

IN THE SEYCHELLES COURT OF APPEAL

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

Criminal Appeal SCA 19/2015

(Appeal from Supreme Court Decision CR 19/2011)

Maalin Daoud Olad

Appellant

Versus

The Republic

Respondent

Heard: 07 December 2015

Counsel: Mr. Nichol Gabriel for the Appellant

Mr. Jayaraj Chinnasamy for the Respondent

Delivered: 17 December 2015

JUDGMENT

J. Msoffe (J.A)

[1] The Appellant Maalin Daoud Olad and ten others were charged with two counts of piracy contrary to section 65(4) (a) and (b), respectively, of the Penal Code read together with section 23 of the Penal Code and punishable under section 65(1) of the same Code. As per the court proceedings of 23rd September 2011 (page 233 of the record) the charge was amended by adding a third count of attempt to commit piracy contrary to sections 377 and 65 of the Penal Code read together with section 23 of the said Code. The third count was brought in as an alternative to the first count. After a full trial they were acquitted of the first count and convicted of the second count and the alternative third count. They were sentenced to respective terms of ten and six years imprisonment with an order for the sentences to run concurrently and with a further order that the period(s) spent in remand custody should be considered as part of sentence.

- [2] Aggrieved, the Appellant is appealing against both conviction and sentence. He has preferred four grounds. **One**, the Judge erred in concluding that the Appellant participated in an act of piracy on the high seas. **Two**, it was wrong for the Judge to find that the Appellant had knowledge of the fact that the ship they were using was a pirate ship. **Three**, in the circumstances of the case the conviction was unsafe and unsatisfactory. **Four**, the sentence was manifestly harsh, excessive and wrong in principle.
- [3] Thirteen witnesses testified on behalf of the prosecution. Briefly stated, the prosecution case was that on the 28th day of March 2011 at about midday the crew of the vessel, DRACO, had just put out the nets to start fishing when one of its security officers sighted a blue small skiff approaching from the rear at a high speed of 27 knots. He alerted the rest of the crew via a radio. PW1 Jesus Azkarete who was in charge of fishing used binoculars to observe the skiff which was 400 to 700 metres away. PW1, PW2 Roman Vasilier and PW3 Juan Garcia Tampton stated that since the sea was calm with good visibility they saw the skiff as it moved towards the DRACO. The closest the skiff came to the DRACO was 300 metres. As the skiff came closer Vasilier fired shots. In the meantime, according to these witnesses, through the binoculars fixed on the DRACO they could see 6 to 8 persons onboard the blue skiff. In total, Vasilier fired 171 rounds both in the air and in the sea.
- [4] Further evidence was led that from the DRACO the blue skiff was seen joining a white whaler that had been holding off in the vicinity about 6 nautical miles away. Some persons were also seen onboard the whaler.
- [5] In the meantime, in response to a distress call from the DRACO PW5 Captain Marcel Topez was dispatched in a helicopter “Toro” from the “Canaris” — a warship. According to PW5, on arrival the helicopter circled the area severally and tried to make contact with the two skiffs on the very high frequency radio

(VHF) channel 16 but there was no response. In his evidence, PW4 Lieutenant Luis Barrera, the Chief of the boarding party of the Canaris, stated that he used a dingy to approach the whaler and skiff which he boarded and apprehended the eleven occupants — the accused persons at the trial.

[6] The Appellant and the other accused persons chose not to adduce evidence at the trial but remained silent when they were called upon to put up a defence. Under the law in Seychelles (Article 19(2) (h)) of the Constitution) no adverse inference should be drawn for the exercise of their constitutional right to remain silent.

[7] In their pre-trial statement the Appellant and the others disclosed a somewhat similar or common story. That, they were Somali immigrants who had paid sums of money ranging from 400 USD to 800 USD to the boat owner to transport them to South Africa where they were going to look for employment. That, after one month at sea they ran out of drinking water and decided to send one of the boats to DRACO and ask for fresh water. They denied having possessed any weapons or even having fired at the DRACO. They also stated that they never threw any weapons into the sea. In their further evidence, they stated that they were not fishing; they only had a small line which they used to catch fish for their own consumption.

[8] In terms of section 65 (4) (b) of the Penal Code (under which count 2 was based) piracy includes:-

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.

[Emphasis supplied.]

[9] The grounds of appeal are inter-linked. Thus, in disposing of the appeal we propose to do so generally.

[10] The starting point will be the conviction in count two. The question here is whether the Appellant participated in the operation of a ship with knowledge that it was a pirate ship. The answer to this question is simple and brief and it is in the affirmative. From the available evidence it is clear that the two skiffs were within the vicinity of the DRACO. Even after being repelled by fire from DRACO they did not go far away or hide from the DRACO. All this time the crew at the DRACO maintained a constant surveillance over them on the radar. Thus, they never lost sight of them until the helicopter “Toro” from the “Canaris” arrived.

[11] The trial Judge dealt with this aspect of the case under paragraph 31 of his Judgment. He stated as follows:-

31. *With regard to count two, it is now settled that the accused were arrested while on board two ‘pirate ships’ which had already attempted to attack another ship (Draco) and its crew and also fired at the helicopter. It is obvious, and indeed not in dispute, that they were not only in dominant control of the said vessels but had also full knowledge of the fact that they were ‘pirate ships’ (section 65(5). This is also supported by their conduct especially during and after the attempted attack. Unfortunately for them they could not neither run nor hide on the open seas. Clearly, the accused were waiting to chance on other passing vessels and their participation in the operation of the ‘pirate ships’ as well as the whole venture was voluntary rather than involuntary, and for private ends. In any case, none of the accused persons has disputed this fact or the other, that the vessels they operated were pirate ships. See section 65(4). The prosecution has proved count two as well to the satisfaction of this court, beyond reasonable doubt.*

[12] With respect, we entirely agree with the Judge and we will adopt his reasoning as ours. Therefore, there will be nothing else useful for us to add on the point.

[13] This brings us to the alternative third count. It must be pointed out here that the alternative third count was brought in after the prosecution had closed its case and after learned Counsel for the accused persons had made a submission of no case to answer. It is not clear why the amendment was brought in at that late stage of the proceedings. It is no wonder, therefore, that at pages 231 and 232 of the record, part of the proceedings went on as follows:-

Mr. Mulkerrins: I am going to seek leave to an additional count to the two count indictment In short it is; having looked at the evidence that we have heard thus far I consider right that your Lordship should not be placing a corner so far as count 1 is concerned without been (sic) given the opportunity to consider that there may have been an attempt of piracy act arising out of the conduct so far as the attack on the Draco is concerned I will stick by my guns but it is right that your Lordship is not placed in an awkward position of not having an alternative

Court: Defence counsel is there anything you would want to say?

Mr. Renaud: My Lord I would not raise any objection to the filing of the amended charge. It is an attempt charge and everything else in law follows but I want to place on record that the prosecution must have realized that the evidence they had on a substantive charge is weak and they are now —

Court: That you will bring in at the right time.

[14] From the available record, it is evident that no new evidence was led in relation to the new charge. It would seem that the trial court assumed that the evidence

already led by the prosecution was sufficient for the Judge to make a decision on the alternative third count. Be as it may, in determining the appeal relating to the conviction on the alternative third count it will be necessary to look at whether or not the prosecution evidence established an offence under section 65(3) of the Penal Code read together with section 377 thereto.

- [15] In order to answer the complaint raised in relation to the conviction on attempt to commit piracy, it is important at this stage to cite both sections 65(3) and 377 of the Penal Code as under:-

Section 65(3) provides for attempted piracy as follows:-

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.

And section 377 reads as under:-

*When a person, intending to commit an offence, **begins to put his intention into execution** by means adapted to its fulfilment, **and manifests his intention by some overt act**, but does not fulfil his intention to such an extent as to commit the offence, he is deemed to attempt to commit the offence.*

It is immaterial, except so far as regards punishment, whether the offender does all that is necessary on his part for completing the commission of the offence, or whether the complete fulfilment of his intention is prevented by circumstances independent of his will, or whether he desists

of his own motion from the further prosecution of his intention.

It is immaterial that by reason of circumstances not known to the offender it is impossible in fact to commit the offence.

[Emphasis added.]

[16] In Seychelles, therefore, the law on attempt to commit an offence is settled. The law is as provided for under section 377 [supra], that for a person to be convicted of the offence there must be evidence to show that he began to put his intention into execution and manifested the intention by some overt act.

[17] We may also add here that it is settled law that an attempt to commit a crime is an act done with intent to commit that crime, and forming part of a series of acts which would constitute its actual commission if it were not interrupted. The point at which such a series of acts begins cannot be defined, but will depend on the circumstances of each particular case.

[18] As stated by Jonathan Burchell, Principles of Criminal Law, 3rd edition at page 628:-

Attempt may fall into two classes;

Those in which the wrongdoer, intended to commit a crime has done everything which he set out to do but has failed in his purpose either through lack of skill, or of foresight, or through the existence of some unexpected obstacle, or otherwise, or;

Those in which the wrongdoer has not completed all he set out to do, because the completion of his otherwise unlawful

acts has been prevented by the intervention of some outside agency.

[19] In this case, the case against the Appellant and his co-accused fell under the second class of attempt.

[20] So, the question falling for consideration and decision in this appeal is whether the offence of attempt to commit piracy was established against the Appellant. In our respective view, the answer to this question is in the affirmative.

[21] In convicting the Appellant and his co-accused of the alternative third count the Judge relied heavily on the evidence of PW1, PW2, PW3 and PW4. In the process, he stated, quite correctly in our view, that the conduct of an accused person before, during and after the commission of an alleged offence may act as a pointer to his guilt — see page 266 para. 27. Then the Judge went on to state:-

..... The manner in which the skiff was approaching the DRACO, with one man carrying a bazooka and the whaler holding off at a safe distance, is similar to what case law and experts on this subject have described as the way in which a piracy attack is launched and executed.

[22] Thereafter, the Judge stated:-

I have no doubt whatsoever in my mind that these preparatory overt acts executed were intended to precede the actual commission of the offence of piracy by violently attacking, boarding and detaining or taking control of the Draco. The manifested intent however had been foiled due to the repulsion by the gunfire from Draco, which independent factor is unnecessary for proof of an offence under section 377. In the context of later participation, it will be recalled

that immediately after being turned away the blue skiff had gone back and some of its occupants seen by the witnesses disembarking and boarding the whaler. Fuel cans had also been loaded on the blue skiff before the vessels motoring in different directions. Witness Felipe saw gunfire from the skiffs directed to their helicopter. Shortly thereafter the weapons had been thrown overboard and this explains why none was found on the skiffs. Given the prevailing circumstances, the actions of abandoning the attack only when fired at, and refusing to stop and at the same time trying to escape when finally stopped as well as getting rid of the weapons after shooting at the helicopter, cannot be said to be conduct of innocent seafarers claiming to look for fresh water from another vessel.

- [23] With respect, we agree with the Judge in the above reasoning. We will only add by way of emphasis that a look at the evidence of PW7 Felipe Valazaquez at pages 227 and 128 of the record will also confirm that the Appellant (with his colleagues of course) carried weapons (AK or Kalashnikov) and were sharing and passing them over to each other.
- [24] Further to the above evidence, there was also the evidence of the video recordings as well as photographs to support the view that the overt acts done by the Appellant and his co-accused were more than merely preparatory to commit piracy but were clear testimony of the attempt to commit piracy on the DRACO.
- [25] Surely, on the basis of the evidence on record, the Appellant was not an innocent seafarer. To this end, the evidence on record supports the finding by the trial Judge that he committed the offence of attempt to commit piracy.

[26] Given the seriousness of the offences in question, we do not think that the concurrent sentences of 10 and 6 years imprisonment were harsh and excessive or wrong in principle in the circumstances of the case. The Judge took into account the maximum sentence of 30 years imprisonment and a fine of one million rupees prescribed under the law in relation to count two. As for the alternative third count he also considered the maximum sentence of seven years imprisonment prescribed pursuant to sections 377, 379 and 65 of the Penal Code. Under paragraph 7 of the sentencing order (page 274) it is also evident that he addressed his mind to the mitigating factors in the case. Indeed, he went on further to order that the period spent on remand should be considered as part of sentence. Having done all that, we do not think that the sentences meted on the Appellant were manifestly harsh, excessive or wrong in principle. Therefore, there is no basis for us to disturb the said sentences which, we may repeat, were after all ordered to run concurrently.

[27] Consequently, in our appreciation of the evidence on record there is nothing to fault the Judge. We are satisfied that the appeal has no merit. We hereby dismiss it in its entirety.

J. Msoffe (J.A)

I concur:. A.Fernando (J.A)

I concur:. M. Twomey (J.A)

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