

IN THE SEYCHELLES COURT OF APPEAL

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

CriminalAppeal SCA05 to 09/2016

(Appeal from Supreme Court DecisionCR 06/2014)

Mohammed Ali Hussein

Abdulkader Mohamed Hassan

Abdul Ali Abullahi

Ali Dahir Hassan

Salad Dhjir Jimale

Appellants

Versus

The Republic

Respondent

Heard: 02 December 2016

Counsel: Mr. S. Rajasundaram for the Appellants

Mr. D. Esparon for the Respondent

Delivered: 09 December 2016

JUDGMENT

A. Fernando (J.A)

1. The Appellants have appealed against their conviction by the Supreme Court on a charge of Piracy contrary to section 65(1) and 65(4)(a) of the Penal Code and another charge of piracy under section 65(1) and 65(4)(b) of the Penal Code and the sentences of 12 years imposed for each of the offences, but made to run concurrently.

Charges:-

2. The indictment filed before the Supreme Court reads as follows:

Count 1

STATEMENT OF OFFENCE

PIRACY, contrary to section 65(1) and (4)(a) of the Penal Code, as read with section 22 of the Penal Code

PARTICULARS OF OFFENCE

MOHAMMED ALI HUSSEIN, ABDUKADER MOHAMED HASSAN, ABDULLE ALI ABDULLAHI, ALI DAHIR HASSAN, and SALA DAHIR JIMAALE between the 1st day of January 2014 and the 18th day of January 2014 on the high seas, with common intention, committed an act of piracy, by committing an illegal act of violence or detention, or an act of depredation, for private ends against the crew of another ship, namely the Shane Hind.

Count 2

STATEMENT OF OFFENCE

PIRACY, contrary to section 65(1) and (4)(b) of the Penal Code, as read with section 22 of the Penal Code

PARTICULARS OF OFFENCE

MOHAMMED ALI HUSSEIN, ABDULKADER MOHAMED HASSAN, ABDULLE ALI ABDULLAHI, ALI DAHIR HASSAN, and SALAD DAHIR JIMAALE between the 1st day of January 2014 and the 18th day of January 2014 on the high seas, with common intention, committed an act of piracy, by voluntarily participating in the operation of a ship, namely the Shane Hind, with knowledge of fact making it a pirate ship.

Count 3

STATEMENT OF OFFENCE

PIRACY, contrary to section 65(1) and (4)(a) of the Penal Code, as read with section 22 of the Penal Code

PARTICULARS OF OFFENCE

MOHAMMED ALI HUSSEIN, ABDULKADER MOHAMED HASSAN, ABDULLE ALI ABDULLAHI, ALI DAHIR HASSAN, and SALAD DAHIR JIMAALE on the 17th day of January 2014 on the high seas, with common intention, committed an act of piracy, by committing an illegal act of violence or detention, or an act of depredation, for private ends against the crew of another ship, namely the M/T Nave Atropos.

A brief Synopsis of the Evidence:-

3. I have copied herein verbatim paragraph 1 of the judgment where the learned Trial Judge had set out “a brief synopsis of the events as they developed”.

“On the 17th January 2014, the Nave Atropos, a cargo vessel is attacked on the high seas at the entry to the Gulf of Eden. The attack is suspected to be by pirates.

The attack is repelled by security personnel who were on board the Nave Atropos who returned fire and the attackers fled. Distress signals were simultaneously broadcasted from the Nave Atropos.

The distress calls were picked up by the Japanese naval vessel, the Samidare and retransmitted and were also picked up by the French naval vessel, the Siroco.

The Samidare sent a helicopter to investigate and take pictures and video recordings of the incident;

The French vessel the Siroco also sent helicopters to relieve the Japanese and continue the operation of keeping watch and recording through pictures and video.

Both the Japanese and French identified the Nave Atropos and located in the vicinity, was a dhow; the Shane Hind. They suspected that the attack had been conducted from the Shane Hind using the skiff that they found being pulled along by the Shane Hind.

The Japanese and French concluded that there were no other vessels in the area that would have been able to mount the attack;

The French send boarding teams to intercept and board the Shane Hind under the command of Romain Lacoste;

The boarding teams found 11 persons of Indian origin and 5 persons of Somalis origin on board the Shane Hind in two separate groups. They also searched the Shane Hind and items that could have been used for acts of piracy were found on board the Shane Hind.

After concluding their searches and investigations, the persons of Somali origin were detained on board the French vessel and those of Indian origin were allowed to go.

The 5 persons now identified as the 5 Somalis were taken to Seychelles and handed over to the Seychelles Police where they were arrested for the offence of piracy and charged accordingly with 3 counts relating to piracy.”

The attack on Nave Atropos had been carried out by 4 to 5 persons on a skiff who could not be identified even by colour. The security personnel on board the Nave Atropos had watched the movements of the skiff after the attack had been repulsed up to the time it moved to the dhow, later identified as the Shane Hind. The information pertaining to the location of the Shane Hind and skiff had been passed on by M/T Nave Atropos to the French and Japanese helicopter personnel who were searching the area, who were able to trace them. **There is no evidence that the 4 to 5 persons on the skiff who attacked the Nave Atropos were acting in conjunction with the persons on the Shane Hind, save that for the skiff going towards the Shane Hind and later on been tied to the Shane Hind.** The 2 rifle butts and 10 bullets are the items alleged to be found on board the Shane Hind and according to the learned Trial Judge that could have been used for acts of piracy.

Acquittal of Appellants by the Trial Court under count 1:-

4. At the conclusion of the trial the learned Trial Judge had acquitted the Appellants on count one on the following basis as set out in paragraphs 54 & 55 of the judgment:

“[54] However, having considered the evidence adduced I find that this Court has been left bereft on an important aspect of the element of the offence contained in the 1st count. There is no evidence adduced that established how the 5 accused persons came to be on the Shane Hind. Yet the particulars of the offence state that *Mohammed Ali Hussein, Abdulkader Mohamed Hassan, Abdulle Ali Abdullahi, Ali Dahir Hassan, and Salad Dajhir Jimaale between 01st day of January 2014 and the 18th January 2014 on the high seas, with common intention, committed an act of piracy, by committing an illegal act of violence or detention, or an act of depredation, for private ends against the crew of another ship, namely the Shane Hind.*

[55] This Court cannot assume that if the 5 accused persons were operating from the vessel Shane Hind, they must have committed an act of piracy against the Shane Hind. The act of piracy against the Shane Hind must be proved by the prosecution beyond reasonable doubt. Having not adduced any evidence to

that effect, I find that the 1st count against the 5 accused persons has not been proved to the standard required by law. I therefore find all 5 accused persons not guilty of the 1st count of piracy and I acquit all of them of that count accordingly.” (emphasis added)

5. The learned Trial Judge had however convicted all the Appellants on counts two and three.

Law pertaining to Piracy:-

6. The relevant provisions pertaining to this case in section 65 of the Penal Code pertaining to Piracy are:

- (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.

- (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; ...

- (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).

Elements of the offences:-

7. In respect of count 2, Prosecution had to prove that the Appellants had:-

- during the period set out in the charge and on the high seas
- with common intention
- voluntarily participated
- in the operation of a ship
- with knowledge of facts making it a pirate ship, namely that the ship :
 - has been used to commit an illegal act and remained under the control of the persons who committed the said illegal act or
 - was intended by the person in dominant control of it to be used for the purpose of committing any acts of piracy.

8. In respect of count 3 Prosecution had to prove that the Appellants had:-

- On the date set out in the charge and on the high seas
- with common intention
- committed an illegal act of violence, namely an act of piracy
- for private ends
- against the ship M/T Nave Atropos
- while being the crew or members of a private ship

Defective Charges:-

9. I find that there is no mention in count 3 of one of the essential elements of the offence under section 65 (4)(a) namely, that the said offence had been committed while being the crew or members of a private ship. Another important element that is missing in both counts 2 & 3 is the fact that the Appellants had committed the said offences in conjunction with 11 crew members of the Shane Hind. This is because of the learned Trial Judge's finding at paragraph 60 of his judgment that the Appellants had "either on their own or in conjunction with the crew of the Shane Hind, operated the Shane Hind with knowledge of making it a pirate vessel (sic)". This statement makes it clear that the learned Trial Judge, as much as we in assessing the evidence in this case, are in doubt as to whether liability for the acts of piracy as set out in counts 2 and 3 can be exclusively

pinned on the Appellants. In fact the Chief Boarding Officer R. Lacoste from the French vessel Siroco who boarded the Shane Hind had said that at the time of boarding he had treated everyone as a suspect and had ordered all on board the Shane Hind to put their hands on the head and had even searched the Indians. According to him the bullets were found in the Captain's cabin. Lois-Marie Leroi who was part of the search team had said that he searched the navigational documents and passports of the Indians on board the Shane Hind, all suggestive that at that stage they were not sure who were involved in the attack on M/T Nave Atropos. It appears however that the learned Trial Judge had convicted the Appellants on the basis of having committed the offences set out in counts 2 and 3 with common intention with the Indians on board the Shane Hind. Charging the Appellants who were Somalis of committing the offences exclusively and charging them of committing the offences with the Indian persons on board the Shane Hind with common intention are separate matters.

10. It is incumbent on the Prosecution in view of the provisions of **article 19(2)(b) of the Constitution** to give the details of the nature of the offence, to the person who is charged. This is an essential ingredient of the Right to a Fair Hearing and the Right to Innocence enshrined in our Constitution. In the South African case of **Moloi and others V Minister of Justice and Constitutional Development and Others 2010 (2) SACR 78** it was held: "The question whether an accused has been prejudiced by a defective charge in the proper conduct of his or her case speaks to the fairness of the trial. Section 35(3)(a) of the Constitution guarantees every accused person the right to a fair trial, which includes the right to be informed of the charge with sufficient detail to answer it and the warranty to be presumed innocent until proven guilty. In **S V Langa 2010(2) SACR 289** the majority of the Court recognized the principle that a fair trial demands that an accused has the requisite knowledge in sufficient time to make critical decisions which will bear on the outcome of the case as a whole. It is for this very reason that a charge sheet ought to inform an accused with sufficient detail of the charge he or she should face. It should set forth the relevant elements of the crime that has been committed and the manner in which the offence was committed.

11. In **Sayed Imitiaz Ahmed Essop V The State SACR 931 (2004)** reference is made to the case of **Rex V Alexander and others 1936 AD 445 at 447** where it was stated: “The purpose of a charge sheet is to inform the accused in clear and unmistakable language what the charge is or what the charges are which he has to meet. It must not be framed in such a way that an accused person has to guess or puzzle out by piecing sections of the indictment or portions of sections together what the real charge is which the Crown intends to lay against him. In **Legoa (2002) 4 All SA 373 (SCA) and Makatu (2) SACR 582 (SCA)** it was held that care be exercised in drafting and preparing charge sheets and indictments to ensure that they correctly reflect all the necessary averments.
12. The main and only issue that has to be determined in relation to count 3 is the identity of the persons who attacked the M/T Nave Atropos. The Defence Counsel had admitted the fact that the M/T Nave Atropos was attacked by men in a skiff and that the skiff was likely from Shane Hind. The learned Trial Judge at paragraph 58 of his judgment had stated: “This also raises the issue of identification. That is whether the prosecution must prove that it was the 5 accused persons who attacked the Nave Atropos and not the persons of Indian origin found on board the Shane Hind”; but had surprisingly not gone on to deal with the issue raised. In acquitting the Appellants on count 1 the learned Trial Judge had pronounced that “This court cannot assume that if the 5 accused persons were operating from the vessel Shane Hind they must have committed an act of piracy against the Shane Hind. The act of piracy against the Shane Hind must be proved by the prosecution beyond reasonable doubt.” and that is because according to his own pronouncement “There is no evidence adduced that established how the 5 accused persons came to be on the Shane Hind”. Just as much there is no evidence that the 5 Appellants had committed an act of piracy against the Shane Hind as correctly determined by the trial Judge there is also not an iota of evidence that the 5 Appellants were on the skiff that attacked the Nave Atropos or that they shared a common intention with the persons of Indian origin on the Shane Hind in attacking the Nave Atropos.

Appellants Version:-

13. The learned Trial Judge in his judgment at paragraph 20 had made reference to the declarations made by the 5 Appellants to the crew of the Siroco as regards their occupations in Somalia and reason they were in Shane Hind:

“1st Appellant – A peddler of goods using a wheelbarrow in Mogadishu and was travelling clandestinely to Saudi Arabia.

2nd Appellant – A shepherd from the bush and a waiter in Mogadishu and was travelling clandestinely to Saudi Arabia to work as a shepherd and paid \$150.

3rd Appellant – A shoeshine boy in Mogadishu and was travelling clandestinely to Saudi Arabia to work as a shepherd and paid \$150.

4th Appellant – He burns wood to make charcoal for sale and was travelling clandestinely to Saudi Arabia to work as a shepherd and paid \$150.

5th Appellant - Travelling clandestinely to Saudi Arabia to work as a shepherd.”

The learned Trial Judge had failed to mention the reasons given by the Appellants in their statements, in seeking to flee from Somalia, namely because of the problems (security and poverty) and the 2nd Appellant saying that his father was killed by the Alshabab. Other than making reference to the Appellants’ declarations in his judgment there is nothing to indicate that the learned Trial Judge had considered the probability of the Appellants’ versions as to how they came to be on Shane Hind. His failure to do so amounts to a denial of a fair hearing. We have also to bear in mind that many people from Somalia and the North of Africa cross the oceans to get out from their home countries and in the process take innumerable risks. One cannot rule out the possibility that the Appellants were, in fact illegal immigrants, seeking to get to Saudi Arabia. We cannot presume that every black skinned person is a Somali and every Somali is a pirate.

Reasons set out by the Trial Judge for the conviction of the Appellants:-

14. The learned Trial Judge had concluded that it was the Appellants who attacked the Nave Atropos for the following reasons:

- that they were identified by the persons of Indian origin on board the Shane Hind as the persons who attacked the Navy Atropos. This cannot be relied upon as it is

Hearsay Evidence as the persons of Indian origin on board the Shane Hind had not testified before the Court.

- that the evidence has established that the 5 accused persons were apprehended on board the vessel Shane Hind after a thorough investigation by the French investigators had identified them as the perpetrators of the attack against the Nave Atropos. We are surprised that the learned Trial Judge was prepared to base a conviction on what he believed to be a “thorough investigation by the French investigators” and not on an independent determination made by him.
 - that the 5 Appellants “were in a separate group from the persons of Indian origin and that the persons of Indian origin appeared frightened and subdued” at the time of their arrest. This is based on opinions expressed by some of those from Siroco who boarded the Shane Hind.
 - that items relating to the offence of piracy were recovered from the Shane Hind. The following items had been recovered from Shane Hind according to the evidence: a plastic container which contained cigarettes and torches, a pouch containing 9 bullets and medicine, 2 rifle butts, an ammunition shell, cell phones, a satellite phone and a GPS device. There is no evidence as to whom the 9 bullets, the 2 rifle butts or the ammunition cell, belonged. These items had been found as stated earlier in the Captain’s cabin.
 - that according to Jean-Marie Le Quilliec, the Captain and Comanding Officer of the French Navy vessel Siroco and Romain Lacoste the boarding team leader from the vessel Siroco, who boarded the Shane Hind, when the Siroco got closer to the Shane Hind they had contacted it by radio. The Shane Hind had then stopped its engine and they had heard over the VHF 16 requests for help emanating from the Shane Hind with an Indian accent saying “11 Indians on board and 5 Somali people, please help and Somali surrender, Sir, please help”.
15. The prosecution had relied heavily on this last item of evidence in pressing for a conviction of the Appellants. This evidence had been sought to be lead under the doctrine of ‘Res Gestae’. Under the doctrine of Res gestae, which is an exception to the common law rule against hearsay evidence, a fact or a statement of fact or opinion which is closely

associated in time, place, and circumstances with some act, event, or state of affairs which is in issue that it can be said to form a part of the same transaction as the act or event in issue, is admissible in evidence. The statement should be closely intertwined with the events in issue as to amount to part of what was going on. Here the act, event, or state of affairs which was in issue was the attack on Nave Atropos and the Appellants' operating the Shane Hind as a pirate ship. The words alleged to have been heard by Jean-Marie Le Quilliec, the Captain and Comanding Officer of the French Navy vessel Siroco was about 15 hours after the attack on Nave Atropos had been repulsed since the Siroco was about 320 nautical miles away from Nave Atropos at the time of the attack on Nave Atropos. From the words: "11 Indians on board and 5 Somali people, please help and Somali surrender, Sir, please help" one cannot necessarily conclude that the Appellants were operating the Shane Hind as a pirate ship or that the Appellants had attacked the Nave Atropos. The first part of the sentence is only descriptive of the numbers of Indians and Somalis on board the Shane Hind and the second part a request for help. We cannot place reliance on Jean Marc Le Quilliec's voice identification as of Indian accent as he had not claimed to be an Audio - Phonetic Forensic Expert. Le Quilliec had also admitted that he does not know whether the person who spoke was in charge of Shane Hind.

16. In **Ratten v R (1972) AC 378, PC at 389 Lord Wilberforce**, delivering the reasons of the Board said: "...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. The test should be not the uncertain one, whether the making of the statement should be regarded as part of the event or transaction. This may often be difficult to show. But if the drama, leading up to the climax, has commenced and assumed such intensity and pressure that the utterance can safely be regarded as a true reflection of what was unrolling or actually happening, it ought to be received."

17. In **R V Andrews (1987) AC 281, HL at 302 Lord Ackner** said: “The primary question which the judge must ask himself 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.” Lord Ackner had said that a judge should also have to consider whether the person who made the statement had a motive of his own to fabricate or concoct. He had gone on to state 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 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.
18. It is difficult to conclude that the utterances heard on VHF 16 was an “instinctive reaction to an event giving no real opportunity for reasoned reflection” as the Appellants, who are alleged to have attacked the Shane Hind had been on the Shane Hind by that time as per the charges for almost 18 days. There is nothing to indicate that at the time of the VHF transmission the offence of the act of piracy was still alive and ongoing. There is nothing to indicate at that point in time the Somalis were in control of the boat and the Indians were held hostages on the hijacked vessel. There is nothing to indicate that the person who is alleged to have spoken with an Indian accent was under threat of death or bodily injury. It cannot be said that the Indians were in mortal fear of the Appellants if the speaker said “Somali surrender.” It is also clear at the time the voice was heard over the VHF 16 there were no weapons on board the Shane Hind, save 2 rifle butts and 10 bullets.
19. The admissibility of the Res Gestae evidence has also to be considered in the light of 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) of the Constitution** 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. In the absence of any evidence from a member of the Indian crew of ‘Shane Hind’, the possibility by the Indians 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. There is nothing to exclude the possibility that the Indians were acting in cahoots with the Somalis in committing acts of piracy. The failure to charge the Appellants for committing acts of piracy in conjunction with those on board the Shane Hind relieves them from any liability as the identity of those on the skiff has not been established. There is also nothing to exclude the possibility that the Indians were involved in illegal human trafficking of the 5 Somalis.
21. The learned Trial Judge had said in convicting the Appellants under counts 2 & 3 “It is immaterial whether the 5 persons had total control over the Shane Hind and its crew or whether they had joined the crew of the Shane Hind to carry out the offence of piracy as the evidence established that they were either in control of the Shane Hind or part of the crew of the Shane Hind. The evidence also showed that the 5 accused persons either acted on their own as a separate group or together with the persons of Indian origin...” (emphasis added). This is a clear indication that the learned Trial Judge was in doubt as to the role of the 5 Appellants on board the Shane Hind, and rightly so in our view. The Appellants have not been charged as stated earlier under count 3 for committing the act of piracy set out therein with common intention with the persons of Indian origin. If that had been the case it would not have mattered if only the 5 Appellants who were of Somali origin were charged, provided that the evidence clearly showed that the 5 Appellants along with the 11 Indians were in fact pirates. In my view the lack of clear evidence in respect of the role of the 5 Appellants on board the Shane Hind coupled with the defective charge, suffices to allow this appeal.
22. In relation to count 2 there is absolutely no evidence that the 5 Appellants ‘with common intention’, ‘voluntarily’, ‘participated in the operation of the Shane Hind’, essential

elements to be proved under count 2, save the fact that they were found on board the Shane Hind and what was heard by Jean-Marie Le Quilliec, the Captain and Commanding Officer of the French Navy vessel Siroco over the VHF radio, which has been dealt with at paragraphs 15 - 19 above. ‘Mere presence’ on board a ship cannot amount to ‘voluntary participation in the operation’ of a ship. There is no evidence that after the alleged attack on Nave Atropos by the skiff that was being towed by Shane Hind, the Appellants had control of the Shane Hind and were involved in the operation of the Shane Hind. There is no evidence as to who was in ‘dominant control’ of Shane Hind at the time of its apprehension by the French ship Sirrocco or before that. There is no evidence that the skiff was a necessary part of the Shane Hind, save the fact it was being towed by Shane Hind. In the absence of any evidence as to the identity of the persons on the skiff and coupled with the absence of evidence as to whom the skiff belonged it cannot be said as averred in count 2 that the Appellants were operating a pirate ship, namely the Shane Hind. Therefore, none of the elements of count 2 have been established.

23. We therefore allow the appeals of all the Appellants quash their convictions and sentences and order that they be repatriated to Somalia immediately.

A.Fernando (J.A)

I concur:.

S. Domah (J.A)

I concur:.

M. Twomey (J.A)

Signed, dated and delivered at Palais de Justice, Ile du Port on 09 December 2016