

THE REPUBLIC OF SEYCHELLES
IN THE SUPREME COURT OF SEYCHELLES
(Holden At Victoria, Mahe Island)

THE REPUBLIC

VS.

MOHAMED AHMED DAHIR & TEN (10) OTHERS

Criminal Side No. 51 of 2009

Attorney General, Mr. R. Govinden for the Republic

Mr. A. Juliette for all 11 Accused persons

JUDGMENT

Gaswaga, J

[1] The eleven (11) accused persons: Mohamed Ahmed Dahir (A1), Ares Isse Karshe (A2), Abdullah Said Igaal (A3), Abdullah Mohamed Hussein (A4), Abdiquadir Ali Ahmed (A5), Mowlid Ahmed Abidoon (A6), Abdiquadir Hassan Biid (A7), Ahmed Ibrahim Qorgab (A8), Ahmed Osmal Mohamed (A9), Daud Ali Salad (A10), and Ahmed Khali Warsame (A11) are all Somali nationals charged with various offences as indicated herein below.

Count 1

Statement of offence

Committing a terrorist act contrary to Section 4(b) and Section (2) of the Prevention of Terrorism Act 2004 as read with section 23 of the Penal Code.

Particulars of Offence

Abdullah Mohamed Hussein, Abdiquadir Ali Ahmed, Mowlid Ahmed

Abidoon , Abdiquadir Hassan Biid, Ahmed Ibrahim Qorgab, Ahmed Osmal Mohamed, Daud Ali Salad,d and Ahmed Khali Warsame being all of Somalis nationality on the 6th of December 2009 whilst being in two different vessels on a part of the high seas which falls within the Seychelles Exclusive Economic Zone, with common intention, used firearms and explosives against the Seychelles Coast Guard Patrol Vessel “*Topaz*” and its crew, such act being intended or by its very nature and context could be reasonably regarded as being intended to compel the Government of Seychelles to limit or to stop patrolling, controlling and monitoring its Exclusive Economic Zone.

Count 2

Statement of Offence

Being a member of a terrorist group contrary to and punishable under section 18 (1) as read with Section (2) of the Prevention of Terrorism Act 2009.

Particulars of Offence

Abdullah Mohamed Hussein, Abdiquadir Ali Ahmed, Mowlid Ahmed Abidoon , Abdiquadir Hassan Biid, Ahmed Ibrahim Qorgab, Ahmed Osmal Mohamed, Daud Ali Salad, Ahmed Khali Warsame as a result of committing the terrorist act referred above in Count (1) you are members of an entity that has as one of its activities and purposes, the committing of or the facilitation of the commission of a terrorist act.

Count 3

Statement of Offence

Piracy contrary to section 65 of the Penal Code as read with the Common Law of England.

Particulars of Offence

Abdullah Mohamed Hussein, Abdiquadir Ali Ahmed, Mowlid Ahmed Abidoon , Abdiquadir Hassan Biid, Ahmed Ibrahim Qorgab, Ahmed Osmal Mohamed, Daud Ali Salad, and Ahmed Khali Warsame being all of Somalis

nationality on the 6th December 2009 with common intention, whilst being in two different vessels on a part of the high seas which falls within the Seychelles Exclusive Economic Zone assaulted and put in fear of their lives the crew of the Seychelles Coast Guard Patrol vessel “*Topaz*” in an attempt to commit robbery of the said vessel “*Topaz*”

Count 4

Statement of Offence

Aiding and Abetting the Commission of the offence of Committing a Terrorist Act contrary to and punishable under section 20 (a) as read with Section 4 (b) and Section 2 of the Prevention of Terrorism Act 2004.

Particulars of Offence

Mohamed Ahmed Dahir, Ares Isse Karshe, Abdulkllah Said Igaal being all of Somalis nationality on or about the 6th of December 2009 whilst being on a part of the high seas which falls within the Seychelles exclusive economic zone aided and abetted Abdullah Mohamed Hussein, Abdiquadir Ali Ahmed, Mowlid Ahmed Abidoon , Abdiquadir Hassan Biid, Ahmed Ibrahim Qorgab, Ahmed Osmal Mohamed, Daud Ali Salad, Ahmed Khali Warsame to use firearms and explosives against the Seychelles Coast Guard Patrol vessel “*Topaz*” and its crew, such act being intended or by its very nature and context which could be reasonably regarded as intending to compel the Government of Seychelles to limit or stop patrolling, survelling an monitoring its Exclusive Economic Zone.

Count 5

Statement of Offence

Being a member of a terrorist group contrary to and punishable under Section 18 (1) as read with Section (2) of the Prevention of Terrorism Act 2004.

Particulars of Offence

Mohamed Ahmed Dahir, Ares Issee Karshe and Addullahi Said Igaal as a result of the commission of the offence of Aiding and Abetting a Terrorist Act as referred to in Count (4) you are members of an entity that has one of its purposes, the committing of or the facilitation of commission of a terrorist act.

Count 6

Statement of Offence

Conspiracy to commit a terrorist act contrary to and punishable under Section 20 (c) as read with section 4 (b) and Section 2 of the Prevention of Terrorism Act 2004.

Particulars of Offence

Mohamed Ahmed Dahir, Ares Isse Karshe, Abdulkllah Said Igaal, Abdullah Mohamed Hussein, Abdiquadir Ali Ahmed, Mowlid Ahmed Abidoon , Abdiquadir Hassan Biid, Ahmed Ibrahim Qorgab, Ahmed Osmal Mohamed, Daud Ali Salad, Ahmed Khali Warsame on or around the 6th of December 2009 conspired to commit the offence of Committing a Terrorist Act namely to, whilst being on a part of the high seas which falls within the Seychelles exclusive economic zone, used firearms and explosives against the Seychelles Coast Guard patrol vessel “ *Topaz*” and its crew, such act being intended or by its very nature and context could reasonably be regarded as intended to compel the Government of Seychelles to stop or limit the patrolling, controlling and monitoring in the Economic Zone.

Count 7

Statement of Offence

Aiding and Abetting an act of piracy contrary to section 65 of the Penal Code as read with the Common Law of England as read with section 22(c) of the Penal Code.

Particulars of Offence

Mohammed Ahmed Dahir, Ares Isee Karshe and Abdullahi Said Igaal being all of Somalis nationality on the 5th of December, 2009 whilst being on a part of the high seas which falls within the Seychelles Exclusive Economic Zone aided and abetted Abdullah Mohamed Hussein, Abdiquadir Ali Ahmed, Mowlid Ahmed Abidoon , Abdiquadir Hassan Biid, Ahmed Ibrahim Qorgab, Ahmed Osmal Mohamed, Daud Ali Salad, Ahmed Khali Warsame by acting as the crew of the “Mother Ship which provided firearms, ammunition, food, water and fuel to the two vessels used by Abdullah Mohamed Hussein, Abdiquadir Ali Ahmed, Mowlid Ahmed Abidoon , Abdiquadir Hassan Biid, Ahmed Ibrahim Qorgab, Ahmed Osmal Mohamed, Daud Ali Salad, Ahmed Khali Warsame to assault and put in fear in the lives the crew of the Seychelles Coast Guard Patrol Vessel “*Topaz*” on a part of the high seas which falls within the Seychelles Exclusive Economic Zone.

[2] All the accused denied the charges and the prosecution led evidence of sixteen witnesses in a bid to prove the case beyond reasonable doubt.

[3] The facts giving rise to these charges are briefly that on the 5th day of December, 2009 Serge Devriese (PW15) employed as a sensor operator in aircrafts set out on a surveillance mission over the Indian ocean in a highly sophisticated maritime aircraft. The aircraft is fitted with a special camera and a digital recorder. During the survey at 06.32 Hrs Zulu time (10.32 Hrs

Seychelles time) Serge Devriese noticed a mother ship pulling two skiffs in a row, with an estimated number of eleven persons and sixteen barrels, and a gun. On each skiff there was a ladder while the mother ship had a distinctive feature of a roof or cover at the front part with a cut. That at detection the boats were stagnant in the water at position 030643 south and 0516128 east but had started moving after five minutes.(See PE 46). Devriese sent out a message to his contacts including the Seychelles coast guard and the detachment commander whose computer is also linked to the coast guard.

[4] The “*Topaz*” - a Seychelles coast guard war ship had been contacted by radio and was to arrive in the area of interest within one and a half hours. The surveillance took about three and a half hours as the plane circled around the boats.(See PE 42). Upon landing at Mahe the tape together with the flash disk containing the information of the flight were handed over to Hervey Delon (PW16) who extracted the relevant information and created a video. Devriese also made a report and handed it over to Hervey Delon who is an imagery analyst with experience of twenty years working for the CIA and fifteen years for the French Intelligence Imagery.

[5] On the 6th of December, 2009 Devriese returned to the same area for same duties but did not find the boats. (See PE 43). Even a further search northwards revealed nothing of interest. Since they were running low on fuel the mission was suspended and the aircraft left for Mahe at 16.53 Hrs Seychelles time. However, on its way southwards to Mahe the aircraft spotted the three boats dead in the water at grid 033745 South 0520028 east. (See PE 46). Devriese had visual contact with the boats which after two minutes had started moving. Messages on the situation were sent out. A radio message was received by “

Topaz” which was within the vicinity of the boats whose actual location and description at the time was also given.

[6] The aircraft was 1.5 to 2.5 nautical miles away from the boats when Devriese was doing the filming using the big camera whose zoom can go up to 8 nautical miles, and two small ones all of which provided good viewing. At one point in time he saw the two attack skiffs being pulled closer to the mother ship, boarded by four persons each from the mother ship who then started loading items off the mother ship to the skiffs. Particularly, an AK- 47 Sub Machine Gun (SMG) with a long bat was seen being transferred onto one of the skiffs. It could not have been a piece of stick as suggested by defence counsel because its barrel and a sling were very visible in the video footage. Besides, Devriese saw very clear and high quality images of the gun. It should be recalled that he has experience of twenty years in the army and can recognize and certify arms.

[7] Noticeable of the three persons who remained on the mother ship was an old man with a long beard dressed in a pink shirt and another wearing a green t-shirt. They had again been positively identified severally in the dock by different witnesses as **A3** and **A2** respectively. Devriese also spotted a ladder with hooks and a 40 HP Yamaha outer board engine on each skiff. That the mother ship originally had on board eleven people and seventeen barrels of various colors, arranged along the starboard (right) side and the port (left) side. Similar rusty perches and repair marks on the sides as well as blue paint at the front were again noticeable on the mother ship. It was also his evidence that this was the same arrangement, features, type and color of boats and number of people that he had detected and recorded on the 5th of December, 2009.

[8] Again the same procedure had been followed upon landing at Mahe and a video prepared by Hervey Delon from the information on the tape and flash disk handed him by Devriese. These, together with a report made thereof were forwarded to the commander of operation Atlanta, EU Navfor. (See DVD, PE 27 and CD, PE 28)

[9] After studying the pictures and video recordings Hervey Delon concluded that the boats had the same characteristics and the eleven people seen in the video of 5th December were the same persons recorded in the video of 6th December, 2009. The video footage was also screened in court.

[10] Major Simon Laurencin (PW10) the Captain of “*Topaz*” testified that following the information given on radio by the MP Aircraft, his navigation officer, Warrant officer class one, Lindon Lablache (PW11) plotted the coordinates on the radar. The three small boats had been detected at 235 nautical miles from Mahe island and 115 nautical miles from the African Coastal Bank, which position falls within the Exclusive Economic Zone (EEZ) of the Seychelles. While heading towards this position they detected a target 11 nautical miles in their direction and approached it. Investigations revealed that it was an Iranian ship that had broken down and was waiting to be towed.

[11] It was during this moment, at about 19.45 hours, while Lindon Lablache was watching the radar carefully that he detected two small targets approaching at a very high speed of about 20 nautical miles. They were at a distance of 3 nautical miles away. At that time the “*Topaz*” lights were on and it was not easy to tell whether it was a war ship or passenger ship. The target was confronted and since tracer bullets were being fired in its direction from two sources, the

Captain of “*Topaz*” ordered combat action and they started firing back. From this point everything went on very fast. On the radar Lablache could see that the two sources of fire were originally in a line but as they came closer to “*Topaz*” which was moving at a speed of 20 to 23 nautical miles, they separated. This is corroborated by Private Dereck Nourice (PW8), Captain Francis Laporte (PW9) and Major Laurencin Simon (PW10) who saw tracer bullets, which illuminate once projectiled in the air, on the starboard as well as portside of “*Topaz*”.

- [12] Due to persistent fire harassment from “*Topaz*” the attackers were subdued. The “*Topaz*” crew quickly recovered a plastic gallon with fuel, an AK-47 Sub-Machine Gun (SMG), loaded with 26 bullets in the magazine (PE1) from the first skiff. Four men, now arraigned before court as A4, A5, A6, and A7, were seized while there skiff was left adrift since “*Topaz*” was in a hurry to catch up with the second skiff that had turned back and sped off. The said skiff was being manoeuvred at a high speed of 20 nautical miles and in a zigzag manner. It collided with the “*Topaz*” whereupon the crew rushed to pick two AK-47 SMG’s, one with a long bat and thirty bullets (PE2) and another with a folded bat and one bullet in the chamber (PE4) as well as a greenish loaded Rocket Propelled Grenade (RPG) bomb (PE3). Four men, now standing before the court as A8, A9, A10, and A11, were rescued from the skiff, whose power had gone off, and it sunk very fast before the ladders and other items could be recovered.

- [13] “*Topaz*” then went after the third contact which was headed south at 6 nautical miles and captured the three occupants of the bigger vessel (mother ship). They are cited as A1, A2, and A3 in these proceedings. The mother ship was then towed to port Victoria, Seychelles and one geographical positioning

system (GPS) (PE5), two mobile phones (PE6) and (PE7), and seventeen barrels of same size but different colors (PE10), and personal effects among other items were retrieved therefrom. Some of the barrels contained food, fresh water and fuel.

[14] Sub Inspector David Belle (PW4) who had boarded “*Topaz*” together with Sub Inspector Ronny Alcindor (PW1) on the 7th of December, 2009, following instructions from their superior, Superintendant of police John Heenan (PW3), arrested the accused after a briefing from Major Simon Laurencin. It had been submitted that the accused were not explained their constitutional rights- *to counsel, to remain silent and to be informed of the reasons for their arrest and detention in a language understood by them-* before being arrested. Of course it was impracticable to provide a lawyer to the accused while at sea. Even if counsel were to be assigned at the time there was no Somali/English interpreter in the country to assist him and the police as well as the court until the United Nations Office on Drugs and Crime (UNODC) procured one from overseas, “... *as soon as it was reasonably practicable thereafter*”, in line with Article 18 (3) of the Constitution.

[15] Ronny Alcindor photographed all the items seized and the eleven men while at sea on board “*Topaz*” and upon arrival at Victoria. See (PE18) and (PE19). Captain Francois Laporte (PW9) also took some photographs immediately after the capture of the accused and during the search of the mother ship. Private Derrick Nourice (PW8), Captain Francois Laporte (PW9), Major Simon Laurencin (PW10), and Warrant Officer two Lindon Lablache (PW11) who were among the 21 “*Topaz*” crew that encountered and captured the accused, together with Sub Inspectors David Belle and Ronny Alcindor

positively identified all the accused in the photographs, then outside court and in the dock. These witnesses also identified the weapons, the boats and other items that had been recovered from the three boats.

[16] After carrying out a comparative analysis of the photos of the three boats and there occupants taken on the 5th and 6th of December by Devriese while in the aircraft and those taken by Captain Laporte of the coast guard, Herve Delon the intelligence imagery analyst concluded that the photos were similar and a perfect match with same characteristics. A similar conclusion was reached for the vessels and there occupants as well as the positioning and color of the seventeen barrels on the mother ship.

[17] Corporal Emanuel Esparon (PW6) a weapons technician with the Seychelles Peoples Defence Forces (SPDF) examined the RPG bomb (PE3) and concluded that it was serviceable although it had been exposed to and affected by elements and was rusty. As for the SMG's (PE1, PE2 and PE4) he found carbon deposition on the piston and gas cylinder tube and concluded that they were serviceable and had been recently fired. Although Corporal Esparon could not tell the exact time and date when they were fired, he opined that it could have been around the first four days of December, 2009.

[18] As for their defence the accused persons neither testified nor called any witnesses. The court draws no adverse inference from their election to remain silent as such right is perfectly provided for under Art 19 (2) (h) of our constitution. However, earlier on, in their pre-trial statements all the accused persons had given similar versions of what they say happened. The accused admitted being of Somali nationality and having come to Seychelles as a

group of boats consisting of two skiffs and one mother ship, on which all of them depended for survival. They also claimed that they are fishermen and use lines and hooks to fish. Further, that on the day of their arrest they were peacefully fishing when the Seychelles coast guard (“*Topaz*”) forcefully attacked them. They never initiated any violence.

[19] In addition and on their behalf the defence counsel made submissions in respect of counts 1, 4, and 6 that interpreting the alleged use of fire arms as “*an act being intended or by its very nature and context could be reasonably regarded as being intended to compel the Government of Seychelles to limit or to stop patrolling, controlling and monitoring its Exclusive Economic zone*” is farfetched and unsustainable because such alleged act is at its best a criminal offence and not terrorism. Further, that it is well known that “Somali pirates” capture ships and hold them for financial ransom, nothing else. He contends that in other words they are robbers at sea with no other agenda which might fall into any definition of terrorism.

[20] For counts 2 and 5 which make reference to count 1, he submitted that the alleged offence in count 1 amounts at best to a case of assault and robbery, but not terrorism which has to have an ideology of some sort as the cornerstone of its very being. With regard to counts 3 and 7 it was submitted that the charges are duplicated and relate to alleged criminal activities (assault and robbery) on the part of the accused, not any ideological or political struggle or mission to amount to terrorism, for example, that of the Al Qaeda. Following the same reasoning, he lambasts counts 2 and 5.

[21] From this evidence it is clear that the accused were arrested in the Seychelles

EEZ aboard the three small vessels. It is also not in dispute that it was the accused in there three vessels that had been sighted on the 5th December before being arrested on 6th December. However, the defence disputes the fact that the accused were armed with the weapons exhibited in court and during cross-examination it was put to the witnesses that the said weapons belong to the Seychelles forces and were just ‘planted’ on the accused by the “*Topaz*” crew. The prosecution witnesses denied this allegation and the suggestion that “*Topaz*” attacked the accused who were at that point in time peacefully fishing. The witnesses also refuted the suggestion that a helicopter from the French vessel ‘*Floreal*’ assisted “*Topaz*” in arresting the accused. The press release (DE1) by the EUNAVFOR which carried this information lacked supporting evidence and the Court attached no credence to it.

[22] Defence counsel also urged the court not merely to rely on the credibility of the witnesses and accept their evidence as the basis for its judgment. It must be clearly stated that Judges depend on evidence properly adduced by credible witnesses, and accepted by the court as a tool to reach a just decision. Cross-examination of the witnesses by counsel too assists in determining and pointing out a credible witness and therefore good and reliable evidence.

[23] There is overwhelming evidence that some of the weapons seen, photographed and filmed by Devriese on the 5th of Dember were exactly similar to those finally impounded on arrest of the accused on the 6th December and then photographed while displayed on the floor of “*Topaz*”. I have no doubt whatsoever that these weapons were recovered from the accused persons. Such direct evidence, even without DNA or finger print or any additional

forensic evidence, on this matter suffices.

[24] In addition, Captain Franky Hoareau (PW5) a logistics officer in charge of the armory registry of the Seychelles Peoples Defence Forces (SPDF) confirmed that he has a list of all the arms in the country but the serial numbers of the above exhibited weapons were not registered with him. Same answer was given by Lance Corporal Radley Moncherry (PW2) the officer in charge of the Seychelles police armory who further stated that there are no RPG bombs in the armory. As for Corporal Emmanuel Esparon (PW6) a weapons technician of the SPDF stated that although there were AK-47 SMG's registered in the Seychelles the quality and manufacturer were different from the exhibited guns bearing a code (56/1) indicating China as the country of origin. In their armory there are no weapons neither manufactured nor purchased from China.

[25] Corporal Radley Moncherry, Corporal Emmanuel Esparon, Captain Franky Hoareau and Private Andy Barra testified that contrary to all the weapons kept in the Seychelles armory they found the exhibited weapons to be rusty and not well maintained. They opined that this could have been caused by poor maintenance (or lack of it) and exposure of the weapons to salinity and elements. However, they were all still serviceable.

[26] From this discourse, it cannot be said that these weapons belonged to or were 'planted' by the Seychelles forces ("*Topaz*"). I am fully satisfied that none other than the accused persons had in their possession these weapons and would therefore know their source. No weapons are reported missing from the armories.

[27] It should be recalled that the seizure of the skiffs and accused persons, and the recovery of the weapons exhibited was done in the night and in haste before the skiffs sinking with other items. All this happened amidst an exchange of fire and clash of the skiffs with the “*Topaz*”. In my view this explains why not all the sighted items like ladders and hooks and other weapons could not be recovered. Not even the bullet shells or cartridges which the defence counsel insisted should have been produced to prove that the weapons had been fired could be recovered in those circumstances.

[28] It is also plausible that taking photos at that time would have been cumbersome as the crew had taken combat positions and were in action. In the same vein I would agree with the Attorney General that as is always the practice some of the weapons and ladders and hooks sighted on the skiffs could have been thrown into the sea and for the gun that had a full magazine, it stands to reason that one might have been in the process of reloading it when arrested since there is expert evidence to show that it had been recently fired. Besides, there are other guns that had been fired and given the evidence adduced, the Court is convinced that there was firing of those rifles on that day.

[29] **Section 23 of the Penal Code, Cap 158** has been added on to both counts 1 and 3 to have the accused charged jointly. It states: -

“When two or more persons form a common intention to prosecute an unlawful purpose in conjunction with one another, and in the prosecution of that 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.”

[30] The provision in itself does not create an offence but provides for the establishment of common intention and lays down a principle of joint criminal liability, which therefore is only a rule of evidence. The book “**Law of Crimes**” (23rd Edition) by **Ratanlal and Dhirajlal** offers a commentary on Section 34 of the Penal Code of India (common intention) and states thus

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“This section is framed to meet a case in which it may be difficult to distinguish between the acts of individual members of a party or to prove exactly what part was taken by each of them. The reason why all of them are deemed guilty in such cases is that the presence of accomplice gives encouragement, support and protection to the person actually committing the act”

[31] In real life, it is difficult if not impossible to procure direct evidence to prove the intention of an individual; in most cases it has to be inferred from his acts or conduct or other relevant circumstances of the case. The inference could be gathered by the manner in which the accused arrived on the scene and mounted the attack, the determination and concert with which the act was done by one or some of them, the acts done by others to assist those causing the injuries or damage, the concerted conduct subsequent to the commission of the offence, as for instance, that all of them had come to and probably left the scene of incident together and other acts which all or some might have done as would help in determining the common intention to all. See “**Law of Crimes**” (supra) at page 89 **S.N. Misra on the “Indian Penal Code” page 96.**

[32] Common Intention therefore implies a pre-arranged plan, prior meeting of minds, prior consultation in between all the persons constituting the group. It also means the *mens rea* necessary to constitute the offence that has been

committed. In other circumstances it means evil intent to commit some criminal act, but not necessarily the same offence, which is committed. Be that as it may, common intention does not necessarily, and in all cases; imply an express agreement and pre-arranged plan before the act. The arrangement may be tacit and common design conceived immediately before it is executed on the spur of the moment.

[33] For instance the evidence shows all the accused aboard the mother ship on the 5th lying in waiting before eventually eight of them taking the different skiffs to attack the same target, “*Topaz*”. They were heavily armed but no evidence has been adduced to show who specifically fired and who did not, and for those that did, which one of the exhibited rifles they used exactly. Common intention can positively be inferred from these facts and circumstances raising a presumption of a common plan to carry out the unlawful design of attacking and firing at “*Topaz*”.

[34] I shall first deal with counts 1, 2, 4, 5, and 6 given that they all hinge on alleged acts of terrorism, then turn to counts 3 and 7 which stem from alleged piracy activities. But before this I find it imperative to resolve the issue: **whether this court has jurisdiction to try the accused persons on terrorism charges as proffered by the State**, since it goes to the root of the case. Contrary to the learned Attorney General’s submission the learned defence counsel stated that this court lacked jurisdiction since the accused persons did not satisfy all the elements outlined (cumulatively) in section 27 (3) (a) to (e) of the **Terrorism Prevention Act, 2004**, which provides for extra-territorial jurisdiction. Mr. Juliette contends that this is a domestic law providing for terrorism offences that have been committed within the borders

of Seychelles and its territorial seas, of usually 12 nautical miles, which are an extension of sovereignty over land, and not at the high seas. Indeed the legal provision lists five different situations (a-e) which are clearly separated by a '**semicolon**' each and a '**semicolon**' and '**or**' after the fourth one, meaning that they are **disjunctive** and **not cumulative** as suggested by Mr. Juliette.

[35] The Legislative Drafting and Legal Manual (5th Edition) 2010 Boston Massachusetts reads: "use a single '**or**' to indicate the **disjunctive** and a single '**and**' to indicate the **conjunction** at the **end of the next-to-last item** in a series."

[36] In my view, the intention of the legislature was to have a citizen or non citizen of Seychelles whose circumstances, actions or facts tantamount to the offence of terrorism but committed outside the country against property belonging to the Government of Seychelles and falls in any of the five categories to be tried by the Supreme Court. A reading of all the five situations together will support this view. They are dissimilar, for instance (c) and (d), each with a different purpose, victim and class of offenders to cater for. Accordingly, I reject the interpretation and application Mr. Juliette seeks to attach to section 27 (3) (a) to (e). I am in total agreement with learned Attorney General that this court is seized with jurisdiction to entertain the terrorism charges herein as the accused fall within some of the outlined categories.

[37] In this case two categories of offences are charged namely **piracy** and **terrorism**. It must be stressed at the outset that piracy deals with illegal acts of violence committed for **private ends** by the crew of a private ship on the high seas against another ship or persons or property on board and does not include acts with

governmental objectives. The definition of a terrorist act is found section 4(b) read with section 2 of the Prevention of Terrorism Act, 2004. Terrorism usually involves indiscriminate violence with the **objective of influencing governments or international organizations for political ends**. Does the evidence in this case disclose these objectives?

[38] As for count one its alleged that A4 to A11 committed a terrorist act by using fire arms and explosives against the Seychelles coast guard patrol vessel- “*Topaz*” and its crew, such act being **intended** or by its very nature and context **could be reasonably regarded as being intended** to compel the Government of Seychelles to limit or to stop patrolling, controlling and monitoring its EEZ. The prosecution submits that the physical element is an act or threat of action that either endangers a person’s life or involves the use of a firearm or explosives or an act or threat of action that involves a prejudice to national security or public safety. Further, that the *mens rea* involves an **intention** (and this can be shown to exist, if the nature and context of the actions reasonably permits) to compel the Government to omit to do an act, which it is duty bound to carry out.

[39] Mr. Juliette totally disagrees with this submission and contends that such interpretation of the alleged use of firearms is farfetched and unsustainable, and at its best can only be a criminal offence of assault and or robbery committed at sea, but not terrorism. In his view, terrorism is a more serious offence involving some ideological and political elements, as well as struggle and mission like that of the Al Qaeda.

[40] Whereas it is true that by firing at the “*Topaz*” there was a possibility of it getting damaged and preventing the crew or the Government of Seychelles from

patrolling its EEZ, I am unable to agree with the prosecution that this was the objective of the accused.

[41] In criminal law, intention means the decision to bring about a prohibited consequence. It is one of the three classes of *mens rea* necessary to constitute a conventional as opposed to strict liability crime. A person intends a consequence when he or she foresees that it will happen if the given series of acts or omission continue and desires it to happen.

[42] Like I have already stated intention can be inferred from the facts and surrounding circumstances. However, I see no pertinent concrete facts to base such requisite logical and irresistible inference here. This decision is fortified by the evidence on record. Both parties accept that pirates hijack ships for a financial ransom. On the fateful day they were on the high seas waiting to chance on any ship that came by and not in particular the “*Topaz*”. No evidence on record tends to suggest that “*Topaz*” or the government of Seychelles was being targeted. “*Topaz*” was not even expected in that area at the time of the incident, it had been called upon and directed there by the maritime aircraft. The Captain of “*Topaz*”, Major Simon Laurencin’s testimony is pertinent in strengthening this position. He stated that unless one is close and well informed about ships, it’s difficult to tell at night whether “*Topaz*” is a war ship or passenger ship especially when the lights are on. According to him, had the accused known that “*Topaz*” was a war ship they would not have attacked it.

[43] It cannot therefore be strongly argued that the intention of the whole attack was to compel the Government of Seychelles to limit or to stop patrolling and monitoring its EEZ. Although one could attempt to say that the presence of the

accused in a piracy infested area combined with their subsequent attacks on “*Topaz*” in a way impacted on the business of the Seychelles Government in its EEZ, it should be noted that this is too remote to hold the offenders criminally liable for. And even if it were so, it does not tantamount to terrorism. Not every use or firing of rifles is taken as terrorism. It is true that the Government of Seychelles may have suffered as a result in many aspects i.e. security, transport, fishing, tourism, and maritime business generally, but all this cannot be stretched and heaped on the accused in criminal charges of terrorism as it was never their intention.

[44] It is trite that every element in a criminal case must be proved beyond a reasonable doubt. On count one, as seen from above, intention remains unproved by the prosecution. Unless for moot purposes, I see no reason to discuss the other elements in detail. Accordingly count 1 is dismissed and all accused acquitted.

[45] As for count 2, it was submitted that if the court finds the accused to be guilty of the offence of “committing a terrorist act with common intention (**count 1 above**)” the court should thereafter come to a logical conclusion that they belong to a terrorist group as they had acted in concert as an entity which has as one of its principal activity the commission of a terrorist act. This, without saying more or adducing supporting evidence is not sufficient to prove beyond a reasonable doubt that the accused are members of a terrorist group. I decline the invitation to reach such conclusion predicated upon count 1 which has already been dismissed. Count 2 also fails. This discourse disposes of count 5 as well. All the accused on both counts are acquitted.

[46] On count 4 the prosecution urged the court to find the accused guilty if it is

satisfied that the evidence proves that A1, A2, and A3 facilitated the commission of the offence of “committing a terrorist act with common intention” **as charged in count 1**. In respect of count 6 the prosecution submitted that all the accused had conspired to commit a terrorist act against the “*Topaz*” then went on to invite the court to infer the element of ‘agreement’ from the facts. In addition a close scrutiny however reveals that the submission does not support the particulars in count 6. Whereas the particulars of offence speak of a specific “attack on “*Topaz*” and intention” the submission averred that there was no need for the Republic to prove intent to attack a specific vessel i.e. “*Topaz*”. For the reasons stated herein above counts 4 and 6 are also dismissed and all the accused acquitted.

[47] Perhaps I should remark at this point that a reading of the particulars of counts 1, 2, 4, 5, and 6 indicates that these charges are properly covered by counts 3 and 7 as they are basically the same, referring to the same thing and requiring the same evidence. It was a repetition which could have been done away with by laying the charges in the alternative or pursuing few but specific offences. An accused would definitely be put in a difficult if not embarrassing position to prepare and defend himself against such multiple charges.

[48] On count 3 the accused persons stand charged with the offence of piracy contrary to section 65 of the Seychelles Penal Code, Cap 158 as read with section 23 of the Penal Code and the Common Law of England. It goes on to state that “*any person who is guilty of piracy or any crime connected with or akin to piracy shall be liable to be tried and punished according to the law of England for the time being in force*”. According to established principles and case law, the phrase “for the time being in force” would refer to the law in force up to the 29th June, 1976 when Seychelles attained independence

from Britain. See **Jhundoo Vs Jhuree, 1981 Mauritius Reports page 111** and **Kim Koon Vs Rep 1969, SCAR page 60.** Therefore the English common law of piracy as it stood in June 1976 prevailed in Seychelles even at the time of the commission of the offences of piracy, and aiding and abetting the offence of piracy on the 6th of December, 2009.

[49] However, Section 65 has now been amended to clarify on issues such as jurisdiction and carries a more detailed definition of the offence of piracy in line with the United Nations Convention on the Law of the Sea (UNCLOS).

[50] According to **Archbold, 1968, Paragraphs 3051 to 3058**, Piracy *jure gentium* is defined in the following term:

“Everyone commits piracy by the law of nations who, without legal authority from any state and without any colour of right:-

(a) *Seizes or attempts to seize any ship on the high seas within the jurisdiction of the Lord High Admiral [now the Admiralty] by violence or by putting those in possession of such ship in fear; or*

Attacks such ships and takes and carries away any of the goods thereon by violence or by putting those in possession of such ship in fear; or

Attacks or attempts to attack such ship with intent to take and carry away any of the goods thereon by violence or by putting those in possession of such ship in fear; or

Attacks such ship and offers violence to anyone on board thereof or attacks

or attempts to attack such ship with intent to offer violence as aforesaid.”

[51] It is worth noting that Piracy *jure gentium* is justiciable by the courts of every nation. Such universal jurisdiction is provided for in international law, that the arresting State is free to prosecute suspected pirates and punish them if found guilty. There is now evidence adduced to the satisfaction of the court that the accused were armed when they attacked and fired shots towards the “*Topaz*”. Nobody sustained any injuries. Neither was the vessel damaged. As already discussed the defence disputes the alleged attack basing on those grounds. It must be observed that not every attack results into damage of the vessel or bodily injuries. One must recall that this was an exchange of fire as the small boats approached the “*Topaz*” which managed to repulse them well in time.

[52] This is not an isolated incident, it’s a common phenomenon. In the case of **Hassan M. Ahmed Vs Rep. Crim. Appeals No. 198 to 207 of 2008, (High Court, Kenya at Mombasa)** the accused who had accessed a vessel called Safina Al Bisarat-M.N.V-723 in high speed boats and fired in the air were convicted on piracy charges although there was no damage at all occasioned on the vessel.

[53] Besides, piracy is more of an offence to do with stealing of property (vessel and cargo) for private ends at the high seas than assaulting or causing injuries to the crew, which is incidental to the main criminal act. We must therefore understand that the assailants’ main aim is to seize, rob and take control of or hold the vessel and its cargo and crew for a ransom. Therefore, much as we had been told by the ballistics expert that the RPG bomb (PE3) was capable of drilling a huge hole in the vessel and totally incapacitate or even sink it, it is

not surprising that this or any other form of damage was not occasioned on “*Topaz*” because the accused would have frustrated their own efforts - to destroy what they were all out to find and hijack.

[54] I find the testimonies of the prosecution witnesses to be credible and cogent.

The version of the accused persons as recorded in their pre-trial statements that they were fishing then the Seychelles coast guard (*Topaz*) attacked them is false and is hereby rejected. There is totally nothing to show that they were fishermen or fishing. No lines or hooks, no fish, no nets or baits or any fishing gear or paraphernalia was recovered from any of the three vessels. Instead there is in place sufficient evidence and all the indicia to show that they were involved in piracy activities at the high seas.

[55] This court believes the story of the accused attacking “*Topaz*”, but when overpowered, failing to board and rob or take control of the vessel. The unexpected resistance and repulsion foiled the whole venture. In his final submissions, defence counsel had emphasized that “Somali pirates” are robbers at sea and further, that the prosecution case was clearly based on assault and robbery.

[56] Assault, as defined in the Collins Dictionary and Thesaurus means “*1.a violent attack, either physical or verbal. 2. An act that causes violence to another.*” Causing of some actual hurt is not necessary for constituting assault. Mere threat may constitute assault. The essence of the offence of assault lies in the effect which threat creates in the mind of the victim. See **Rupabati V/s Shyama (1958) Cut 710.**

[57] As was held in **Re Piracy Jure Gentium [1934] A.C. 586.** “*an actual robbery is not an essential element of the crime. A frustrated attempt to commit a*

piratical robbery will constitute piracy jure gentium.” Such acts of piracy or akin to piracy must have been committed at the high seas. Of importance to note here is that the Exclusive Economic Zone (EEZ) - stretching for up to 200 nautical miles past the territorial seas- is essentially concerned with resources. The law of the coastal state does not apply in the EEZ, and it does not have general enforcement rights. Other than as regards resources, EEZ’s are counted as the high seas. There is no doubt now that if one considers the evidence of the Captain of “*Topaz*”, Major Simon Laurencin (PW10), Serge Devriese (PW15) and Hervey Delon (PW16) the acts alleged herein took place in the EEZ of Seychelles which therefore forms part of the high seas.

[58] Such scathing attacks obviously put in immediate danger the life of the occupants of “*Topaz*” thereby causing fear in them. It is only human that however strong and prepared a warrior may be, once under attack they will fear for their life although may continue to confront the enemy. I am unable to agree with defence counsel’s seemingly convincing arguments and examples narrated on this aspect. Bearing in mind the elements of the offence of piracy, once violence is proved, as is the case here, failure to prove ‘fear’ would not be fatal since the definition provides for either or both.

[59] Witnesses with superior knowledge on how the offence of piracy is committed had opined that according to the number and sizes of boats; the manner in which the attack was launched (in two speeding skiffs while firing shots); the kind of weapons used; the area or scene of attack being far away from the coast (open seas where small boats or skiffs are not expected yet they were unregistered and flying no flag); the movements and behavior of the accused before and during attack; as well as the gadgets and equipment found in their

possession on arrest, the accused were launching an act of piracy. Moreover, the ballistics experts had stated that such weapons with a short or folded bat are mostly used by paratroopers and pirates as they are easy to climb with. Evidence of the prosecution witnesses had been tested under cross examination and their testimonies found to be free of major contradictions. Even the minor contradictions were satisfactorily explained away. Their evidence was consistent and cogent, and I found them to be credible witnesses.

[60] J.P Bishop on “Criminal Law”, Vol 1(3rd Edition) at page 439.comments on the element of common intention (our section 23) as follows:

“When two or more persons unite to accomplish a criminal object, whether through the physical volition of one, or of all, proceeding severally or collectively, each individual whose will contributed to the wrong doing is in law responsible for the whole, in the same way as though performed by himself alone.”

[61] I am convinced beyond doubt that the activities of each and every accused as outlined and proved herein tantamount to assault and a frustrated attempt to commit a piratical robbery which, according to the cited authorities and definition constitutes the offence of piracy *jure gentium*. In doing all these activities the accused had no legal authority or any colour of right from any state. The prosecution has proved all the ingredients of this offence beyond a reasonable doubt. All the eight (8) accused persons are hereby found guilty and convicted as charged.

[62] On count 7, A1, A2 and A3 are charged with the offence of aiding and abetting an act of piracy. A person abets the doing of a thing, who intentionally

aids, by any act or illegal omission, the doing of that thing. Abetment is a separate and distinct offence provided the thing abetted is an offence and does not in itself involve the actual commission of the crime abetted. It cannot be held in law that a person can never be convicted of abetting a certain offence when the person alleged to have committed that offence, in consequence of the abatement, has been acquitted. The question of the abettor's guilt depends on the nature of the act abetted and the manner in which the abatement was made.

[63] Furthermore, a person abets by aiding, when by any act done either prior to, or at the time of, the commission of an act, he intends to facilitate, and does in fact facilitate, the commission thereof. The intention should be to aid an offence or to facilitate the commission of a crime. Mere presence at the commission of a crime cannot amount to intentional aid unless it was intended to have that effect. A mere giving of an aid will not make an act an offence, if the person who gave the aid or lends his support did not know that an act of offence was being committed or contemplated. Intentional aiding and therefore active complicity is the gist of the offence of abatement. It implies a certain degree of activity in the abettor. The *actus reas* referred to here is either actual or constructive presence. It is absolutely necessary to connect the accused with those steps of the transaction which are criminal. See **Nim Chand Mookerjee (1873) 20 WR (Cr) 41.**

[64] **Ratanlal and Dhirajral's Law of Crimes, 23rd Edition, page 336** reads:

“When an offence is committed and several persons take part in the commission of it, each person may contribute in a manner and degree different from the others to the doing of the criminal

act. The act may be done by the hands of one person while another is present, or is close at hand ready to afford help; or the actual doer may be a guilty agent acting under the orders of an absent person; and besides these participators, there may be other persons who contribute less directly to the commission of the offence by advice, persuasion, incitement or aid”.

[65] In the case of **National Coal Board Vs Gamble (1958) 3 AER 203**, at pg. 207 Devlin J. held-

“... aiding and abetting is a crime that requires proof of mens rea, that is to say, of intention to aid as well as of knowledge of the circumstances, and proof of the intent involves proof of a positive act of assistance voluntarily done.” See also **Thomas Vs Lindo (1950) 1 AER 966**.

[66] The three occupants of the bigger boat (mother ship) properly fit in the above categories or situations. Contrary to the arguments of defence counsel there is ample evidence to show and prove that although A1, A2 and A3 did not come directly to attack the “*Topaz*” were at all material times working and acting together with common intention towards a common goal. Much as they were a short distance away from the scene of attack they were fully aware of the circumstances and what was happening, having been involved in the preparatory stages. They were close enough ready to afford further assistance to the two skiffs. It is common knowledge that in piracy activities, when skiffs sight and go on to attack their prey the mother ship remains behind in waiting, keeping a safe distance.

[67] There is undisputed evidence that right from the 5th of December when first sighted, the two skiffs were being pulled by the mother ship using a string. Even when stagnant in the water the unoccupied skiffs remained tied on the mother ship. In the video footage the accused are clearly seen loading weapons and boarding the skiffs from the mother ship - four persons per skiff. At one point in time Abdullah Said Igaal (A3) who was spotting a long beard and pink shirt could be seen handing over a gun with a long bat and sling to another person on the skiff.

[68] In their own pre-trial statements the accused stated they all depended on the mother ship. It was the ‘umbilical cord’ of the skiffs, for without it there was no way they could re-fuel, get food, weapons and ammunitions, and reach the high seas to be able to attack “*Topaz*”. Indeed there were barely any supplies on the skiffs. How could one expect them to survive in those circumstances? This is further strengthened by the evidence of the kind of items retrieved from the mother ship upon being searched. There were barrels of fuel and fresh water, stocks of food, mobile phones, a geographical positioning system (GPS), spare clothes, combs and other personal effects. A charcoal stove and cooking utensils too were recovered.

[69] I have not even the slightest doubt that the three accused were intentionally aiding the occupants of the two skiffs to commit the offence of piracy. They actively participated in the whole exercise and assisted voluntarily though at some point, from a distance. Each ones presence and contribution gave courage and confidence to the other in a way.

[70] The prosecution has proved beyond a reasonable doubt all the ingredients of

the offence under count seven (7). Each of the three accused persons is found guilty and accordingly convicted as charged.

[71] In conclusion this Court finds that the prosecution has failed to prove to the required standard counts 1, 2, 4, 5 and 6 which stem from alleged terrorism activities. Accordingly, those counts are dismissed and all the accused acquitted. However, with regard to the piracy related charges the court finds counts 3 and 7 proved beyond a reasonable doubt. Accordingly, all the accused are found guilty and convicted as charged.

D. GASWAGA

JUDGE

Dated this 26th day of July, 2010.