**SUPREME COURT OF SEYCHELLES**

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**Reportable**
[2019] SCSC 994
CO 28/2019

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| **THE REPUBLIC**<br>*(rep. by John Thachett)* | **Republic** |
| versus | |
| **MOHAMED DAAHIR WEHLIYE** | **1st Accused** |
| **FESYAL MAHAMOUD MAHAMED** | **2nd Accused** |
| **ABDOULKADER AHMED FARAM** | **3rd Accused** |
| **ABDIKADER MOHMMED FARAH** | **4th Accused** |
| **AHMED MOHAMED ALI**<br>*(rep. by Joel Camille)* | **5th Accused** |

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| **Neutral Citation:** | *R v Wehliye & Ors* (CO 28/2019) [2020] SCSC 994 (22 December 2020) |
| **Before:** | G.Dodin - Judge |
| **Summary:** | Piracy – identification of accused – lack of direct testimony of complainant re: count 3 – no case to answer |
| **Heard:** | 3rd November 2020 |
| **Delivered:** | 22nd December 2020 |

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**ORDER**

The prosecution has established a prima facie case against the 5 accused persons on all 3 counts. The accused persons are called upon to make their defence accordingly.

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**RULING**

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**DODIN J.**

[1] The accused persons Mohammed Daahir Wehliye, Fesyal Mohammoud Mahamed, Abdoulkader Ahmed Faram, Abdikader Mohammed Farah and Ahmed Mohammed Ali all Somali nationals, stand charged with the following offences:

Count 1

Statement of Offence

Committing an act of Piracy, Contrary to Section 65(1) read with Section 65 4(a) of the Penal Code and further read with Section 22 of the Penal Code.

Particulars of Offence

Mohammed Daahir Wehliye 47 years old Mahe Somalian national, Fesyal Mohammoud Mahamed 31 year old Male Somalian national, Abdoulkader Ahmed Faram 21 years old Male Somalian national, Abdikader Mohammed Farah 35 year old Somalian national, and Ahmed Mohammed Ali 30 year old Somalian national, on or about 21st April 2019 , at high sea off Somalian Coast, committed an act of piracy by way of an illegal act of violence against a South Korean fishing vessel namely Adria.

Count 2

Statement of Offence

Committing an act of Piracy, Contrary to section 65 (1) read with Section 65 4(a) of the Penal Code and further read with Section 22 of the Penal Code.

Particulars of Offence

Mohammed Daahir Wehliye, 47 year old Male Somalian national, Fesyal Mahamoud Mahamed 31 year old Male Somalian national, Abdoulkader Ahmed Faram 21 year old Male Somalian national, Abdikader Mohamed Farah 35 year old Somalian national, and Ahmed Mohamed Ali 30 year old Somalian national, on or about 21st April 2019, at high sea off Somalian Coast, committed an act of piracy by way of an illegal act of violence against a Spanish fishing vessel namely Txori Argi.

Count 3

Statement of Offence

Committing an act of Piracy, Contrary to section 65(1) read with Section 65 4(a) of the Penal Code and further read with section 22 of the Penal Code.

Particulars of Offence

Mohammed Daahir Wehliye, 47 year old Male Somalian national, Fesyal Mahamoud Mahamed 31 year old Mahe Somalian national, Abdoulkader Ahmed Faram 21 year old Male Somalian national, Abdikader Mohamed Farah 35 year old Somalian national, and Ahmed Mohamed Ali 30 year old Somalian national, on or about 21st April 2019, at high sea off Somalian Coast, committed an act of piracy by way of an illegal act of violence and detention against a Yemenian dhow Al Ahzam and the person on board the said dhow.

[2] Learned Counsel for the accused moved the Court on a motion of no case to answer at the close of the case for the prosecution. In his submission, learned counsel submitted that there are 2 elements not mentioned in the particulars of offence against the accused which are fatal to the charges under section 65 of the Penal Code. For ease of reference I shall reproduce the submissions of both learned counsel hereunder instead of summarising the same as is normally done.

[3] Learned for the accused made the following submission:

"*My Lord, in my brief submission, I will submit to the Court that the first Count alleges that the accused on or about the 21st April 2019 on the high seas off the Somali coast committed an act of piracy by way of an illegal act of violence against a South Korean fishing vessel namely Adria. Your Lordship will also further note that in the same terms, count number 2 alleges, that on or about the 21st April 2019, on the high seas off the Somali coast the accused committed an act of piracy by way of an illegal act of violence, against Spanish ship, Txori Argi. I will submit that in respect to both counts the prosecution has failed to tender evidence of identification, in regards to the 5 Accused*

*persons. My Lord, we have heard evidence from the various Spanish officers, Lieutenant Anthony* (not Spanish), *Lieutenant Carlos Arias, and others, and none of those officers identified any or all of the 5 accused persons as having committed those acts of piracy against the 2 fishing vessels. On that basis, given the fact that, there is this doubt in regards to the identification of the persons alleged to have committed those acts of piracy, against the 2 fishing vessels those charges against the 5 accused must fail. Your Lordship will particularly note that there is no direct evidence, against the 5 accused persons to show that they may have participated in the aborted acts, against the fishing vessels. They were never apprehended and at any point in time were they seen committing the attacks against the 2 fishing vessels. Therefore, the issue of identification is very much alive here, and in the absence of evidence in that regard, those charges must fail. My Lord, let us look at the 3rd count, that on or about the 20th April 2019 on the high seas off the Somali coast, the 5 Accused persons, committed an act of piracy, by way of illegal act of violence and detention against Yemeni dhow, Al Azham and the persons on board the said dhow. My Lord, Section 65 is very clear. In fact section 65(4) describe what piracy means. There are in fact 2 important parts; an illegal act of violence, detention or any act of depredation committed for private ends, by crew or passenger of private ship, or private aircraft and directed on the high seas, against another ship, or air craft or against person on board a ship or aircraft. Against a ship, an aircraft, a person or property, in a place outside of the jurisdiction of any state. Any act of voluntary participation in the operation of the ship or an aircraft with knowledge of the facts, making it a pirate ship or a pirate aircraft. Essentially, these are the elements that must be proved by the prosecution. My Lord, firstly on the date set in the charge and on the high seas, this is one element, with common intention committed an act of violence, namely an act of piracy, which is defined, for private ends, against the ship has alleged while being the crew member or member of a private ship. My Lord if the court looks at the charge, in fact in respect of all three counts, two important elements are not named by the prosecution in the charge. I will submit that this is defective. Firstly the prosecution has failed to mention, the essential elements of common intention. My Lord, there is no allegation, no averments nothing in regards to common intention. And secondly my Lord, they have also failed to mention the elements that the said offence had*

*been committed, while being the crew or members of a private ship. My Lord, these two elements are very important for the prosecution to name in the charge, otherwise the charge must be declared as defective. The Court of appeal has said in Criminal Appeal SCA 05209 of 209 of 2016 the case of Mohammed Ally Hussein vs the Republic, it was said that where the prosecution has failed to mention these two specific elements in their charges, which is similar to this one. It was stated by the Court of Appeal, that it is encumbent on the prosecution, in view of the provisions contains in Article 19 (2) (b) of the Constitution, which relate to the right to a fair hearing. The prosecution must give details on the nature of the offence, to the person who is charged. And it was further heard in that case my Lord, that it was an essential ingredient of right to a fair hearing, and the right to innocence, and stand in the Constitution that the Prosecution mentioned those 2 elements. My Lord this they failed to do, and in my submissions, that charge must be regarded as defective. In fact my Lord, when the Court looks at the evidence, there is no evidence to show, in respect of Count number 3, that the 5 Accused persons were participating in any act of piracy. My Lord, when the Spanish Officer gave evidence, the 1st question I asked him was when you approached the boat, the dhow, where did you see the 5 accused persons? They were just there along with the Yemenis. They were not found with any weapons, any implements which will relate to piracy, activities of piracy, like ladders, what other implements that is usually associated with acts of piracy. None of them were found to be in possession, in fact my Lord the prosecution cannot rely on the evidence in which the Court has already declared to have been hearsay, in regards to the presence of the 5 Accused persons there. And one we know my Lord, we know that there has been a skiff, which contains 5 nationals, we do not know whether they were Somalis, we do not know whether they were Ethiopians. Throughout the time, the Spanish Naval vessel, approached the Al Azham, those 5 nationals, those 5 person got into the skiff sailed towards Somalia and disappeared inland. And it was those 5 nationals whatever nationality they were who disappeared on land, that were fired on, and that evidence of bullets were retrieved from. In fact the Court will note that the skiff was retrieved by the Spanish and they were brought here in Seychelles in connection to this case but which has nothing to do in my submission with the five accused person. So essentially the prosecution has failed to tender any evidence of common intention. When the five*

*Accused persons were found on that Dow, along with the Yemenis, were they in concert with each other for them to do an Act of Piracy? My Lord, there is no evidence. The prosecution has failed to produce any evidence of that. Let alone the fact they have failed to mention it in the charge. And that all the Spanish has confirmed that when they went there, there were no weapon, nothing, they were just standing there my Lord. My Lord on that basis, I will submit that given the doubt in regards to the identity of the Accused persons, given the fact that the prosecution has failed, to mention important elements in regards to the charge and thirdly my Lord, given the fact that they have also failed on a prima facie basis to tender evidence in regards to both element's, particularly, the elements of common intention, those charges must fail my Lord, they must fail."*

[4] Learned counsel for the Republic made the following submission in reply.

*"My Lord, in this case, the prosecution called a number of witnesses. Both local as well as overseas, and, I would say that the important evidence was given by the commanding Officer of the intercepting Spanish Naval Force. So, he testified before this Court on the grounds for suspecting the piracy attack, for the reason for launching the interception, as well as to also produce the information, regarding the prospective piracy attack. The report was marked as P26. So my Lord in P26, details, the information obtained as well as the nature of the offences committed against the Yemenis vessel, Al Azham, and the reason for the interception by the Spanish Naval Officers. We have the evidence of the boarding of the team. He testified that he was the leader of the boarding team, and when they arrived at the sea or at the vessel – at the Yemenis vessel, they saw a group of people, the Yemenis were there, the Somalis also. The 7 Somalis. He could identify the two of them as security officers from their three previous interceptions. And the 5 remaining where the suspects. My Lord he also testified as to confirmation of this fact from the captain of the vessel or the Master of the Yemeni vessel, as well as the other two members. They were using the techniques of thumbs up or thumbs down. Therefore, he had the previous knowledge about the securities, so regarding the presence of the five new Somalis on board this vessel. He could identify from the Master who were the crew members those who are the suspected pirates. My Lord, the fact that some of them were injured, and in fact two of them were from the boat which had bullet holes now here in*

*Seychelles. And my Lord, there were other persons on board the Yemenis vessel. Also established in this case is that they were not being a part of the security, and I have marked the evidence report which was marked also that they were on board this Yemenis vessel, as pirates and using the vessel, to launch an attack against the Spanish vessel. My Lord, in fact my friend was referring that I did not put common invention. But, look at the charge, it is treatable to the Section 22 of the Penal Code, all three counts my Lord. They say joint enterprise. It was. In addition, my Lord, that case was that, they were using this Yemenis vessel to in fact attack the other two vessels. So, not being the crew members, they were not crew members of the Yemeni vessel. But using this as another vessel, to launch attacks against the other two vessel my Lord. So, not being the crew members, they are not the crew members of any vessel, but using this as another vessel. Moreover also the exhibit officer Arias produced the exhibits which were retrieved from one of the skiffs. And then, there were bullets holes as well as there were shells also found there. So, my Lord that also strengthen the case of the prosecution that this skiff was used to launch attacks against the other vessels my Lord. In fact my Lord the GPS position, has also been noted, is recorded, video recorded, also the GPS processions of the Yemeni vessel. Also, there is evidence which also showed that this vessel, the Yemeni vessel was in close proximity of the Korean as well as Spanish vessels, fishing vessels which were attacked my Lord. Of course we could not get the evidence of the important Yemeni witnesses. Perhaps if in the case, evidence given by the report of the Commanding Officer as well as the evidence of the boarding team, also the video evidence it would show, in fact in one of the video, it could be seen that when the vessel was, the Spanish Naval Vessel was approaching, they were in the hands of the suspects. So my Lord that would show that for the offences charged a prima facie case has been made. That will be my submission your Lordship."*

[5] When determining whether an accused has a case to answer the Court must make an assessment of the evidence as a whole and not just focus on the credibility of individual witnesses or on evidential inconsistencies between the witnesses. Where the prosecution's evidence fails to address a particular element of the offence at all, then no conviction could possibly be reached and the Court must allow the application of no case

to succeed. Where there is some evidence to show that the accused committed or must have committed the offence but for some reason such evidence seems unconvincing, the matter is better left for the end of the trial where the evidence would be weighed and the Court would reach a verdict after assessing the witnesses' credibility together with all available evidence.

[6] Further, where the evidence before the Court has been so compromised by the defence or by serious inconsistencies in the prosecution's testimonies, the Court is entitled to consider whether the evidence adduced taken as its highest would not properly secure a conviction. If the Court determines that in such a circumstance a conviction could not be secured, the submission of no case must also succeed.

[7] In the case of *R v Galbraith [ 1981 ] 1 WLR 1039* Lord Lane C.J. summarised the above proposition as follows:

> *"How then should a judge approach a submission of 'no case'? If there has been no evidence that the crime alleged has been committed by the defendant, there is no difficulty. The judge will of course stop the case. The difficulty arises where there is some evidence but it is of a tenuous character, for example, because of inherent weakness or vagueness or because it is inconsistent with other evidence. Where the judge comes to the conclusion that the prosecution evidence, taken at its highest, is such that a jury properly directed could not properly convict upon it, it is his duty, upon a submission being made, to stop the case. Where however the prosecution evidence is such that its strength or weakness depends on the view to be taken of a witness' reliability, or other matters which are generally speaking within the province of the jury and where on one possible view of the facts there is evidence upon which a jury could properly come to the conclusion that the defendant is guilty, then the judge should allow the matter to be tried by the jury ... There will of course, as always in this branch of the law, be borderline cases. They can safely be left to the discretion of the judge."*

[8] See also the cases of *Green v. R [1972] No 6, R v. Stiven [1971] No 9 and R v. Olsen [1973] No 5*.

[9] The first issue is whether the failure to include the words common intention in the particulars of offence rendered the charges defective and fatal to the case. Learned

counsel for the prosecution contended that the statement of offence clear pleads section 22 of the Penal Code. Section 22 of the Penal Code states:

*"22. When an offence is committed, each of the following person is deemed to have taken part in committing the offence and be guilty of the offence, and may be charged with actually committing it, that is to say-*

*(a) every person who actually does the act or makes the omission which constitutes the offence;*

*(b) every person who does or omits to do any act for the purpose of enabling or aiding another person to commit the offence;*

*(c) every person who aids or abets another person in committing the offence;*

*(d) any person who counsels or procures any other person to commit the offence.*

*In the fourth case he may be charged with himself committing the offence or with counseling or procuring its commission.*

*A conviction of counseling or procuring the commission of an offence entails the same consequences in all respects as a conviction of committing the offence.*

*Any person who procures another to do or omit to do any act of such nature that, if he had himself done the act or made the omission, the act or omission would have constituted an offence on his part, is guilty of an offence of the same kind, and is liable to the same punishment, as if he had himself done the act or made the omission, and he may be charged with himself doing the act or making the omission".*

[10] Common intention is not specifically stated in section 22 of the Penal Code but the Court takes note that the Prosecution did not plead common intention in this case but section 22 which consists of a greater variation of associations which are akin to joint participation than common intention. There is therefore an element of uncertainty as to whether the accused have been charged under section 22(a), (b), (c) or (d).

[11] Section 23 however is more specific on the type of association which amounts to common intention:

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

Learned counsel for the prosecution did not clarify in his submission whether the charges were to be read with section 22 only in which case the uncertainty would remain or whether he intended to amend to section 23 which would leave no doubt for the accused in their defence. The question is whether such defect is fatal to the charges.

[12] Section 111 of the Criminal Procedure Code states:

> *"111. Every charge or information shall contain, and shall be sufficient if it contains, a statement of the specific offence or offences with which the accused person is charged, together with such particulars as may be necessary for giving reasonable information as to the nature of the offence charged."*

The Court has sufficient discretion to determine whether section 111 of the Criminal Procedure Code has been sufficiently complied with in terms of the charges under section 65(1) read with sections 65(4)(a) and 22 of the Penal Code. In order to do that, the Court must consider all the evidence adduced by the prosecution which the Court is not required to do on the motion of no case to answer. The Court is only required to find whether on the evidence before it a prima facie case has been established against the accused. It is my considered opinion that the defence should have raised this issue separately before the commencement of the trial or even during the trial for a determination and direction of the Court. I therefore leave this matter open and may be dealt with at the close of the trial if it is concluded in this ruling that the accused have a case to answer.

[13] As it transpired through the submissions, the evidence of the witnesses brought by the Prosecution were not contradicted or compromised in respect of what each of these witnesses observed or did in respect of the apprehension, transportation and handing over of the 5 accused persons. The contention of the defence is that there is lack of evidence in respect of the charge that the accused persons committed an act of piracy against the Yemeni dhow Al Ahzam as no witness was called to testify to the effect that the dhow was actually under the control of the five accused. The Prosecution on its part contends that the evidence adduced by the boarding team, particularly Captain Ordiz and Lieutenant Arias were sufficient to establish that the 5 accused persons were not part of

the Yemeni crew and that together with some other Somalis who managed to escape to the shore had taken over the dhow.

[14] Obviously, had any Yemeni crew testified for the prosecution, this issue would have been resolved to a certain point. It is now for the court to determine whether the evidence adduced by the witnesses who were not on the dhow at the time when the offences were allegedly committed, taken with other circumstantial witnesses would be sufficient to establish the identities of the accused and whether they actually had control of the dhow. This cannot be done at this stage where the court has to determine only the issue of whether the accused have a case to answer because it involves assessing and weighing the evidence as a whole and make a finding on the accused persons' guilt. This should be left to the end of the trial.

[15] At this stage the court has evidence that the 5 accused persons are Somalis. They were apprehended on the dhow Al Ahzam. They were identified by means of thumbs up or down by the crew of Al Azham. Two of the accused had injuries caused by firearms and were treated on board the Frigate Navarra and at Seychelles Hospital. There is evidence that the vessel Txori Argi, a Spanish fishing vessel was attacked by two skiffs and there was exchanges of fire between the security team on the Txori Argi and the persons manning the skiffs. There is evidence that the vessel Adria was also chased by two skiffs but managed to speed away from the skiffs to escape the attack. There is evidence that a skiff with at least 5 persons on board escaped to the shores of Somalia. The skiff was retrieved and brought to Seychelles and showed that it had been damaged by firearms. All these evidence taken together are consistent with the commission of the offences charged in counts 1 and 2 of the charge. It is not in dispute that these events occurred on the high seas off the Somali coast.

[16] It is nevertheless obvious that count 3 of the charge has to be proved for the first two counts to be sustained. As stated above, whether the 5 accused are the same persons who had control of the dhow Al Azham, or whether they had control of the dhow Al Azham at all would be determined at the end of the trial by assessing the evidence as a whole. At

this stage the court is only required to determine whether there is a prima facie case against the accused persons.

[17] Having considered the evidence adduced, I find that the prosecution has established a prima facie case against the 5 accused persons on all 3 counts. I therefore call upon the accused persons to make their defence accordingly.

Signed, dated and delivered at Ile du Port on 22 December 2020.

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G Dodin

Judge