

IN THE SEYCHELLES COURT OF APPEAL

[Coram: A. Fernando (J.A) , M. Twomey (J.A) , J. Msoffe (J.A)]

Criminal Appeal SCA 07/2013

(Appeal from Supreme Court Decision 28/2012)

Ahmed Abdi Barre

1st Appellant

Mukhtar Tahobow Ga'al

2nd Appellant

Versus

The Republic

Respondent

Heard: 07 April 2015

Counsel: Mr Nichol Gabriel, for the Appellants

Mr Ananth Subramaniam, Assistant Principal State Counsel, for the Respondent

Delivered: 17 April 2015

JUDGMENT

A. Fernando (J.A)

1. The two Appellants are appealing against their convictions by the Supreme Court for piracy and the sentences imposed on them.
2. The Appellants were arraigned before the Supreme Court with two others on the following charges:

Count 1

Statement of offence

Piracy, contrary to section 65(1) of the Penal Code as amended by section 2 of the Penal Code (Amendment) Act 2010.

Particulars off offence

Ahmed Abdi Barre, Adullahi Mohamoud Adam, Mukhtaar Tohabow Ga'al and Muhyadin Abshir Samriye, on the 11th day of April 2012 on the High Seas, voluntarily participated in the operation of a ship, namely the F/V Suidis also known as Jelbut 48, with knowledge of the facts making the same to be a pirate ship.

Count 2

Statement of Offence

Piracy, contrary to section 65(1) of the Penal Code as amended by section 2 of the Penal Code9Amendment) Act 2010.

Particulars of Offence

Ahmed Abdi Barre, Adullahi Mohamoud Adam, Mukhtaar Tohabow Ga'al and Muhyadin Abshir Samriye, between the 1st day of March 2012 and 11th day of April 2012, on the High Seas, being crew or passengers of a private vessel committed for private ends an illegal act of violence or detention or depredation against the fishing vessel Suidis, also known as Jelbut 48, and her crew.

3. Ahmed Abdi Barre, Adullahi Mohamoud Adam, Mukhtaar Tohabow Ga'al and Muhyadin Abshir Samriye were all convicted and sentenced by the Supreme Court. Adullahi Mohamoud Adam and Muhyadin Abshir Samriye withdrew their appeals subsequently and have been repatriated to Somalia under the Prisoner Transfer Agreement to serve their sentences there.

4. The relevant provisions of the Penal Code are cited below:

“65. (1) Any person who commits any act of piracy within Seychelles or elsewhere is guilty of an offence and liable to imprisonment for 30 years and a fine of R1 million.

(2) Notwithstanding the provisions of section 6 and any other written law, the courts of Seychelles shall have jurisdiction to try an offence of piracy or an offence referred to under subsection (3) whether the offence is committed within the territory of Seychelles or outside the territory of Seychelles.

(3).....

(4) For the purposes of this section “piracy” includes-

(a) any illegal act of violence or detention, or any act of depredation, committed for private ends by the crew or the passengers of a private ship or a private aircraft and directed-

- (i) on the high seas, against another ship or aircraft, or against persons or property on board such a ship or aircraft;
- (ii) against a ship, an aircraft, a person or property in a place outside the jurisdiction of any State;
- (b) any act of voluntary participation in the operation of a ship or an aircraft with knowledge of facts making it a pirate ship or a pirate aircraft; or
- (c).....

(5) A ship or aircraft shall be considered a pirate ship or a pirate aircraft if-

- (a) it has been used to commit any of the acts referred to in subsection (4) and remains under the control of the persons who committed those acts; or
- (b) it is intended by the person in dominant control of it to be used for the purpose of committing any of the acts referred to in subsection (4).”

5. The Appellants Ahmed Abdi Barre and Mukhtaar Tohabow Ga’al have filed 4 grounds of appeal against their convictions, namely:

- i. The learned trial Judge erred in convicting the Appellants on a defective charge which did not state the element of joint liability enterprise as per section 22 of the Penal Code.
- ii. The learned trial Judge erred, in law and in fact in concluding that the two Appellants had participated in an act of piracy on the high seas.
- iii. The learned trial Judge erred, in law and in fact by finding that the two Appellants had knowledge of the fact that the ship they were using was a pirate ship.
- iv. In all the circumstances of the case, the conviction of the four Appellants was unsafe and unsatisfactory.

6. The Appellants have also appealed against the 20 years sentences imposed on them on the ground it is manifestly harsh and excessive and wrong in principle.

7. The facts of this case are in brief to the effect that the Danish ship ‘Absalon’ had arrested ‘Jelbut 48’ an Iranian ship, two days after it had left ‘Grisby’, a known pirate port off the Somali coast, suspecting it to be a pirate ship. The reason for the suspicion

had been based on seeing two groups of people on board the ship, namely Arabian looking people and Somalis and two skiffs and a ladder. After the arrest of the ship F/V Suidis which came to be named by NATO, as 'Jelbut 48', the Iranians on board the ship 'Jelbut 48' had alleged that they had been attacked by a group of pirates about two weeks prior to that date and had been taken to Somalia. Having anchored at the coast in Somalia, 'Jelbut 48' had set sail according to the Iranians with 16 Somalis on board with the intention of "catching another ship". The Danish authorities after arrest of 'Jelbut 48' had released 12 out of the 16 Somalis who were found on board the 'Jelbut 48' and arrangements had been made for them to sail back to Somalia. The basis of this decision to select 4 and send them for prosecution in the Seychelles is not clear.

8. This appeal rests on the second, third and fourth grounds of appeal, namely whether the two Appellants participated in an act of piracy on the high seas as set out in count 2 of the Indictment, whether the two Appellants had knowledge of the fact that the ship they were using was a pirate ship as set out in count 1 and whether in all the circumstances of the case, the conviction of the four Appellants was unsafe and unsatisfactory.
9. The second ground which is in relation to the conviction on count 2 is dependant entirely on the evidence of **Ali Aktahali**, the Iranian captain of the fishing vessel, 'F/V Suidis' aka 'Jelbut 48' and his deputy **Yusuf Yahoo** as to the identity of the Appellants as being part of the group who allegedly attacked them while at sea from a 'small boat/skiff', which makes it an offence under section 65(4)(a)(i) of the Penal Code. It is a interesting question whether a 'small boat'/skiff' can be considered 'a private ship' as referred to in section 65(4) (a). Unfortunately there is no definition of 'private ship' either in the Penal Code or UNCLOS. We are conscious of the fact that sometimes the words 'ship' and 'boat' are used interchangeably and treated as synonyms. We are of the view that the Legislature should consider amending this provision to read as 'private vessel' in order to clear any possible ambiguity.
10. At the trial before the Supreme Court both Aktahali and Yusuf had identified the Appellants as being part of the group that attacked them. A material contradiction is to be found in the examination of the evidence of the two them. According to Aktahali the Somalis who attacked their boat came in a single boat and there were 9 of them, while according to Yusuf they came in two groups, one boat carrying 9 Somalis and the other boat 3, altogether making a total of 12. It is also evident from their evidence that while their boat was anchored in Somalia there were Somalis coming in and going out of the boat and that most of the Somalis looked alike. Further at the time of the arrest of 'Jelbut 48' there were 16 Somalis in all. Both Aktahali and Yusuuf had identified the Appellants for the first time, nine months after the incident in the Supreme Court. Aktahali and Yusuf had not been called upon by the Danish authorities to point them on a line up or in photographs prior to that.

11. The third ground which is in relation to the conviction on count 1 is to be determined on the basis of evidence available on the record as to whether the two Appellants had knowledge of the fact that the ship they were using, namely 'Jelbut 48', was a pirate ship as set out in count 1, which makes it an offence under section 65(4)(b) read with 65(5) (b) of the Penal Code. This matter too will be dependent on the evidence of Aktahali and Yusuuf and whether it is clear from the evidence that the Appellants were, or part of a group, who were in dominant control of 'Jelbut 48' and intended to use 'Jelbut 48' for the purpose of committing any of the acts referred to in section 65(4) of the Penal Code. Section 65(4)(a) will have no application as there is no evidence to show that 'Jelbut 48' had been used to commit any of the acts referred to in subsection (4) prior to its seizure by 'Absalon'. Intention to use 'Jelbut 48' for the purpose of committing any of the acts referred to in section 65(4) of the Penal Code could be inferred only if the evidence of Aktahali and Yusuf is believed that the Appellants 'Boss' had told them that 'Jelbut 48' was needed to catch other boats. This is hearsay evidence and there is nothing to indicate that the Appellants had any connection to this so called 'Boss'. There is no evidence, other than of Aktahali and Yusuuf, that any one of the Appellants and for that matter any one of the 16 Somalis were involved in the attack on 'Jelbut 48'. There is not an iota of evidence that any one of the Appellants were seen carrying guns or throwing guns overboard, when 'Absalon' approached 'Jelbut 48'.
12. The argument of the prosecution that 'Jelbut 48' was in fact a boat being used for piracy, is put into doubt when one asks oneself the question that if in fact the 12 non-Somalis (9 Iranians and 3 Pakistanis) found on board were mere hostages, why were they there? and would not the Somalis be running the risk of taking all of them on board, especially knowing that they were the ones who were familiar with operating the "Jelbut 48" and there was the risk of them taking control of 'Jelbut 48' while on the high seas. According to the prosecution 'Jelbut 48' was being used as a pirate vessel to attack other ships and bring them to Somalia to seek ransom. If that be the case what was the need for the 12 hostages when there were already 16 Somalis on board?
13. **Anders Fris**, Commanding Officer of the Danish warship ABSALON testifying before the Court had stated that in April 2012, he had been patrolling the sea in the area around Grisby, in Puntland, which is a known pirate camp from which many a vessels used for piracy are anchored, take off to sea. According to intelligence received they were in the watch out for 'Jelbut 48' that was anchored at Grisby. 'Jelbut 48' was the code name given by NATO to an Iranian dhow 'F/V Suidis' by their task force for purposes of identification. On the night of the 10th of March 2012 Absalon had started to follow 'Jelbut 48' which commenced sailing from Grisby and dispatched the helicopter of Absalon to make closer observations. From the photographs taken from the helicopter and produced at the trial, it was possible to make out that there were "Arabian looking

people at the cargo place in front of the ship, a skiff and a ladder”. He had therefore taken a decision to board ‘Jelbut 48’ and had sent out his teams for that purpose instructing them to separate those of Arabic origin and Somali origin. We are disturbed to find that from many of the cases that have come up before the courts that there seems to be a tendency to brand anyone resembling Somali as a pirate.

14. ‘Jelbut 48’ at the time of boarding was flying an Iranian flag. He had not seen any weapons or any weapons being thrown into the sea. Persons on ‘Jelbut 48’ had not fired at ‘Absalon’ nor offered any form of resistance. On board ‘Jelbut 48’ they had found a skiff with an outboard engine which was believed to be belonging to the Somalis and another white coloured skiff belonging to the Iranians. Inside the skiff that was believed to be belonging to the Somalis they had found a hooked ladder, as normally used by pirates. They had also found a GPS. After the arrest of ‘Jelbut 48’ both the 16 Somalis and the crew of ‘Jelbut 48’, 9 Iranians and 3 Pakistanis had been brought to ‘Absalon’ and had remained on board for 2 days. The Iranian and Pakistani crew of ‘Absalon’ while on board the ‘Absalon’ were questioned in groups of 4. Of the 16 Somalis arrested on board the ‘Absalon’, 4 were brought to the Seychelles for prosecution and the remaining 12 were sent back to Somalia. The white coloured skiff was not seized as it was believed that it belonged to the Iranians. According to the evidence of Fris there was nothing to distinguish the 4 accused from the rest of the 12 Somalis who were found and arrested on board the ‘Jelbut 48’ so far as their conduct on the 10th and 11th of April. They were not armed nor is there evidence of the 4 accused having done any act indicative of voluntary participation in the operation of ‘Jelbut 48’ prior to and during the arrest of ‘Jelbut 48’. The only evidence against them is that of the two Iranian witnesses, namely the Captain and his deputy.
15. When questioned in examination-in-chief as to why there are only 4 Somalis standing trial before the Seychelles Court out of a 16 who were arrested on board ‘Jelbut 48’, Fris had wavered in his answer and said “I am not quite aware of the decision why only 4 but I am a navy Officer. I do not stick to politics and the decision had been taken by the Danish authorities who have been in contact with the Seychelles authorities.” But to the question “Why these particular four?, his answer had been “Because the evidence is strongest against those 4” and the source of evidence had been the Iranians and Pakistanis amongst others. But that evidence had not been placed before the court.
16. Fris had admitted that some of the Somalis after their arrest on board ‘Jelbut 48’ had stated that they had paid dollars to the Iranians for them to be taken to Libya from where they could proceed to Italy. Therefore the identity of the 4 accused becomes a paramount issue in this case. Fris had admitted that the 4 accused had not done anything other than been found on ‘Jelbut 48’ which was sailing on the south East Coast prior to their arrest on the 11th of April.

17. Fris when asked repeatedly in cross examination: “On the very day when they had been arrested or detained a decision was made for you to let all 16 go back to Somalia?, had been very evasive by answering: “Could you repeat the question Sir”, “I do not understand the question, sorry’, “I am not quite sure what you mean sir”. The Counsel for the Defence had then questioned Fris on the basis of the communications between the operation room and the bridge that are logged. Fris had admitted that he as commanding officer on Absalon, was in charge of both the operation room and the bridge. Communications are made from the operation room to the bridge for execution. On the communication from the bridge informing the operation center that there are 16 Somalis on board the Jelbut 48, it is recorded that the bridge had communicated “Give them the choice to get into their skiffs and sail towards the shore.”

The following extract verbatim from the recorded proceedings under cross-examination of Friss is to be noted.

“Q. The bridge told the operation center that there were Pakistanis and 16 Somalis on board the Jelbut 48 and the operation center told the bridge “yes standby, give them the choice to get into their skiffs and sail towards the shore.”

A. I cannot remember any details but I am listening.

Q. And the bridge said “the Somalis are to be given the choice now?” and the operation center said to the bridge “standby for confirmation, confirmed it is Somalis who should go into the skiffs” and from the bridge “Yes of course but do you want us to give them the option now?”and then there was some communications about skiffs and then further down on page 7 from the bridge communicating to Jelbut it says “we can give you 2 boats for the Somalis to sail to shore”.

A. Yes

Q. On page 8 from the operation center to the bridge.

A. That is the officer to the second in command.

Q. So the officer to the second in command said “we can escort them back to shore if they are in the skiffs in order to make sure that they reach the shore” these were action that you on the day of arresting these people, they were supposed to be pirates yet all arrangements have been made for them to be taken to go to shore, so they could not have been pirates?

A. I do not agree, I can see the communication has been going on and I do not have comments on that.

Q. I have done a lot of criminal cases in my time and this is the most ridiculous one I have come across, you were going to arrest suspected pirates and the first thing you do is to tell them to take their boats and you will escort them back home, how consistent is that to these people being pirates? It does not make sense.

A. It is my responsibility that is correct but I cannot control what things are being said, the decision I made was to board Jelbut 48 and that is the outcome of it. ” (verbatim)

Fris had stated that when they got to Seychelles, the military police documents and the 4 Somalis were handed over to the Seychelles authorities. (102)

18. **Henrik S. Lauritsen**, one of the military policeman on board the Absalon testifying before the Court had stated that he was amongst the first party to board Jelbut 48 after it was intercepted. Climbing on board they had found the Somalis in front of the ship with their hands raised and the Iranian crew on top of the ship. Both the Somalis and the original crew of Jelbut were taken on board the ‘Absalon’. In answer to the question: “Were any photographs shown to the captain and members of his crew of the suspected pirates?” his answer had been a definite “no”.

Under cross examination Lauritsen had stated that he did not find on board the ‘Absalon’ any bullets or bullet casing, nor did he throw or see any one throw any bullets or bullet casing from ‘Jelbut 48’. He had gone on to state that if a bullet was found it would not have been thrown away and he would have retained it as an exhibit. He had said an ID parade was not held on board the ‘Absalon’ for the crew of ‘Jelbut 48’ to identify the Somalis.

19. It is only after the arrest of the ‘Jelbut 48’ that the alleged story pertaining to the attack on ‘Jelbut 48’ came to light which became the basis of the charge in count 2, namely “committing for private ends an illegal act of violence or detention or depredation against the fishing vessel F/V Sudis aka Jelbut 48 and her crew”. **Ali Aktahali**, the Iranian captain of fishing vessel, F/V ‘Suidis’ which came to be named by NATO as ‘Jelbut 48’, testifying before the Court had stated that in March 2012, he sailed with a crew of 4 Iranians and 8 Pakistanis on a fishing expedition, and after some days had encountered a “very small” Somali boat coming towards them. There had been 9 Somalis on it and they were firing at the Jelbut 48. According to Aktahali all of them had guns. Aktahali has been contradicted on this matter by the other Iranian witness **Yusuf Yahoo**, the second captain on board the ‘Jelbut 48’. According to Yusuf the Somalis had come in two groups, 9 in the first boat, and 3 in another boat making a total of 12.

20. On boarding the ‘Jelbut 48’ the Somalis had ordered them to proceed to Somalia. They had pointed the guns at the crew of ‘Jelbut 48’ and told them to do as told and otherwise they would kill them. On reaching Somalia Aktahali had stated that “Their ‘boss’ came

from the land to us” and “asked for 10 million dollars”. ‘Jelbut 48’ had been anchored in Somalia for 11 days and thereafter they had been told by the boss that ‘Jelbut 48’ was needed to catch other boats. They then commenced to sail and there had been 16 Somalis on board the ‘Jelbut 48’ by this time. According to Aktahali the Somalis were operating the boat and the 2nd Appellant had been in charge. Aktahali has been contradicted on this matter by the other Iranian witness **Yusuf Yahoo**, the second captain on board the ‘Jelbut 48’. According to Yusuf the ‘Jelbut 48’ was being operated by Captain Ali but the Somali people were with him watching his movements. While they were thus sailing they had seen a helicopter and they had cried out for help. Thereafter the personnel from the Dutch navy had boarded the Jelbut 48 and took control of it. All the Somalis had been taken in small navy boats. Aktahali has said that the white boat found on Jelbut 48 belonged to them.

21. From their conversation while on ‘Jelbut 48’ Aktahali had claimed that he had gathered the names of three of Somalis, namely ‘Mousta’, ‘Ahmed’, and ‘Abdullah’. ‘Abdullahi’ who was arraigned as an accused before the Supreme Court and convicted has withdrawn his appeal. The 2nd Appellant in this case is ‘Mukthaar’ and Ahmed is the 1st Appellant. It is to be noted that Aktahali who recalled the names of three of the accused before the Supreme Court, 9 months after the incident, was unable to recall the name of the boat of which he had sailed and of which he had been skipper for the past 2 years nor the date his boat was attacked or the date they sailed from Iran.
22. Aktahali had stated that at no point was he asked to identify any one of the Somalis by the Danish authorities in any line up or from any photographs and it is clear from his evidence that it is for the first time after 9 months since their ordeal at sea that he identified the 4 accused in the Supreme Court, two of whom are the Appellants in this case. The manner Aktahali came to identify the 4 accused, before the trial court, is unconventional and totally improper; for the prosecutor had got the 4 accused to stand up in court, and asked Aktahali whether he could identify each of them. We quote herein an extract of the proceedings.

“Q. Can all the four suspects stand up please.”

When Counsel for the Defence had sought clarification as to the purpose of this question the reply of the Prosecuting Counsel had been that the question is being asked to ascertain whether Aktahali could recognize them. Counsel for the Defence had then objected to the question on the basis that prior to asking that question the foundation for it should be laid and the witness should be asked to first give a description of the accused. It is then the Prosecuting Counsel had asked the question as to what their ages were.

23. Having obtained the answer that the accused were in their twenties the questions that followed have been leading questions with the answers virtually put into the mouth of

the witness, and we are surprised that the Trial Judge had permitted this line of questioning:

- “Take your time, its very important, and the first man in white shirt do you recognize that man?
- And the second gentleman in the blue top,.....do you recognize him....?
- Lets move on to the last gentleman at the end, do you recognize him?
- Were these the four of the nine? There were five others that are not here today but these were the four of that original crew?” (underlining by us)

The answers to all these questions had been in the affirmative.

24. We find this type of questioning unacceptable and a breach of the right to a fair hearing and the general rule against asking leading questions. In **Moor VS Moor [1954] 1 WLR 927** it was held the method by which evidence is obtained through leading questions may rob them of all or most of their significance and that the weight which can be attached to such is thereby reduced. **Cross & Tapper on Evidence, 10th Ed** states: “Leading questions are objectionable because of the danger of collusion between the person asking them and the witness, or the impropriety of suggesting the existence of facts which are not in evidence.” It is more so, because, the guilt of the accused who stood trial before the Supreme Court in our view was entirely dependent on their identification. This evidence needs to be tested on the background of Aktahali’s evidence under cross-examination, that there were Somalis around while they were held by them after the attack; when they had anchored in Somalia and when they sailed back and that all of them were “basically the same”. Aktahali had also admitted that he was “under a lot of stress, under a lot of trauma and under a lot of fear.” Aktahali had however been adamant about his identification of the 4 accused charged before the Supreme Court. It has also been the defence suggestion that both Aktahali and Yusuf had been paid by the Danish authorities to come down and testify before the Seychelles Supreme Court.

25. The manner the prosecutor had called upon **Yusuf Yahoo** to identify the accused before the Court is similar to that of Aktahali and is herein recorded:

“Q. Can you describe the ages of the people – the age range?

A. They were small and young

Q. And to your knowledge they were all Somalis?

A. They were all Somalis

Q. I am going to ask you to look at the four men here in Court, look at them one by one, the gentleman in the white shirt have you ever seen him before?

A. I do not remember the first one but I remembered the other three.

Q. So the gentleman in the blue shirt and the one in the green olive shirt and the one in the white stripe?

A. Yes

We are surprised to find the manner in which the prosecutor had been asking leading

questions from Yusuf without any objections from Counsel for the defence and interruption from the trial Judge, especially in view of the fact that the crucial issue in this case was the identity of the 4 accused. Having clearly stated in his examination-in-chief, “I do not remember the first one”, in re-examination the witness on being asked whether he could identify anyone of the 4 accused had said that he could identify “All of them.”

26. Yusuf had also admitted that during the 12 days ‘Jelbut 48’ was anchored in Somalia, Somalis were coming in and going out “like changing shift”. Yusuf had also said that the Somalis they had seen on the boat and on the shore in Somalia looked the same. In answer to the question “So therefore Sir you cannot identify anyone of them with any particularity because they all look the same” his answer had been “Yes, they look the same.”

Yusuf had also admitted under cross-examination that the Somalis had wanted to go to Italy via Libya. We quote here an extract from the proceedings:

“Q. All Somalis have given evidence against the statement that you did and they all said they had to pay you the crew and the Captain for them to be taken to Italy via Libya.

A. Yes they wanted to go to Italy.”

27. **Claus Anderson**, a photo analyst on board the Absalon testifying before the Court had stated that he had spoken to three of the accused while on board the Absalon and they had told him that “they were refugees was going to Italy and they are paid at about \$400 to go to Italy.” (verbatim, the words ‘they are paid’ seems to be a typo) Anderson had found clothes and personal items but not any arms or ladders or a bullet while on board the Jelbut 48.
28. **Kapsler Ladegarrd**, watch & boarding officer of ‘Absalon’, testifying at the trial had stated that as per the video footage taken from FALYR or the Electrical Optical System he could see a splash suggestive of something been thrown overboard from the portside of ‘Jelbut 48’ around 07:05:29 zulu time. He could also see another splash smaller than the earlier one suggestive of a much smaller object been thrown than the earlier one. The splashing according to him could not have been caused by the ship’s structure or the sea. We cannot however from this evidence conclude that some things had in fact been thrown nor that what was thrown were arms and ladders. He was a member of the second party to board the ‘Absalon’ on the 11th of April. Ladegarrd had by looking into a photograph produced at the trial stated that it is a bullet from a AK 47 gun recovered from ‘Absalon’. Objection had been taken to the introduction of this photograph as it was not in the original bundle of documents served on the defence but had been given only at the commencement of the hearing on the 22nd of November 2012. The photograph of the bullet was also not among the documents originally handed over to the Seychelles authorities. It had been the position of the defence that the photograph of the bullet taken from ‘Jelbut 48’ is a fabrication. After the boarding of the ‘Jelbut 48’ the Somalis were taken to ‘Absalon’ while the Iranian & Pakistani crew were taken in batches of four. Later a decision was taken by the Captain of ‘Absalon’ to allow the

- Iranians to sail back home after giving them sufficient food and water. No ladders were found during their search of Jelbut 48.
29. Both Aktahali and Yusuf had stated that prior to the arrival of the Danish boat 'Abasalon' the Somalis had thrown the weapons overboard. Reliance on their evidence is dependant on the credibility that could be attached to their evidence.
 30. The 1st Appellant in his statement to the Seychelles Police had stated that he was 16 years of age and that he was on his way to Libya when he was arrested on board 'Jelbut 48'. He used to raise animals but never had any proper form of employment and had earlier been to Saudi Arabia as an illegal immigrant. He had paid USD 400 to one Ilkaase for the trip to Libya. All that he could recall was, having boarded a big boat at night in Somalia along with some Somalis and falling asleep and thereafter been awakened by a military man holding a gun. He had said that when he boarded the boat there were some Iranians on it. He had denied hijacking any boat or of having had any weapon with him. He had refuted the allegation that he was a pirate and claimed he was innocent and that he was merely an illegal immigrant.
 31. The 2nd Appellant in his statement to the police had stated that he was 24 years old and had boarded a big boat to go to Libya as an illegal immigrant looking for a better life, having paid money to the owners of the boat. He had gone on to state: "It was night time I do not know the port of departure, I could not recall the date, we were on a big boat, there was a small boat that was on the big boat which was for emergency, and there were sixteen of us and some foreigners were also there, all males, all of us Somalians were new to one another so I do not really know them. The weather was fine. The next day, in the daytime, around morning hours, our boat was approached by a big Navy Warship, its number was L16 and it belonged to N.A.T.O. The captain on our boat spoke on the radio to them, the navy on the other warship asked if there is any Somalian aboard, our Captain said "No", and the Navy ship told our captain on the radio to stop our boat because they are coming to search on our boat. Then there was a helicopter circling over our boat and taking photographs, and we were ordered from the Navy ship for all Somalians to go on the front part of the boat, and for all other nationalities to go on the backside of the boat. Then we were arrested, and then we were boarded onto the Navy Warship, and we remained there for twenty days. After twenty days we were brought to Seychelles and we were handed over to the Police and detained in cells." He had denied the allegation that they were pirates and had attacked the Iranian fishing boat and kidnapped its crew.
 32. In answer to the question as to what happened to the nets and fish in the Iranian fishing boat his answer had been that he had not seen anything. It is interesting to note neither Aktahali nor Yusuuf had ever mentioned anything about the fishing gear in their boat and what became of them. This raises serious doubts as to whether 'Jelbut 48' was in fact a vessel involved in fishing or any other illegal activity such as human trafficking?
 33. The learned Trial Judge had been quick to dismiss the defence version that the Appellants were seeking to go to Libya as illegal immigrants looking for a better life,

having paid money to the owners of the boat, on the basis that “The evidence however showed that no document or money was found on board the Suidis and none of the accused persons had any document or item with them that could have supported their claims that they were Somali refugees about to travel to a foreign country.” Not a single question had been asked by the prosecution regarding the search of the boat ‘Jelbut 48’ for documents or money and thus the first part of the learned Trial Judge’s statement quoted above is inaccurate. Further in the business of human trafficking payment of money is not documented. Since the Appellants had categorically stated that they were planning to travel to Libya as illegal immigrants it was incorrect for the Trial Judge to have expected to have found travel documents with them.

34. The other reason for dismissing the defence case by the Trial Judge is that he had “considered the statements of the 4 accused persons admitted as evidence” and that he found those statements “to be inconsistent with one another and most unconvincing in themselves.” We have carefully examined the statements of the two Appellants and the other two accused before the Supreme Court and do not find any inconsistencies in their statements. For that matter they corroborate each other. The learned Trial had failed to give any consideration to the well known fact that Somalia is a failed State and that many Somalis do in fact travel out of Somalia as illegal immigrants to other states. We are of the view that the approach of the Trial Judge to the defence case was injudicious and not impartial.
35. The other two accused who were convicted along with the two Appellants had also denied that they were pirates or had weapons with them and stated that they were on their way to Libya to work there as illegal immigrants and look for a better life, having paid money to the owners of ‘Jelbut 48’.
36. The charges, as set out at paragraph 2 above, under which the Appellants were convicted in this case are defective as they do not comply with article 19(2)(b) of the Constitution which requires that a person charged with an offence “shall be informed.....in detail, of the nature of the offence”. The Appellants stood charged under the two counts for committing an illegal act of violence, detention or depredation against the fishing vessel ‘Suidis’ aka ‘Jelbut 48’ while being the crew or passengers of a private vessel and for being involved in the ‘operation’ of a pirate ship with knowledge of facts making it a pirate ship. The offence of piracy can be committed in one of two ways, namely by committing an illegal act of violence, detention or depredation under 65(4)(a); or by being involved in the ‘operation’ of a pirate ship under section 65(4)(b). Thus the charge in count 1 should necessarily have stated that the accused were being charged under section 65(1) read with 65(4)(b) and 65(5) and in count 2 that the accused were being charged under section 65(1) read with 65(4)(a) and 65(5). Both charges only make reference to section 65(1). Further the charge merely states “on the high seas” and does not specify in which part of the high seas.
37. We are generally reluctant to interfere with the findings of fact by a Trial Judge and his belief of witnesses but when he has failed to consider material contradictions in the

testimony of the prosecution witnesses and the serious doubts arising from the prosecution case, we do not hesitate to disturb his findings.

- 38. We have to bear in mind that the Appellants were in a foreign land, being prosecuted and defended by foreigners under a legal system unfamiliar to them. Therefore extra care should have been taken in the manner the prosecution was conducted to ensure due process. In short the legitimacy of the verdict should involve fundamental respect for the court process. The quality of proceedings and not merely their product are central to judicial legitimacy. **R. Dworkin in ‘A matter of Principle (1986) p 72** states: “The criminal justice system is not merely about convicting the guilty and ensuring the protection of the innocent from conviction. There is an additional and onerous responsibility to maintain the moral integrity of the criminal process.”
- 39. In **R. V A. (No. 2) (2002) 1 AC 45, HL Lord Steyn** observed that it is well-established that the right to a fair trial was absolute in the sense that a conviction obtained in breach of it cannot stand. In the **Australian case of Davies and Cody V The King (1937) HCA 27 as quoted in Gipp V R (1988) HCA 21**, it was held “that the duty imposed on a court of appeal to quash a conviction when it thinks that on any ground there was a miscarriage of justice covers not only cases where there is affirmative reason to suppose the appellant is innocent, but also cases of quite another description. For it will set aside a conviction whenever it appears unjust or unsafe to allow the verdict to stand because some failure has occurred in observing the conditions which, in the court’s view, are essential to a satisfactory trial, or because there is some feature of the case raising a substantial possibility that, either in the conclusion itself, or in the manner in which it has been reached, the jury may have been mistaken or misled.”
- 40. In the case of **R V Cooper (1969) 53 Cr. App R 82** it was said an appeal court “must in the end ask itself a subjective question, whether we are content to let the matter stand as it is, or whether there is not some lurking doubt in our minds which makes us wonder whether an injustice has been done. This is a reaction which may not be based strictly on the evidence as such; it is a reaction which can be produced by the general feel of the case as the Court experiences it.” In this case there is a lurking doubt and a general feeling in our minds as to whether an injustice has been done.
- 41. In the circumstances we allow the appeal, quash the convictions and acquit the Appellants forthwith.

A. Fernando (J.A)

I concur: M. Twomey (J.A)

I concur: J. Msoffe (J.A)

Signed, dated and delivered at Palais de Justice, Ile du Port on 17 April 2015