IN THE SEYCHELLES COURT OF APPEAL

Before:

Mr. Justice H. Goburdhun — President
Mr. Justice A.M. Silungwe — J.A.
Mr. Justice E.O. Ayoola — J.A.

YDRA III NAFTIKI ETERIA — Appellants

(HYDRA III MARITIME COMPANY)

V.

THE REPUBLIC — Respondent

Criminal Appeal No 11/93

Mr. B. Georges for the appellants
Mr. De Livera for the Respondent

Reasons for Decision of the Court

Mr. Sebastien Murangira was captain of a motor vessel called, and hereinafter referred to as Malo, but registered as M.V. Maria, carrying at the material time arms of war and munitions of war. On 5th March 1993 the motor vessel sailed into Port Victoria, Seychelles with its cargo. As a result of that event Murangira together with one Ilias Durdunis and one Vassilios Karatzias who were respectively Chief Officer and Chief Engineer was charge in two counts with the offences, respectively, of importing into Seychelles, arms of war without permit, and importing into Seychelles munitions of war without a permit both contrary to section 26(1) and section 26(3) proviso of the Firearms Act 1973 read with section 23 of the Penal Code. Durdunis and Karatzias, charged respectively as second and third accused, were acquitted of both charges by Alleear Ag. C.J. (as he

then was), before whom they were charged. He convicted Murangira and sentenced him to a term of imprisonment and made orders of forfeiture pursuant to section 151 of the Criminal Procedure Code and section 34 of the Firearms and Ammunition Ordinance 1973 respectively in respect of the vessel Malo and the arms and ammunitions.

Murangira appealed from his conviction but he died before his appeal could be heard. On an application by the owners of the vessel Malo, Ydra III Naftiki Eteria (Hydra III Maritime Company) ("the owners"), opposed by the Republic, the owners were granted leave to appeal out of time with reasons to be given later. The appeal which was heard by this court was the appeal of the owners who have appealed from the decision convicting Murangira and forfeiting the vessel and the arms and ammunition to the State. Murangira having died before his appeal was heard his appeal abated. After hearing Mr. Georges counsel for the owners and Mr. De Livera State Counsel on behalf of the Republic this court dismissed the owners' appeal in its entirety and reserved reasons for that decision till later. We now state our reasons for granting leave to the owners to appeal out of time and for the decision to dismiss the appeal.

The application of the owners for enlargement of time within which to appeal.

Murangira was convicted on 9th December, 1992. The owners' application for leave to appeal out of time was filed on 9th March 1994 even though the time within which an appeal ought to have been lodged expired on 23rd December 1993. Murangira who was convicted and had appealed died on 27th February 1994. It is evident that had Murangira not died and had pursued his appeal the owners would probably have been content to safeguard whatever rights they claim to have

by seeking to quash the forfeiture orders through Murangira's appeal, since the conviction of Murangira is central to the validity of the forfeiture orders with which the owners are primarily concerned. Seeking to fight their battle through Murangira was probably imprudent, but in the circumstances of this case in which Murangira's appeal could not be pursued not because Murangira had voluntarily abandoned it but because his death over which neither he nor the owners could have had any control, had intervened, it was just to exercise a discretion to grant an enlargement of time to the owners to appeal, provided they have a right of appeal. The question which, therefore, was central to the owners' application was whether the owners have a right of appeal.

In Durdunis v. The Republic (Criminal Appeal No. 12 of 1993) (Unreported judgment of 20th March, 1994) we considered whether and in what circumstances a person who has not been convicted in a criminal proceeding can appeal from the conviction in the light of section 120(2) of The Constitution of The Republic of Seychelles 1993 ("the Constitution") which provides thus:

> "Except as this Constitution or an act otherwise provides there shall be a right of appeal to the Court of Appeal from a judgment, direction, decision, declaration, decree, writ or order of the Supreme Court."

and section 329 of the Criminal Procedure Code (Cap. 45) which gave liberty to appeal from the Supreme Court to the Court of Appeal in criminal proceedings to "any person convicted on a trial held by the Supreme Court." This court in that case came to the conclusion that the wider right of appeal granted by Article 120(2) cannot by implication be circumscribed by section 329 of the Criminal Procedure Code and can only be excluded by express statutory provision. We further held that notwithstanding that fact however, standing

is essential to the right to invoke the appellate jurisdiction of this court in the absence of a specific provision in the Constitution prescribing the person by whom the right of appeal it confers should be exercised. The broad principles of Durdunis are applicable to this case and the question in this case is whether the owners have a standing.

As was said in Paddington Valuation Officer ex parte Peachey Property Corporation Ltd. (1966) 1 Q.B. 380,400-1 per Lord Denning:

> "The court would not listen ..... to a mere busy body who was interfering in things which did not concern him. But it will listen to anyone whose interests are affected by what has been done....."

The owners in this case are not busybodies as there is no gainsaying the fact that their interests are affected by the forfeiture of the vessel M.V. Malo to the State. Notwithstanding that the decision appealed from is in criminal proceeedings, where, as in this case, an order in the proceedings directly affects the interests of a person, such a person should not be denied a liberty to appeal. This is but a general proposition exceptions to which have to be worked out case by case. In this case the interests of the owners were sufficiently and directly affected by the decision. They have locus standi to appeal. We granted them leave to appeal out of time accordingly for these reasons.

Some objections were raised to the owners' application on the grounds that Mr. Georges had not shown that he was properly instructed and that there was some doubt as to the correct name of the owners. These are

inconsequential objections in the circumstances of this case and they are not worthy of any detailed consideration. It suffices to say that sufficient materials are placed before us to justify the conclusion that Mr. Georges had been properlyinstructed and to fix the identity of the owners by the names given in the title of this appeal.

The Substantive Issues

The substantive issues in this appeal are (i) whether the learned Ag. Chief Justice adequately and properly evaluated the evidence before he came to a decision convicting Murangira. (ii) Whether in law an "importation" into Seychelles of arms and munitions of war has been established, and (iii) whether the vessel Malo is liable to forfeiture pursuant to section 151 of the Criminal Procedure Code. These issues we now consider separately.

Did the learned Ag. Chief Justice adequately and properly evaluate the evidence.

Most of the background facts of this case were not in dispute. The vessel Malo was observed on a routine patrol by the Seychelles Coast Guard sometime on 4th March 1993 moving very slowly in the Exclusive Economic Zone of Seychelles (E.E.Z) at about 12.10 p.m. Upon a report made of the observation to the headquarters a major naval patrol involving two vessels was sent to verify the target. On 5th March 1993 one of the vessels, named Salmar, made contact with the vessel which was identified by its captain as M.V. Malo. It was questioned as to its intention and the captain explained its intention. At that time the M.V. Malo was 47.5 nautical miles of Mahe. Suspecting that the M.V. Malo had been fishing illegally in the EEZ the vessel was boarded by the coastguard officers. The M.V. Malo thereafter came

into Port Victoria where it was discovered to have been carrying a cargo of arms and ammunition of war. As earlier, stated, consequent upon this discovery, Murangira was charged with importation of arms of war and munitions of war into Seychelles without permit.

The main controversial issue of fact in this case concerned the circumstances in which the vessel Malo sailed into Port Victoria. According to the prosecution while the vessel was 47.5 nautical miles West of Mahe the captain of the vessel was questioned as to his intention and he had replied that the vessel was awaiting a new crew and supplies from Mahe. Upon being told that it could not be provided with supplies at that distance the captain asked for assistance so that he could come to Mahe to get them. Questioned as to the vessel's cargo, the captain had told the coast guard officers that the vessel was carrying Mercedez-Benz spare parts and building materials. One Major Ciseau then communicated with Headquarters and advised them of the captain's request for assistance. The request was granted, whereon Major Gertrude decided to leave a coast guard officer and some sailors on the vessel to help guide it safely to Port Victoria as the Malo had no navigation charts. When the vessel had been navigated for some distance the captain had asked for a tug to tow the Malo so that it could reach port before dark and, on Headquarters being informed by Major Ciseau, arrangements were made accordingly.

The version given by the defence was summarised by the learned Ag. Chief Justice in his judgment. Further summarised, the defence on the controversial issue of fact is that while the vessel had remained virtually stationary for about 18 hours somewhere 80 or 60 nautical miles from Mahe on 4th March 1993 awaiting fresh supplies and a new crew from

Mahe promised by the owners, the vessel was on 5th March 1993 boarded by heavily armed coast guard officers ostensibly to inspect the vessel's refrigerators for fish. Upon disclosure of the true nature of the vessel's cargo to Major Ciseau, the Commanding Officer of the Coast Guards, by the captain, Major Ciseau had gone into the hold of the ship to verify for himself the said cargo which were arms and munitions of war destined for Somalia. Following the verification of the cargo the Coast Guard Officers had arrested the vessel Malo and forced the three accused persons to proceed to Port Victoria under heavy armed escort.

It is thus that the main controversial issue of fact was whether the vessel was arrested and brought into port under armed escort as alleged by the defence, or, as alleged by the prosecution, it was assisted to port at the request of the captain of the vessel.

On the main issue of fact the learned Ag. Chief Justice had rejected the defence version. It is evident that one of the reasons he gave for rejecting that version is that the vessel was in dire need of fresh water and fuel and upon learning that it could not obtain fresh supplies at 47.5 nautical miles the captain had out of frustration requested assistance of the Coast Guard Officers for safe navigation to Port victoria. He rejected the contention that the vessel was arrested at 47.5 nautical miles. The reasons given by the learned Ag. Chief Justice form the main thrust of the criticism of the judgment by counsel for the owners.

The main grounds of criticism of the judgment advanced by counsel on behalf of the owners, if we may summarise them, are:

(i) that the learned Ag. Chief Justice rejected the

defence version without accepting the prosecution version and therefore misplaced the burden of proof;

(ii) that he did not weigh the relative strength of the prosecution case against the defence version;

(iii) that the reasons he gave for rejecting the defence version were not valid;

(iv) that on the facts, doubt should have been created in the mind of the learned judge.

A general dismay was expressed about the brevity of the judgment in comparison with the volume of evidence. It goes without saying that a judgment cannot rightly be criticised for its brevity if clear conclusions have been arrived at upon a proper evaluation of the evidence.

In this case it cannot be rightly held that the learned Ag. Chief Justice rejected the defence version without accepting the prosecution's version of the events. Even though a trial judge did not use the set phrases: "I believe" or "I disbelieve" or "I accept" or "I do not accept" in regard to the prosecution's case, if on the totality of the judgment it is evident that he had accepted the prosecution's case on its own merits and not because he rejected the defence such judgment should not be faulted merely because set phrases were not used showing which evidence was accepted. In this case the learned Ag. Chief Justice accepted the prosecution's case and stated reasons why the evidence in support of the prosecution's case is credible finding support for that view from the evidence of the defence. The learned judge reached a conclusion on an issue of primary fact based on the credibility of the witnesses when he found that the captain of the vessel Malo made a request to the Coast Guard Officers as alleged.

The criticism that the learned Ag. Chief Justice did

not weigh the relative strength of the cases seems to us, at the end, to be nothing but criticism as to the form of the judgment rather than its substance. A judgment cannot be rightly criticised for failing to set side by side every controversial issue of fact on which the parties have testified, stating which is preferred. It suffices if on reading the judgment it is clear which way the controversial issues of fact have been resolved. In this case that is amply demonstrated by the conclusion that the request was made that the vessel be helped to gain entry to Seychelles and be helped to Port. These are conclusions which could not have been arrived at if the prosecution witnesses had not been believed.

Scrutinizing the evidence, Mr. Georges tried to fault the reasons given by the Ag. Chief Justice for giving credence to the prosecution case. In substance it was submitted that he misdirected himself on several facts such as whether or not the vessel was in dire need of fuel, whether the crew attempted to avoid detection by changing the name of the vessel, whether a first rejection of a tug by the captain was indicative of his being in charge of the boat and whether the captain could reasonably have expected to receive supplies without going into port at a distance of 60 nautical miles having regard to the pilotage book. Some issue was also made of a press release whose source had not been established. It was argued by counsel for the owners that the Ag. Chief Justice ought to have entertained some doubt in the case by reason of the press release.

On the evidence, these criticisms were not justified. Besides, these criticisms overlooked the fact that the case was not based on circumstantial evidence nor was it one which turned on inference to be drawn from the

facts. The evidence of the request made by the captain to the coast guard officers was direct and not at all circumstantial. The evidence of the circumstances in which the request was made, that is, that it was upon the captain being told that he could not receive supplies at the distance the vessel was also direct. It is evident that the Ag. Chief Justice accepted this evidence. He also, rightly, in our view, refused to ascribe any probative or consequential value to a press release whose source has not been established.

This court does not embark on an appeal such as this by way of re-hearing. What should be decisive is whether there is evidence to support the conclusions of fact made by the learned Ag. Chief Justice. Ample support for those conclusions found on a careful reading of the evidence and even that of Murangira himself which we need not repeat. We hold that the learned Ag. Chief Justice adequately and properly evaluated the evidence.

The Question of Importation

The established facts are that the vessel sailed into Port Victoria carrying without permit arms and munitions of war which were allegedly destined for Somalia. Learned counsel for the owners made some interesting submissions concerning the various definitions of the territorial area of the Republic of Seychelles in the 1976 and 1979 Constitutions compared with the definition contained in The Interpretation and General Provisions Act. Since, however, the prosecution's case and the conviction of Murangira had not been based on the presence of the vessel within the EEZ but on its presence in Port Victoria with a cargo of arms and munitions of war, the definition of the area of the Republic of Seychelles is of purely academic interest in this case.

Of more significance is the question whether for there to be "importation" the goods must have been landed; that is to say, brought ashore.

Section 26(1) of The Firearms Act, 1973 under which Murangira was charged and convicted provided as follows:

> No person shall import or export any firearm or ammunition save under and in accordance with the terms of an import and export permit, as the case may be, issued by an authorised officer:"

By section 29 the "Licensing Authority" may inter alia grant transit permits for the importation or exportation, or the removal within or transportation through Seychelles to any place outside Seychelles. The Firearms Act does not contain a definition of the word "import", but the Interpretation and General Provisions Act 1976 defines "import" as meaning "to bring or cause to be brought into Seychelles."
Section 49 of the Penal Code to which learned counsel for the owners referred in the course of his argument defined "import" for the limited purpose of specified sections of the Code as including:

> "(a) to bring into Seychelles, and
>
> (b) to bring within the territorial waters of Seychelles whether or not the publication is brought ashore, and whether or not there is an intention to bring the same ashore."

Counsel for the owners, Mr. Georges, argued that only that cargo which is off loaded onto the wharf is cargo which is imported into Seychelles. Arguing on the basis of absurdity, he argued that it cannot be logically correct to hold that cargo on board vessels in transit through Seychelles is imported into Seychelles. Arguing on what he conceived to be the mischief which the Firearms Act was

designed to meet, he argued that the Act was designed to prevent persons taking arms and ammunitions into Seychelles for use in Seychelles without permit. It was further submitted that when the legislature had intended to widen the definition of importation to include bringing a particular article within the territorial waters of Seychelles whether with or without intention to bring it ashore, it had expressly so provided, as was done in section 49 of the Penal Code. Such express definition would not be necessary, it was argued, if the definition of importation in the Interpretation and General Provisions Act had had that same meaning, in its ordinary sense.

In our view it is of very limited value to attempt to use the definition in section 49 of the Penal Code as a clue to the meaning of "import" in the Firearms Act since one statute is not an exposition of the other. The Penal Code is not an exposition of the Firearms Act or of The Interpretation and General Provisions Act. Although a subsequent Act may be resorted to for the interpretation of an earlier Act, this is on condition that both laws are on the same subject. Importation of seditious publications dealt with in section 49 of the Penal Code is not the same as importation of arms and munitions of war dealt with by the Firearms Act. The Judicial Committee of the Privy Council in Re. Samuel (1913) AC 514, 526 (per Lord Haldane L.C) said:

> "It is not a conclusive argument as to the construction of an earlier Act to say that unless it be construed in a particular way a later Act would be surplusage. The later Act may have been designed, ex abundanti cautela, to remove possible doubts."

In the same vein, condescension to details in an earlier Act, done apparently ex abundanti cautela, should not lead to a restricted interpretation of a word which in its natural

meaning includes that meaning which has been specifically mentioned in that earlier act.

We have been referred by Mr. De Livera, learned State Counsel, to decisions of some courts in the Commonwealth in which consideration has been given to the words "importation" and "import". Some of these cases are Ko Min Cheung and another v. Public Prosecutor (1992) 2 S.L.R. 87, R. v. Hancox 1990 LRC Crim 5N, and R.v. Smith (Donald) 1973 2 All E.R., 1161. Where such cases depend on particular definitions in the relevant enactments they are to be treated with caution as they offer limited assistance. However, where such decisions deal with the ordinary meaning of words which we now have to interprete in its ordinary meaning they are of highly persuasive value. In Ko. Mung Cheung's case applying the definition of "import" in section 2 of the Interpretation Act of Singapore it was held that the drugs in question in that case were imported into Singapore regardless of whether or not Singapore was their ultimate destination. In R. v. Hancox the Court of Appeal of New Zealand considered the ordinary meaning of "import" which is "to introduce or bring in from abroad or to cause to be brought in from abroad." In that case, applying the ordinary meaning of "import" it was held that:

> "The element of importing exists from the time the goods enter New Zealand until they reach their immediate destination."

A passage in the judgment of Dickson J. in the Canadian case of Bell v. R. (1983) 3 DLC 4th 385, 392 was cited with approval in R. v. Hancox - Dickson J. said

> "The elements of an offence of importing are present as soon as the goods cross the border....." (Emphasis ours).

In the ordinary sense, "import" means the act of

bringing goods and merchandise into a country from a foreign country. (see Black's Law Dictionary 5th Edn. p.80). That definition is also reflected in The Interpretation and General Provisions Act 1976. If the view is taken that whatever is contained as cargo in a ship that has sailed into Seychelles has been brought into Seychelles then there is no doubt that the cargo on the vessel Malo has been "imported" into Seychelles notwithstanding that it was claimed to be originally destined for Somalia and that it has not been brought ashore. However it was argued on behalf of the owners that since the goods were destined for Somalia they were not "imported" into the Seychelles. In our view, quite apart from consideration of law, that argument is based on faulty factual basis in view of the evidence that although the cargo at the point of loading was destined for Somalia, at a point in time in the course of the voyage it had no clear destination. The evidence that it was to be offloaded in Mombasa given by Murangira and that later the vessel had to be drifting at sea with instructions of the owners to go to Seychelles or "to the area of Seychelles" bears this out. The argument based on the fact of transit is on the facts weak indeed.

Besides, importation is capable of being conceived in ordinary terms either as importation for use within the country or for transportation to another country. The policy of the statute, in this case, is that permit should be obtained whenever arms and ammunitions are brought into the country whether they are for use in the country or in transit. There dois nothing absurd in that policy which we venture to think, is reasonable not only in the interest of state security but also in the interest of the safety of the public.

In our judgment, having regard to the purpose of the

Firearms Act, the arms and ammunitions of war carried in the vessel Malo were imported into Seychelles notwithstanding that they have not been brought ashore.

The Forfeiture Question

Section 151 of The Criminal Procedure Code pursuant to which the vessel M.V. Malo was forfeited reads -

> "In addition to any forfeiture specially provided for by this Code or any other law, the corpus delicti, where it is the property of the offender, and all the things produced by the offence or which may have been used or were intended to be used for committing an offence shall on the conviction of the offender become forfeited to the State."

The main reason why the learned Ag. Chief Justice had forfeited the vessel to the state is that the captain's acts or omission must in the circumstances of this case be taken to be acts of the owners. However, on this appeal Mr. Georges for the owners has, rightly, based his submission on what he urged should be the true ambit of section 151 and the classification of the vessel in relation to that section. His argument, encapsulated, is that the vessel was part of the corpus delicti and therefore could not be forfeited as it was not the property of the convicted offender, Murangira. It was further submitted that the vessel was not something which was used for committing an offence but something used in the commission of the offence and was thus its corpus delicti.

The definition of corpus delicti has been rather elusive and it is disconcerting that such an elusive terminology has been used in a penal statute. In J<owitt's Dictionary of English Law corpus delicti was defined as-

> "the facts which constitute an offence. It does not mean the body of a murdered man, or a thing which has been stolen or anything which has been the subject-matter of a crime...."

Such definition which makes corpus delicti intangible is hardly appropriate for the purpose of section 151 which deals mainly with forfeiture of tangible objects. We use the word "mainly" because it may be argued that there are probably intangible things such as chooses in action which may be forfeited. More appropriate in our opinion is the definition in Black's Law Dictionary (5th edn. p.310) of corpus delicti as including,

> "the body or substance of the crime, which ordinarily includes two elements: the act and the criminal agency of the act."

We venture to think that if "criminal agency" is to be given a specific meaning, something used merely in the commission of an offence is not corpus delicti unless there is criminality in the use of it as to make its use an integral part of the offence. A thing can however be "used for committing an offence" without its use itself bearing such taint of criminality. In R. v. MacDonald and Anor 1967 51 Cr. App. 359 where the victim of a sexual offence was seized and abducted in a car to the scene of the offence. An order of deprevation of the car made upon conviction of the offender was upheld under S43 of the English Powers of Criminal Courts Act 1973 which empowers the court to make a deprevation order, inter alia, of property which "has been used for the purpose of committing, or facilitating the commission of, any offence."

A vessel used in bringing arms and ammunitons of war into Seychelles without permit is a thing "used for committing an offence." To bring arms and ammunition of war into Seychelles without permit is an offence and what has been used as vehicle of such importation is liable to forfeiture not as corpus delicti but under the "user" clause

of section 151. We have come to this conclusion not without some anxious consideration of the submission that injustice might result if the owner of the thing used was not the offender or acting in complicity with the offender. On the facts of the instant case no injustice arises. Not only did the owners create the occasion for the captain of the vessel to request entry into Seychelles, but also knowing the true nature of the cargo which the vessel was carrying they had concealed it from the Captain at the initial stages of the voyage. The facts of this case are far different from the hypothetical case given by learned counsel in the course of his argument of an innocent owner whose property has been used for committing an offence. In such hypothetical case the resilience of the judicial process, in the absence of express statutory provision, may not be wanting in fashioning a relief for the innocent claimant. Be that as it may, in our judgment the learned Ag. Chief Justice was right in making a forfeiture order. That he described the conviction of Murangira as standing "on a highly technical ground" is a factor which relates more to the exercise of the power of pardon by the President pursuant to section 60 of the Constitution than to the legality of the forfeiture order which in terms of section 151 is mandatory.

As regards the forfeiture of the arms and ammunitions carried by the vessel Malo, the owners of the vessel have not been shown to be the owners of the cargo or to have interest in the cargo affected by the forfeiture order. As regards the arms and ammunitions they have no standing to appeal. In the result such of the argument by counsel for the owners that relate to forfeiture of the arms and ammunitions must be discountenanced.

It was for the reasons herein given that we dismissed

the appeal of the owners in its entirety.

H. GOBURDHUN, P.

A.M. SILUNGWE, J.A.

E.O. AYOOLA, J.A.

Reasons read in open court the day the 23rd August 1994 by me and delivered same

Judge C. A. Ameerun Ag.
Ag Chief Justice.