

Republic v Ali

(2010) SLR 341

J Lloyd State counsel for the Republic
Frank Elizabeth for all the accused

Judgment delivered on 3 November 2010 by

BURHAN J: All the above-mentioned accused were charged as follows:

Statement of offence

Piracy contrary to section 65 and section 377 of the Penal Code read with section 23 of the Penal Code and punishable under section 65 of the Penal Code.

Particulars of the offence,

Abid Ali, Oman Hali Omar, Ahmed Hussein, Ahmed Abdi, Aziiz Aziz Abdi, Mohamed Abdi Farah, Mohamed Momud, Hasom Ibrahim, Mohamed Abdigani Noor, Ahmed Mohamed Ismail and Said Abdisamad on the 5th of March 2010 on the high seas with common intention, attempted to seize a ship, namely the Intertuna II by violence or putting those in possession of such ship in fear.

The eleven accused denied the aforementioned charge and trial against them commenced on 6 September 2010.

The law

Prior to analysing the evidence led in this case, it would be pertinent to set out the law contained in section 65 of the Penal Code of Seychelles.

Section 65 of the Penal Code of the Republic of Seychelles reads as follows:

Any person who is guilty of piracy or any crime connected with or akin to piracy shall be liable to be tried and punished according to the law of England for the time being in force.

The phrase "time being in force" according to established principles and case law refers to the common law prevailing in England as at 29 June 1976 (hereinafter referred to as the relevant time) when Seychelles attained independence from the United Kingdom. A similar interpretation was followed by Gaswaga J in the case of *Mohamed Ahmed Dahir* Criminal Side No 51 of 2009.

Section 377 of the Penal Code of Seychelles defines the term "attempt" while section 23 of the Penal Code of Seychelles reads -

when two or more persons form a common intention to prosecute an unlawful purpose in conjunction with one another, and in the

prosecution of such purpose an offence is committed of such nature that its commission was a probable consequence of the prosecution of such purpose, each of them is deemed to have committed the offence.

In relation to the meaning or definition of piracy, it would be pertinent in light of section 65 of the Penal Code to follow the definitions or meanings given to it under the English law at the relevant time.

In 1909 in the case of *Bolivia Republic v Indemnity Mutual Marine Assurance Co* [1909] 1 KB 785 at 802, Kennedy LJ 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.

In the landmark case of *In re Piracy Jure Gentium* [1934] AC 586 at 600 the Privy Council did not venture to define piracy but 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 juriconsults 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.

Halsbury's Laws of England, 4th ed as revised in 1977, vol 18 at 787 para 1536 sets out the meaning of piracy in international law at the relevant time as follows:

Piracy in international law (piracy jure gentium) was defined by the Convention on the High Seas, and this definition forms part of the law in England

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 facilitating 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.

Halsbury's Laws of England (supra) at 787, further refers to the fact that by virtue of section 4 of the Tokyo Convention Act 1967 (an Act of the UK Parliament) this definition contained in articles 15 -17 of the Convention formed part of the law of England.

In regard to the municipal law and the international law applicable to piracy the Privy Council had this to say *In re Piracy Jure Gentium* (supra) at 589 -

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)

Even *Halsbury's Laws of England* (supra) 787 paragraph 1535 states: "By customary international law, a pirate is hostis humani generis and is subject to universal jurisdiction".

Halsbury's Laws of England (supra) 789 paragraph 1539 further reiterates this position:

The English Courts have jurisdiction to try all cases of piracy *jure gentium* in whatever part of the high seas and upon whosoever's property it may be committed and whether the accused are British subjects or the subjects of any foreign state with whom Her Majesty is at amity.

It is pertinent to mention at this stage that the municipal law in England in force in regard to piracy was the Piracy Act of 1837 which was eventually superseded by the Merchant Shipping and Maritime Security Act 1997 which incorporated into English law the United Nations Convention on the Law of the Sea 1982 (UNCLOS).

The case for the prosecution and the defence

The case for the prosecution was that on 5 March 2010, Intertuna II (also referred to in the proceedings as Intertuna Dos), a Spanish fishing vessel registered in the Seychelles was fishing in the high seas with two of its own smaller boats deployed to sea, when the alarm was sounded by the lookout on duty Mr Karim Dioufe that another small boat was travelling at high speed towards their vessel. Immediately the captain of the vessel Captain Josu Arrueispizua sounded the alarm and all the crew members of the ship made their way down to the bottom of the ship which was the usual security drill and all doors were locked. The only persons on the deck of the ship were the captain and the security personnel.

According to the evidence of Mr Foggin the leader of the security team, the approaching vessel, referred to as a skiff was blue in colour and coming at a high speed which he estimated to be about 15 to 20 knots. He stated he had experienced three pirate attacks before and using his binoculars, he observed that there were four persons aboard the approaching skiff. The two persons in front of the skiff had a ladder with hooks and two more persons were behind them armed with Klashnikov rifles. He and the other security officer Mr Daren Nickson had come to the conclusion that the Intertuna II was in danger and had begun firing warning shots at the approaching skiff. The warning shots had gone unheeded and the skiff had continued to approach at high speed. The security officers on board the Intertuna II had then begun to fire directly at the approaching craft. After a while the shooting had its desired effect and the skiff had turned and gone back in the direction it had come from.

Thereafter he had seen the first skiff join two other vessels. He noticed that one vessel was larger than the other which was also a skiff. He stated in his experience in piracy, it was usual and common practice for small skiffs to be associated with "larger mother vessels" also referred to as whalers and it was the mother vessel which usually acted as a support vessel for storing fuel, supplies and carrying personnel. Both skiffs had thereafter approached the Intertuna II at high speed. Once again warning shots had been fired to no avail and it was only direct firing at the two skiffs that made the crafts stop their approach and turn back.

On reaching the whaler, the persons from the skiffs had transferred themselves onto it. One skiff was tied to the whaler while the other was left adrift. Witness Mr Foggin stated they had opened fire because he felt that the crew, the vessel and his life were in danger. The other security officer Mr Nickson testified to the fact that at one stage he saw gun flashes from the weapons in the hands of the persons in the skiff but no one was injured nor was the vessel damaged. Witness William Mangan of the Public Security and Support Wing Seychelles testified that with his 17 years' experience in handling guns he could state that some of the AK47s produced in court had been fired due to the carbon deposit in the barrel and the cylinder tube of the guns.

Meanwhile the captain of the vessel Intertuna II, Captain Josu Arrueispizua had called for help on the radio and a Cisna aircraft had flown in and dropped smoke bombs on the pirate vessels. The Cisna at his request had done an expanded circle overhead and went as far as he could see which was the distance from the bridge wing to the horizon which he said was usually approximately 8 miles and reported that there were no other suspect vessels sighted by them. The Cisna aircraft he stated was with them for about 1 hour 15 minutes and thereafter helicopters had arrived soon after the Cisna had left. The radar on Intertuna II also showed that other than these three vessels there were no other suspect vessels in the vicinity.

The pilot and the officer in charge of the helicopter Helios, Mr Sylvain Baise testified to the fact that he was on board the French Naval Ship (FNS) Nivose which was concerned with anti-piracy marine patrolling of the area and responded to a call from Intertuna II in his helicopter Helios. When he arrived he noticed an empty skiff with a ladder inside and a whaler towing another skiff. In the area there was another Spanish plane and another helicopter (Vulcan) from the Italian Marines. He had stayed in the area for about 10 minutes and left to refuel. Thereafter he had taken off again to intercept the whaler which was towing the skiff.

The witness further stated he intercepted the whaler by flying the helicopter above it and making a sign for it to stop. He identified all the photographs taken from the helicopter Helios that day. Thereafter the officers of the FNS Nivose had boarded the whaler. He stated that the zone he flew through was about 10,000 nautical miles and there were no other whalers or skiffs in that zone. Pilots of the helicopter Vulcan, Walter Germana and the Cisna aircraft, Juan Barberon gave evidence and identified photographs taken by them at the scene. From their evidence it is apparent that the whaler towing the skiff was constantly monitored.

Jean Rene Drovin chief of the protection brigade stated at approximately 13.30 GMT he prepared his boarding team for an operation. They had left in two rigid boats one called Hurricane and the other Zodiac. He was on the Zodiac with four other officers while there were five other officers in the Hurricane. They saw the helicopter Helios about a knot away and went towards it. When they approached the helicopter they saw the whaler beneath with 11 persons on board. His crews were fully armed and the persons on the whaler had offered no resistance and obeyed all commands given in English and by signs. They had taken the 11 persons aboard the FNS Nivose and placed them at the back of the warship, as there were 11 more persons arrested earlier who had already been placed in the front of the ship. Thereafter they had searched the whaler and found seven AK47s and two RPGs and ammunition.

They had also found fuel cans and a ladder with hooks. The witness identified through photographs the whaler, the skiff and all the exhibits taken into custody.

Witness Nicolas Pendriez the legal officer on board FNS Nivose stated he was present on the Nivose at the time the persons aboard the whaler were transferred to the Nivose. He was responsible for photographing and identifying the persons and exhibits. He identified the weapons and ammunition taken into custody from the whaler, the videos showing the Helios circling the whaler and the boarding team approaching the whaler and the photographs, a map depicting the history of the interception and the ladder retrieved from the skiff. He further identified the photographs of the accused as those taken by him. He also identified the notebook and the loose documentation taken into custody from the whaler and a GPS of Garmin 72 also taken into custody from the whaler.

Witness Ian Delfgou stated he received photographs taken from the Cisna and helicopters Helios and Vulcan. He had compared the photographs taken by the aforementioned three aircraft at different times of the incident and had marked the similarities of the vessels and the cargo on board to identify these were the same vessels which were involved in the aborted attack on the Intertuna II and had subsequently been intercepted by FNS Nivose and its crew. In order to show the similarities of the two pictures he had marked the similarities in similar colours and written within a box to depict same. He stated that some of the colours had changed due to the copy being compressed.

Mr James Tirant stated that all the exhibits relevant to this case were handed over to him and kept in his custody and they had not been tampered with. He identified the phones, weapons, photographs and other exhibits in open court. He stated that at the time of receipt of the exhibits the seals were intact. He had tested the weapons for fingerprints but there were none. Thereafter the statements given to the police by all of the accused were produced. The statement of the 1st accused was admitted only after a voir dire was held, as there was an objection in respect of its voluntariness, which was overruled by a ruling dated 22 September 2010. Thereafter a Somali translator gave evidence translating the documents which were in the Somali language to the language of the court.

When one considers the case for the defence all the accused exercised their right to remain silent. It is to be noted that in terms of article 19(1)(h) of the Constitution of the Republic of Seychelles, no adverse inference should be drawn by the court from the exercise of the right to silence by the accused. Both counsel thereafter made oral submissions.

Analysis of the case for the defence

On analysing the defence case as set out in the submissions by counsel for the accused and that arising from the cross-examination of witnesses, one of the defence contentions is that the accused's names were incorrectly stated in the charge sheet and that there was no signature of a process server to the effect that the summons containing the charge was served on the accused. One should take note that the reason why the process server signs the said document is for the information of court that summons have been duly served. When the summons

containing the charge is handed over in open court there is no necessity for such service to be signed by the process server concerned. The record shows that time was given for the accused to consult their counsel prior to the amended charge being read out. The amended charge was read over to all the accused in the presence of their counsel and thus this court is satisfied that no prejudice has been caused to the accused by this procedure.

With regard to the names of the accused being incorrectly spelt, as correctly pointed out by counsel for the prosecution, the name of each of the accused was called out several times in open court during the trial and pre-trial stages, and each accused acknowledged and responded to the name read out. Had there been any discrepancy in the spelling of their names, it should have been the duty of counsel for the accused to have brought this to the notice of court and the corrections made and not to rely on such trivial technicalities to have the accused acquitted. For the purposes of the record, the correct names of the accused appear in the caption of the judgment as set out in their statements produced in court.

Another ground urged by counsel for the accused was that it was the officers on board the Intertuna II that opened fire and attacked the persons on the skiff and that there was no evidence that the crew were put in fear by the acts of the persons of the skiff. If one is to follow the steps taken by the captain of Intertuna II, the crew and members of the security team, one would see that the entire crew abandoned their work and went down below deck and shut themselves in till the "all clear" was given and the fact that the captain radioed for help are all acts indicating fear of acts of piracy from armed persons on the fast approaching skiffs.

Even the fact that the security team took up positions and fired warning shots at the fast approaching skiff with armed gunmen, shows the security team too was acting, as they were in fear of an act of piracy from the armed personnel on board the skiffs. The leader of the security team Mr Foggin specifically states he opened fire as he felt the security of the crew, vessel and his life were in danger. It is clear the captain felt this way too as he had radioed for help. This court is satisfied that the actions of the armed persons on the skiffs were indicative of acts of piracy on the Intertuna II and the actions of the crew, captain and the security personnel were that of persons in fear of such acts of piracy namely illegal acts of violence, detention or any act of depredation.

Counsel has also urged the court that the amended charge sheet of 3 September 2010 is faulty and the statement of offence does not charge the accused with attempted piracy and even if the prosecution evidence was to be accepted that the charge of piracy could not be established as no physical boarding or taking over of the ship had ever occurred. Firstly the statement of the offence specifically refers to section 377 of the Penal Code which defines what attempt to commit an offence is. Therefore it cannot be said the accused have not been charged with attempt to commit piracy.

When one considers the evidence in this case, the fact that the skiffs came at a high speed towards Intertuna II despite warning shots being fired, the fact that the persons aboard the skiffs were armed with Klashnikov rifles and were carrying a hooked ladder, obviously for boarding purposes and repeated the "charge" for a

second time, even after being turned back once by the shooting of the security team, the only conclusion one can come to is there was an attempt by those on board the skiffs to commit illegal acts of violence, detention or some act of depredation on the crew and vessel Intertuna II.

When one refers to the case of *In re Jure Gentium* (supra) it was held:

actual robbery is not an essential element in the crime of piracy jure gentium. A frustrated attempt to commit a piratical robbery is equally piracy jure gentium.

It is obvious that the evidence in this case sets out a frustrated attempt to commit piracy. For the aforementioned reasons the contention of counsel bears no merit.

Counsel for the defence also contended that there was a mix-up of the accused taken into custody by the officers of the FNS Nivose as they had arrested three groups of persons including another group of 11 Somalis. However the evidence of the prosecution is that they had specifically kept those arrested separately, photographed them and in fact fixed coloured bands on them for identification purposes. This evidence was not tarnished in anyway despite the lengthy cross-examination of witnesses. I cannot see any merit in the defence suggestion that there was a mix-up, when there is clear and uncontradicted evidence by the prosecution that all precautions had been taken to avoid same.

Counsel also submitted that the arrest of the whaler containing the accused was illegal in all respects. When one considers the facts of this case, it is clear that the FNS Nivose responded to the call for help from the captain of the Intertuna II and had intercepted the whaler containing the accused who had been involved in the attempted act of piracy on the Intertuna II. Thereafter the crew of FNS Nivose had taken the 11 accused aboard the Nivose and held them and thereafter made arrangements for them to be transported via Djibouti to Seychelles to be tried. It cannot be said by any stretch of imagination that by responding to a call for help from Intertuna II in respect of an act of piracy or attempted piracy, and by intercepting the whaler with the pirates aboard and by holding them aboard the Nivose, that such acts violate the norms of international law. Both articles 19 and 21 of the Convention on the High Seas and article 107 of UNCLOS 1982 provide for such intervention.

Therefore this court is of the view that in the case of the offence of piracy which offence attracts universal jurisdiction, if the pirates were held on board FNS Nivose in order to hand them over to judicial authorities for arrest and detention and the pirates were in fact eventually taken to the appropriate country to be handed over, as was done in this instant case, holding them for the necessary period of time for the naval vessel to get the pirates to the relevant country, where the formalities of arrest and judicial proceedings are to commence, cannot be considered to be illegal and not a violation of any norms of international law.

With regard to the jurisdiction to try this case as the law of England is operative as mentioned earlier, *Halsbury's Laws of England* (supra) 787 paragraph 1535 states:

By customary international law, a pirate is *hostis humani generis* and is subject to universal jurisdiction.

Further page 789 para 1539 reiterates this position and read together with the decision *In re Piracy Jure Gentium*, which also accepts the position that pirates are *hostis humani generis* (enemy of mankind) and subject to universal jurisdiction, this court is satisfied that it has jurisdiction to hear this case.

Analysis of the evidence of the prosecution and conclusion

When one considers the evidence led by the prosecution it is established by the evidence of the captain of Intertuna II Josu Arrueispizua that on 5 March 2010 about 8.30 GMT (Seychelles time 11.30) the vessel Intertuna II was in international waters when the said skiffs with armed persons approached the vessel at high speed. It is to be noted that the term "High Seas" is defined in Article 1 of the Convention on the High Seas and reads as follows:

The term "high seas" means all parts of the sea that are not included in the territorial sea or in the internal waters of a State.

He explained that there were differences in respect of the position at given times due to the fact that the boat would have drifted a distance while it was stopped. He corroborates the evidence of Mr Foggin given in respect of the incidents relating to the approach of the skiffs with armed persons and steps taken by the security team to repulse same. Witness Darren Nickson too testified giving details. Even though subject to lengthy cross-examination, this court is satisfied that no material contradictions arose to disbelieve the evidence given by these witnesses.

It is apparent when one considers the evidence in this case that the persons on the skiffs were armed, carrying ladders with hooks and did not have prior permission of the captain to approach or board and had kept on approaching at high speed even after warning shots were fired. It is clear these facts establish that the armed persons on board the skiffs were attempting to seize the vessel Intertuna II. It is also obvious that by carrying weapons, they were intending to use violence or instil fear of violence and attempt to seize the ship as stated in the particulars of the offence.

When one considers the evidence that the whaler and the skiffs were seen together and were operating together during the entire incident, it is clear that the personnel on both skiffs and the whaler were acting on a prearranged plan and in a concerted manner during the second approach towards the Intertuna II and soon thereafter even when attempting to leave the scene. This evidence on the concerted conduct of the persons on the skiffs and whalers clearly indicates that they were acting with common intention as set out in section 23 of the Penal Code. It is to be noted that common intention does not always require a prearranged plan, the arrangement may be tacit and the common design conceived immediately before it is executed or on the spur of the moment. The evidence in this case clearly indicates that the persons aboard the whaler and the two skiffs had the common intention to attempt to seize the ship Intertuna II by violence or instil fear of violence and seize the ship.

With regard to the identity of the accused, the legal officer of the FNS Nivose Nicolas

Pendriez stated that although there were other persons of Somali origin who were being held aboard the Nivose at the time, after these 11 accused were brought on board, they had kept them separately and tagged them with coloured bands and photographed them. He identified and produced the photographs taken of the accused arrested in respect of the incident concerning Intertuna II. On perusal of the photographs it is clear that the photographs represent the 1st to the 11th accused in this case.

Further when one considers the statements of the accused there are strong similarities in each of their statements in respect of the place of departure Barawe coast and time of departure. Some accused state they left on 4 March 2010 while some of the accused do not give the date but state in their statement they left the day before they were arrested which would be 4 March 2010. Almost all the accused each state they left in a mother boat and two skiffs owned by one Mohamed Abdirahaman (not an accused). Considering the similarities in this evidence together with the positive identification of Nicolas Pendriez, the defence contention that there was a mix-up of persons taken into custody from different boats at different times is unacceptable and the court is satisfied on the identification of the accused.

Further when one considers the evidence of Mr Ian Delfgou, by comparing the photographs specially taken of the whaler and the skiffs by the Cisna and helicopter Helios and Vulcan near the Intertuna II and photographs of the whaler and the skiff taken by Helios at the time of interception by FNS Nivose, referring to picture 14 photograph P19m, he shows the similarities in order to establish, that the whaler photographed by the Cisna near Intertuna II was the same whaler that was intercepted by Helios and FNS Nivose. In picture 17 photograph P 19p, he shows the similarities in order to establish that the photograph taken by the Cisna of the skiff being towed by the whaler near Intertuna II was the same skiff being towed by the whaler when intercepted by Helios and FNS Nivose. Picture 6, photograph P19f and Picture 7 photograph P19g show similarities of pictures of the whaler taken near the scene by the Cisna and at point of interception by Helios. The evidence of the prosecution also shows that there were no other similar suspect vessels detected on the radar or by aerial scrutiny for a distance of about 8 nautical miles. Therefore this court is satisfied that the 11 persons on the whaler intercepted by FNS Nivose at 13.30 hrs GMT and produced as accused in this case were the ones who were intending to use violence or instil fear of violence and attempt to seize the vessel Intertuna II.

In addition to all this evidence there is also evidence that 7 AK47 guns, RPGs ammunition and rocket launchers were found in the whaler, in which the accused was arrested. The ammunition and other explosive material was photographed and destroyed as it was hazardous to transport such items. It is unlikely the officers of the Nivose would have introduced this large amount of arsenal in order to frame these accused, as the officers had seen them for the first time and had no motive to frame these particular accused, especially when there is evidence to show that some of the Somalis taken aboard Nivose were released even without being charged.

With regard to the notebook and loose document papers marked as P13 and P18 the fact that it was found on the whaler is established by witness Nicolas Pendriez. This fact is completely independent of the contents of the documents. Therefore

counsel's contention that had he known the contents of the documents he would have contested the fact it was found on the whaler is unacceptable. He should have obtained the necessary instructions from the accused whether these documents were on the whaler or not, and if not contested such a fact irrespective of the contents of the documents.

It is clear that other than to say these documents were recovered from the whaler Mr Nicolas Pendriez could not speak to its contents as the documents were in Somali. Therefore for this reason and in addition to the reasons contained in its ruling dated 27 September 2010 this Court sees no prejudice being caused to the accused by admitting documents P13 and P18 and the relevant translations even though witness Nicolas Pendriez could not be recalled. When one considers the names and other names mentioned by each of the accused in their statements marked in court there are many similarities with the names mentioned in documents P13 and P18 read with the translations of these documents. Further when one takes all this evidence as a whole this court is satisfied that the attempted acts of violence were committed for private ends by the crew or the passengers of a private ship.

For the aforementioned reasons I proceed to accept the uncontradicted and corroborated evidence of the prosecution in this case. I am satisfied that the prosecution evidence proves all the necessary ingredients of the charge beyond reasonable doubt. Therefore I find all the accused guilty as charged and proceed to convict them.

Record: Criminal Side No 14 of 2010