

IN THE SEYCHELLES COURT OF APPEAL

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

Criminal Appeal SCA 19/2013

(Appeal from Supreme Court Decision 54/2012)

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1. Abdirahaman Nur Roble
 2. Abdullah Sharif Ibrahim
 3. Mohammed Jama Ali
 4. Mohamud Ahmed Abdullahi
 5. Mohamed Abdugaadir Mohamed
 6. Sahal Arten Bare

Appellants

Versus

The Republic

Respondent

Heard: 17 August 2015

Counsel: Mr. Rene Durup for the Appellants

Mr. Jayaraj Chinnasamy for the Respondent

Delivered: 28 August 2015

JUDGMENT

J. Msoffe (J.A)

- [1] This appeal arises from the decision of the Supreme Court (Dodin, J.) convicting the Appellants of two counts of piracy contrary to section 65(1) and 65(4) (b), respectively, of the Penal Code read together with section 23 and punishable under section 65 of the same Code. The particulars of offence in the first count alleged that between 10th August and 14th August 2012 on the high seas with common intention they committed an act of piracy with violence or detention committed for private ends against persons on board another vessel namely Burhan Noor by

unlawfully taking control of the said vessel whilst armed with firearms. In the second count the particulars alleged that between the above dates on the high seas with common intention they committed an act of piracy namely voluntary participation in the operation of the above mentioned ship with knowledge of facts making it a pirate ship.

[2] Following the conviction, except for the 4th Appellant, a minor, the Appellants were each sentenced to 12 years imprisonment in each count with an order for the sentences to run consecutively. The 4th Appellant was sentenced to consecutive terms of six years imprisonment.

[3] The Appellants have canvassed five grounds of appeal which read as under:-

(1) *The decision of the Judge that the Appellants were all guilty cannot be supported by the evidence.*

(2) *The Judge erred in relying heavily on purported statements of the Appellants which were only admitted as items not exhibits.*

(3) *The Judge erred in allowing the prosecution of the 4th Appellant, a minor.*

(4) *The Judge erred in making the 2 sentences run consecutively rather than concurrently.*

(5) *The total sentence of 24 years for all the Appellants and the total sentence of 12 years for the 6th Appellant (a minor) is manifestly harsh in all circumstances of the case.*

[4] Briefly stated, according to the Appellants' cautioned statements made to the Seychelles Police and which were eventually produced by the prosecution and

admitted in evidence, in early August 2012 they left Somalia in a small skiff having 3 AK 47 and one RPG. The purpose of their trip was to escort another vessel into Somalia. As to what happened thereafter, the statements are generally similar and have one common feature which is best captured in the statement of Abdirahaman Nur Roble thus:-

..... When we left Somalia after five days we had an engine problem. We drift away by the waves until we met a Somalian boat escorting goats from Somalia to Oman. We asked them for assistance they gave us food and water and the Captain told us that there is a Pakistanian boat coming from Dubai it will takes (sic) us to Boosaaso as it is going to Boosaaso. Then a German warship approached us and told us to sand (sic) aside so they can search the Pakistani boat. As we were getting on one side Dutch ship approached and told us we have to surrender or they will burn the boat. Then the Pakistani Captain told us to surrender. We surrender to the warship and left our weapons with the Pakistani Captain.

[5] Very briefly, the prosecution evidence was that the Navy Forces had observed suspected piracy activity on Burhan Noor. Eventually the Forces “captured” the Appellants onboard the Burhan Noor. Indeed, part of the prosecution case, according to the trial Court, is best reflected under paragraphs 55 and 56 of the Judgment, thus:-

55. In this case the prosecution led evidence to show that there were two groups of people on board the Burhan Noor and that from their observations the witnesses were of the opinion that one group consisted of captors and they were armed with weapons and the other group were captives and partly hidden

away in the hold. Subsequently to the boarding of the Burhan Noor, the prosecution witnesses all maintained that one group consisted of Pakistanis who maintained that they were the captives of the 6 Somalis now the 6 accused persons who were in control of the Burhan Noor.

56. *The evidence further showed that the Burhan Noor did not stop when ordered to do so and only stopped after a second warning shot was fired and the suspected pirates raised their hands above their heads after having discarded several items including weapons overboard whilst the Pakistanis assisted the boarding teams to get on board and to identify the 6 accused persons now on trial.*

[6] It was also part of the prosecution case that following the “capture”, the Appellants made statements to the Dutch interviewers admitting that they were engaged in piracy activities and that their mission was to capture a dhow for use as a mother ship. And that they were armed and were expecting considerable rewards upon successful execution of their intended mission.

[7] Broadly speaking, the prosecution case was that on 11th August, 2012, the crew of a German warship named Sachsen, under the operation ATALANTA received communication from French Vessel La Fayette that the latter was observing a vessel and had seen a group of 6 suspected pirates leave the vessel. With that information, Sachsen searched for the vessel and later on located a dhow, identified as Burhan Noor. The Burhan Noor (BN) was approaching the coast of Somalia. It was almost sunset and therefore, the commander of the Sachsen decided to observe the suspected pirates boat until the next day. At 6 am, Seychelles time, as the commander of Sachsen prepared his boarding team to board BN, the master of BN called his vessel on bridge to bridge inter

communication channel (channel 16) and asked them to stay away.

- [8] Later communication between the two vessels established that there were 6 armed people of Somalia origin onboard the BN. The master of BN indicated to Sachsen that there was someone next to him, with a gun and they did not want them to board as if they did so, the crew of BN as well as the boarding team would be killed by the gunmen. The commander of Sachsen concluded that in the circumstances, he did not have sufficient team power to board BN and therefore communicated his position to the commanding officer of ATALANTA force and vessel Rotterdam. It is vessel Rotterdam which positioned itself and intercepted the BN.
- [9] The commanding officer had pictures of the occupants of BN taken from a helicopter. He observed that at least one person on board was armed with a AK47 and another one armed with a launcher for RPG. He ordered that they surrender, and be arrested. When they hesitated, warning shots were fired and they eventually surrendered and were arrested. Before they were arrested, passengers the BN were observed throwing down weapons into the sea.
- [10] All the suspected pirates were taken onboard Rotterdam and the crew to the BN stayed onboard BN. Statements of all the suspects were also taken.
- [11] A search was also conducted on the BN. There were two skiffs on board also. One damaged and the other one sea worthy. A total of 40 bullets were found inside the BN. A RPG rocket was also found. The bullets were photographed and disposed off overboard. A knife with a holster and a belt were also found in one of the skiffs. Instructions were sought on what to do with the suspected pirates. After two weeks, instructions were given from the Netherlands to take the suspects to Seychelles for trial. They were therefore transferred to Seychelles. Upon arrival in

Seychelles, all the suspects were re-arrested.

- [12] The Seychelles police, after giving the required caution to the suspects, took statements from all the 6 Appellants. The statements largely contradicted the statements they gave to the Navy officers aboard Rotterdam.
- [13] The statements of the Appellants given to the Seychelles police are not confessions. They, however, contained admissions to a number of facts pointing to their complicity in the crime for which they were charged.
- [14] A confession is generally described as “an unequivocal acknowledgement of guilt, the equivalent of a plea of guilty before a court of law’. On the other hand an admission is referred to as “a statement or conduct adverse to the person from whom it emanates.”
- [15] Following the closure of the prosecution case the Appellants elected to exercise their constitutional right of remaining silent for which, as correctly stated by the Judge, no adverse inference should be drawn from the exercise of the right. In this sense, their common defence, as per the cautioned statements, was that they were on a mission to escort a ship to Somalia and were mistakenly apprehended as pirates.
- [16] As Mathilda Twomey pointed out in her article **MUDDYING THE WATERS OR DEVELOPING THE CUSTOMARY LAW OF PIRACY? SOMALI PIRACY AND SEYCHELLES** – (Comparative Law Journal of the Pacific [2014] Vol. 20 Pg 127), it is very true that piracy has existed for as long as the oceans have been plied for commerce.
- [17] Piracy cases may be a fairly recent and new phenomenon in Seychelles jurisprudence. However, case law and other literature show that it has been a

subject of adjudication and discussion in other parts of the world. For instance, in **Bolivia Republic v Indemnity Mutual Marine Assurance Co.** [1909] 1 KB 782 at 802 Kennedy, L.J. defined it, for the purposes of a policy, as meaning persons who plunder indiscriminately for their private gain, and not persons who simply operate against the property of a particular State for a public political end.

[18] In the case of **In Re Piracy Jure Gentium** [1934] AC 586 at 600 the Privy Council stated:-

A careful examination of the subject shows a gradual widening of the earlier definition of piracy to bring it from time to time more in consonance with situations either not thought of or not in existence when the older jurisconsults were expressing their opinions.

Therefore it follows that definitions in respect of piracy are not exhaustive but subject to change in order to bring it in line with prevailing situations either not thought of or non-existent when defined earlier.

[Emphasis added.]

[19] The Convention on the High Seas (Geneva, 29 April 1958) defines piracy in Articles 15 – 17 as follows:-

Article 15

Piracy consists of any of the following acts:

- (1) *Any illegal acts of violence, 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:*

- (a) *On the high seas, against another ship or aircraft, or against persons or property on board such ship or aircraft;*
- (b) *Against a ship, aircraft, persons or property in a place outside the jurisdiction of any State;*
- (c) *Any act of voluntary participation in the operation of a ship or of an aircraft with knowledge of facts making it a pirate ship or aircraft;*
- (d) *Any act of inciting or of intentionally facilitation an act described in subparagraph 1 or subparagraph 2 of this article.*

Article 16

The acts of piracy, as defined in article 15, committed by a warship, government ship or government aircraft whose crew has mutinied and taken control of the ship or aircraft are assimilated to acts committed by a private ship.

Article 17

A ship or aircraft is considered a pirate ship or aircraft if it is intended by the persons in dominant control to be used for the purpose of committing one of the acts referred to in article 15. The same applies if the ship or aircraft has been used to commit any such act, so long as it remains under the control of the persons guilty of that act.

[20] **Halsbury's Laws of England** at Pg 787, refers to the fact that by virtue of section 4 of the Tokyo Convention Act 1967 (an Act of the UK Parliament) the definition contained in articles 15 – 17 of the Convention formed part of the law of England.

[21] Regarding trials of piracy cases the Privy Council in **In Re Piracy** (*supra*) had the following to say:-

With regard to crimes as defined by international law, that law has no means of trying or punishing them. The recognition of them as constituting crimes, and the trial and punishment of the criminals, are left to the municipal law of each country. But whereas according to international law the criminal jurisdiction of municipal law is ordinarily restricted to crimes committed on its terra firma or territorial waters or its own ships, and to crimes by its own nationals wherever committed, it is also recognized as extending to piracy committed on the high seas by any national on any ship because a person guilty of such piracy has placed himself beyond the protection of any State. He is no longer a national, but "hostis humani generis" and as such he is justiciable by any state anywhere: Grotius (1583-1645) "De Jure Belli ac Pacis, "vol. 2, cap. 20, --- 40."

[Emphasis added.]

[22] When the above literature is put in context it will be evident that it fits in well with Seychelles' law of piracy as borne out by section 65 of the Penal Code, as amended by Act No.2 of 2010.

[23] However, as stated in **In Re Piracy** (*supra*) situations may arise calling for a widening of the definition of piracy.

- [24] In this sense, as suggested by Fernando, J.A, in **Mohamed Hassan Ali and Three Others v Republic**, Criminal Appeal SCA 22/2012, under paragraphs 23 and 24 thereto, perhaps it is timely for Seychelles to amend section 65 in order to make provision for a presumption of piracy. Such provision would help in bringing in to justice persons found in high seas while in possession of piratical instruments or those found cruising suspicious skiffs in high seas.
- [25] To start with, this is a case of maritime piracy, which has no direct connection to Seychelles. In the circumstances, Seychelles is exercising her universal jurisdiction to prosecute it. Further, under Section 65(1), 4 (a), (b) and (c) of the Penal Code as read with section 7 of same Penal Code, the domestic jurisdiction of Seychelles is empowered to prosecute foreign pirates for crimes committed in the high seas.
- [26] Section 7 of the Penal Code reads thus, *“when an act which, if wholly done within the jurisdiction of the court, would be an offence against this Code, is done partly within and partly beyond the jurisdiction, every person who within the jurisdiction does or makes any part of such act may be tried and punished under this Code in the same manner as if such act had been done wholly within the jurisdiction.”* Section 7 is relevant because in the present case, the Appellants are alleged to have boarded the BN in the high seas, but were arrested within the territorial waters of Somalia. It may be fair to digress a bit here and say that they were actually arrested in the course of what is referred to in international law as “hot pursuit”. Anyhow, the UN and especially the UNSC has on several occasions made resolutions giving member states authority to pursue pirates who retreat to Somalia territory and arrest them. Some of the resolutions on Somalia include resolution No 1846 of 2008, last renewed by resolution 2184 of 2014. This is relevant when the crime of piracy has occurred in the high seas, and the pirates direct the pirated ship to the territorial waters of Somalia, either for detention while asking for ransoms, for theft of cargo or even to make the pirated ship a

pirate ship itself.

[27] Perhaps, we should also add here that in this type of offence, i.e., piracy, we consider that the domestic rule of law is subject to the international rule of law. In this sense, Seychelles is perfectly justified and empowered to prosecute pirates for crimes committed beyond its borders. Seychelles does so because as stated in **Re Piracy** (*supra*), it recognizes that a person committing piracy has placed himself beyond the protection of any State. The universality of the offence of piracy combined with the universal principle of domestic jurisdiction prevents the occurrence of any pocket in the rule of law – whether domestic or international.

[28] Perhaps, it could be argued that the above mentioned UN resolutions ought to have been stated in the charge sheet. In our view, it was not necessary to do so.

[29] In spreadlawblogspot.com/2011/10 a charge is defined as:-

a summary made by the police which is submitted to the court. It contains the story in detail how a crime was committed. It also tells the court the role played by each individual in the commission of the crime.

And in **Duhaime's Law Dictionary** it is stated that:-

The first principles of law require that the charge should be so preferred to enable the court to see that the facts amount to a violation of the law, and the prisoner to understand what facts he is to answer or disprove.

Further down, **Duhaime** (*supra*) goes on to state:-

It is on the basis of an indictment that an accused person must stand trial; being the accused of the commission of the crime. It is not evidence of the crime; merely an allegation thereof, the initiating document of a criminal trial.

[30] Applying the above definitions to this case it is evident that basically all that is required of a charge sheet are the facts and a statement of the law that is alleged to

have been violated. So, as stated above, in the justice of this case it was not necessary to state the UN resolutions in the charge sheet. The resolutions could have simply come in as evidence of the crime in the course of the trial.

[31] In fact the point raised here is not an entirely new one because it was dealt with as early as 1840 in a case involving the Captain of a boat in the high seas. The question was whether British Courts had jurisdiction to sit in judgment on the acts of a “rebel” against his sovereign (Thailand). On 2 November the recorder, Sir William Norris, overruled the plea to the jurisdiction “on the basis that defences going to the substance of the charge cannot be a basis for defeating the Court’s jurisdiction” — See *The Law of Piracy* by **Alfred P. Rubin** at page 227.

[32] But even assuming for the sake of argument that it was necessary to state the UN resolutions in the charge sheet still that would not render the charge sheet defective because there is no record that the Appellants were prejudiced in any way. On the contrary, the record is clear that they were very much aware and alive as to what the case against them was all about.

[33] Before discussing the grounds of appeal it is worthwhile mentioning that a close look at the Judgment of the Supreme Court will show that in grounding the convictions the Judge relied heavily on three aspects of the prosecution case: the out of court statements, the cautioned statements and circumstantial evidence.

[34] The crucial question in this appeal is whether or not the above aspects established the prosecution case beyond reasonable doubt. In answering this basic question it is proposed to dispose of the appeal generally.

[35] The starting point will be the complaint that the learned Judge erred in convicting and sentencing the fourth Appellant, Mohamed Ahmed Abdullahi, a minor, without *fiat* of the Attorney General.

[36] It is common ground that the fourth Appellant was a minor at the material time. He was 16 years old. Under section 92(1) (b) of the Children Act the *fiat* of the

Attorney General was necessary before being prosecuted. In this case, no *fiat* was sought for and granted before he was prosecuted. This, no doubt, offended the mandatory provisions of section 92(1) (b) (*supra*).

[37] In **Mohamed Sayid v Republic** SCA 2 of 2012 this Court held in allowing his appeal that the authorization of the Attorney General is required to show that the Attorney General is aware that a child is being prosecuted and that his authorisation has been sought for such prosecution and was granted.

[38] It occurs to us that **Sayid** (*supra*) is still good law. Under section 92(1) (b) (*supra*) the requirement for consent is couched in mandatory terms. Indeed, in this context we think McKee, J. was correct in **William v R** [2013] SCSC 86 [34 – 35] when he stated:-

I take into account the precise meaning of section 92 In my opinion these words mean exactly what they say

[39] We wish to state here that consent should be expressly given. It should not be implied from the record of proceedings. We may add it is good practice to have the consent reduced to writing. Thus, in a case requiring consent under section 92(1) (b), or any other law for that matter, a typical charge would perhaps look something like this:-

IN THE COURT OF SEYCHELLES

The Republic

Versus

XYZ

XYZ is charged with the following offence

Statement of Offence

.....

Particulars of Offence

X Y Z on committed the offence of

Dated this of 20....

Signed

MAGISTRATE/JUDGE/REGISTRAR

CONSENT OF THE ATTORNEY GENERAL

I, Attorney General of the Republic of Seychelles hereby consent that X Y Z be prosecuted for the offence of contrary to section of

Dated this of 20...

Signed

ATTORNEY GENERAL

[40] Of course, the Attorney General’s consent does not necessarily have to exactly follow or take the above format but there should always be a record, preferably a written one as already stated, that he/she has consented to the prosecution of the person charged.

[41] Under Article 76(5) of the Constitution of the Republic of Seychelles the powers of the Attorney General may be exercised by subordinate officers acting in

accordance with the general or special instructions of the said Attorney General. In our view, where that happens the charge sheet would still take more or less the above format save that the name and title of the person acting on special instructions of the Attorney General would appear instead. But yet again, when this happens the consent should preferably be in writing.

[42] Ground two of the appeal contends that the omission of Section 22 of the Penal Code from the charge sheet rendered the counts against the Appellants defective.

[43] The question we need to answer is, did the omission of section 22 from the charge sheet, prejudice the appellants? Was such an omission fatal to the charge?

[44] In the case of *Ali & Ors v R [2014] SCCA 34*, this Court was called to consider whether the non-inclusion of section 22 of the Penal Code was fatal to the charge similar to the one in issue. The Court held that:-

we would agree that the omission of section 22 or section 23 from a charge sheet does not render the charge faulty or bad in law. Both section 22 and section 23 are evidentiary provisions. They are however also procedural provisions that specify the exact offence with which the accused persons are charged and it is highly advisable that they be included in particulars of offences with more than one accused person. It would certainly make for better clarity.

[45] We similarly hold that the omission of section 22 from the charge sheet did not render the charge sheet defective.

[46] *Res gestae* has been raised regarding the recordings of the communication between the Sachsen and the Burhan Noor. Cases on *res gestae* in Seychelles so far is the

case of *Pragassen v R* (1974) SLR13 which only makes the point that the *res gestae* evidence has to be related to the commission of the crime and *Marday* (1998) SCAR 1988. The English case of *Ratten v R* (1972) AC 378 has been cited on many occasions. It may be equally applicable in this case. Evidence of events that are/is part/continuous of the whole event forms part of *res gestae*. Are the recordings *res gestae*?

- [47] The phrase *res gestae* (literally, “things done”) refers to the inclusionary exception by which a party is allowed to admit evidence which consists of, among other things, everything that is said and done in the course of an incident or transaction that is the subject of a civil or criminal trial. The *res gestae* exception is based on the view that, because certain statements are made spontaneously in the course of an event, they carry a high degree of credibility.
- [48] The hearsay evidence in issue comprises the evidence of a VHF radio transmission between Roy Radunzel (Communication Officer) from German warship The Sachsen and a Pakistani crew member from the Burhan Noor — the VHF transmission, text and oral account of a communication between the Lieutenant Roy Radunzel of the German warship the FGS Sachsen and a member of the Pakistani crew of the fishing vessel the Burhan Noor on the 12th of August 2012.
- [49] It was contended by the prosecution, and we entirely agree, that at the time of the VHF transmission the offence of the act of piracy was still alive and ongoing. The evidence of the Pakistani crew member was in the VHF transmission given whilst he was still a hostage to Somali pirates and the victim to acts of violence, false detention and depredation of the Burhan Noor and its entire crew. His statement was made in circumstances when the criminal act complained of was still ongoing and dominant in his words, conduct and demeanour.

[50] In Ireland, the Court of Criminal Appeal considered in detail the *res gestae* in ***The People (Attorney General) v Crosbie and Meehan*** [1966] 1 R 490 and ***The People (DPP) v Lonergan*** [2009] 1 ECCA 52. In the **Crosbie** case, the defendants were convicted of manslaughter. The victim, who had been stabbed, stated within a minute of being stabbed – and when the first defendant was standing near him: “he has a knife, he stabbed me.” On appeal, the Court of Criminal Appeal held that the words spoken by the victim were admissible, although it was hearsay, because it formed part of the criminal act for which the accused was tried. The Court stated that:

evidence of the statement made by [the victim] immediately after he had been stabbed by [the defendant] was admissible in evidence against all the accused, although it was hearsay, because it formed part of the criminal act for which the accused were being tried or for those who prefer to use Latin phrases, because it formed part of the res gestae.

[51] In ***Lonergan***, the Court of Criminal Appeal quoted with approval the following summary of the *res gestae* by McGrath:

Statements concerning an event in issue, made in circumstances of such spontaneity or involvement in an event that the possibility of concoction, distortion or error can be disregarded, are admissible as evidence of the truth of their contents. The rationale for the admission of this category of out of court statements is evident from the formulation of the exception – they are made in circumstances where the declarant’s mind is so dominated by a startling or overwhelming event that the statement is a spontaneous and instinctive reaction, made without any opportunity for the declarant to devise a false statement. Declan McGrath, Evidence (Thomson Roundhall, 2005), at paragraph 5-53.

[52] The Court in **Lonergan** also approved the approach to the *res gestae* taken in the UK Privy Council case **R v Ratten [1972] AC 378**, in which Lord Wilberforce stated:

The test should be not the uncertain one whether the making of the statement was in some sense part of the event or transaction. This may often be difficult to establish: such external matters as the time which elapses between the events and the speaking of the words (or vice versa), and differences in location being relevant factors but not, taken by themselves, decisive criteria. As regards statements made after the event it must be for the judge,, by preliminary ruling, to satisfy himself that the statement was so clearly made in circumstances of spontaneity or involvement in the event that the possibility of concoction can be disregarded. Conversely, if he considers that the statement was made by way of narrative of a detached prior event so that the speaker was so disengaged from it as to be able to construct or adapt his account, he should exclude it, supra.

[53] The Court in **Lonergan** also noted that this view had later been endorsed by the UK House of Lords in **R v Andrews [1987] AC 281**, in which Lord Ackner had engaged in a significant re-formulation of the relevant principles:

“1. The primary question which the judge must ask himself is – can the possibility of concoction or distortion be disregarded?

*2. To answer that question the judge must first consider the circumstances in which the particular statement was made, in order to satisfy himself that **the event was so unusual or startling or dramatic as to dominate the thoughts of the victim, so that his***

utterance was an instinctive reaction to that event, thus giving no real opportunity for reasoned reflection. In such a situation the judge would be entitled to conclude that the involvement or the pressure of the event would exclude the possibility of concoction or distortion, providing that the statement was made in conditions of approximate but not exact contemporaneity.

3. In order for the statement to be sufficiently “spontaneous” it must be so closely associated with the event which has excited the statement, that it can be fairly stated that the mind of the declarant was still dominated by the event...

4. Quite apart from the time factor, there may be special features in the case, which relate to the possibility of concoction or distortion. In the instant appeal the defence relied upon evidence to support the contention that the deceased had a motive of his own to fabricate or concoct, namely ... malice ...”

5. As to the possibility of error in the facts narrated in the statement, if only the ordinary fallibility of human recollection is relied upon, this goes to the weight to be attracted to and not to the admissibility of the statement and is therefore a matter of the jury. However, here again there may be special features that may give rise to the possibility of error ... In such circumstances the trial Judge must consider whether he can exclude the possibility of error.

[54] Despite its long established position in the law of evidence, the *res gestae* inclusionary exception has attracted some criticism. In the English case ***Holmes v Newman*, (1931) 2 Ch 112** the phrase *res gestae* was criticised because it provides “a respectable legal cloak for a variety of cases to which no formulae of precision

can be applied.” Likewise, in **R v Ratten** it was said that the expression *res gestae* is often used to cover situations that have been insufficiently analysed.

[55] In England, the Law Commission contemplated the abolition of the *res gestae* exception as it considered the case law on the scope of it to be convoluted and lacking in any clear principles. (See **Consultation Paper on Evidence in Criminal Proceedings: Hearsay and Related Topics (Law Com CP No 138, 1996) paragraph 3.49.**) Ultimately, it recommended that the composite test set out by the UK House of Lords in **R v Andrews** should be retained in statutory form in criminal cases. Bearing in mind that English law in civil cases (under the *Civil Evidence Act 1995*) has effectively moved towards an inclusionary hearsay rule, it is notable that, following the Law Commission’s approach the *res gestae* exception has, for criminal cases, been placed on a statutory footing in section 118 of *Criminal Justice Act 2003*, and this statutorily reflects the approach taken in **R v Andrews**.

[56] As shall be demonstrated hereunder, the composite test set out in **R v Andrews** applied in this case regarding the VHF transmission proves that the recording is *res gestae*.

[57] This brings us to the out of court admissions to the Dutch military police. A confession is an admission of guilt made to someone in authority. When it is challenged the Court has to hold a *voire dire* to look into their voluntariness.

A *voire dire* as to the admissibility of the statements was not held at the trial even though the Learned Trial Judge stated that it would be. ‘Ok. That is agreed. We will take a break for about 10 minutes and then we come and start the *voire dire*.’ (p.241, Volume II, Records of proceedings.) Yet, at page 242 the learned Judge gave a ruling admitting the documents disregarding the fact that he had earlier said that the court was going to hold a *voire dire*! And, yet again, at pages 296 and 297 the statements were tendered in evidence, as it were.

[58] It is true that an accused has no “right” to a *voire dire* hearing. In Australia it was held that:

It is of the utmost importance that practitioners and judges always remember that the grant of a voir dire hearing is a matter of discretion not of right, and that a party who seeks a voir dire hearing must first satisfy the judge that there is reasonable ground for departing from the ordinary procedure of the trial to that extent. It is important that counsel seeking a voir dire identify the issues to which it is directed ... – per Badgery Parker J, McInernay J agreeing, R v Hawkins, unreported CCANSW 17 December 1992 (BC9202721).

[59] The law in relation to *voire dire*s in Seychelles is stated in the case of **G. Pool vs. R. (1974) SLR**:

There is no reason why a court should not accept and act upon admission by an accused as against himself, though rejecting as untrue the part of the statement sought to implicate other persons.

In the case of **David Antoine v R, (unreported) Criminal 32/1995**. This Court held:

*The Court is entitled to found a conviction solely on the admission of an accused person provided that the Court is satisfied beyond doubt that the confession was either made **voluntarily** or in the case of a repudiated statement that it was made but repudiated because of its truth.*

In **Azemia and Others v R [2005] SCCA 8** the Court stated in paragraph 28:

... at common law no statement by an accused person can be given in evidence against himself unless the prosecution proves beyond reasonable doubt that it was freely and voluntarily made.” See ***Ibrahim v Regem* [1914 – 15] All E. R. 847 (PC); DPP v Ping Lin** [1975] 3 ALL E. R. 175 (HL). The main reason underlying this principle is that it is against public policy to convict a man out of his own mouth. Indeed experience shows that it is not uncommon for people to admit guilt where they are innocent. Thus, to obviate the danger of innocent people being convicted, the English common law evolved a principle that has stood the test of time, namely, that it is for the prosecution, and not the accused, to prove its case beyond reasonable doubt.

[60] Similarly, English common law has evolved a further principle that an extra-judicial confession requires corroboration as a safeguard against a wrong conviction. Such corroboration must obviously be evidence independent of the statement in question and implicating the accused in a material aspect. See ***D.P.P. v Kilbourne* [1973] A. C. 729 (HL)**. In ***Guy Robert Pool v The Republic* 1974 SCAR** this Court itself held that once a confession is retracted there must be corroboration showing the guilt of the accused.”

[61] In the UK **Section 81(1) of the Police and Criminal Evidence Act 1984** provides the following statutory definition:

‘confession’ includes any statement wholly or partly adverse to the person who made it whether made to a person in authority or not and whether made in words or otherwise.

Richard Glover and Peter Murphy, *Murphy on Evidence* (13th edn, Oxford University 2013), note that usually confessions are made to police officers or other investigators as a result of interrogation, but they may equally be made to the

victim of an offence, a friend or relative, or any other person. ‘The law regarding confessions is now the same in all cases, and it no longer matters whether the person to whom the confession is made is **a person in authority**, *supra*.

Declan McGrath, Evidence (Thomson Roundhall, 2005), at paragraph 8.49, states:

It is well settled that, in order for the traditional voluntariness test to apply, the impugned inducement must have been held out by a person in authority. (R v Doherty (1984) 13 Cox C.C. 23, R v Row (1909) Russ. & Ry. 153, R v Gibbons (1823) 1 C. & P. 97, R v Tyler (1823) 1 C. & P. 129, R v Moore (1852) 2 Den. 522.

In People (DPP) v McCann, (1998) 4 I.R. 397 at 412, the Court held that a person in authority is ‘someone engaged in the arrest, detention, examination, or prosecution’. Obviously, this category of persons would include, in appropriate cases, the police, customs, and **military officers**, **R v Smith** (1959) 2 All E.R 193.

[62] So, based on the above authorities, and particularly the law in Seychelles, we are faced with this basic question: Were the statements made to the Dutch military police in this case admissible? Our considered view is that it would be very difficult to prove their admissibility. Even though the Learned Trial Judge agreed to a *voire dire* hearing, the hearing did not actually take place for some unknown reasons. Since these statements were retracted the learned Judge ought to have conducted a *voire dire* examination to determine their admissibility or otherwise in evidence — In the circumstances, these statements were wrongly admitted in evidence and the Judge ought not to have relied on them in grounding the convictions against the Appellants. For purposes of our decision in this appeal, we will disregard these statements.

[63] Having said that, there is still enough evidence to uphold the Appellants’ convictions on Count 1, namely:

- **VHF transmission which is res gestae**

The composite test set out in *R v Andrews* applied in this case regarding the VHF transmission admits the recording as *res gestae*.

- The **event** was “**unusual or startling or dramatic** as to dominate the thoughts of the victim, so that his utterance was an instinctive reaction to that event, thus no opportunity for reasoned reflection”. (Being held hostage on the hijacked vessel).
- The involvement or the pressure of the events would exclude the possibility of concoction or distortion. (Being threatened with a gun, being threatened to be killed.)
- The statement was **spontaneous** as it was made in the circumstance when the offence of the act of **piracy was still alive and ongoing** (the pirates were on the boat holding weapons) and just because the event was so startling or overwhelming, the mind of the declarant **was still dominated** by event, hence left no opportunity for the declarant to make a false statement. (The transcripts of the VHF transmission indicates that the declarant was scared for his life, nervously repeating ‘... *the Somalis will kill you... they will kill us ...*’.

[64] Counsel for the Appellants submitted that there was an alternative set of events, namely that the identity of the declarant is unknown, implying that he could be from Somalia. However, it is to be noted that the Appellants do not speak English. Moreover, Counsel for the Appellants himself stated that he communicates with his clients only through the interpreter. It was also confirmed by the Somali interpreter that the Appellants do not speak English.

[65] In this case it is not important to know who exactly was the person making the statement via radio. It is crucial, however to determine, if the person was

representing the Somalis or the Pakistanis group. There were two groups of people on the Burhan Noor, the Somalis who did not speak English, and the Pakistanis. It is clear that the declarant must belong to the latter group. Therefore, the Somalis were the captors and the Pakistanis the captives. Certainly, the captors and the captives, respectively, were not “business partners”, so to speak.

[66] This brings us to circumstantial evidence in the case. The law on circumstantial evidence is settled. In the often cited case of **Guy Bristol v Republic [1980] SLR** it was stated:-

*The Magistrate took all the above evidence into account and said there was strong circumstantial evidence that the appellant took the money. However he failed to direct himself specifically as is necessary in a case depending entirely on circumstantial evidence. In such a case, the trial Judge or Magistrate must direct himself that before an accused person can be convicted he must first find that the inculpatory facts are inconsistent with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of guilt. It is also advantageous to bear in mind the following passage of the Privy Council’s opinion in *Teper v/s R (1952) AC 480 at p.489:**

It is also necessary before drawing the inference of the accused’s guilt from circumstantial evidence to be sure that there was no other co-existing circumstances which would weaken or destroy the inference.

[67] Also **SARKAR ON EVIDENCE**, Fifteenth Edition, Reprint 2004 at pages 66 to 68, sets out the general rules regarding circumstantial evidence as follows:-

1. *That in a case which depends wholly upon circumstantial evidence, the circumstances must be of such a nature as to be capable of supporting the exclusive hypothesis that the accused is guilty of the crime of which he is charged. The circumstances relied upon as establishing the involvement of the accused in the crime must clinch the issue of guilt.*
2. *That all the incriminating facts and circumstances must be incompatible with the innocence of the accused or the guilt of any other person and incapable of explanation upon any other hypothesis than that of his guilt, otherwise the accused must be given the benefit of doubt.*
3. *That the circumstances from which an inference adverse to the accused is sought to be drawn must be proved beyond reasonable doubt and must be closely connected with the fact sought to be inferred therefore.*
4. *Where circumstances are susceptible of two equally possible inferences the inference favouring the accused rather than the prosecution should be accepted.*
5. *There must be a chain of evidence so far complete as not to leave reasonable ground for a conclusion therefrom consistent with the innocence of the accused, and the chain must be such human probability the act must have been done by the accused.*
6. *Where a series of circumstances are dependent on one another they should be read as one integrated whole and not*

considered separately, otherwise the very concept of proof of circumstantial evidence would be defeated.

7. *Circumstances of strong suspicion without more conclusive evidence are not sufficient to justify conviction, even though they party offers no explanation of them.*
8. *If combined effect of all the proved facts taken together is conclusive in establishing guilt of the accused, conviction would be justified even though any one or more of those facts by itself is not decisive.*

[68] Applying the above principles to this case, it is evident that circumstantial evidence is mainly borne out by the following aspects of the evidence:-

- It is clear from the VHF radio conversations that the Burhan Noor was under the control of the accused persons and when the first warning shots were fired they chose to ignore it and carried on trying to escape back to Somalia. These were not the actions of innocent people.
- The evidence of the German and Dutch officers and the helicopter crew is to the effect that the persons on board were separated into 2 groups, the Somalis (who were carrying the weapons AK 47s and an RPG as evident on the pictures), and the Pakistanis who were not armed and scared for their lives.
- The Appellants stated that their skiff contained 60 litres of petrol, two jerry cans of drinking water, food, satellite phone, GPS, three AK47 and one RPG.

[69] This brings us to the Appellants' cautioned statements to the Seychelles police. Besides the bridge to bridge conversation, several things also are agreed in all the

statements of the Appellants to the Seychelles police, which bolster the prosecution case:

- That all the Appellants had been in the waters for at least 5 days before arrest.
- That they had all been commissioned to the sea by someone at the shore, and therefore, they were in the sea for their personal (private benefit).
- That they had with them 3 AK47 guns and a RPG – These guns were carried interchangeably, and each one of them would carry the gun at one time or the other.
- That they were to meet some vessel which was about 30 miles off the Somalia Coast.
- That they never saw the alleged Iranian ship they were to escort back to Somalia. In the five days they claim to have been drifting, the Iranian ship did not come by. The Boat going to Oman did not seem to be aware of the Iranian ship either. Later when they boarded the BN, they did not seek to know if BN may have been aware of any other ship on its way to Somalia: they wanted to go back to Somalia.
- That BN was not their boat/ship.
- That at the time of their arrest, BN was heading to Boosaaso port in Somalia. The Appellants come from Boosaaso.

[70] In concluding the above aspects of the case against the Appellants it is necessary to look at certain aspects of the case and provide answers to them. We think it is important to do so for purposes of completeness of this Judgment.

- [71] It could perhaps be argued that the Pakistani Captain concocted a story in order to escape criminal responsibility for being found with a group of armed Somalis in an area where it is common ground that piracy is rampant. With respect, that could not be true. The transcript of VHF communication shows that the person was frightened and very nervous (for example the sentences “*Wait sir. Wait sir. Don’t come near us. Please sir, wait. They have a RPG. Somali will kill us*”). When the story is planned the statements are precise and clear. Certainly, the statements of the declarant do not show any element that they were probably concocted.
- [72] Once again it could also probably be asked that if the Pakistani Captain was really helping the Somalis and the ship was not hijacked would it not be more of a natural reaction for the Captain to just stop the ship and explain to the navy the situation instead of “making up the story”? Yet again, the answer to this would be this:- The event was “unusual or startling or dramatic as to dominate the thoughts of the victim, so that his utterance was an instinctive reaction to that event, thus no opportunity for reasoned judgment.”
- [73] It could also probably be asked and said that “Sachsen” was pursuing the “Burhan Noor” for a long time before the bridge to bridge conversation took place. Therefore, was the event “unusual or startling”, particularly noting that the pirates had taken over the ship long before the bridge to bridge conversation on the 13th? The answer to this probable query would be this:- The event of piracy is always a dramatic one for captives. “Sachsen” communicated with Pakistani crew through the radio. The conversation itself had to be a very dramatic and stressful event for the hostages who had been speaking with “Sachsen”. He was told by Sachsen to stop the boat while the Somalis told him not to and if he will, he will be killed (“*one Somali people telling me. No stop your boat, we kill you*”). We believe he had no opportunity for reasoned reflection.

- [74] It could also be said that the statement that the Somalis were captors and the Pakistanis were captives is only an assumption with no evidence to support it. With respect, this cannot be true because the evidence shows that there were two groups of people on the “Burhan Noor”, the Somalis who did not speak English, and the Pakistanis. The Pakistani person who spoke with “Sachsen” in English, was obviously frightened of the Somali people. He was constantly repeating “*They will kill you ... They will kill us*”. In this regard, it is already clear that the Pakistanis were the captives and the Somalis were the captors.
- [75] It could perhaps also be said that the fact that the VHF conversations indicate that the Burhan Noor was under the control of the accused persons and that when the first warning shots were fired they chose to ignore it and carried on trying to escape to Somalia is not borne out by the evidence. It is true that there is no direct evidence as to who was piloting the ship at this time and if a Pakistani was in reality under threat. Our answer to the statement is borne out by the following piece of evidence “*one Somali people is telling me. No stop your boat. You will stop your boat, we kill you*”. In our considered opinion, this statement indicates that at that point in time the Somalis were in control of the boat and the Pakistanis were held hostages on the hijacked vessel.
- [76] Regarding the evidence that the Appellants stated that their skiffs contained 60 litres of petrol, two jerry cans of drinking water, etc. and that they admitted carrying weapons because they were to accompany a boat carrying fish in an area of the sea where robberies are rampant. Our answer will be this:- This could be one version. However, in analysing the evidence in its entirety, we do not believe that the Appellants’ version was credible. The version was not supported by evidence. The credible version was that this equipment was needed to commit the unlawful act of piracy. In fact, if their story was anything to go by, it is difficult to imagine and believe that they would go all out to sea to rescue the alleged Iranian

ship with a RPG which we believe is a military equipment usually used for warfare!

[77] It could also be said that admissibility of *res gestae* evidence has to be viewed against the backdrop of Article 19(2) (e) of the Constitution. Indeed, one of the Appellants is on record as having said “*I would ask the Seychelles Government to look for the Burhan Noor vessel and ask them if we forced it to divert to Somalia*”. However, in the circumstances of this case it is common ground that the prosecution did everything in their power to bring the witnesses to Seychelles to testify but to no success. At any rate, with or without the evidence of Bashir Ahmed, the prosecution case was established through other aspects of the evidence as already alluded to.

[78] Finally, we are satisfied that, the evidence taken as a whole proved the prosecution case against the 1st, 2nd, 3rd, 5th and 6th Appellants beyond reasonable doubt. Hence, there is nothing to fault the convictions entered against them by the Supreme Court.

[79] The learned Counsel for Appellants 1, 2, 3, 5 and 6 asserts that the learned Judge erred in convicting/sentencing them on two counts of the same offence in the same alleged transaction. There is merit in this ground because a close look at section 65 will show that sections 65(4) (a) and (b) are different acts but they fall within the same offence, being piracy. Indeed in analysing the prosecution evidence on count 1, namely *res gestae* and circumstantial evidence, there is no doubt that the Appellants in this case who were aboard the Burhan Noor (BN) had taken control over the said ship by violent means and by use of weapons and were detaining the Pakistani crew of the BN and were using BN. As for count 2 it is hard to prove however that each voluntarily participated in the operation of the ship with knowledge of facts making it a pirate ship.

- [80] Having said so, it therefore seems to us that the sentence of 12 years in the second count is redundant; so it is hereby set aside and the order for it to run consecutively with the sentence of 12 years in the first count is also vacated.
- [81] After setting aside the sentence of 12 years in the second count, the issue is whether the sentence of 12 years in the first count is manifestly excessive .
- [82] In Seychelles, the law on sentencing is settled. Beginning with **Dingwall v R, Criminal Appeal No.4 of 1966**, to date, the principle has always been that a court of criminal appeal does not alter a sentence on the mere ground that if the members of the court had been trying the Appellant they might have passed a somewhat different sentence. The sentence must be manifestly excessive in view of the circumstances of the case or be wrong in principle before the court will interfere. The Appellate Court will only alter a sentence imposed by the trial

court if it is evident that it has acted on a wrong principle or overlooked some material factor or if the sentence is manifestly excessive in view of the circumstances of the case.

- [83] Regarding the length of sentences in piracy cases this is no doubt a “virgin land”, or a “test case” for that matter, insofar as the Court of Appeal of Seychelles is concerned. We say so because most of the case law on this subject is that of the Supreme Court. For instance:-

In the case of **R Mohamed Dahir and Ten others** (Supreme Court of Seychelles) Criminal No.51 of 2009 (**Topaz** case) where 11 accused unsuccessfully attacked and fired weapons at the ‘**Topaz**’, a Seychelles coast guard ship, and caused

neither injury to the crew nor damage to the vessel, each accused was sentenced to ten (10) years in prison

In **R v Abdi Ali and others** (Supreme Court of Seychelles) (2010) SLR 341 (*Intertuna II* case) where 11 accused attempted to seize a ship '**Intertuna II**' and were twice repulsed, the court sentenced each of the accused persons to 22 years in prison. No substantial explanation was provided by Burhan J for departing so significantly from the sentence given in the previous case of **Dahir**, but **Abdi Ali** was to establish sentencing precedent in the piracy cases that followed.

Both **R v Mohamed Dahir & Ors** and **R v Abdi Ali & Ors** were appealed to the Court of Appeal but the Appellants withdrew their cases close to the hearing and were repatriated to Somalia to serve their sentences. Their convictions remained untested in the court of final resort in Seychelles.

In **R v Mohamed Aweys Sayid & Eight Others** (Supreme Court of Seychelles) Criminal Side No.19 of 2010 (*Galate case*) which involved attacks on three different vessels during the same transaction, a sentence of 11 years was imposed on each accused on counts I and II with an order that they run consecutively. The ten years imposed on count III were to run concurrently with 22 years. Sayid was successfully appealed to the Court of Appeal **by one** of the nine convicts on a very specific ground. The Court of Appeal overturned the Appellant's conviction. The sole Appellant was a child of 16 years at the time of the offence and his rights under the Constitution and Children Act 1982 had been breached.

In **Nur Mohamed Aden & 9 Others** (Supreme Court of Seychelles) Criminal Side No.75 of 2010 (the **Faith** case), the accused seized and detained for four days a vessel operated by 7 Seychellois fishermen (whom they roughed up), before the vessel was intercepted by the Seychelles Coast Guard on its way to Somalia. A sentence of 20 years and 10 years to run concurrently was imposed on each of the accused. There was no appeal.

[84] Considering the principles laid out in **Dingwall** (*supra*) and subsequent Seychelles cases on the subject, the seriousness of the offence of piracy, and the general sentencing pattern of the Supreme Court of Seychelles in piracy cases, a pattern we consider to be fairly reasonable, we are of the view that the sentence of 12 years imprisonment meted in the first count is not manifestly excessive. In this regard, there is no justification for us to interfere with the said sentence.

[85] When all is said and done, we allow the fourth Appellant's appeal. The said Mohamed Ahmed Abdullahi's conviction is accordingly quashed and sentence(s) set aside. He will be released from prison unless held on a lawful cause and repatriated to Somalia.

[86] The appeal against conviction by the 1st, 2nd, 3rd, 5th and 6th Appellants is dismissed. Their appeal against sentence is partly allowed in the sense that they will each continue serving only the 12-year term of imprisonment meted in the

first count. However, as happened in **R v Mohamed Dahir and others** and **R v Abdi Ali and others** (*supra*), they may be repatriated to Somalia to continue serving their sentences.

J. Msoffe (J.A)

I concur:

M. Twomey (J.A)

Signed, dated and delivered at Palais de Justice, Ile du Port on 28 August 2015

DISSENTING JUDGMENT

A. Fernando (J.A)

- 1) The Appellants appeal against their conviction on two counts of piracy and the sentence imposed on such conviction by the Supreme Court.
- 2) The Appellants were charged as follows:

Count 1

Statement of Offence

Piracy contrary to section 65(1) of the Penal Code read with section 23 of the Penal Code and punishable under section 65 of the Penal Code.

Particulars of offence

Abdira Nur ROBLE, Abdullahi Sharif IBRAHIM, Mohamed Jama ALI, Mohamed Ahmed ABDULLALI, Mohamed Abdugaadir MOHAMED and Sahal Arten BARE between 10th August and 14th August 2012 on the high seas with common intention committed an act of piracy with violence or detention committed for private ends against persons on board another vessel namely BURHAN NOOR by unlawfully taking control of the said vessel whilst armed with fire arms.

Count 2

Statement of Offence

Piracy contrary to section 65(4) (b) of the Penal Code read with section 23 of the Penal Code and punishable under section 65 of the Penal Code.

Particulars of offence

Abdira Nur ROBLE, Abdullahi Sharif IBRAHIM, Mohamed Jama ALI, Mohamed Ahmed ABDULLALI, Mohamed Abdugaadir MOHAMED and Sahal Arten BARE between 10th August and 14th August 2012 on the high seas with common intention committed an act of piracy namely voluntary participation in the operation of a ship namely the BURHAN NOOR with knowledge of facts making it a pirate ship.

- 3) The Appellants had filed the following grounds of appeal:

- I. The decision of the Judge that the Appellants were all guilty cannot be supported by the evidence.
- II. The Judge erred in relying heavily on purported statements of the Appellants which were only admitted as items and not exhibits.
- III. The Judge erred in allowing the prosecution of the 4th Appellant, a minor.
- IV. The Judge erred in making the 2 sentences run consecutively rather than concurrently.
- V. The total sentence of 24 years for all the Appellants and the total sentence of 12 years for the 6th appellant (a minor) is manifestly harsh in all the circumstances of the case.

4) The law relating to piracy is set out in section 65 of the Penal Code as follows:

“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) Any person who attempts or conspires to commit, or incites, aids and abets, counsels or procures the commission of, an offence contrary to section 65(1) within Seychelles or elsewhere commits an offence and shall be liable to imprisonment for 30 years and a fine of R1 million.

(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) *any act described in paragraph (a) or (b) which, except for the fact that it was committed within a maritime zone of Seychelles, would have been an act of piracy under either of those paragraphs.*

(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).*

(6) *A ship or aircraft may retain its nationality although it has become a pirate ship or a pirate aircraft. The retention or loss of nationality shall be determined by the law of the State from which such nationality was derived.*

(7) *Members of the Police and Defence Forces of Seychelles shall on the high seas, or may in any other place outside the jurisdiction of any State, seize a pirate ship or a pirate aircraft, or a ship or an aircraft taken by piracy and in the control of pirates, and arrest the persons and seize the property on board. The Seychelles Court shall hear and determine the case against such persons and order the action to be taken as regards the ships, aircraft or property seized, accordingly to the law.”*

- 5) According to section 65 of the Penal Code as set out at paragraph 4 above the courts of Seychelles have jurisdiction to try an offence of piracy whether the offence is committed within the territory of Seychelles or outside the territory of Seychelles. The words ‘outside the territory of Seychelles’ as per the provisions in section 65 (4) and 65 (7) of the Penal Code necessarily means, ‘on the high seas or in a place outside the jurisdiction of any State’.

- 6) The issue of jurisdiction arises in this case as there is no clear evidence as to where the Appellants “committed an act of piracy with violence or detention for private ends against persons on board another vessel namely Burhan Noor or voluntarily participated in the operation of a pirate ship” as set out in counts 1 & 2 of the indictment. Was it on the high seas or the territorial waters of Somalia? The Prosecuting Counsel had raised this issue in his closing submission when he said: “To conclude, the only point I haven’t address in this submission is the high seas aspects, the pursuit and detention of its crew continued from close to the coast of Yemen across through the high seas and re entering territorial waters when it entered the territorial waters of Somalia. And the offence being a continued offence were ever it started or finished provided as it was performed and some part on the high seas is sufficient.”(verbatim but emphasis added by us) This is a clear indication that the Prosecutor was unsure as to where the alleged act of piracy had occurred and was relying in relation to ‘jurisdiction of the court’, on some part of the piratical activity occurring on the high seas and thus very much conscious of the jurisdictional issue. However, the evidence pertaining to an illegal act of detention or violence against the ‘Burhan Noor’ or its crew, which has been presented to court, was only that of, what was witnessed by the Danish and German naval officers on the 13th of August 2012 inside the territorial waters of Seychelles, as stated below. There was no evidence that some part of the offence was committed on the high seas. This raises the issue, if the Appellants had committed the act of piracy in the territorial waters of Somalia by illegally detaining the crew of ‘Burhan Noor’, would it amount to an act of piracy under section 65 of the Penal Code.
- 7) It is to be noted that the present section 65 of the Penal Code was brought in by way of the Penal Code (Amendment) Act 2 of 2010 which came into effect on the 19th of March 2010 after repeal of the earlier section and as an exception to section 6 and 7 of the Penal Code which only provides the Seychelles courts, a territorial jurisdiction.
- 8) Section 6 of the Penal Code specifies that “*The Jurisdiction of the courts of Seychelles for the purpose of the Penal Code extends to every place within Seychelles.*” By way of qualification to the territorial application of the Penal Code, it is stated at section 7 that: “*When an act which, if wholly done within the jurisdiction of the court, would be an offence against this Code, is done partly within and partly beyond the jurisdiction, every person who within the jurisdiction does or makes any part of such act may be tried and punished under this Code in the same manner as if such act had been done wholly within the jurisdiction.*” Thus in respect of acts declared as offences under the Penal Code and committed partly within and partly beyond the jurisdiction of Seychelles, it is only those persons who within Seychelles does or makes any part of such act, who may be tried and punished under the Penal Code in the same manner as if such act had been done wholly within the Seychelles.

- 9) The 2010 amendment was made to give jurisdiction to our courts to try piracy cases committed outside the territory of Seychelles, namely on the high seas or in a place outside the jurisdiction of any State, since under our legal system as it existed prior to the 2010 amendment, it was considered not possible to apply the international law of piracy and the concept of universal jurisdiction in the Seychelles courts automatically, without having them incorporated into national law. However the 2010 amendment did not grant jurisdiction to our courts to try cases of piracy that have been committed within the territorial waters of another state. Commenting on the 2010 amendment the Supreme Court stated in **The Republic VS Nur Mohamed Aden & nine others (SC CR. SIDE NO 75 of 2010)** that “This court has jurisdiction to try any piracy crime committed on the high seas...or anywhere else, but outside the jurisdiction of any other state.”
- 10) In connection with the relationship of its national law with international law, Seychelles has always applied a dualist system in preference to a monist system. According to the dualist doctrine, international law and the internal law of states are totally separate legal systems. Being separate systems, international law would not as such form part of the internal law of a state, but to the extent that in particular instances rules of international law may apply within a state and they do so by virtue of their adoption by the internal law of the state, and apply as part of the internal law and not as international law. Thus it is the translation of international law into national law which makes it part of national law. The monist doctrine postulates that the two systems of law are part of one legal structure, the various national systems of law being derived by way of delegation from the international legal system. Since international law can thus be seen as essentially part of the same legal order as municipal law, and as superior to it, it can be regarded as incorporated in municipal law, giving rise to no difficulty of principle in its application as international law within states. The act of ratifying an international treaty immediately incorporates the law into national law and there is no need to have it translated into national law.
- 11) In regard to application of treaties, agreements or conventions in respect of international relations, the **Constitution of Seychelles in article 64** provides: 64(3) “*The President may execute or cause to be executed treaties, agreements or conventions in the name of the Republic*”.
- 64(4)** “*A treaty, agreement or convention in respect of international relations which is to be executed by or under the authority of the President shall not bind the Republic unless it is ratified by –*

(a) *An Act; or*

(b) *A resolution passed by the votes of a majority of the members of the National Assembly*".(emphasis added)

Article **64(5)** of the Constitution also provides:

“Clause (4) shall not apply where a written law confers upon the President the authority to execute or authorize the execution of any treaty, agreement or convention.”

In view of article 64(5) it is possible to argue that where article 64(5) applies, translation of the treaty to national law does not arise and the act of ratifying the treaty in the international plane, immediately incorporates the treaty into national law. This is somewhat similar to the position under the Constitution of the United States of America. However since the promulgation of the Constitution in June 1993 there has not been a single instance where article 64(5) has been made use of, thus showing a reluctance on the part of government to put into practice a monist doctrine in the relationship of our national law with international law.

12) Article 64(5) which may be interpreted to give recognition to the monist doctrine has to be understood in terms of article 1 and the Preamble of the Constitution. **Article 1** states: *“Seychelles is a sovereign democratic Republic”*. In the **Preamble to the Constitution**, *the people of Seychelles have solemnly declared their unswaying commitment to safeguard the sovereignty and territorial integrity of Seychelles and have adopted and conferred upon themselves the Constitution as the fundamental and supreme law of their sovereign and democratic Republic*. **Article 5** of the Constitution has also a bearing on the understanding of article 64(5). Article 5 states: *“This Constitution is the supreme law of Seychelles and any other law found to be inconsistent with this Constitution is, to the extent of the inconsistency, void.”*

13) I am conscious of the fact that in order to deal with Somali pirates who took advantage of their geographical location to attack ships in the Gulf of Aden and speedily retreat to Somali territorial waters the United Nations Security Council passed several resolutions which authorized patrolling nations operating in the Gulf of Aden to enter Somali territorial waters and even enter Somali land to chase and capture pirates after having encountered them in the high seas. The resolutions did not modify existing customary rules of international law but only applied to Somalia. (S.C. Resolutions 1816, 1818, 1838, 1844, 1846, 1851, 1897, 1918, 1950, 1976, 2015, 2020 and 2125 during the period 2nd June 2008 to 18th November 2013). There has not been any ratification of these resolutions by the National Assembly. There is no evidence in this case that the original encounter occurred in the high seas. In fact the evidence suggests that the first encounter with ‘Burhan Noor’ was inside the territorial waters of Somalia.

- 14) However the ‘jurisdiction of the courts’ is a matter to be specifically legislated upon by the internal law of each State. It needs to prescribe the extent to which, and manner in which, the State in fact asserts its jurisdiction. This is more so because in connection with the relationship of its national law with international law, Seychelles has always applied a dualist system as stated earlier. This is why the Penal Code (Amendment) Act 2 of 2010 was brought in to give jurisdiction to the Seychelles courts to try offences of piracy on the high seas or in a place outside the jurisdiction of any State. In England the power to try cases of piracy committed on the high seas was granted to the English courts by the Offences at Sea Act, 1536. The Criminal Procedure Code and the Merchant Shipping Act of Kenya has expressly granted jurisdiction to Kenyan courts to try cases of piracy committed on the high seas. The 1978 Judicature Act of Sri Lanka has granted the High Court to try any offence committed by any person on the high seas where such offence is piracy by the law of nations. There would have been no need in these countries to specifically grant jurisdiction to their courts by domestic legislation if piracy on the high seas was an offence which could have been dealt with by the courts of those countries on the basis of universal jurisdiction. The issue in this case is can the Seychelles courts assume a jurisdiction which has not been granted to it by its domestic law, merely based on UN Resolutions? I am of the view that the Seychelles courts cannot make use of article 48(a) of the Constitution which states “*This Chapter (i.e. Chapter III which contains the Seychellois Charter of Fundamental Human Rights and Freedoms) shall be interpreted in such a way so as not to be inconsistent with any international obligations of Seychelles relating to human rights and freedoms and a court shall, when interpreting the provisions of this Chapter, take judicial notice of the international instruments containing these obligations.*”; to assume a jurisdiction. This is simply because this is not a case involving the interpretation of chapter III, but one of jurisdiction of the courts. Had it been the intention of the Legislature to grant our courts jurisdiction to try cases of piracy committed within the territorial waters of Somalia, they would have so provided for it, in the Penal Code (Amendment Act) 2 of 2010 or the Penal Code (Amendment Act) 5 of 2011, which were enacted after these UN Security Council resolutions had come into effect. To assume jurisdiction to try cases committed within the territorial waters of Somalia by placing reliance on the UN Security Council resolutions may be contrary to articles 1,5, 64(4), and the Preamble of the Constitution and the very clear provisions of section 65(4) and 65(7) of the Penal Code.
- 15) It is unfortunate that the jurisdictional issue has not been determined by or properly argued before the Trial Court nor was it raised by the Appellants before us. I have therefore decided not to make a final determination on the matter leaving it to be decided on a future case. I decided to make reference to it as we are presently at a stage of developing our jurisprudence on the law of Piracy. I have therefore decided to determine this appeal on the basis of the other issues raised.

16) The ‘Statements of offences’ in both counts 1 & 2, referred to at paragraph 2 above, make reference to offences committed under section 65 of the Penal Code and does not make reference to any UN resolutions. As stated earlier section 65 makes reference to offences committed on the high seas or in a place outside the jurisdiction of any state and not offences committed within the territorial waters of Somalia. Further the ‘Particulars of Offences’ in both counts 1 & 2, referred to at paragraph 2 above, make reference to offences committed on the high seas and not in the territorial waters of Somalia. Thus even if the UN Resolutions can be said to be applicable, the Appellants have been convicted of an offence of which, they were not properly charged. In **R V Wallwork, 42 Cr. App. R. 153, CCA** it was held that there is no necessity to identify in the indictment the place where an offence is alleged to have taken place unless it is material to the charge. **Lord Goddard CJ in R V Wallwork** in explaining this went on to state: “There are cases.....in which it is necessary to indicate a particular place in the indictment, and an illustration [is] the offence of larceny on a ship which was at the time of larceny in a harbour or in a creek or other place of anchorage.....where it would be necessary to show that the theft took place while the ship was in a harbour or some particular creek, and then it would be necessary to mention the name of the harbour or creek.....”.**Blackstone’s Criminal Practice 2010, D11.38**, in reference to Lord Goddard’s statement above states: “The example given in the above passage of instances where the place of offence should be particularized may be anachronistic, but current examples of the same requirement are burglary and dangerous driving. Counts to the former should state the building entered as a trespasser and counts for the latter the roads or other public places where the driving took place. The reason, in both cases, is that, having regard to the definition of offences, the place where the prohibited conduct occurred is an essential ingredient of the crime.” Section 65 makes reference to offences committed only on the high seas or in a place outside the jurisdiction of any state and thus in my view the place of offence is an essential ingredient of the offence of piracy under section 65 of the Penal Code. **Article 19(2) (b) of the Constitution** states: “Every person who is charged with an offence shall be informed at the time the person is charged or as soon as is reasonably practicable, a language that the person understands and in detail, of the nature of the offence.” **Section 114 (f) of the Criminal Procedure Code** states that “it shall be sufficient to describe any place,.....which it is necessary to refer in any charge or information in ordinary language, in such a manner as to indicate with reasonable clearness the place,....referred to.” I am of the view that the failure to correctly state the place of offence i.e. even if the UN Resolutions were applicable, as ‘within the territorial waters of Somalia’, was a fatal irregularity that could not be cured under section 344 of the Criminal Procedure Code or under the proviso to rule 31 of the Seychelles Court of Appeal Rules 2005.

- 17) The facts in brief as presented by the prosecution before the Supreme Court are set out herein. The Commander of the German Frigate 'Sachsen', Andreas Krug, testifying before the Court had stated that on the 11th of August 2012 they received information from the French vessel "La Faillette" that was conducting piracy operations in the coast of Africa, *"that they went on board another dhow which was named Alsabrie and that the crew of the said dhow reported just before the French boarded team went on board a group of 6 pirates who had left the dhow named 'Alsabrie' and changed to another dhow named the Burhan Noor"*. There is no evidence before the Court as to why the French authorities termed the group of 6 as pirates, as no one from 'La Faillette' or 'Alsabrie' had testified before the Court. With the information received from 'La Faillette'; 'Sachsen' had started looking for 'Burhan Noor' and were successful in locating it on the morning of the 13th of August. On approaching the 'Burhan Noor', there had been a bridge to bridge conversation between the 'Sachsen' and 'Burhan Noor', where at such conversation it was reported, that if the crew of 'Sachsen' were to board the 'Burhan Noor' the crew of 'Burhan Noor', who were said to be Pakistanis, will be killed by the armed Somalis on board the 'Burhan Noor', and that they will also open fire at the 'Sachsen'. 'Sachsen' had continued to follow 'Burhan Noor' which was heading towards Bossaso in Somalia after informing the Danish vessel 'Rotterdam' to block 'Burhan Noor' from the side of the coast of Somalia as their requests for 'Burhan Noor', to stop and permit 'Sachsen' to board 'Burhan Noor' had proved futile. However at no time had 'Burhan Noor' fired at the 'Sachsen' during this pursuit.
- 18) Roy Razundel, the communications officer and officer of the watch on the bridge of 'Sachsen', who was involved with the bridge to bridge communication with the 'Burhan Noor', testifying before the Court had stated that the communication had been recorded on an audio system and later transferred to a smart disc. The smart disc had been produced as Exhibit **P1** and a written transcript of it had been produced as Exhibit **P2**. Razundel could only state that he spoke to someone on board the 'Burhan Noor', but had not been able to say who that person was. This conversation between Razundel and the unidentified person from 'Burhan Noor' had been admitted by the Court as 'Res Gestae' evidence. There is no record of the date and time of the conversation in **P1** or **P2**. There is no specific evidence as to whether this conversation took place within or outside the territorial waters of Somalia, a factor most relevant, in view that both charges allege that the offences were committed on the high seas. This gave rise to the question of jurisdiction which I have dealt with earlier. This is a specific question a prudent prosecutor should necessarily have asked, without leaving it to conjecture. Roy Razundel making reference to the transcript and the audio, had stated that the caller from 'Burhan Noor' had given the name of the ship as 'Burhan Noor' and the name of the master of the ship as Bashir Ahmed. The caller had said that their last port of call was Salalah and the next port of call was Bossaso. As regards

the cargo, he had said it was “*mixed or general cargo including shoes, milk something like that*”. This was the only evidence before the Court as regards the cargo the ‘Burhan Noor’ was carrying, and it cannot be said that this type of cargo is not among the list of usual imports to Somalia. He had said that there are 14 crew members. A perusal of the written transcript (**P2**) shows that the caller from ‘Burhan Noor’, had been repeatedly pleading with ‘Sachsen’ to go away, saying that the six Somalis on board the ‘Burhan Noor’, were threatening to kill them; if ‘Sachsen’ were to approach them. According to the caller the Somalis’ were armed and reference had been made to a RPG in their possession. The caller had said that Razundel’s request to the Somalis to throw away their guns had been turned down. However the conduct of the Somalis, the Appellants in this case, in not putting up any form of resistance against the ‘Sachsen’ and surrendering, is not consistent with the threats they are alleged to have made to the crew of ‘Burhan Noor’ as reflected in **P1 & P2**. Under cross- examination Razundel had said that he does not know whether the caller from ‘Burhan Noor’ was a Pakistani. He had admitted that he had concluded that the Pakistanis were been held as hostages by the Somalis, only because of the threats referred to by the caller. Nowhere in P1 or P2 is stated, that the ‘Burhan Noor’ had been taken over by the Appellants on the high seas by an illegal act of violence, or depredation. Nowhere in P1 or P2 is stated, as to how the Appellants came to be on board the ‘Burhan Noor’. The following questions and answers under cross examination are to be noted.

“Q. At any point during the conversation that you had, did you ask the person what language he was talking with the Somali?”

A. No I did not.

Q. So you have absolutely no idea your personal knowledge as to what language the Pakistani was talking with the Somali?”

A. No.

Q. But Officer what the person is actually saying you cannot say if it is the truth or if he is lying? You can only record and say this is what he is saying but what he is actually saying you cannot see?”

A. That is correct.

Q. And Officer you are recording what is being said but you do not know the motive of the person. Is that correct?”

A. That is also correct.

Q. You can also sense, feel that he is afraid but you cannot say why he is afraid?”

A. That is also correct.

Q. And Officer you cannot say that the person who is talking to you would have an ulterior purpose for making all these statements?”

A. That is also correct.”

- 19) This creates a doubt as to the danger of concoction or distortion. In **R V Andrews (1987) AC 281 Lord Ackner** stated “The primary question which the Judge must ask himself in admitting Res Gestae evidence is: can the possibility of concoction or

distortion be disregarded? To answer that question the Judge must first consider the circumstances in which the particular statement was made, in order to satisfy himself that the event was so unusual or startling or dramatic as to dominate the thoughts of the victim, so that his utterance was an instinctive reaction to that event, thus giving no real opportunity for reasoned reflection.” In **Ratten V R [1972] AC 378** the danger of concoction was the basis for the rejection of the statement. In the absence, at the trial, of the master of the ship ‘Burhan Noor’, Bashir Ahmed or any member of the crew of ‘Burhan Noor’, the possibility by the Pakistanis of concocting the story of them being threatened by the Appellants, in order to escape liability for having been detected in the company of Somalis in an area of the sea where there is piracy activities; cannot be excluded. It cannot be said as stated in the case of **R V Andrews** that “the event was unusual or startling or dramatic as to dominate the thoughts of the victim” as according to the prosecution version the Appellants had taken over the ‘Burhan Noor’ on the 11th of August, and thus long before the bridge to bridge conversation on the 13th of August. It is also difficult to conclude that the utterances during the bridge to bridge conversation was an “instinctive reaction to that event giving no real opportunity for reasoned reflection” as much time had elapsed from the start of the pursuit of ‘Burhan Noor’ by ‘Sachsen’, up to the time the conversation had taken place. The 5th Appellant in his statement to the police in denying the charge of piracy levelled against him had said “*If there is good evidence that the boat was going to Oman but we forced it to go to Somalia, then I would accept that we are pirates and robbers. I would ask the Seychelles Government to look for the Burhan Noor vessel and ask them if we forced it to divert to Somalia.*” Thus the admissibility of the Res Gestae evidence has also to be considered against the backdrop of this challenge thrown at the Government, even before the commencement of the trial and at a time when it was not known to the prosecution or defence that the captain of ‘Burhan Noor’ will not testify at the trial, and the provisions enumerated in article **19(2)(e) of the Constitution** in order to guarantee a fair hearing to the Appellants. Article 19(2)(e) states: “*Every person who is charged with an offence has a right to examine, in person or a legal practitioner, the witnesses called by the prosecution before any court,.....*”.

- 20) On the 18th of March 2013 the Prosecutor had sought an adjournment of the case till the 22nd of March 2013 for the captain of ‘Burhan Noor’, Bashir Ahamed, who was listed as a witness for the prosecution, to travel to the Seychelles to give evidence. It had been his position “*He has been located and he is willing to travel here to give evidence.*” On the 22nd of March 2013 the prosecution had asked for a further adjournment of the case till the 22nd of April 2013 to lead the evidence of Bashir Ahamed. On the 18th of April the prosecutor had informed the trial court in relation to Bashir Ahamed, “*It would appear that he is taking steps to avoid unwilling to attend to give evidence and therefore the prosecution will seek to continue with the case.*” (verbatim) On the 13th of May 2013 the Prosecutor had formally closed his case after having informed the trial Court that Basir

Ahamed “*has clearly displayed a reluctance*” to attend court. In the case of **A-G’s Referene (No 1 of 2003) [2003] 2 Cr App Rep 453** it was held that the court has a discretion to exclude *res gestae* statements,.....if the inability to cross-examine a potentially available witness is likely to render the trial unfair. In **R V Andrews, Lord Ackner** had said that he would strongly deprecate any attempt in criminal prosecutions to use the doctrine as a device to avoid calling the maker of the statement, when available. In **Tobi V Nicholas (1987) 86 Cr App Rep 323** it was stated that a statement is likely to be excluded when a witness is not present owing to the incompetence of the prosecution. The position would have been different if the prosecution had brought evidence to show that they had taken all reasonable steps to secure the attendance of a witness, but he has simply failed to appear. Merely saying that the witness is unwilling or displayed a reluctance to attend, without stating a reason for his reluctance to attend court, in my view does not suffice. It would be totally improper for this Court to attribute any reasons for Bashir Ahamed’s reluctance to attend the trial.

- 21) In the absence of Bashir Ahamed and any of the Pakistani crew on board the ‘Burhan Noor’; Roy Razundel’s testimony as regards the bridge to bridge communication between the ‘Burhan Noor’ and the ‘Rotterdam’, referred to at paragraph 18 above, loses its significance, more so because of the inability of Razundel to identify the caller from ‘Burhan Noor’, his inability to say whether the caller was speaking the truth or whether the caller had an ulterior motive to say what he said, and Razundel’s inability to say as to why the caller was frightened, even if Razundel had sensed it.
- 22) Captain Jan-Hubert Hulsker of the ‘Rotterdam’ had stated that on receiving information from the German frigate ‘Sachsen’ they had positioned themselves from the side of the Somali coast to block ‘Burhan Noor’ that was coming towards the coast pursued by ‘Sachsen’, by launching 4 landing crafts, 4 fast boats and their helicopter ‘Wildcat’. As ‘Burhan Noor’ approached, Hulsker had ordered them to surrender and since they were not cooperating two warning shots had been fired. He had seen a person on board the ‘Burhan Noor’ with a RPG. There was no gun fire from ‘Burhan Noor’. With the firing of the warning shots, the ‘Burhan Noor’ had come to a halt and the Somalis as ordered had come to the front of ‘Burhan Noor’, lied on the floor and put their hands up in the air. The boarding team from ‘Rotterdam’ had then climbed on to the ‘Burhan Noor’. After the Appellants had been brought on to the ‘Rotterdam’ and the evidence was collected, the Pakistani crew on board the ‘Burhan Noor’ was allowed to continue on their voyage. Hulsker had said that the Pakistani crew appeared to be relieved as result of the boarding of ‘Burhan Noor’ by ‘Rotterdam’. There is no evidence in this case as to where the ‘Burhan Noor’ finally proceeded, whether towards Bossaso or otherwise, when they were allowed to continue with their voyage. Hulsker had however stated under cross-examination that he was 100% sure that ‘Burhan Noor’ was going to

Bossaso. According to Hulsker, the Appellants on orders from the Prosecutor in the Netherlands were taken to Seychelles for trial.

- 23) Rob van den Heuvel Mist, Head of the boarding team in “Rotterdam had stated that he had boarded the ‘Burhan Noor’ to collect evidence. There were two skiffs on the deck of ‘Burhan Noor’, one belonging to the Somalis and the other to the ‘Burhahan Noor’. The one belonging to the Somalis was cracked and damaged and not sea worthy the other which appeared to be in working order had a Yamaha outboard engine fitted onto it, but there had been no gassing container attached to it. He had found at the bottom of one of the skiffs wrapped in cloth, 40, 7.62 caliber ammunition used in AK 47 guns and a RPG rocket missile. Since it was thought that it was dangerous to carry them, they had been dropped into the water after photographing them. The Yamaha outboard engine had been taken on board the ‘Rotterdam’ and had been produced at the trial. A GPS, a few mobile phones and knives seized from ‘Burhan Noor’ had also been produced at the trial.
- 24) SN 0225911 EBE, Team Leader of the Rotterdam and the first party to board the ‘Burhan Noor’ had said that when they were about 15 meters from the boat the Pakistani crew “had their hands in the sky and were shouting for help”. When boarding the ‘Burhan Noor’ they helped them to board by pulling the ladder up. As regards the six Appellants, they have had their “hands in the air” and on being ordered to lie on the ground they had cooperated and complied and had not caused any problems. He had not seen any weapons in their hands. The witness had said that the Appellants after their arrest had been handcuffed and blindfolded as per usual procedures. He had also said that they had found a RPG, ammunition and a knife inside a skiff. Under cross examination the witness had said on approaching the ‘Burhan Noor’, the Appellants had not fired at them or offered any resistance.
- 25) MJS Huisman, Commanding Officer of the Landing Crafts of the Rotterdam, had said that when he was about 500-600 meters from the ‘Burhan Noor’ he saw weapons in the hands of three of the Appellants, one had an AK 47 in the hand, another had an AK 47 on his back and the third person had a RPG. He had said as the Rotterdam approached the ‘Burhan Noor’ he had seen ‘somebody’ throwing an AK 47 type weapon overboard, but cannot identify who he was. It is surprising that after having been able to identify the weapons in the hands of the Appellants at a distance of about 500-600 meters, Huisman was unable to identify whether the AK 47 type of weapon was thrown by one of the Appellants and that at a very much closer distance than 500-600 meters.
- 26) Frank Vannus, a member of the Search Team from ‘Rotterdam’ has testified to having seen two skiffs on board the ‘Burhan Noor’ and in one of them found some clothing, ammunitions and a knife. One of the skiffs was in a “*very bad condition.*” The engine on

the skiff belonging to the 'Burhan Noor' had been removed and taken on board the 'Rotterdam'.

- 27) Exhibit **P 3** shows that a yamaha 60HP outboard engine, 1 Garmin GPS 72H, 1 satellite phone and battery, 2 telephones and phone batteries, 3 knives, some clothing and medicine and 4,000 Somali shillings, recovered from the 'Burhan Noor', in the two skiffs found therein, had been produced before the trial court as part of the prosecution case. There is no mention by any witness of ladders, the usual paraphernalia found on pirate boats, having been found or seen on the 'Burhan Noor' or been thrown into the sea.
- 28) The Prosecution had led the evidence of Robert Wijnbergen from the Military Police of the Netherlands who interviewed the Appellants and recorded their testimony in question and answer form. He was assisted in these interviews by Musse Kadir who did the translations of the questions from Dutch to the language spoken by the Appellants and the alleged answers of the Appellants to those questions from the language spoken by the Appellants to Dutch. We do not know in what Somali language the translator had spoken to the Appellants. Wijnbergen had admitted under cross examination that he cannot testify as to the correctness of the translations. The Learned trial Judge had noted in relation to the Translator, Musse Kadir *"I will put a note that he is one of the witnesses, I do not know whether he will be coming in but he can speak for himself. So I will take what he says with caution."* We see from the proceedings that witness No. 13, Musse Kadir had not testified at the trial and the reason given by the Prosecutor is that *"The Dutch Authorities are refusing to release him for security reasons"*. At the trial in regard to the contents of the interviews had with the Appellants by Wijnbergen the Learned Trial Judge had noted *"And there are 6 statements, so we are going to take the voire dire."* After hearing the arguments of both Counsel, the Learned Trial Judge, as regards to the admissibility of the statements, had made a Ruling dated 15th March 2013, disallowing a Voire Dire. In that Ruling he had said *"In the circumstances, a Voire Dire to determine the voluntariness of the statements recorded on the Rotterdam under Netherland's laws by a Seychelles Court is not appropriate. In the circumstances, I determine that the documents detailing the interviews made by the crew of Netherland's ship Rotterdam, prior to the arrest of the Accused persons to be admissible solely for the purpose of proving that the Accused persons were interviewed and a record of each interview were made by the crew of the ship"*. Wijnbergen had admitted that he did not inform the Appellants that they have a right to choose a lawyer of their own choice from the Seychelles prior to recording the statements of the Appellants. This is in violation of **article 18(3) of the Constitution** which states that a person who is arrested or detained has a right to be informed at the time of the arrest or detention or as soon as is reasonably practicable thereafter in, as far as is practicable, a language that the person understands of the reason for the arrest or detention, among other matters of the right to

be defended by a legal practitioner of the person's choice. He had not given any reasons to conclude that this was not practicable. Wijnbergen had failed to answer the question put to him in cross examination, namely: "*It is noticeable in the statements you took you did not venture into the relationship between the pirates and the Pakistanis on board the Burhan Noor is there a specific reason for that?*"; by stating, "*I based it upon the statement of the captain of the dhow.*"

- 29) In the light of the evidence stated, and the Ruling referred to in paragraph 28 above and the absence of a Voire Dire, I fail to understand how the Learned Trial Judge had made use of the statements made by the Appellants to the Dutch interviewers to the effect:

"I have carefully studied the statements made by all the accused persons to the Dutch interviewers and to the Seychelles police before they were formally charged. Clearly when comparing the statements, the accused persons made previous consistent statements whereby they admitted that they were engaged in piracy activities and that their mission was to capture a dhow for use as a mother ship. They were armed and supplied for the mission by one Bashir and they were expecting considerable rewards for the successful execution of the mission. These admissions were not made in anticipation of their trial to be held in Seychelles. I have no reason to believe that such admissions on the part of the accused persons were not made freely, without any fear of being prosecuted in Seychelles and therefore were truthful statements made to the Dutch interviewers on the Dutch vessel Rotterdam. These statements were also made shortly after they were apprehended and without having had the opportunity to discuss amongst themselves and agree to a common version of events that would have absolved them of the offences charged."

- 30) It is clear that the Learned Trial Judge had relied on these statements to convict the Appellants. Reliance on these statements by the Trial Judge in convicting the Appellants, in my view was a fatal irregularity. I am unable to comprehend whether the Learned Trial Judge would have convicted the Appellants had he not placed reliance on these statements.

- 31) The statements made by the Appellants to the Seychelles Police authorities have been admitted in accordance with section 129 of the Criminal Procedure Code of Seychelles without objection from the defence and had thus become an integral part of the prosecution case. In presenting these statements without qualification and challenge, as part of their case, the prosecution had placed reliance on them. The defence then in my view is entitled make use of other items of the prosecution evidence to corroborate their statements to the Seychelles Police authorities in order to prove their innocence. If the statements made to the Dutch authorities were admissible or if there were another set of statements made by the Appellants to the Seychelles Police authorities which were in direct contradiction with the statements that were admitted under section 129, or if the statements made to the Seychelles Police authorities have been clearly shown to be lies

by other prosecution evidence, then the prosecution would have been entitled to rely on the statements as lies uttered by the Appellants on the basis of the criteria laid down in the case of R V Lucas, (1981) Q B 720, to prove their case. But this was not the case.

- 32) A summary of the statements of the six Appellants is to the effect that they had all been recruited by a person to go to sea to escort an Iranian fishing vessel owned by a Somalian person and bring it ashore to Somalia, because of robberies at sea. The person according to the 3rd and 6th Appellants owned several fishing boats in Oman, Iran and Yemen. They had travelled in a small skiff named 'Leila'. They had a satellite phone, a GPS device, fuel, food and drinking water. They also had with them 3 AK 47 rifles and an RPG. After five days out at sea the skiff developed engine problems and had drifted away until they came across a Somalian boat carrying goats from Somalia to Oman. They had requested assistance and had been given food and water. The captain of the said Somalian boat had also told them that there was a Pakistani boat coming from Iran which was going to Bossaso in Somalia, and that they could travel in that boat. The Appellants' reference to the two boats finds corroboration in the information given to 'Rotterdam' on the 11th of August 2012 by the French vessel "La Faillette" that was conducting piracy operations in the coast of Africa to the effect that a "*..... group of 6 pirates who had left the dhow named 'Alsabrie' and changed to another dhow named the Burhan Noor*" as referred to at paragraph 17 above. The Appellants had not seen the boat they set out to escort back to Somalia. They had thereafter boarded the Pakistani boat 'Burhan Noor' and their skiff had been pulled up by a forklift with the help of the Pakistani crew. There is corroboration of this fact that the Somalian skiff had been found, badly damaged and unseaworthy, on board the 'Burhan Noor', from the evidence of Rob van den Heuvel Mist and Frank Vannus as referred at paragraphs 23 and 26 above. After sometime they had been accosted by two German and Dutch warships about one mile from Bossaso, which had asked them to surrender. They had asked the Pakistani captain of the boat whether the Appellants were "Al Shabab or pirates". It appears that for the German and Dutch authorities the distinguishing features between the two groups found on 'Burhan Noor' in an area of the sea where piracy was rampant, was sufficient to conclude that the Appellants were Al Shabab or pirates. According to the Appellants' statements, they surrendered and their weapons had been thrown into the water by the Pakistani captain, who was afraid. At paragraph 25 above reference is made to the fact that MJS Huisman was unable to identify as to who threw the AK 47 type weapon overboard. They had been detained, blindfolded and hands tied from the back and had been forced to give a statement to the authorities on board the Danish ship. They had denied the allegation that the Pakistani vessel that they boarded was on its way to Oman and that they had forced the boat to divert to Somalia. They had said that 'Burhan Noor' was in fact going to Somalia. This part of their statements finds corroboration in **P2** where the caller from 'Burhan Noor' had told Razundel that that their "*next port of call was Bossaso*" and also Hulkser's evidence under cross-

examination that he was 100% sure that ‘Burhan Noor’ was going to Bossaso. The Appellants had denied that they fired on the ‘Burhan Noor’ for it is a vessel well known in Puntland. They had denied that they are pirates. The 5th Appellant had said that he “*would ask the Seychelles Government to look for the ‘Burhan Noor’ vessel and ask them if we forced it to divert to Somalia*”. It is to be noted that all 6 Appellants had been questioned, by the Seychelles police on the basis of a suspicion of having committed an act of piracy on the 11th of August 2012. But all the evidence led by the prosecution at the trial, only disclose an incident that occurred on the 13th of August 2012.

- 33) The Appellants have raised an interesting point in their Amended Heads of Argument, namely that “*the Learned Trial Judge erred by convicting/sentencing the Appellants on two counts of the same offence in the same alleged transaction*”. In my view the same act cannot constitute 2 separate offences of piracy both under sections 65(4)(a) and 65(4)(b). Section 65(4)(b) is there to criminalize the acts of accessories after and before an act of piracy as defined in section 65(4)(a), is committed. I am in agreement with the submission on behalf of the Appellants that section 65(4) “*traces different stages of the transaction of which any stage, on its own, would constitute the offence of piracy*”. In this case the Prosecutor has, according to his final submission, sought a conviction of the Appellants under count 1 for committing “an illegal act of detention or violence against the ‘Burhan Noor’ or its crew”. The evidence pertaining to an illegal act, namely, detention that has been presented to court was only that of, what was witnessed by the Danish and German naval officers on the 13th of August 2012. In the words of the Prosecutor “*The Burhan Noor at the time was being used during the time of interception, pursuit and boarding to keep captive under arm guard people not native to the same part of the world as the accused*” and “*Your Lordship heard evidence of radio telephone conversation between the bridge of Burhan Noor and both the Sachsen and the Rotterdam from which it was clear that the Somalis clearly threatened the Pakistanis.....*” and further “*they were detained at gun point*”.(emphasis added)
- 34) In the absence of the testimony of any member of the Pakistani crew of ‘Burhan Noor’, as to what happened when the Appellants first boarded the ‘Burhan Noor’, the only evidence presented before the Trial Court, has been to establish, if at all proof of an illegal act of detention against the ‘Burhan Noor’ or its crew on the 13th of August 2012, as set out in count 1, which is an offence under section 65(4)(a). I have already held that the same act cannot constitute 2 separate offences of piracy both under sections 65(4)(a) and 65(4)(b). In view of the absence of any evidence showing that it was the intention of the person in dominant control of ‘Burhan Noor’ to use ‘Burhan Noor’ for the purpose of committing any act of piracy, a charge under section 65(4)(b) read with section 65(5)(b) cannot be sustained. The evidence on record both from the prosecution and the defence show that ‘Burhan Noor’ with its mixed cargo of shoes, milk, etc. was on its

way to Bossaso in Somalia and at the time of its interception was sailing close to the shores of Somalia. I am therefore of the view that the conviction of the Appellants under count 2 was duplicitous.

- 35) The reasoning of the Learned Trial Judge to convict the Appellants needs examination. It is to be found in paragraphs 55 to 62 of the judgment and is reproduced below:

“55) In this case the prosecution led evidence to show that there were two groups of people on board the Burhan Noor and that from their observations the witnesses were of the opinion that one group consisted of captors and they were armed with weapons and the other group were captives and partly hidden away in the hold. Subsequently to the boarding of the Burhan Noor, the prosecution witnesses all maintained that one group consisted of Pakistanis who maintained that they were the captives of the 6 Somalis now the 6 accused persons who were in control of the Burhan Noor.

56) The evidence further showed that the Burhan Noor did not stop when ordered to do so and only stopped after a second warning shot was fired and the suspected pirates raised their hands above their heads after having discarded several items including weapons overboard whilst the Pakistanis assisted the boarding teams to get on board and to identify the 6 accused persons now on trial.

57) Despite rigorous cross-examination by the defence, the prosecution witnesses were consistent in their testimonies and no contradictions were apparent in their evidence. The defence maintained that all these happening were innocent activities of a group of Somalis who had gone out in a small skiff to escort a cargo vessel to Somalia and that they were mistakenly intercepted and taken for pirates.

58) I have carefully studied the statements made by all the accused persons to the Dutch interviewers and to the Seychelles police before they were formally charged. Clearly when comparing the statements, the accused persons made previous consistent statements whereby they admitted that they were engaged in piracy activities and that their mission was to capture a dhow for use as a mother ship. They were armed and supplied for the mission by one Bashir and they were expecting considerable rewards for the successful execution of the mission. These admissions were not made in anticipation of their trial to be held in Seychelles. I have no reason to believe that such admissions on the part of the accused persons were not made freely, without any fear of being prosecuted in Seychelles and therefore were truthful statements made to the Dutch interviewers on the Dutch vessel Rotterdam. These statements were also made shortly after they were apprehended and without having had the opportunity to discuss amongst themselves and agree to a common version of events that would have absolved them of the offences charged.

59) Subsequently, when the accused persons were informed that they were to be transferred to Seychelles for trial, they gave a different version of their mission to

the Seychelles police as related by their statements cited above. In that version they maintained that they were on a mission to escort a ship to Somalia and were mistakenly apprehended as pirates. The major flaw in this account of the accused persons' mission however is that even if they were acting as escort to a ship that was on its way to Somalia, they were not at anytime acting under the legitimate authority of any recognized government or institution and they would still have been conducting unauthorized armed activities on the high seas.

- 60) *Nevertheless for the purpose of the charges leveled against the accused persons, I have considered all the evidence relevant to this case and when the same are considered alongside the direct evidence adduced by the prosecution, I come to the inevitable conclusion and left in no doubt that the 6 accused persons, namely Abdirahaman Nur Roble, Adullahi Sharif Ibrahim, Mohamed Jama Ali, Mohamud Ahmed Abdullahi, Mohamed Abdugaadir Mohamed, and Sahal Arten Bare had actually taken control of the dhow Burhan Noor by subjugating the crew of the said vessel through the use of firearms and that the 6 accused persons were actually in control of the Burhan Noor which they intended to take to Somalia for use as a pirate mother ship and they were expecting rewards for the said acts.*
- 61) *I believe the prosecution witnesses entirely and found their evidence to be cogent and credible. I find that the activities of the accused persons whilst on board the Burhan Noor to be most consistent with the act of a fugitive ship or a ship engaged in illegal activities. I have no doubt that the accused persons were in control of the Burhan Noor for the sole purpose of using the vessel as a mother ship to capture other vessels. I therefore conclude that the accused persons had done much more than was necessary to make the captured vessel Burhan Noor a pirate ship under the provisions of section 65 of the Penal Code as amended.*
- 62) *I have also considered the statements of the accused persons admitted as evidence and I find these statements to be most unconvincing in themselves. They do not give rise to any significant doubt with regards to the case presented by the prosecution and to not in the least persuade this court to arrive at any alternative conclusion or to be inclined to agree with the submission of the defence that the accused persons were just on an escort mission.”*
- 36) As regards paragraph 55 of the judgment it is the Appellants submission that the Learned Trial Judge had not considered that the International Naval Force had actually ordered all Appellants to come on deck on the ‘Burhan Noor’ and move away from the Pakistani crew and in support of this assertion had relied on the evidence of Captain Jan-Hubert Hulsker who had said: “*I told them..... that they should go the fore course of the ship and the original crew stay on the aft so there was a separation between the pirates and the original crew*”. There was no evidence that the alleged captives, namely the Pakistanis were partly hidden away in the hold. Again the fact that there were two groups on the “Burhan Noor’ is not suggestive of any guilt if one were to consider the Appellants’ version that they, who were ‘Somalis’, had boarded the ‘Burhan Noor’

manned by a 'Pakistani' crew with the intention of travelling to Bossaso in Somalia. Obviously the two groups had clear distinguishing features. The Learned Trial Judge was in error to have relied on what was alleged to have been told to the witnesses by the Pakistani crew about their capture as it was hear say evidence.

- 37) As regards paragraph 56 of the judgment there is no evidence as to who was piloting the 'Burhan Noor' when they were ordered to stop by the Danish and German naval forces. The Appellants had admitted that there were 2 AK 47 rifles and a RPG with them. One has to consider this in the light of the Appellants statements to the Seychelles police, led as part of the prosecution case, without qualification, that they went to sea to escort an Iranian fishing vessel and bring it ashore to Somalia, because of robberies at sea. Again there is no evidence to the effect that any one of the Appellants were seen throwing the weapons overboard. The position of the Appellants in their statements to the Seychelles police, led as part of the prosecution case, without qualification or challenge, had been to the effect that it was Bashir Ahamed, the Pakistani captain, who had thrown the weapons into the water because he was afraid. The fact that the Appellants "raised their hands above their heads" does not prove guilt but compliance with the orders given to them by the Danish and German naval forces who had already judged them as pirates or members of the Al Shabab, as stated in the statements of the Appellants made to the Seychelles police. The so called identification of the Appellants by the Pakistani crew referred to in paragraph 56 of the judgment has no value in the absence of any Pakistani to testify at the trial.
- 38) At paragraph 57 the Learned Trial Judge had commented on the consistency in the testimony of the prosecution witnesses and the absence of contradictions in the testimony of the prosecution witnesses. However in my view the fundamental issue in this case is the sufficiency of evidence against the Appellants to substantiate the charges. The only uncontradicted and valid evidence that can be availed of against the Appellants is that they were '**Somalis**', were found on a vessel said to be belonging to the Pakistanis, going in the direction Bossaso of the coast of Somalia and that three of them were armed. If an inference is to be drawn from an accumulation of facts, the inference will depend on a concatenation of circumstances which point to a particular conclusion. Suspicious circumstances do not establish guilt. Nor does the proof of any number of suspicious circumstances relieve the prosecution of its burden of proving the case against an accused beyond reasonable doubt. The effect of the prosecution's evidence in its entirety, may raise a probability of the guilt of the accused. But probability, even high probability, does fall short of the recognized standard of proof of a serious criminal charge which has long been a feature of the administration of criminal justice in this country. The Trial Judge's express preference for one of the hypothesis in a case like this where the circumstantial evidence was equally reconcilable with two hypothesis was

dangerous. It will be a travesty of justice to base a conviction against any one of the Appellants on the basis of the evidence in this case.

- 39) I have already dealt with the irregularity of relying on the statements made by the Appellants to the Dutch interviewers to convict the Appellants as stated at paragraph 58 of the judgment, and referred to at paragraphs 28, 29 and 30 above. I also find that the statements made by the Appellants to the Seychelles police before they were formally charged, also speak of a common version of events and are consistent with one another just like the statements made by the Appellants to the Dutch interviewers; and I am therefore in a difficulty to comprehend why the Learned Trial Judge preferred to make use of the statements made by all the accused persons to the Dutch interviewers commenting on their “consistency” and “common version of events”; as opposed to the statements made by all Appellants to the Seychelles police; for convicting the Appellants.
- 40) Section 65 of the Penal Code, the offence with which the Appellants were charged, does not criminalize “*escorting a fishing vessel to Somalia without governmental authority*” or “*unauthorized armed activities*” as stated at paragraph 59 of the judgment. It does not also criminalize “*the act of a fugitive ship or a ship engaged in illegal activities*” per se as stated at paragraph 61 of the judgment.
- 41) I am at a lost to understand what the Learned Trial Judge meant at paragraph 60, when he said “*Nevertheless for the purpose of the charges levelled against the accused persons, I have considered all the evidence relevant to this case and when the same are considered alongside the direct evidence adduced by the prosecution.....*”; for the only evidence is the direct evidence of the Dutch and German naval officers about the so called bridge to bridge conversation and that three of the Appellants were armed with two AK 47 rifles and a RPG and the finding of the AK 47 ammunition inside a skiff that was on board the ‘Burhan Noor’. I have said that the bridge to bridge conversation loses its significance in view of what has been stated at paragraphs 17 to 21 above. The Appellants in their statements to the Seychelles police had admitted that they were armed with two AK 47 rifles and a RPG and stated that they were on a mission to escort a fishing vessel back home to Somalia in view of robberies at sea. There is no evidence whatsoever from the Danish or German officers who testified before the court that any of the Pakistanis on board the ‘Burhan Noor’ were harmed or restrained in any way by the Appellants or of any damage that had been caused to the ‘Burhan Noor’ by the Appellants, suggestive that the crew of ‘Burhan Noor’ had been subjugated by the use of firearms.
- 42) I am of the view that the comment made by the Learned Trial Judge at paragraph 62 of the judgment is a sweeping statement without a proper appreciation of the totality of the

evidence led in this case. I am also of the view that the Learned Trial Judge had been quick to disbelieve the defence version as “most unconvincing” and thus been persuaded to convict the Appellants rather than first satisfying himself, whether the prosecution had proved its case beyond a reasonable doubt. This becomes more aggravated because the Trial Judge’s disbelief of the Appellants version has been due to the inconsistencies he found and commented upon between the statements the Appellants made to the Seychelles police authorities and the Dutch authorities. I have at paragraph 30 above stated that placing reliance on the alleged statements made to the Dutch authorities was a fatal irregularity. It is only when the Court has satisfied itself that the Prosecution has proved its case beyond a reasonable doubt that the defence case needs to be looked into. If in viewing the defence case serious doubts were to arise as to the prosecution case then the accused are entitled to an acquittal. It is only when the Court is satisfied that the prosecution case has been proved beyond a reasonable doubt and the defence case is rejected by the court that a conviction of the accused can be maintained. I am of the view the Trial Court had not acted accordingly.

43) In the case of **Ahmed Abdi Barre & another Vs The Republic, CR. Appeal SCA 07/2013** this court in allowing the appeals, stated:

- a) “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.”
- b) 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.”

- c) 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.”
- 44) In this case it is clear from the evidence that right from the onset the Danish and German authorities had pre-judged that the Appellants were pirates and this trend had continued throughout the investigation, the prosecution and even at the hearing. The information ‘Sachsen’ received from ‘La Faliette’ as stated at paragraph 13 above was that the Appellants were pirates without an iota evidence, that had been led before the court to substantiate this statement. The first question that was asked from the captain of ‘Burhan Noor’ by the Danish authorities when they approached the ‘Burhan Noor’ as stated at paragraph 32 above, was whether the Appellants were ‘Al Shabab or pirates’. The Pakistanis were allowed to sail without ensuring the presence of anyone to testify at the trial. There has been no serious attempt to get the captain of ‘Burhan Noor’, Bashir Ahamed to testify at the trial. There is a lurking doubt and a general feeling in my mind as to whether an injustice has been done.
- 45) In view of what has been stated above I allow the appeals of all 6 Appellants, quash their convictions and acquit them forthwith. I make order that all 6 Appellants be repatriated to Somalia by the necessary authorities.

A. Fernando (J.A)

Signed, dated and delivered at Palais de Justice, Ile du Port on 28 August