

**SUPREME COURT OF SEYCHELLES**

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**Reportable**

[2021] SCSC 428

CO 28/2019

**THE REPUBLIC**

*(rep. by Ananth Subramaniam)*

versus

**MOHAMED DAAHIR WEHLIYE**

**1<sup>st</sup> Accused**

**FESYAL MAHAMOUD MAHAMED**

**2<sup>nd</sup> Accused**

**ABDOULKADER AHMED FARAM**

**3<sup>rd</sup> Accused**

**ABDIKADER MOHMMED FARAH**

**4<sup>th</sup> Accused**

**AHMED MOHAMED ALI**

**5<sup>th</sup> Accused**

*(All rep. by Joel Camille)*

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**Neutral Citation:** *R v Wehliye & Ors* (CO 28/2019) [2021] SCSC 428 (16<sup>th</sup> July 2021)

**Before:** G. Dodin - Judge

**Summary:** Piracy – identification of accused – lack of direct testimony of complainants – whether charges defective and defect fatal.

**Heard:** 7, 8, 10, 11, 16, 17, 18, 23, 24, 25 September 2020, 1, 5 October 2020, 3<sup>rd</sup> November 2020, 22 December 2020, 22 April 2021, 19 May 2021

**Delivered:** 16 July 2021.

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**ORDER**

The charges are defective in that the particulars of offence did not contain the element of common intention and amongst whom the common intention was being inferred. However, whether the defect is fatal is subjective and would depend on the level of uncertainty impacting on the right of the accused to a fair trial.

The Prosecution has failed to discharge the burden of proof beyond reasonable doubt in respect of counts 1, 2 and 3. All 5 accused are found not guilty on all 3 counts and are acquitted accordingly.

There is not sufficient evidence to establish that the 5 accused attempted to commit the offence charged in count 4. The accused are acquitted of that count accordingly.

It is recommended that the accused are repatriated to their country as soon as practicable.

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## JUDGMENT

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**DODIN J.**

### **Introduction**

- [1] On Thursday 25th April 2019 at 10:00 hours, Seychelles Police received a report from the EUNAV-FOR Spanish vessel ESPS Navarra, stating that a dhow with five Somalis suspected of piracy had been intercepted outside of the Seychelles waters and they are being brought to the Seychelles port. As a result officers from the Scientific Support & Crime Record Bureau (SS&CRB) and Criminal Investigation Department (CID) were instructed to take on the investigation of the matter.
- [2] The investigation revealed that on the 20th April 2019, at midday, the Frigate ESPS Navarra received an intelligence report from the Spanish Force Headquarters stating that a Yemeni dhow had been attacked. Consequently, the first commander of Navarra, Ricardo Hernandez ordered air surveillance for locations of any dhows or skiffs in the attack area, 250 nautical miles from the Somali Coast.
- [3] On the 21st April 2019, the Frigate ESPS Navarra, whilst moored at the Mombasa Port in Kenya, received an alert message from the Txori Argi, a Spanish fishing vessel, stating that two skiffs separated from a dhow, chased and attempted to attack a South Korean fishing vessel named Adria. Upon noticing the skiffs coming towards their direction, Adria sped up trying to escape the skiffs and went towards Txori Argi. Once they reached Txori Argi, the skiffs launched an attack on the two fishing vessels by means of firing

weapons at the two vessels. Both Adria and Txori Argi returned fire, which resulted in injuries to four Somalis; two in their legs, one in the head and one in the hand.

- [4] The first commander on Navarra ordered air surveillance to locate the dhow in the attack area. At 15:07 hours, air surveillance spotted only one dhow in the area namely Al Ahzam from Yemen. In addition, air surveillance found that the dhow was routed towards the Somali Coast. On the same day in the evening, upon receiving further directives, Navarra immediately left Mombasa port and proceeded north to intercept the dhow Al Ahzam. Throughout surveillance was being maintain and Navarra contacted the attacked fishing vessels whereby both confirmed that they were attacked by Somalis on board two skiffs. Txori Argi further informed that during the attack, there was firing of bullets between the security team on board Txori Argi as self-defence and the suspected pirates on the skiffs which resulted in three bullet holes on the side of one of the skiffs. The suspected pirates had then threw their weapons and a ladder into the sea.
- [5] On the 23rd April 2019, Navarra located and proceeded to approach the dhow, Al Ahzam. During Navarra's approach, they noticed that one of the skiffs was leaving the towing line and proceeding at a high speed towards the Somali coast. The second skiff also tried to escape but was unsuccessful. The dhow was intercepted 4.5 nautical miles from the Somali coast. Navarra boarding team proceeded to board the dhow, where they were informed that the dhow and its crew of Yemenis and 2 Somalis, had been hijacked five days before by a group of five Somalis. That is on the 19 April 2019 in the vicinity of Cadale. The boarding team also found that three Somalis were wounded; two in their knees and one in the hand. The injuries were consistent with those made by firearms.
- [6] The log and track history of the dhow on her Garmin Plotter apparently confirmed that on 21st April 2019 at 0645Z Al Azham's position and time was the same as the fishing vessel Adria when she reported the attack. Furthermore, during their inspection of the seized skiff, they found three mobile phones, three 762 x 39 mm cartridges, seven cartridge casings of 762 x 39 mm and three gunshots holes in the starboard side of a skiff. Navarra had proceeded to seize the escaped skiff which was at the Somali Coast.

- [7] The five Somalis were read their rights using a Djiboutian interpreter and detained on Navarra, which proceeded to Seychelles. On the 25<sup>th</sup> April 2019 at 18:32 hours, Navarra entered the Seychelles dock at Ile du Port IPHS Port Zone 14, where medical assistance was provided to the detainees. At 21:03 hours, SI Decommarmond of SS&CRB photographed the detainees and their injuries were examined. The injury on the hand of one of the suspects was found to be healed. Two detainees had bullet wounds in their legs and were transported to the Seychelles Hospital for surgery, where a bullet was retrieved from the leg of one of them.
- [8] On the 26<sup>th</sup> April 2019, all five Somalis were arrested by PC Tambara with the assistance of an UNODC Somali interpreter. They were all informed of their rights and cautioned. On the 29<sup>th</sup> April 2019, the five suspects were brought before the Supreme Court where they were remanded in Seychelles Police custody. On the 30<sup>th</sup> April and on the 1<sup>st</sup> of May 2019, the suspects were cautioned and interviewed whereby four of the suspects elected to give a full statement except for the 4<sup>th</sup> accused who was still in hospital.
- [9] The accused persons Mohammed Daahir Wehliye, Fesyal Mohamoud Mahamed, Abdoukader Ahmed Faram, Abdikader Mohammed Farah and Ahmed Mohammed Ali all Somali nationals were charged with three counts of piracy whilst acting with common intention to commit the offences and one alternative count of attempting to commit offences of piracy also with common intention.

### **The charges**

- [10] The accused are charged as follows:

#### 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 male Somalian national, Fesyal Mohamoud Mahamed 31 year old male Somalian national, Abdoulkader Ahmed Faram 21 years old male Somalian national, Abdikader Mohammed Farah 35 year old male Somalian national, and Ahmed Mohammed Ali 30 year old male Somalian national, on or about 21<sup>st</sup> April 2019 , on the high sea off the 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 male Somalian national, and Ahmed Mohamed Ali 30 year old male Somalian national, on or about 21<sup>st</sup> 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 21<sup>st</sup> 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 Yemeni dhow Al Ahzam and the person on board the said dhow.*

Count 4(in the alternative to counts 1, 2 and 3)

Statement of Offence

*Attempting to commit an act of Piracy, Contrary to section 65 (1) read with Section 65 4 (a) and section 22 of the Penal code, further read with Section 377 & Section 379 of the Penal Code.*

Particulars of offence

*Mohamed Daahir Wehliye, 47 year old Male Somalian national, Fesyal Mahamoud Mahamed 31 year old Male Somalian national, Abdoukader 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, between 19<sup>th</sup> April 2019 and 21<sup>st</sup> April 2019, at high sea off Somalian Coast, attempted to commit an act of piracy by way of an illegal act of violence against South Korean fishing vessel namely Adria, a Spanish fishing vessel namely Txori Argi and a Yemenian dhow namely Al Ahzam.*

**The evidence**

- [11] The prosecution called 14 witnesses who testified, produced exhibits and identified exhibits and the accused.
- [12] PC Shane Tambara testified that on 26<sup>th</sup> April 2019 whilst on duty he arrested the five Somalis accused for the offence of piracy and read them their rights with the help of a Somali translator. On the same day the 4<sup>th</sup> and 5<sup>th</sup> accused were transported to Seychelles Hospital for medical attention whilst the remaining 3 accused persons were taken to Central Police Station.

- [13] Inspector Joseph Bibi testified that on 26<sup>th</sup> April 2019 he received the transfer documents regarding the five Somali accused from the Captain of the vessel “Navarra”. The documents also contained details of the personal properties retrieved from each accused.
- [14] Ralph Agathine an Scientific Support & Crime Record Bureau officer testified that on the 25<sup>th</sup> April 2019, in the company of ASP Quatre, SI Decomarmond and Corporal Cassime, he went to the jetty at Ile du Port, at around 1936hrs and boarded the vessel Navara where he met with the Captain and his Lieutenant who briefed them about the suspected case of Piracy. SI Decomarmond took photographs of the five accused and also photographed the injuries on three of the accused. On the 26<sup>th</sup> April 2019, he returned to the vessel and collected one box containing 14 packages from Lieutenant Carlos Arias. These included 7 bullet shells, (casings) and 3 bullets. There were also one cell phone mark Techno, one cell phone mark LG and one cell phone marked ITEL. He also received an SD card and hard disk. On the 26<sup>th</sup> of April at around 1730hrs at the Seychelles Hospital he received one bullet head from Nurse Noella Mellie which was placed in a sealed evidence bag. On the 26<sup>th</sup> of April he also received 4 boxes from the Lieutenant Carlos Arias which contained clothes and a watch allegedly belonging to the accused. He was also handed over two outboard engines, 21 gallons, one white bag and another gallon with tools inside all of which were kept in a secured area at the SS&CRB office which was visited by the Court. No ballistic analysis were made and therefore it could not be determined from where the bullets were fired.
- [15] Eduardo Guitian Crespo the Commanding Officer of Frigate ESPS Navarra testified that on the 23<sup>rd</sup> April 2019, the Navarra was deployed at Somali basin just to assure passage of normal traffic as well as to protect other vessels including fishing vessels in the area of the Indian Ocean. On the 21<sup>st</sup> April 2019 the Navarra was moored in Mombasa when they received an emergency call from Spain about an attack on South Korean Vessel Adria about 250 nautical miles off the Coast of Somalia. The Navarra was instructed to proceed to the area to investigate.
- [16] The witness further testified that on the 19th April they received information that a dhow named Al Ahzam had been hijacked near the coast of Somalia and taken to the high seas.

The witness testified further that on the evening of the 22nd April they identified the dhow Al Ahzam and were instructed to follow the dhow until early morning to intercept it which they did. When they approached the dhow they could see some people from the dhow getting into a skiff and sped towards the Somali coast where they escaped. When they boarded the dhow Al Ahzam they could see that there were two seriously injured persons on board. There were seven Somalis and the rest were Yemenis. The master of the dhow Al Ahzam was identified and he stated that they had been hijacked on the 19<sup>th</sup> April 2019. He also received information from the master that persons from the dhow had attacked a Korean ship called Adria and a Spanish fishing vessel called Txori Argi which matched the information that they had.

[17] The witness testified that by checking the GPS equipment of the dhow, its movements were found to match the information the Navarra had placing it where the attacks on the Adria and Txori Argi took place at the time of the attacks. The information was sent to the Operations Headquarters in Spain and the Navarra received instructions to detain the Somali people on board the dhow as suspects involved in a piracy attack.

[18] The witness further testified that after boarding the dhow and found that some people were injured arrangements were made to provide medical care, food and water before moving the suspects from the dhow to the Navarra the suspects were identified and given further medical treatment. After all formalities had been completed the suspects were detained in the “jail” on board the Navarra. The Navarra was instructed to proceed to Seychelles. Before starting their journey to Seychelles the Navarra sent a team to the Somali beach to retrieve the skiff which had escaped earlier and brought it back to the “Navarra”.

[19] The witness testified that upon arriving in Port Victoria, the recovered skiff and all the information that they had gathered were handed over to the Seychelles Authorities. He noted that two other skiffs were attached to the vessel, Al Azham. Those two skiffs were left with the dhow.

[20] Lieutenant Inigo Cordero De La Puente, a Spanish naval officer testified that during April 2019, he was posted on board the Spanish navy ship “Navarra” as Operations Officer. He



was in charge of coordinating all the activities as well as the training of the crew and liaising with navy headquarters during operations. The testimony of the witness matched that of Eduardo Crespo as summarised above. In addition the witness was specific that the Maritime Patrol Aircraft deployed over the area reported that there was only one dhow in that area. That was the dhow Al Azham.

[21] The witness further testified that throughout the operation, he remained on board the Navarra to co-ordinate the operation. As such, he was not able to personally see the dhow nor the skiffs. He did not interview the accused persons even after they were brought to the Navarra.

[22] Lieutenant Commander Pablo Garaizabal Garcias De Los Reyes, also gave consistent testimony to Lieutenant De La Puente and Commanding officer Crespo. In April 2019 he was posted on the Spanish Frigate “Navarra” as Executive Officer. His duty was to take care of the crew and oversee the internal organization of the ship. He was not part of any of the operation but only in charge of the team that received the detainees on board the Navarra.

[23] The witness testified that upon being brought on board the Navarra, the 5 suspects were checked for security reasons and read their rights. Then they completed certain formalities being interviews and paperwork. After they had been provided with baths and change of clothes, medical checks were done after which they were placed in the surveillance compartment where they remained until the handing over to Seychelles Police. He was the one who handed over the accused to Seychelles police together with all the documentation.

[24] Sub-Inspector Dean Decomarmond testified that he is based at SS&CRB unit as crime scene investigator. This involves photography and generally the collecting of evidence from crime scene. In this case, his role was to take photographs of exhibits. On 25th April 2019, he boarded the Spanish vessel Navarra in the company of ASP Quatre, Inspector Agathine and Corporal Casime. He took photographs of injuries on some of the suspects and photographed 5 boxes in the cabin. The next day, on board the same vessel he photographed one white carton box in which there were some bullets and empty

cartridges, memory cards, mobile phones, external drive all of which were in clear plastic bags. He also photographed one white skiff which had some damages suspected to be bullet holes, 2 outboard engines make Yamaha and several containers. On the 16<sup>th</sup> of May he photographed 5 boxes containing clothes. All the photographs were admitted as exhibits.

[25] Lieutenant Patricia Anthony a navigation officer of the Seychelles Coast Guard testified that on 16<sup>th</sup> May 2019 she received 21 coordinates from Sergeant Eulentin to plot on a navigation chart. After completing the chart she handed it back to Sergeant Eulentin on 17<sup>th</sup> May 2019.

[26] Inspector Ivan Esparon of the SS&CRB testified that on the 9th May 2019 he received some SD memory cards from Inspector Agathine also of SS&CRB for extraction of video footages and pictures. He did not view any of the images or videos on those hard drives and SD cards. He was only asked to transfer those content for the purpose of investigation so that the exhibit is not tempered with and then handed it over to the Investigating Officer. In respect of one black mobile phone make LG, one black and blue mobile phone mark Techno data extraction was unsuccessful. He made a report dated 27<sup>th</sup> June 2019 which was handed over with the exhibits.

[27] Captain Borja De La Riva Ordiz of the Spanish Marine Corps testified that on 23<sup>rd</sup> April 2019, whilst stationed on board the Spanish vessel Navarra he received information of attacks on two fishing vessels conducted from a dhow. He was instructed to board the dhow Al Azham with his team which included an interpreter. He observed by using special camera that the dhow Al Azham was towing two skiffs and also observe 3 groups of people on dhow. The large group of 15 persons were at the bow. A smaller group of 8 were at the stern and a third group of 5 were in the middle.

[28] Upon boarding the dhow and based on his experience he was able to identify that a group of people on the dhow were Yemenis and that seven (7) others were Somalis based on the facial features and skin colour. After interviewing the Somalis he found that 2 were members of a security team and five of them were the suspected pirates. He interviewed the master of the Yemeni dhow who stated that the dhow had been hijacked by the

Somalis. After returning to the Frigate “Navarra” with his crew he was instructed to retrieve the skiff used by the Somalis to escape which he did with the help of Yemenis.

[29] Lieutenant Carlos Galiana Arias of the Spanish Navy testified that during April 2019 he was working on board the Spanish Frigate “Navarra” in the Indian Ocean discharging the function of Registry Officer amongst others. As Registry Officer his main task was to collect evidence during operations and maintain the chain of custody of that evidence until it is handed over to the authorities.

[30] On 23rd of April 2019 they received information that a fishing vessel Al Azham had been hijacked near the Somali coast.” After the dhow had been boarded and declared safe, his team went on board the Al Azham at 14 hours for the collection of evidence. After boarding, they made a quick search for guns or other weapons but only found a cell phone. They next went to see the GPS system on the ship to check the log of the ship for the last few days. According to the GPS of Al Azham, he concluded that it was at the place of the attacks at the time of the attacks. At the time of boarding however it was about 8 to 9 miles away from the position of the attacks.

[31] On that day he recorded 5 statements from the persons on the dhow. According to the statements, the Yemenis were all fishermen. Once their tasks were completed all exhibits in their possession were placed in a safe room whilst they transited to Seychelles. Only the recovered skiff with holes in it was kept on deck. He also prepared an exhibits log in conjunction Petty Officer Emilio who was also on the evidence collection team. His evidence in all aspects corresponds with the testimonies of the previous witnesses.

[32] Dr. Mario Lazaro Guedes Consuegra an orthopaedic surgeon at the Seychelles Hospital testified that on the 25<sup>th</sup> April 2019, Doctor Chetty admitted 2 patients brought to casualty section of the Seychelles Hospital with a gunshot wounds. Both wounded on the left side; one in the knee and the other one in the thigh. He removed the bullet which was given to investigation officers. One of the injured had an open femur fracture which wound was infected and he was admitted. He was treated with antibiotics and about one week later they applied external support to fix the bone. The bullet was not removed because it may

affect the artery. Then he was discharged. He also identified the 4<sup>th</sup> and 5<sup>th</sup> accused persons as those treated at the hospital.

[33] Francisco Leyenda Pereira, the Fishing Master of South Korean vessel F/V Adria testified that in April 2019 whilst at sea the crew noticed 3 small skiffs heading towards their vessel. They also noticed another vessel, the Txori Argi which was not moving and not far off. They immediately moved away to escape. The Adria and the Txori Argi were about 2 miles apart when the persons in the skiffs started firing guns and grenades at them. They returned fire. After a time he noticed the persons in the skiffs throwing their weapons and ladders into the water whilst at least one person in a skiff used his shirt to wave at their vessel. They reported the attack to the organisation conducting naval operations in the area.

[34] Detective Woman Police Constable Mariana Eulentin of the Criminal Investigation Department of the Seychelles police testified that she was the co-investigator in this case. Sub Inspector Shepperd Leon was the other co-investigator. During the investigation statements were taken from the witnesses and suspects. She also received the coordinates that were transferred to the Coast Guard for them to plot on a chart. These coordinates were given to Lieutenant Anthony at the Coast Guard and later she remitted the plotted chart to her.

[35] The witness further testified that she attempted on several occasions to contact the Yeminis from the dhow without success. She also tried through UNODC but was informed that they were not responding. She even tried by making contact with the Navarra but it was also unsuccessful.

### **Submissions**

[36] At the close of the case for the prosecution, learned counsel for the accused moved the court to rule that all accused had no case to answer due to lack of sufficient evidence against them. On the 22 December, 2020 the court ruled that there was sufficient evidence to establish a prima facie case against each accused and called on the accused to

exercise their right to make a defence. All accused opted to remain silent and did not call any witness. I note at this stage that the right to remain silent is a constitutional right afforded to each accused and no adverse inference should be made where an accused choose to exercise that right.

[37] The Prosecution and defence then proceeded to make final submissions.

[38] Learned counsel for the Prosecution submitted that from the evidence adduced during the trial in accordance with section 65(4)(a) of the Penal Code, the prosecution needs only to prove voluntary participation with the knowledge of the facts making a vessel a pirate ship. Further the prosecution is relying on Section 22(a) of the Penal Code, showing that all the five accused persons acted as a unit and hence had common intention to go in pursuit of the act of piracy.

[39] Learned counsel submitted that the prosecution must prove the following elements of the offences:

- i. An illegal act of violence or detention, or any act of depredation;
- ii. Committed for private ends;
- iii. On the high seas;
- iv. That each accused voluntarily participated in the operation of the dhow; and
- v. That each accused had knowledge of facts making the dhow a pirate ship.

[40] In respect of an illegal act of violence or detention or act of depredation learned counsel submitted that the witnesses for the prosecution were consistent and credible and their testimonies showed that the accused persons were involved in piracy activities. The prosecution has proved beyond reasonable doubt that the five accused persons voluntarily participated in the hijacking of a ship namely Al Azham with knowledge of the facts making the same to be a pirate ship contrary to Section 65 (1) of the Penal Code. Learned counsel submitted that the accused persons were also on the high seas when they committed the illegal act of piracy for their private ends against the fishing vessels namely Txori Argi and Adria.

- [41] Learned counsel further submitted that the GPS record and the evidence of the Spanish Naval Officers corroborate the fact that the dhow Al Azham was located in the vicinity of the attacks at the material time and the very fact of interception was made due to information received regarding attacks. Learned counsel further submitted that the bullet holes in the skiff that was used to escaped from dhow also corroborates that this was the skiff used for attacking two vessels. Learned counsel submitted that the evidence of the Naval Officers confirms that except these five accused persons, the remainder of the persons on the dhow were Yemenis. The bullet injuries on the 4<sup>th</sup> &5<sup>th</sup> accused persons corroborate the fact that they were the pirates and sustained injuries during their attack on other two vessels.
- [42] Learned counsel further submitted that there is no evidence to suggest that the accused persons were crew members of vessel Al Azham and they sustained injuries whilst on board during attack for public or political ends. The court, is entitled to infer, from all circumstances, and from modus operandi of Somali piracy attacks, that these accused persons hijacked the vessel Al Azham and used it for attacking the other two vessels for their private ends.
- [43] Learned counsel submitted further that there is ample evidence to show that these accused persons were involved and carried out attacks against other vessels namely, Txori Argi and Adria. The evidence as to the location of the two attacks and the movement and location of vessel Al Azham was not challenged by the defence. On the contrary, the naval officers categorically stated that the vessel Al Azham was located in the vicinity of the attacks through the GPS analysis of track points and coordinates. The master of the said vessel was already known to them during their friendly checking up when on patrol.
- [44] With regard to the identification of the accused learned counsel submitted that Captain Borja De La Riva Ordiz testified that based on his experience he was able to identify the groups of people at the bow and stern of the dhow as Yemenis and that seven others were Somalis based on the facial features and skin colour. He also used the technique of thumbs up and down to identify the suspected pirates. He also identified them in the

court. The video footages retrieved from the SD memory cards clearly proved the identification of accused persons. Of the 7 Somalis 2 of them were their security guards. The remaining 5 Somalis were separated and they could not account for their being on board the vessel Al Azham.

- [45] Learned counsel submitted that it is the prosecution's case that each of accused committed the offence together. Pursuant to section 22 of the Penal Code, every person who does the act that constitutes the offence may be found guilty of it. Section 22 of the Penal Code establishes the principle of joint liability and common intention under Seychelles Law, and it is the appropriate section to consider in such a case as confirmed by the Court of Appeal in the case of Mohamed Hasan Ali & others in SCA 22/2012 delivered on 12th December 2014, held that

*“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 submitted that the way section 22 has been drafted, it is not necessary to specify whether a person is being charged as principal or secondary party since the secondary party can be indicted for the substantive offence rather than on the basis of his participation in it.

- [46] Learned counsel submitted that where a criminal offence is committed by two or more persons, each one may play a different part. However, each one is guilty of the offence if they were acting together as a part of the joint plan or agreement, to commit the offence. The essence of joint liability for an offence is that each accused shared a common intention to commit the offence, and played a part in it. It is not necessary for the prosecution to prove the precise role played by each accused, as long as the court is sure that they were all working and acting together, with common intention and common criminal purpose.

- [47] In respect of count 4, attempt to commit piracy, learned counsel submitted that an attempt to commit a crime is an act done with intent to commit the crime and forming part of a series of acts which would constitute its actual commission if it were not interrupted. The point at which such a series of acts begins cannot be defined, but will depend on the circumstances of each particular case. To that end, the prosecution relies on the evidence of witnesses Leyanda Pereira and the Spanish naval officers. The injuries sustained by the 3 accused also support the contention that only the Somali pirates sustained injuries, hence a safe inference can be drawn from the available circumstantial evidence that they sustained those injuries in the attempt to commit piracy.
- [48] Learned counsel submitted also that none of accused were able to account for their being on board Al Azham and how some of them sustained bullet injuries. Learned counsel referred the court to the case of *Jose Nenesse Vs Republic in SCA 35/2013*, which contains in paragraph 24, “*When pretty stringent proof of circumstances is produced tending to support the charge, and it is apparent that the accused is so situated that he could offer evidence of all the facts and circumstances as they exist, and show, if such was the truth, that the suspicious circumstances can be accounted for consistently with his innocence and he fails to offer such proof, the natural conclusion would tend to sustain the charge.*”
- [49] Learned counsel further added that in *Burdett (1820) 4 B. & Ald 95* at p.120 it had been held “*No person is to be required to explain or contradict until enough has been proved to warrant a reasonable and just conclusion against him, in the absence of explanation or contradiction; but when such proof has been given, and the nature of the case is such as to admit of explanation or contradiction, can human reason do otherwise than adopt the conclusion to which proof tends?*” [Sic].
- [50] Learned counsel further referred the Court to the South African cases of *Magmoed V Janse van Rensburg and others 1993 (1) SACR 67 (A)* which held that where there is direct evidence implicating an accused in the commission of an offence, the prosecution case is ipso facto strengthened where such evidence is uncontroverted due to the failure of the accused to testify. In *S V Tandwa 2008 (1) SACR 615* it was held that an accused



has the constitutional right to remain silent but his choice must be exercised decisively as *'the choice to remain silent in the face of evidence suggestive of complicity must, in an appropriate case, lead to an inference of guilt'*.

[51] Learned counsel moved the Court to find that the prosecution has proved its case beyond reasonable doubt against the five accused persons as charged and to convict them accordingly.

[52] Learned counsel for the accused submitted that the Prosecution has failed to tender evidence in respect of the counts to show that the accused persons committed the acts against the vessels at all. There is no evidence tendered by the prosecution to show that any of the 5 accused persons participated in any such attacks, let alone to show that they acted in concert on any date as alleged or at all.

[53] Learned counsel submitted that none of the prosecution witnesses identified any of the accused as being the person involved in both incidents or as acting in concert with each other to effect the attacks. The prosecution evidence merely show that there were attacks by persons described as Somali nationals following two separate incidents, involving the two fishing vessel and no more. The Court is invited to consider the evidence of Captain Borja De La Riva Ordiz who testified on behalf of the prosecution. He testified that on the 23<sup>rd</sup> April 2019 he was ordered to board a dhow close to the coast of Somalia. He used two small boats to board the dhow. He identified 12 persons on the dhow when they were about 15 meters away from the dhow. Through physical distinction, he stated that he could identify Somalis and Yemins. He noticed that some Somali nationals had been injured. He could not testify however how those Somalis had been injured. He clearly testified that he spoke with the master of the dhow, a Yemeni and to none of the accused persons found on the dhow.

[54] Learned counsel submitted that Captain Borja De La Riva Ordiz clearly testified that when he approached the dhow, he identified 5 people who got into a skiff and fled towards the Somalia coast. He then order for the skiff to be taken into their custody from the coast of Somalia. The 5 persons were never apprehended. Importantly, the captain confirmed in cross examination, that when he saw the accused person on the dhow, none

of them were involved in any criminal act. They had been passive on the deck of the dhow and they had no weapons in their custody. He also confirmed that he spoke only to the Yemini and did not interview any of the accused persons. The master of the Yemini dhow had told him that it was the 5 persons which fled to the Somalia coast, were the persons that had attacked his dhow. (Note that according to the record the witness said the 5 were part of the group of Somalis).

[55] Learned counsel submitted that the evidence of Captain Borja De La Riva Ordiz is corroborated by the evidence of Lieutenant Carlos Arias, who testified that he ordered a thorough search of the dhow and no illegal weapons were found. He confirmed that he searched the GPS log of the dhow and saw that the boat had been in the place of the attack of the two fishing vessels, but was not in the exact place of the attack (at the time it was boarded). Mr. Arias also confirmed that he interviewed only the Yeminis and none of the accused persons. In cross examination he also confirmed that the dhow Al Azham had at the material time, a license to fish in Somali waters. Yet he did not ascertain from the accused persons or any other authorities, whether the accused persons had been authorized as fishermen, to fish on board Al Ahzam. The presence of the accused persons were never investigated by any of the Spanish navy personals who boarded the dhow.

[56] Learned counsel submitted that the prosecution's evidence leaves a major doubt as regards the identity of the attackers in respect to both incidents, as alleged under counts 1 and 2 of the charge. There is clearly no evidence to show that the 5 accused persons attacked the two finishing vessels. The apprehension of the 5 accused persons by the Navarra had occurred some 2 days after the incident of the 21 April 2019.

[57] Learned counsel submitted that the prosecution's evidence has shown that 5 people fled the dhow in a skiff to the Somali coast. The skiff was retrieved and evidence of bullet holes and bullet shells and casing were retrieved from the same skiff. None of the accused were arrested from the fleeing bunch. They were arrested on the dhow, without any paraphernalia to commit any illegal act, let alone piracy. Learned counsel admitted that two of the accused persons were injured but contended that the court must take note that the prosecution never tendered evidence to show that they had been injured through

the illegal act of piracy. Learned counsel submitted that the accused must benefit from the doubt and must be acquitted accordingly.

[58] In respect of the 3<sup>rd</sup> count learned counsel referred to section 65 of the Penal Code and submitted that the charge is defective as the prosecution has failed to mention one essential element of the offence namely, that of common intention. The prosecution has also failed to mention the further element that the said offence had been committed while being the crew or members of a private ship. Learned counsel referred the Court to the case of *Mohammed Ali Hussein vs Republic Criminal Appeal SCAOS 09/2016* where it was held that where the prosecution has failed to mention these two specific elements in their charges as presently, it was stated by the Seychelles Court of Appeal that 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. It was further held that this was an essential ingredient of the Right to a fair hearing and the Right to Innocence enshrined in the Constitution. It was further concluded that, '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.' Learned counsel submitted that the prosecution failure is fatal to the charge and must be dismissed against the accused person.

[59] Learned counsel further submitted that the prosecution has failed to prove under count 3, any illegal act committed by the accused. In that respect the court is referred to the evidence of both Capt. Borja and Mr Arias to the effect that at the material time, none of the accused persons were caught in an illegal act against the dhow. There is further no evidence from any of the fishermen on the dhow to confirm that they had been attacked by the accused persons in an act of piracy or otherwise. None of the Yemini fishermen testified. Neither did the master of the dhow.

[60] Learned counsel submitted that the mere fact that the accused persons were on the dhow cannot mean that they were involved in the act of piracy. The act of piracy against the dhow must be proved by the prosecution beyond reasonable doubt. Learned counsel

submitted that having adduced no evidence to that effect, Count 3 must also fail and the accused persons must be acquitted.

[61] Learned counsel moved the Court to dismiss all the counts against the accused and to acquit the accused persons accordingly.

### **The law**

[62] Section 65 of the Penal Code as amended by Act 2 of 2010 has the following provisions in respect of the offence of or related to piracy:

*65(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.”*

[63] Section 65(4) gives the following definitions of piracy:

*65(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 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 or an aircraft or 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 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.”*

[64] Section 65(5) states:

*5. “A ship or aircraft shall be considered a pirate ship or pirate aircraft if-*

*(i) It had 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*

*(ii) 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).”*

[65] Chapter 5 of the Penal Code starts at section 22 which states:

*Principal offenders*

*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.*

[66] Section 23 is in respect of joint offenders. It states:

*Joint offenders*

*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.*

## **Analysis**

[67] The elements of the offence of piracy under section 65(4)(a) read with section 23 of the Penal Code are:

- i. On a date set out in the charge
- ii. On the high seas
- iii. With common intention
- iv. Committed an illegal act of violence or detention or any act of depredation
- v. For private ends
- vi. Against the mentioned ship
- vii. While being a crew or member of a private ship,

[68] Learned counsel for the Prosecution submitted that the accused persons are being tried for the offences of piracy read with the provision of acting with common intention. What constitutes common intention is 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.

[69] Common intention consists of the principle of joint liability in the commission of a criminal act and is not concerned with the manner of committing the offence. Common intention envisages a sharing of similar intention entertained by the accused persons. It requires a common meeting of minds or a sharing of similar intention before or at the time the offence is committed. When more than one person are involved in the commission of an offence there can be equal participation or unequal participation but what counts is not the degree of participation but the mindset of the participants.

[70] The defence did not take issue with whether the correct section of the Penal Code was referred to in the statement of offence. Learned counsel contended that the charges are

defective because the element of the offence, acting with common intention, has not been stated in the particulars of offence.

[71] In the case of *Mohammed Ali Hussein vs Republic Criminal Appeal SCAOS 09/2016* the charges were drafted including the words “with common intention” in the charges. The defence had raised no issue in respect of the charges being defective at the trial stage which held the prevalent understanding of common intention amongst the accused. The Court of Appeal however interpreted common intention as between the accused and the Indian crew of the dhow. The lesson to be drawn from this is that unless the particulars of offence state clearly who were acting in common intention with whom, the accused would be left with uncertainty in the preparation and conduct of his defence.

[72] The Court of Appeal in the same case concluded that one element of the offence of piracy under section 65(4)(a) is that the accused must be the crew or members of a private ship. Learned counsel for the accused submitted that that element of the offence is missing making the charges defective. The Court of Appeal found the charge to be defective stating at paragraph 10 of its judgment:

*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.... 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.*

[73] In respect of the evidence, it is trite law that the Prosecution must prove all the elements of the offences against each accused beyond reasonable doubt. It is only if the Court is satisfied that the Prosecution has discharged its burden of proof to the required standard that the Court would consider any defence that might have been raised by the accused. The standard of proof needed to secure convictions on the charges is much higher than a prima facie case required to determine whether the accused have a case to answer.

- [74] Going by the elements of the offences, the dates the incidents occurred and the location on the high seas off the coast of Somalia have not been disputed by the defence. The remaining elements of the offences are however very much in dispute.
- [75] Common intention has been partly treated above, in its legal context and with regard to the particulars of the offences. The evidential burden of establishing common intention lies on the prosecution and it must be proved beyond reasonable doubt. The only evidence placing the 5 accused persons on the vessel Al Azham came from the officers of the Spanish vessel Navarra. None of those witnesses however witnessed any of the accused committing act of violence, detention or act of depredation against any vessel. The fact that 3 of the accused were injured and two had a bullet still lodged in their bodies might lead to the conclusion that the accused must have been injured by gunfire but it does not establish the role of the accused in the incident.
- [76] The only witness who testified of an attack on his vessel was Francisco Leyenda Pereira, the Fishing Master of South Korean vessel F/V Adria. The Adria immediately moved away to escape and came to within 2 miles of the Txori Argi. After exchanging fire with the persons in the skiffs he noticed the persons in the skiffs throwing their weapons and ladders into the water and at least one person in a skiff used his shirt to wave at their vessel. The attack was reported to the organisation conducting naval operations in the area. None of the accused was identified as one of the persons in the skiffs.
- [77] The other notable element of the offence for which the Prosecution had to adduce sufficient evidence is that the accused were a crew or member of a private ship. The fact that the accused were found on board the dhow Al Azham does not automatically make them a crew or a member of the Al Azham. There was also no evidence to support the Prosecution's contention that the accused has hijacked the vessel Al Azham or had dominant control of the vessel and had used it as a pirate ship. No witness from the Al Azham crew testified in this case.
- [78] The elements of the offences iv and v, for private ends and the identity of the attacked vessel would only become relevant if the other elements have been proved. However it is also obvious that the particulars of the offences did not make reference to element vii of



the offences, that is, that the accused acted while being a crew or member of a private ship.

### **Findings**

- [79] In the analysis of the evidence, the Court finds that the testimonies of the Prosecution witnesses whilst credible and uncontroverted, failed to address certain elements of the offences, particularly that the accused committed an illegal act of violence or detention or any act of depredation and while being a crew or member of a private ship.
- [80] On the framing of the charges, I find the charges to be defective in that the particulars of offence did not contain the element of common intention and amongst whom the common intention was being inferred. Whether the defect is fatal however would depend on the level of uncertainty impacting on the right of the accused to a fair trial. This is subjective to each case or charge.
- [81] Since there is insufficient evidence to sustain the charges against the accused on counts 1, 2 and 3, I find that the Prosecution has failed to discharge the burden of proof beyond reasonable doubt as required by law. Consequently, all 5 accused are found not guilty and are acquitted of all 3 counts accordingly.
- [82] In respect to count 4, I find that there is not sufficient evidence to establish that the 5 accused attempted to commit the offence charged. The accused are acquitted of that count accordingly.
- [83] Having found the accused persons not guilty on all counts and having acquitted them, I recommend that they are repatriated to their country as soon as practicable.

Signed, dated and delivered at Ile du Port on 16<sup>th</sup> July 2021.

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Dodin J