Bathurst, then part of the cause of action arose within the jurisdiction of this Court with a new and fresh promise to repay moneys, not a copy of a lost note"

9. The undertaking of the 8th March 1963 was admitted as Exhibit "B" and it reads as follows:-

30 "Copy in lieu of lost Promissory Note made on the 2nd July 1962 at Freetown (Sa.Leone) which reads as follows:- P.49

I, Solo Dabo hereby declare and admit having received from Mr. Mohammed Abdullah Mousa the sum of £19,200 - say Nineteen thousand two hundred pounds sterling, for safe keeping and promise to deliver this sum to his nephew Mr. Mohamed Khalil at Bo Sierra Leone on demand.

(sgd) Solo Dabo

40 Witness (sgd) A.R. Cole
3 Hill Street
Bathurst

Witness (sgd) M. Jacob

Dated at Bathurst this 8th day of March 1963"

The document was stamped, with the duty appropriate for a promissory note of this sum, in Bathurst on the 14th March 1963.

Record

P.65 10. The jurisdiction point was argued again before the
1.13 Gambia Court of Appeal. The learned President accepted the
argument of the Appellant (conceded by the Respondent) that
the Bathurst undertaking of the 8th March 1963 was not a
promissory note, but he held that this did not affect the
jurisdiction point. The Appellant (who was a Gambian, with
property in Gambia) came to Bathurst where he was asked for
the money but refused to give it, although he signed, in
Gambia a document admitting his indebtedness. The Statement
of Claim did not state that the undertaking was a promissory
1.23 note. The Respondent's claim was for money given to deliver,
and admitted not to have been delivered, and refused to be
returned to the Respondent when demanded and admitted to be
still unpaid and owing to the Respondent. A demand and
refusal had been made in Gambia and thereby a sufficient
1.4 cause of action arose in Gambia 10

P.10 11. The Respondent gave evidence to the effect that his
1.10 cousin, a trader in Freetown, asked for a loan to cover a
bank overdraft and to be repaid in three or four days' time. 20
The Respondent loaned the money - £19,200 - which was returned
to him in cash on the 1st July 1962 at his cousin's shop in
Freetown. The Respondent was a licensed diamond dealer and
P.6 he lived at Bo. in Sierra Leone. The Appellant also lived
1.19 at Bo, was a friend of the Respondent, and held a diamond
digger's licence. The Respondent had often bought diamonds
(obtaining receipts) from the Appellant but he had never sold
P.9 1.8 diamonds to him; this was not permissible under his dealer's
P.6 licence. The Respondent wanted the £19,200 delivered to his
1.15 nephew, one Khalil, who was also a licensed diamond dealer 30
at Bo but he (the Respondent) was not planning to return to
Bo from Freetown for several days. On the 2nd July 1962 he
met the Appellant in Freetown and learnt that the latter
was going to Bo. He therefore asked the Appellant to take
the £19,200 to Bo and deliver it to Khalil. The Appellant
1.20 agreed to do so and gave the Respondent a small note in which
he acknowledged that he had received £19,200 from the
Respondent to give to Khalil. The note was now lost.

P.25 After two or three days the Respondent himself went up
1.30 to Bo to find that Khalil had neither received the money nor
seen the Appellant. The Appellant did not appear in Bo
and after a week or so the Respondent went to the Lebanon
where they met. He left Freetown on the 13th July 1962 and
reached the Lebanon, via Paris and Switzerland on the 20th
July. The Respondent asked for his money, was told that
it was in Freetown and that the Appellant who was returning
there that day would pay it to Khalil. The Appellant left
the Lebanon but the Respondent later heard that Khalil had
not received the money. 40

In December the Respondent went to Bathurst but failing to find the Appellant there he went to Freetown. On the 27th February 1963 he returned to Bathurst and met the Appellant in the street. On asking for his money he was told that the Appellant was not running away with it. He had 160.000 Indian rupees in Geneva and was sending his younger brother one Dembo Dabo to get it. The Respondent said that Dembo Dabo could hand the money over to a friend of his (the Respondent) in Geneva. He gave Dembo Dabo a letter for the Geneva friend to whom he sent a telegram. He later telephoned the Geneva friend who said Dembo Dabo had not arrived there. On the 8th March 1963 he asked the Appellant to give him another note to replace that which was lost. The Appellant agreed. Ahmed Jacob and his clerk Cole were present. Ahmed Jacob drew the note at the Respondent's request. Cole gave it to the Appellant who signed it, and Ahmed Jacob and Cole signed as witnesses. On the 14th March 1964 the Appellant signed a letter (Exhibit "C") addressed to one Aub Wazni at Bo asking the latter to pay £4,000 to Khalil or give him diamonds to that value. The letter was typed for the Appellant by Ahmed Jacob's clerk Cole, at the Appellant's dictation. There were two copies of which one was given to the Respondent. He wrote to Khalil asking him to collect the £4,000.

P.49

P.11 1.4.

P.7 1.25

It was after the 14th March that the Respondent learnt that no money had been delivered in Geneva. He then told the Appellant that he would not go away until he received the £19,200 and he asked the Appellant to mortgage his properties in Bathurst and Freetown. The Appellant agreed and an appointment was made with Mr. Mahoney (a solicitor in Bathurst). The Appellant, The Respondent, Ahmed Jacob, and one Marry Tambadu went to Mahoney's office (Mahoney gave evidence that this was on the 19th or 20th March 1963). Mahoney asked for the deeds but was told by the Appellant that they were all at Freetown. Mahoney asked for the amount of the mortgage and the Respondent said £19,200 but the Appellant said £4,000 should not be included because he had already given instructions for the payment of that sum. The Appellant then said he had also given the Respondent £7,000 and diamonds to the value of £6,200 and that he only owed the Respondent £5,000. Mahoney told them to go away and come back when they were agreed on figures, and the meeting broke up. Later (the 21st March 1963) the Respondent had a telegram from Khalil to say that £4,000 had not been handed over (Exhibit D).

P.7 1.32

P.7 1.35

P.38 1.27

P.8 1.3

P.50

In cross-examination the Respondent denied that the undertaking of the 8th March 1963 and the letter of the 14th March 1963 were forgeries. He had not been dealing illegally in diamonds with the Appellant. Until the meeting at Mahoney's office the Appellant had not denied that he owed £19,200. Diamonds were mentioned at this meeting for the first time.

P.10 1.34

P.9 1.11

P.11.1.40

P.12.1.10

P.13.1.2

Record

12. Evidence was given for the Respondent by the following, among other witnesses:-

P.13 (a) Abdul Rahman Cole who was a clerk employed by Jacobs & Sons Ltd. On the 8th March 1963 Mr. Ahmed Jacob in the presence of the witness and the Respondent, and in his own office, wrote out the undertaking of that date. Only the second paragraph was written at first. The Appellant arrived and went upstairs. Mr. Jacob gave him the writing and he took it upstairs. There was conversation 10 between Respondent and Appellant and the witness took it down again for Ahmed Jacob to add the first paragraph. When this was done he took it up again and read it and explained it in the vernacular to the Appellant. Afterwards Ahmed Jacob joined them. The Appellant was satisfied with the document and signed it without argument. The witness and Ahmed Jacob then signed it.

P.14 On the 14th March 1963 he prepared and typed a letter (Exhibit C) at the dictation of the Appellant. The Appellant signed it. This was on Ahmed Jacob's premises. 20 The witness had done many odd jobs - letter writing - for the Appellant. Exhibits B and C were not forgeries.

P.15 (b) Mohamed Jacobs said that the Respondent, who was his guest, came to his office on the 8th March 1963 and asked him to draw a promissory note for £19,200. He did so. He wrote the second paragraph first and his clerk Cole took it upstairs to the Appellant. A few minutes later the Respondent called him and asked him to add the first paragraph, and he did so. He went upstairs where Cole was reading and explained the document in 30 the vernacular. The Appellant and Cole signed in his presence and he signed in their presence.

At a later date he went with the parties and Marry Tambadu to Mahoney's office, so that the Appellant could mortgage his property to secure the £19,200. The Appellant said it was not as much as that and mentioned £4,000, £5,000 and £9,200. Mahoney suggested they should go away and agree the figure. They were only there two or three minutes.

The letter of the 14th March 1963 was typed by Cole with his permission. The parties were upstairs at the time. The undertaking was not forged. The Appellant never denied the £19,200 before the Mahoney meeting. 40

P.18 (c) Martin Ebenezer Sock, Chief Clerk of the Bank of West Africa in Bathurst said the Bank would not accept the signatures on either Exhibits B or C as the signature of the Appellant if they appeared on a cheque. The Appellant was illiterate and signed script on his cheques.

(d) Marry Tambadu, on subpoena, said he and the parties were all friends. He had heard the Respondent ask the Appellant for £19,200 and threaten to go to Court if it was not paid. The Appellant had not denied that he owed the money. He had never seen the Appellant use the signature that appeared on the undertaking. He had been present at the Mahoney meeting.

P.20 1.15

10 (e) Reuel Andrews, a clerk employed by Cable & Wireless, on subpoena, produced five telegrams which he said were despatched by the Appellant. Two were signed by the Appellant in his presence. One of those was to Switzerland and the Respondent was present when it was prepared. The two signatures were not the same. It was not correct that the Switzerland telegram was sent by the Respondent and that the Appellant was not present. He (the witness) wrote out the telegram after the Appellant had dictated it in pidgin English and the Appellant then signed it.

P.23 1.28

P.24 1.3

20 13. The Appellant gave evidence to the effect that he had had a diamond digger's licence in Sierra Leone. On the 10th June 1962 he had bought diamonds from the Respondent for £12,300. and paid a deposit of £1,000. On the 21st June he bought some more diamonds for £7,000 which he paid in cash. The Respondent orally guaranteed to accept them back at £6,200 if unsold.

P.27

P.28

30 He was involved in a case with the Customs in Bo. That case finished at 2 o'clock on the 2nd July 1962. He was not in Freetown on that day. He signed no paper and the Respondent gave him no money. On the 3rd July he left for Liberia and a few days later flew to Bathurst. From there he went to Lebanon via Dakar and Paris. The Respondent did not ask him about money in the Lebanon. He met the Respondent in February 1963 in Bathurst and was told by him that everybody had been deported from Sierra Leone but they could do business in the Congo and elsewhere. There was another meeting at Jacob's house between the 18th and the 20th March, when the Respondent asked if they could settle the business between them. The Respondent said: "If you have not got the money now - let us go and see a lawyer for the balance left - to make a paper". He agreed to this and the parties with Jacob and Tambadu went to see Mahoney. The visit was not for the purpose of mortgaging his property but to make an account. The Respondent then asked for £19,200, being £15,200 for himself and £4,000 for his brother. The Appellant wanted the £4,000 left out and the Respondent agreed. The Appellant challenged the £15,200 and the Respondent agreed he had had diamonds for £6,200 and a radiogram for £100 but said his account was for £21,400. The Appellant referred to the balance of £11,300 from the 10th July transaction; said the Respondent had guaranteed the £7,000 deal to the extent of

P.29 1.27

P.34 1.26

Record

£6,300; said that the diamonds representing the £7,000 had not been sold and had been returned to the Respondent; and claimed that the guarantee was revoked reducing the £11,300 by £6,300 to a balance of £5,000 which he, the Appellant, admitted he owed to the Respondent.

P.30 He did not make any agreement with the Respondent on
1.12 the 8th March. He did not send any telegram whilst in the
 company of the Respondent. He did not write any letter on
 the 14th March.. On that day he travelled early in the 10
 morning, away from Bathurst.

P.35 On cross-examination he said that he left Bo on the
1.1 2nd July 1962. He had not said he was in Bo on the 1st
 July.

14. Evidence was given for the Appellant by the following, among other witnesses:-

P.38 (a) Jacob Laurance Mahoney, Barrister and Solicitor,
 said that Ahmed Jacob had arranged an interview which took
 place on the 19th or 20th March 1963. The parties, Ahmed 20
 Jacob and another tall African had come. The purpose of
 the visit was to prepare a mortgage. This was what he had
 been told when the interview was arranged and it was
 repeated when the parties arrived. He asked what properties
 were involved and was told they were in Freetown whereupon
 he told the parties they would have to go to Freetown. He
 was then told there was property in Bathurst, but the
 Appellant said the deeds of that also were in Freetown.
 Ahmed Jacobs suggested an agreement to make a mortgage
 when the documents arrived. There was then argument between 30
 the parties as to the sum involved and the witness told the
 parties he could not draw an agreement if they were not agreed
P.39 as to the amount. In cross-examination he said the Appellant
1.8 did not ask him to prepare an account

P.34 (b) The Hon. Bangali Singateh said that on the 14th March
 1963 he left Bathurst at about 6.30 a.m. with the Appellant.
 They reached Kerewan, after a stop for about 2 hours at
 Barra, at about 11.30 or 12 o'clock.

P.46 (c) Police Corporal Dodou Sonko said he saw the
 Appellant at Barra at about 7.30 a.m. on the 14th March 1963.
 The Appellant was with him until about 10 a.m. (He (the 40
 witness) arranged a Land Rover for the Appellant. The Land
 Rover returned between 1.30 and 2 p.m.

P.42 (d) Omar Sissoho said the Appellant was involved in
1.27 a case in Bo which ended on the 2nd July 1962, after which
 the Appellant left for Monrovia. In cross-examination he
 said he did not know if the Appellant was in Court on the
1.35 1st July 1962.

Record

15. The learned Chief Justice found for the Respondent. P.46 1.48
After dealing with the issue of jurisdiction he said the
defence of illegality must fail, quite apart from his findings
of fact, because foreign law must be proved by evidence and no P.47 1.1
evidence had been adduced before them as to the Laws of
Sierra Leone relating to diamond dealings. He then turned
to the undertaking of the 8th March 1963 and said that it
was not a forgery; he accepted and believed the evidence of
Ahmed Jacob and Cole "without hesitation". He accepted the
evidence of Andrews as to the fact that the Appellant had
despatched the two telegrams and he accepted the evidence of
the Respondent's witnesses as to the authenticity of the
letter of the 14th March. He rejected the evidence of the
Appellant's witnesses as to the Appellant's times of
movements on the 14th March. He also accepted that the P.49 1.17
Appellant had received £19,200 from the Respondent in
Freetown. He said that Bo and Freetown had not been proved
to be at such inaccessible distances devoid of transport to
support an alibi in the space of time in the circumstances
of the case. The two parties were close friends and had
large amounts of cash and travelled unlimited, and he
found nothing inherently improbable in the transaction
alleged by the Respondent. The learned Chief Justice
dealt with the credibility of the Appellant by saying: P.48 1.28
"He also set up his defence of diamond transactions to
defeat his just dues. That is my summary of credibility."

16. In the Gambia Court of Appeal the two Justices
of Appeal agreed with the learned President. He dealt with
the points about the validity of the writ and jurisdiction
as shown above (paragraphs 6 and 10). As to the defence
of illegality he said: P.66 1.26

"The evidence was not clear to me as to me as to what
exactly (the Appellant) was alleging the illegality to be.
He failed to rebut the Plaintiff's version of the trans-
action. Moreover there was no proper proof, as the learned
Chief Justice pointed out, as to what is and what is not
legal in diamond mining in Sierra Leone. So, had the
particular transaction been clearly established, there
would have been no means for the learned Chief Justice
to decide whether or not it was illegal"

Dealing with the issues of fact the learned President said
that the result of hearing argument had been that he agreed
with the findings of fact of the learned Chief Justice with
one exception (the authenticity of notes produced by the
Appellant) He continued: "And as to the so-called forgeries, P.65 1.41
there is the clearest evidence indicating not the probability
but the certainty that the documents were genuine". He would
dismiss the appeal.

Record

17. It is respectfully submitted that the Gambia Court of Appeal were correct in holding the writ valid. A document does not become a writ until it is signed and sealed and it was therefore for the Appellant to show the alteration had been made after this had been done, but he made no attempt to do so. In fact the parties appeared in Court on the altered return day and the Court was then ready to receive them. The inference must therefore be that the alteration was effected before signing and sealing and was thus not an alteration of the writ. It is respectfully submitted that even if the alteration was to the writ, this was a mere imperfection and not a fatal error and if ratification was needed, this was impliedly done by the Court.

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18. It is respectfully submitted that the Court of Appeal were correct in holding that the Supreme Court had jurisdiction. The learned President was correct in holding that, even although the document of the 8th March 1963 was not a promissory note, nevertheless, sufficient cause of action arose in Gambia when a demand and refusal were there made and that the Supreme Court thereby obtained jurisdiction. But even if no cause of action occurred in Gambia it is nevertheless respectfully submitted that the Supreme Court had jurisdiction. The Supreme Court of the Gambia has, by ordinance, jurisdiction within the Colony which is vested in the High Court in England. The action was an action in personam and the Appellant (who was a domiciled Gambian possessed of property in the Colony) was in the Colony when the writ was served upon him.

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19. It is respectfully submitted that the Court of Appeal were correct in dismissing the defence of illegality. For his defence to succeed it was essential for the Appellant to establish (a) that there were contracts between himself and the Respondent which were (b) tainted with illegality by the laws of Sierra Leone (showing, by evidence, what those laws were) and (c) that the £19,200 or any other sum found due from him to the Respondent was a sum payable in pursuance of such contracts. The Appellant failed to establish any of these matters.

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20. It is respectfully submitted that the view taken by the Court of Appeal of the facts was the only view it was reasonably possible for the Court to take. The Respondent acted consistently throughout and his evidence was supported by credible witnesses. The Appellant (whose evidence in one material particular, was contradicted by his own witness Mahoney) claimed that certain documents purporting to carry his written acknowledgment had been forged by or on behalf of the Respondent, but two of these documents (the letter of the 14th March and the telegram of the 5th March) in no way supported the Respondent's claim, (a fact which points away from forgery).

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21. It is respectfully submitted that the appeal ought to be dismissed with costs for the following among other

REASONS

1. Because the writ of summons was not void and the trial was not a nullity.
2. Because the Supreme Court had jurisdiction to entertain the case.
- 10 3. Because the defence of illegality was never established by the Appellant.
4. Because on the facts the Respondent established his case.
5. Because, in the Courts below, there were concurrent findings on the material facts.
6. Because the decision of the Gambia Court of Appeal was right and ought to be affirmed.

GERALD DAVIES.

