

**R v OSMAN**

**(2011) SLR 345**

M Mulkerrins for the Republic

J Renaud for the accused

**Judgment delivered on 12 October 2011 by**

**GASWAGA J:**

The eleven (11) accused persons: Houssein Mohammed Osman (A1), Nadir Mousse Dhera (A2), Addijabar Abdillahi Elmi (A3), Mohammed Abdi Dirieh (A4), Said Mohammed Hassan Ali(A5), Yousouf Mohamoud Halane(A6), Saddam Houssein Hassanof (A7), Abdaziz Mohamoud Ali (A8), Maalin Daoud Olad (A9), Abdi Mouhaumad Goure Ali (A10) and Nour Mohammed Chaban (A11) are all Somali nationals charged with three counts. Counts one and two constitute the offence of piracy contrary to section 65 of the Penal Code read with section 23 of the Penal Code and punishable under section 65 of the said Code. Count three, brought in the alternative to count one, is that of attempt to commit piracy contrary to sections 377 and 65 of the Penal Code read with section 23 also of the Penal Code and punishable under section sections 379 and 65 of the said Code.

The particulars of these offences allege that all eleven accused persons on the 28 March 2011 upon the high seas, with common intention, committed an illegal act of piracy being an act of violence or detention or an act of depredation committed for private ends against persons on board another ship namely the *Draco* by unlawfully attacking the said ship whilst armed with firearms. The particulars further allege that the accused persons also committed an illegal act of voluntary participation in the operation of a ship with knowledge of facts making it a pirate ship. As for count three, the particulars allege that all the accused attempted to commit the above illegal acts against persons on board the *Draco* by unlawfully attacking the said ship whilst armed with weapons.

Evidence of thirteen witnesses was led by the prosecution to prove the case beyond reasonable doubt since each one of the accused persons had denied all the charges.

It is imperative to first outline the facts giving rise to these charges. On the 28 March 2011 at about midday the crew of the vessel, *Draco*, had just put out the nets to start fishing when one of the four security officers who was on the lookout in the observation post located on top of the tower sighted a blue small skiff approaching from the rear at a very high speed of about 27 knots. He alerted the rest of the crew via radio. Another security officer had also seen the blue skiff from the second security position at the bridge. At that time, since the nets had already been lowered into the water, the *Draco* was incapable of maneuvering. Juan Garcia Lampon (PW3) testified that all the crew became so nervous while Roman Vasilier (PW2), in charge of the security, stated in cross-examination that being on the high seas far

away from the coast, where no such small boat would be expected, the crew were scared and they thought that the occupants of the skiff had come to take their vessel.

The commander in charge of fishing, Jesus Azkarate (PW1), used the binoculars to see the skiff which was 4 to 7 nautical miles away. Vasilier had also seen the speeding skiff through the binoculars fixed on the vessel near the bridge. It was also his evidence that he could even see the persons on board (POB) with his naked eyes as they manoeuvred closer to the *Draco*. In their testimonies, Azkarate, Vasilier and Lampon stated that the sea was quite calm with good and clear visibility. The witnesses were able to see 6 to 8 POB the blue skiff which continued to move towards the *Draco* even when Vasilier had started firing flares in the air and warning shots into the water, in front of the skiff. In particular, Vasilier saw one of the POB in a standing position with a Bazooka on the shoulder pointed to the *Draco*.

Undeterred by the flares and warning shots, the skiff went on to close the distance between the two vessels. That the closest it came to the *Draco* was 3 nautical miles when Vasilier intensified the fire which eventually repulsed them and it turned around on the portside of the vessel and sped away. In total, Vasilier had fired 171 rounds both in the air and into the water. By this time, the *Draco* had already sent out a radio message calling for help from the nearby EUNAVFOR vessel.

All this period, the witnesses monitored the movements of the skiff both on the radar and through the binoculars. Further evidence was led to the effect 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 POB 's were also seen boarding the whaler from the skiff. In response to the *Draco*'s distress call, Captain Manuel Lopez had been dispatched in a helicopter *Toro* from the vessel *Canarias* - a warship, arriving in the vicinity located 80 nautical miles apart within 3 to 4 hours of the incident. It should be remembered that the *Draco* crew never lost sight of the skiff and the whaler, and were able to observe the helicopter arriving and starting its operations.

It was deposed that the helicopter is fitted with high definition radar and integrated sensors (cameras) that can enable the operator to detect, see and capture clearly very small objects positioned several miles away, even at night. Whatever is seen on the radar of the helicopter is recorded and relayed instantaneously, in real time, to the mother ship, the *Canarias*. Juan Ramos (PW6) is a chief petty officer in the Spanish navy deployed on the *Canarias* to assist in operating the remote sensor thereon and collecting photographs recorded and transmitted to the *Canarias* by the helicopter.

According to Captain Lopez and his crew, immediately after takeoff they detected the *Draco*, with which they remained in constant radio-communication, as well as two small contacts lying about one nautical mile from the *Draco*. Upon arrival, the helicopter circled the area several times and tried making contact with the two skiffs on the Very High Frequency (VHF) radio, channel 16 but there was no response. Felipe Valazquez (PW7), the sensor operator on the helicopter testified that on noticing the presence of the helicopter, he saw some people quickly loading fuel cans from a white whaler onto a blue skiff which immediately sped off in a different direction. The video recordings PE7, PE9 and PE10 as well as photographs PE1 and

PE2 - of the white whaler and the blue skiff, which were also positively identified by the crew of the *Draco*, aptly support this testimony.

The helicopter continued hovering over the two small vessels for approximately 8 hours during which time each one of the vessels had on many occasions attempted to escape. Felipe has experience of 20 years in the army and apart from operating the camera he is also in charge of the radio contacts and fires the gun on the helicopter once ordered by the Captain. He had fired several shots in front of the small vessels, in any case not less than a 25 to 50 metre radius of each vessel, to stop them from further manoeuvring away until the *Canarias* arrived and intercepted them. Felipe fired 127 rounds all together. During cross-examination, Felipe said that he saw the occupants of these vessels passing on weapons from one person to another and from one vessel to another. In addition, the testimonies of Felipe and Ramos are to the effect that at some point in time they had witnessed the persons on the blue skiff throwing certain items, including weapons, overboard. See photographs PE13, and the above recordings together with footage PE14 (the enhanced-slow motion DVD of PE6). However, none of the prosecution witnesses alleged that there was any firing of weapons directed to the *Draco*.

In his evidence, Lieutenant Luis Barrera (PW4), the chief of boarding party of the *Canarias* used a dinghy to approach the whaler and skiff which he boarded, apprehended the eleven occupants, now arraigned before this court, and also retrieved some items such as a cell phone (PES) and GPS (PE4). The accused were interviewed by Lieutenant Francisco Delgado (PW8) an intelligence officer with the Spanish army through a Somali/English interpreter, Lieutenant Ismail Hared (PW9) of the Djiboutian army also deployed on the *Canarias*. As the blue skiff could not be brought on board yet abandoning it afloat was dangerous to navigation, it was sunk. The whaler was towed for some distance and also sank when it could not be drained of the water it had taken in. On arrival in port Victoria on the 2 April 2011, Police Constable Dave Jeane (PW11) formally arrested them and with the assistance of a Somali/English interpreter recorded their statements (PE16). Detective Sergeant Robin Omblime (PW10) of the Seychelles scientific support unit received the retrieved items (four barrels of fuel, CDs, photos etc) from the exhibit officer on the *Canarias*, Luis Barrera (PW4), and placed them under safe custody before producing same in court as exhibits. The court is satisfied with the manner in which these items were handled and kept. The chain of evidence was not broken.

I should also remark at this point that bearing in mind that some of the accused were below the age of 18 years, two probation officers were always present during the recording of each minor suspect's statement as required by law, and all the accused (minors and adults) were jointly arraigned before this court pursuant to section 93 of the Children's Act.

All the accused chose not to adduce any evidence but remained silent when called upon to put up a defence pursuant to section 184 of the Criminal Procedure Code, and no adverse inference was drawn (article 19(2)(h) of the Constitution).

However, in their respective pre-trial statements, all the accused, save for A1, A7 and A10, denied being pirates or having participated in any piracy activities. With regard to A1, A7 and A10 defence counsel, John Renaud, submitted that this was a mere

paper admission done by the accused who did not know the legal meaning and implications of piracy. It will be recalled that the said statements were never contested, hence leaving such admissions standing. Moreover, in *Pool v R* (1974) SLR it was stated that there is no reason why a court should not accept and act upon admission made by an accused as against himself, though rejecting as untrue the part of the statement sought to implicate other persons or exonerate himself.

Generally all the accused disclosed a somewhat similar story in their statements. They stated that they are Somali immigrants who had paid a sum of money between 400 USD and 800 USD to the boat owner to transport them to South Africa where they were going to look for work. That after one month of the voyage they ran out of drinking water and decided to send one of the boats to approach the *Draco* and ask for fresh water. They denied having been in possession of any weapons or having fired at the *Draco*, and further, that they never threw any weapons into the water. The accused also stated that they were not fishing and only had a small line which they used to catch fish for their own consumption. The accused's stories had some contradictions on various aspects including the time they had spent at sea.

Be that as it may, it is a cardinal obligation for the prosecution to prove beyond reasonable doubt that each one of the accused committed the offence charged. It must be stressed that this burden of proof is in respect of every issue and in respect of every element of the crime. The court is not bothered by the strength or weakness of the defence case. The defendant is entitled to be acquitted even though the court is not satisfied that his story is true, so long as the court is of the view that his story might reasonably be true. See *Green v The Queen* [1971] CLR 28.

From the evidence adduced, it is clear that during the material time the two small vessels were within the vicinity of the *Draco*, the blue one having proceeded to approach the *Draco* up to a distance of 3 nautical miles. Even after being repelled by the fire from the *Draco*, the vessels could not go far or hide away from the *Draco* whose crew maintained a clear and constant surveillance over them on the radar and therefore never lost sight of the vessels until the helicopter arrived. Apparently this has not been disputed by the defence. I find the authority of *Rep v Mohamed Ahamedlse & Four Others*, Crm Side No 75 of 2010 (Supreme Court of Seychelles) to be instructive on this matter –

Lack of options for possible hiding places in the vast and open sea as compared to the ordinary crime of robbery on land. The main difference between the crime of piracy and ordinary robbery offences is that, whereas in robbery the perpetrators can run, escape on land and easily merge into the surrounding environment (bushes, buildings and crowds) after abandoning their means of transport, the environment in which pirates operate does not present such options. Pirates can run or flee the scene of attack but can never hide on the open seas; neither can they abandon all their vessels (skiffs). In addition, in the piracy theatre, even when they flee, they have a limited travel range and therefore can only cover so much distance in a given timeframe. This works against them. In the instant case, the PAG covered a short distance and was unable to escape the vicinity of the attack.

Given the above circumstances, timing and flow of events, and the evidence of Barrera (PW4) of the *Canarias*, Lopez, the Captain of the helicopter *Toro* and his

camera man Felipe to the effect that there was no other contact detected within a radius of 256 nautical miles of that area, I am fully satisfied that the blue skiff and the white whaler (PE1&2) intercepted by the helicopter and subsequently impounded by the *Canarias* were the vessels involved in the incident of 28 March 2011 with the *Draco*.

None of the prosecution witnesses from the *Draco* could identify any of the accused persons as one of those that were on board the blue skiff that allegedly attempted to attack them. I found the said witnesses to be credible. When one examines the above factors and circumstantial evidence globally, it becomes irresistibly apparent that the accused are the men who were on the two small vessels. The accepted evidence shows that the blue skiff approached the *Draco* at a high speed, and in a manner akin to that employed by skiffs in piracy attacks. In the case at hand however, apart from a man seen by witness Vasilier wielding a bazooka there were no arms seen and no firing of rifles at the *Draco*.

The prosecution submitted that this was neither a friendly approach nor a request for fresh water as claimed by the defendants but a concerted attack with arms. Citing section 65 (4) of the Penal Code, it was further submitted that there is no need to prove that the accused boarded the vessel or captured and took control of it for the offence of piracy to be proved. That a failed attempt to seize the vessel to which the skiff had directed its activities would suffice to establish piracy. The authorities of *Rep v Abdi Ali & Ten Others* (Supreme Court of Seychelles) Criminal Side No. 14 of 2010-paras 13-15 (the *Intertuna 11* case) and *Rep v Mohamed Ahamed Ise & Four Others* (Supreme Court of Seychelles) Criminal Side No. 75 of 2010 (the *Talenduic* case) were cited by the prosecutor in support thereof.

Section 65(4) reads:

(1) For the purpose 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 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.

Section 65(5) also provides:

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).

I am unable to agree with the prosecutor on this matter. Instead, I am in agreement with the defence counsel that the evidence adduced does not support acts of violence depredation of detention as described in section 65(4)(a), as having been considered directed to the *Draco*. In the authorities relied on (the *Intertuna 11* and the *Talenduic*) (supra) violence had been occasioned openly and directed to the vessels and crew by the accused when they fired at the vessels in an attempt to intercept board and detain or take control thereof, and further, in the *Talenduic* the accused even twice chased after both vessels in vain, and eventually gave up. In the current case, the situation was different. The accused had only come in a speeding skiff and got turned away by the gunfire from the *Draco* before or without committing any of the above overt acts.

In my view, this is not the kind of attempt envisaged under section 65 (4)(a) or the common law as propounded by the authority of *Re Piracy Jure Gentium* [1934] AC 586. Consequently, count one must fail.

The facts in this case are somewhat similar to those in the case of *Rep v Abdi Ali & Ten Others* SSC Criminal Side No 14 2010 (the *Intertuna 11* case) where the accused, visibly armed with Kalashnikov rifles and hooked ladders, obviously for boarding purposes, had come in a skiff at a very high speed towards the vessel *Intertuna 11* and got turned back by the fire from the said vessel. The second attempt too was thwarted by the sporadic shooting of guns at the skiff by the security team on the vessel. The accused were then intercepted by helicopter as they fled the scene, arrested and charged with one count under section 65 of the Penal Code read with section 377 and 23 of the Penal Code (just like in count three of this case). That court convicted them for attempting to commit the offence of piracy.

Section 377 of the Penal Code however provides:

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.

It should be pointed out that the conduct of an accused before, during and after the commission of an alleged offence may act as a pointer to his guilt. 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. See *Rep v Mohamed Ahamed Ise & Four Others* SSC Criminal Side No 75 2010 (the *Talenduic* case), *Rep v Abdi Ali & Ten Others* SSC Criminal Side NO 2010 at 13-15 the *Intertuna II* case *Rep v Nur Mohamed Aden & Nine Others* SSC Criminal Side No 75 2010 (the *Faith* case) , *Rep v Mohamed Aweys Sayid & Eight others* SSC Criminal Side No 19 of 2010 (the *Galate*) and *Rep v Mohamed Dahir & Ten Others* SSC Criminal Side No. 51 2009 (the *Topaz* case). 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. Defence counsel submitted that 'the accused did not resort to the use of force even though they were armed with AK47 and RPGs'. 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.

It is the practice at sea for a vessel facing some difficulty to make a distress call to a particular or any vessel in the region, get consent with the Master of that vessel before coming alongside to obtain the assistance ought. This, the skiff did not do. Instead, it just approached at a high speed. The skiffs were flying no flag while on the high seas and lacked communication gadgets or systems. In my view, the accused had all the indicia of bands of sea brigands and were operating on the high seas as a Piracy Action Group (PAG) waiting to prey on innocent and unsuspecting sea voyagers. Their vessels were 'pirate ships' as defined by section 65(5) of the Penal Code. They had not only been used in the attempt to launch an attack on the *Draco* by the accused who were all the time in dominant control of the vessels but were still mounting attacks by firing at the helicopter, which is clearly indicative of intention to further commit piratical activities.

This evidence satisfies the requirements of section 23, 'the element of common intention'. That at all material times the eleven accused persons, though at times travelling on separate skiffs, were working and acting together, with a common intention as a piracy action group waiting to chance on any available vessel. Although each one of them had a different role to play, the group had a common criminal purpose and structures with their leader as Maalin Daoud Olad(A9). Therefore, each one of them is deemed to be liable for the offence preferred as if committed alone.

As already indicated, our law provides for attempt to commit piracy, section 65(3), and the charges under count 3 have been brought under sections 65, 23 and 377. The latter provisions offering the definition for 'attempt'. This evidence also sustains

the elements of section 377. I am satisfied that the offence charged and laid down in count 3 (alternative to count one) has been proved beyond a reasonable doubt.

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 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 a reasonable doubt

Additionally, we must note that a pirate is treated as an outlaw, as the enemy of mankind (*hostis humani generis*), and since the crime is committed at the high seas, he places himself beyond the protection of any state and any nation may in the interest of all capture, prosecute and punish. Hence, bringing to the fore the principle of universal jurisdiction. See *SS Lotus (France vs Turkey)*, 1927 PCIJ (ser.A), No. 9 at 70, Grotius (1583-1645) 'De Jure Beli ac Paris' vol 2Cap 20,,40, Halsbury's Laws of England,4th ed as revised in 1977 Vol 18 at 787-789,

Darco is a Seychelles flagged vessel with predominantly Spanish and African crew while all the accused are Somali nationals who have been tried under the Seychelles municipal law. It may be worthy stating that our Penal Code as amended by Act No.2 of 2010, has incorporated some of these relevant international law principles as well as provisions of the United Nations Convention on the Law of the Sea, 1982 (UNCLOS).

As already stated, there was no direct evidence of eye-witnesses placing any of the accused on the scene apart from circumstantial evidence. However, the inculpatory facts adduced were incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of guilt. Further, any alternative possibility that might point to the innocence of the accused has been satisfactorily explained leaving no other circumstances weakening or destroying the inference of guilt drawn from the said evidence. See *Sauzier v Rep* (1961) SLR 264, *Rep v Hoareau* (1984) SLR 18, and *R Onezime v Rep* (1978) SLR 140.

In conclusion, I find the prosecution to have proved all the ingredients of the offences under counts two and three beyond a reasonable doubt and each one of the accused persons is accordingly found guilty and convicted as charged on those two counts.