

IN THE SEYCHELLES COURT OF APPEAL

[Coram: A.Fernando (J.A),M. Twomey (J.A),J. Msoffe (J.A)]

CriminalAppeal SCA 06 - 13/2015

(Appeal from Supreme Court Decision CR 73/2013)

Hassan Thaliil Ahmed

Farah Abdullahi Ali Farah

Mohamed Abdullahi Mohamed

Abdishakur Yahye Kheyre

Mohamed Bashir Mohamed

Hassan Siyat Farah

Abdidqadar Abdi Salan

Adan Abdullahi Barise

Appellants

Versus

The Republic

Respondent

Heard: 01 December 2016

Counsel: Mr. N. Gabriel for the Appellants

Mr. J. Chinnasamy for the Respondent

Delivered: 09 December 2016

JUDGMENT

A.Fernando (J.A)

1. The Appellants have appealed against their convictions on three charges of piracy and the sentences of 14 years imprisonment imposed on each of the three charges but ordered to run concurrently. The juvenile who was tried and convicted by the Supreme Court has not appealed.

Charges:-

2. Charges set out in counts one and two were for acting contrary to section 65(1) and (4) (a) of the Penal Code read with section 22 of the Penal Code. The particulars of offence in count 1 were that the Appellants had on the 6th day of November 2013 on the high seas, with common intention, committed an act of piracy, by committing an illegal act of violence or detention, or an act of depredation, for private ends against another ship, namely the M/V Zhongji No.1. The particulars of offence in respect of count 2 were identical to count 1 save as regards to the date of offence and the name of the ship subjected to an act of piracy. The date in count 2 was given as 9th day of November 2013 and the name of the ship subjected to an act of piracy stated as M/V Torm Kansas. The charge set out in count 3 had alleged that the Appellants had acted contrary to section 65(1)(4)(b) of the Penal Code read with section 22 of the Penal Code and the particulars were to the effect that the seven Appellants between the 06th day and the 10th day of November 2013, with common intention, committed an act of piracy, by voluntarily participating in the operation of a ship on the high seas, with knowledge of facts making it a pirate ship.

3. **The grounds of appeal against the conviction were:**

- a) The learned trial Judge erred in convicting the Appellants on insufficient and uncorroborated evidence.

- b) The learned trial Judge erred, in law and in fact in concluding that the Appellants had participated in act of piracy on the high seas.
- c) The learned trial Judge erred, in law and in fact by finding that the Appellants had knowledge of the fact that the ship they were using was a pirate ship.
- d) The learned Judge erred in finding that the appellants did not have a defence of “autrefois acquit” thus contravening the appellants’ right to a fair hearing under article 19(5) of the Seychelles Charter of fundamental Human Rights and Freedoms.
- e) In all the circumstances of the case, the conviction of the Appellants was unsafe and unsatisfactory.

The sole ground of appeal against the sentences imposed was that they were manifestly harsh and excessive and wrong in principle.

By way of relief the Appellants had sought that the conviction and sentences entered by the learned trial Judge be quashed.

4. Since counts one and two relate to two separate acts of piracy it would have been better had the Defence Counsel been specific as to whether his challenge in ground (b) was in respect of the conviction in relation to count one or two or both. We are prepared to accept this ground as a challenge to the convictions on both counts one and two. An examination of the grounds of appeal against conviction show that grounds (a), (b), (c), & (e) can all be encapsulated into a single ground, namely, insufficient evidence. In grounds (b) & (c) we find an implied admission that all the Appellants were on a ship on the high seas, also taking into consideration the uncontradicted evidence of this case. There is no challenge as to the identity of anyone of the Appellants that were found on the whaler. There is no challenge to the admissibility of any item of evidence led by the prosecution in this case. We therefore have decided to set out the elements of the offences that the Prosecution had to prove and briefly set out the facts of this case itemizing the evidence that was available against the Appellants. Ground (d) is a purely legal issue with which we shall deal with separately.

Law pertaining to Piracy

5. The relevant provisions pertaining to this case in section 65 of the Penal Code pertaining to Piracy are:

(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.

(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 a private aircraft and directed –

(i) on the high seas, against another ship or aircraft, or against persons or property on board such a ship or aircraft;

(ii) against a ship, an aircraft, a person or property in a place outside the jurisdiction of any State;

(b) any act of voluntary participation in the operation of a ship or an aircraft with knowledge of facts making it a pirate ship or a pirate aircraft; ...

(5) A ship or aircraft shall be considered a pirate ship or a pirate aircraft if –

(a) it has been used to commit any of the acts referred to in subsection (4) and remains under the control of the persons who committed those acts; or

(b) it is intended by the person in dominant control of it to be used for the purpose of committing any of the acts referred to in subsection (4).

Elements of the offences:-

6. In respect of counts 1 & 2, Prosecution had to prove that the Appellants had:-

- On the dates set out in the charges and on the high seas
- with common intention
- committed an illegal act of violence, namely an act of piracy
- for private ends
- against the ships, M/V Zhongji No. 1 and Torm Kansas
- while being the crew of a private ship

In respect of count 3, Prosecution had to prove that the Appellants had:-

- during the period set out in the charge and on the high seas
- with common intention
- voluntarily participated
- in the operation of a ship
- with knowledge of facts making it a pirate ship, namely a ship that:
 - has been used to commit an illegal act and remained under the control of the persons who committed the said illegal act or
 - was intended by the person in dominant control of it to be used for the purpose of committing any acts of piracy.

Facts in Brief:-

7. **HDMS Esbern-Snare**, a Danish flexible support war ship had been deployed on patrol in the Indian Ocean and the Gulf of Aden on anti-piracy operations. On the 6th of November 2013 the Esbern-Snare had been alerted at 06.14 local time, which is three hours ahead of zulu time that **M/V Zhongji1**, a chemical tanker, the subject matter of count 1, was under attack from a skiff at location 05 degrees 40minutes South and 46degrees 59 minutes East, which is on the high seas. At this time Esbern-Snare had been 400 nautical miles from Zhongji1 and according to their calculations more than a day away from this place. In regard to the attack of the vessel Zhongji 1 the evidence had been to the effect that a skiff had approached Zhongji1, and warning shots had been fired first and when this had failed there had been an exchange of fire between the security personnel on board the Zhongji 1 and those on the skiff. Zhongji 1 had succeeded to repulse the attack and there had been no damage to Zhongji

1. Five people had been identified in the skiff along with a ladder. The shots fired from the skiff appeared to be from an AK 47. David O'Neal and Mark J. Williams the security personnel on board the Zhongji 1 had said that the skiff was primarily white in colour with blue and green markings and they had seen about five dark skinned men on board the skiff with a ladder. The vessel Zhongji 1 had been on its way to Beira in Mozambique at the time when it was subjected to an attack. The attack on Zhongji was outside the Seychelles EEZ and on the high seas.

8. Again on the 9th of November 2013 Esbern-Snare had received a distress call from **M/V Torm Kansas**, an oil tanker, at 17.01 local time, which was 14.01 zulu time that they were under attack from a skiff at location 07 degrees 20 minutes South and 48 degrees 37 minutes East. At that time of attack M/V Torm Kansas was on its way to Mussel Bay in South Africa from Sekkar Port, India. At that time Esbern-Snare received the distress call it had been 100 nautical miles further to the north and on deploying a search of the area Esbern-Snare had, afterwards, by means of their infra-red cameras and the ships radar detected a whaler and a skiff. This was about 10 nautical miles away from the coordinates received from Torm Kansas. Esbern-Snare had approached the whaler and skiff keeping a distance so that it would not be noticed. The evidence in regard to the attack of the vessel Torm Kansas as given by captain Banlamudi S. Pockley and S. Reynolds is similar to the attack of the vessel Zhongji 1 described in the earlier paragraph. The persons in the skiff according to the evidence had been armed with automatic weapons and the colour of the skiff similar to the one that attacked Zhongji 1. The attack on Torm Kansas was on the high seas inside the Seychelles EEZ.
9. It was not suggested to the witnesses who testified as to the attack on Zhongji 1 or Torm Kansas that the said vessels were not attacked by persons on board a skiff while on the high seas, thus accepting the fact that an act of piracy had in fact taken place. The Written Submissions filed by the Defence in this appeal before this Court do not challenge the evidence pertaining to the attack on Zhonghi 1 and Torm Kansas or the interception of the whaler and the skiff on the high seas in the circumstances and manner described by the

prosecution. The only challenge is as to the involvement of the Appellants in the attacks on Zhonghi 1 and Torm Kansas.

10. While keeping watch of the whaler and the skiff, persons on board the Esbern-Snare had observed a trawler cruising by and then seen the whaler and skiff spring into action. According to witness testimony of those on board the Esbern-Snare, two or three persons from the whaler had entered the skiff that was being towed by the whaler and set off in the direction of the trawler. Esbern-Snare had then decided to move in the direction of the trawler and keep their warship between the skiff and the trawler. The skiff had then suddenly turned and gone back in the direction of the whaler. The Defence had not put forward any satisfactory explanation as regards the actions of those on the skiff. Thereafter personnel from Esbern-Snare had approached and boarded the whaler, which was near the skiff and taken all nine persons, including the Appellants, who were aboard the whaler on board the Esbern Snare and the whaler and skiff into their custody. The whaler had an inboard engine and the skiff a 60 hp outboard Yamaha engine. There was no resistance from the Appellants. The skiff was white with blue and green markings according to witness testimony. This is the colour of the skiff that attacked Zhongji 1 and Torm Kansas as given by those who witnessed the said attacks and testified before the court.
11. On examination of the whaler the personnel from the Esbern-Snare had seen a navigation GPS, a portable radio, three anchors of different sizes(that could be according to witness testimony, used as grappling hooks to which a rope or a ladder could be attached to board a vessel), several yellow canisters (about 89 and about 49 of them containing fuel), some hand written notes in Somali language,6 mobile phones and 4 SIM cards, 3 knives, food (rice, pasta, dates and cooking oil), medicine, clothes, a tarpaulin, a barrel containing fuel for the engine, rocks indicative of a place to cook, a barrel containing fuel and another containing drinking water and a black plastic bag; some of which was taken into custody and produced as exhibits. The GPS was found in the sleeping compartment in the whaler in a black plastic bag. They had not seen any fish, fishing gear or nets or a freezer to store fish. They had also not seen any firearms, ammunition or ladders. The skiff and its 60 hp outboard Yamaha

engine had been produced as exhibits while the whaler that was photographed had to be abandoned at sea as it sank.

GLOBAL POSITIONING SYSTEM (GPS) Evidence:-

12. Claus Sloth Andersen, an Intelligence Specialist and Analyst on board the Esbern Snare, testifying before the Court had stated that he had analysed the GPS 72 recovered from the whaler in which the Appellants were found, to ascertain the route from the recordings in the GPS. He had down loaded all the data inside the GPS to one of his programs on his computer. Prior to expressing his opinion on the data downloaded Andersen had gone on to explain in detail the terminology used in relation to GPS evidence, which we consider necessary to set out in our judgment as this case is the first of its kind that has come up before this Court where a conviction had been based mainly placing reliance on GPS evidence.
13. According to Andersen a 'Way Point' (WP) is a particular location somewhere on the earth's surface that can either be programmed into the GPS as a place one needs to sail to or the place one has sailed from and to which one needs to return. It can be referred to by a name or number. It records the date and time when you mark the 'WP' according to the date and time which is programmed inside the GPS. It also records the coordinates (latitude and longitude) of the place when the 'WP' is marked. Thus latitude would give whether you are North (N) or South(S) of the Equator and longitude whether you are East (E) or West (W) of the Meridian. This position is unique for it is the only position in the world. The small circle is indicative of the degree above or below the Equator. One need not necessarily need to be on the place where you mark the 'WP', because if you know the coordinates of a particular place you could enter it into the device or by pressing a button the coordinates of the place where the person marking the 'WP' will be recorded. But this has to be done manually unlike Track Points which get recorded automatically. According to Andersen, pirates usually use a 'WP' as a skiff or whaler launch or transit point before or after a hijacking.
14. A 'Navigational Way Point' (NWP), is a position which is in close proximity to a known location like a city or harbour. Once you get the bearings from a GPS you can get to the

NWP with a compass without the GPS. Most of the NWP found on the GPS that was recovered, were places along the coast in Somalia and marked when the person who entered them was on site and knew the area to give it a name. Pirates normally mark 'WP's as a launch or return point. One of the NWPs, namely 17, was in very close proximity to Camp Grisby, a well-known piracy camp. Some of the NWPs recorded on the GPS were places from which fuel, water, food could be obtained and places where if necessary repairs to the engine could have been made.

15. A ROUTE is a series of way points. There has to be at least 2 Way Points on a route which you can program for each route, so you can follow that route to different way points.
16. A TRACK POINT (TP), is a series of points which are recorded automatically by memory inside the GPS, when you turn the GPS on, and it has a signal to at least 3 satellites and then until you turn the GPS off it will automatically report all the points at a certain interval that you can program the GPS to do. Memory of the GPS is limited. It can only store 2047 TPs. Therefore when a new TP is added the oldest gets deleted. If the GPS is turned off it will not generate TPs. From the TPs one can track the course that the GPS device took during those times. According to Andersen TPs are like bread crumbs being put out for a bird to follow. A TP will say where the GPS has been at any given time and recorded in Zulu time. It is generally recorded the American way – month, day, year. The TP and the time stamp on it are generated automatically as given by the satellite or space station.
17. MAN OVER BOARD (MOB) is a point to which one could navigate any time by pressing the MOB button, like if as the name suggests if a person falls over board. Thus when you press the MOB button a 'WP' is registered and the ship can turn back and go back to that point.
18. MSCOH (Maritime Shipping Centre Hall of Africa), is a place where you can collect information about the ships sailing around in the World. Sailing ships when they have an emergency will notify the MSCOH and they will pass on the information to ships sailing in the area.

19. Andersen had found 27 ‘Way Points’, 8 ‘Routes’ and ‘2047 Track Points’ recorded in the GPS that was recovered from the whaler.
20. GPS evidence provides a method of establishing the location of a vessel at a given time by longitudinal and latitudinal coordinates; by a navigational system consisting of a series of satellites that broadcasts information. In our view GPS data is admissible just as much as evidence obtained from a computer device or a mobile phone. In all these instances the data is down loaded from or extracted from the device and then explained by an expert.

Documentary evidence from computer records is admissible under **section 15(1) of the Evidence Act.**

“In any trial, a statement contained in a document produced by a computers shall be admitted as evidence of any fact stated therein of which direct oral evidence would be admissible, if it is shown that –

- (1) The computer was used to store, process or retrieve information for the purposes of any activities carried on by anybody or person;*
- (2) the information contained in the statement reproduces or is derived from information supplied to the computer in the course of these activities; and*
- (3) while the computer was so used in the course of those activities*
 - (a) appropriate measures were in force for preventing unauthorized interference with the computer; and*
 - (b) the computer was operating properly or, if not, that any respect in which it was not operating properly or was out of operation, was not such as to affect the production of the document or the accuracy of its contents...”*

21. GPS evidence like computer generated evidence created through mechanical processes has been accepted by US courts as non-hearsay. In **Commonwealth VS Thissel 910 N.E. 2d 943, 946 (Mass. App Ct 2009)**, the Massachusetts Appellate Court held that GPS documents consisting of maps and logs are not hearsay. Reliance had been placed on GPS evidence in several cases. See **Attorney General’s Reference No 73 of 2012 (2013) 2 Cr App R 38; R**

v Jamie Greene, John Beere, Daniel Payne (2012) EWCA Crim 656; Hzun v Germany (2011) EHRR 24; R v Anderson (2010) EWCA Crim 615; US case of State v Jackson, 46 p 3d 257 (Wash, Ct App 2002) and in the Seychelles Supreme Court case of The Republic v Ali Galawe Mowlid and 10 others, SC CR Side No 31 of 2012.

22. There has been no challenge that the GPS data was not accurate due to technological flaws or in plotting the GPS coordinates onto maps or intentional tampering nor has there been a challenge to the competency of the expert, Claus Andersen who had accessed the data from the GPS found on the whaler and testified before the Trial Court in relation to the data extracted.
23. Having explained the terminology pertaining to GPS, Andersen had analysed the material down loaded from the GPS found on the whaler, pertaining to the attack on Zhongji 1. According to him 'WP' No: 25 had been created by pressing the MOB button at the scene at 0447 zulu time on the 6th of November. He had come to this conclusion by looking at the 'TP's on the GPS. According to Andersen the distance between 'WP' 'MOBS' found on the GPS found on the whaler and the coordinates of Zhongji 1; as narrated to Court by A. O. Sreenarayanan, Captain and master-in-Charge of Zongji 1 and those given to Andersen by 'MSCOH'; on the 6th of November at 0447 zulu time; had been 1.4 nautical miles. This distance on the high seas is negligible, according to Andersen. The coordinates where Zhongji 1 was on the 6th of November 2013 around the time it was attacked had also been confirmed from information obtained from the head camera footage on Zhongji 1 by Mark James Williams, who testified before the Court. Mark J. Williams had been wearing the head camera at the time of the attack. The route of the TPs of the GPS device on the whaler when compared with the TPs he had drawn of the route of the vessel Zhongji 1, Andersen had observed that the GPS device had crossed directly over the path taken by the vessel Zhongji 1 and then had turned back into the path of the Zhongji 1 again. The distance between the GPS device and the Zhongji 1 according to his calculations would have been 0.12 nautical miles off the route that Zhongji 1 took, during the attack. This according to Andersen shows that the GPS had been in very close proximity to the Zhongji 1 both in time and space at the time of the attack on Zhongji 1. It had also been his view that taking into consideration the speed on the GPS, it had been on the whaler.

24. On analysis by Andersen of the material down loaded from the GPS found in the whaler pertaining to the attack on Torm Kansas and comparing it with the data on the GPS in Torm Kansas, as stated to Court by Karna Bandlamundi, the captain of Torm Kansas, who testified through “live television link” in accordance with the provisions of **section 11 C of the Evidence Act** and the data which he had got access to from Dina Thompson, the Security Manager at the company ‘Torm’ in Denmark; Andersen had been of the view that the GPS on the whaler had been in very close proximity to the Torm Kansas both in time and space at the time of the attack on Torm Kansas. ‘TP’ 2041 is time stamped 12.09.38 on the 9th November 2013. The distance between TP 2041 and the route that was taken by the Torm Kansas is 0.39 nautical miles. Attack on Torm Kansas as recorded had occurred at 0719.8 South and 04836.7 East. The distance between ‘TP’ 2043 to those coordinates is 4.95 nautical miles and from ‘TP’ 2044 is 3.86 nautical miles. The Pirate Action Group (PAG), namely the whaler and the skiff, had been first located by Esbern Snare 8.92 nautical miles away from where Torm Kansas was attacked and by the time they boarded the whaler, 6.11 nautical miles.

In view of the close proximity in the time difference between the position of the Torm Kansas and the position stored inside the GPS found on the whaler, Andersen had concluded that the whaler and skiff arrested by Esbern-Snare were responsible for the attack on Torm Kansas. Here again he had been of the view that taking into consideration the speed on the GPS, it had been on board the whaler. He had however stated that he was unable to say with certainty whether the whaler and the skiff in which the Appellants were found were the ones involved in the attack on Zhongji 1 and Torm Kansas.

25. It had been the evidence of Commander H. H. Rasmussen, Commanding officer and LT Commander A. K. S. Pertersen of the HDMS Esbern-Snare and Lt M. Hinkdjaer the tactical co-ordinator on board the helicopter on board the Esbern-Snare, during the period 6th to 10th November this was the only whaler and skiff that they had seen in the area of their search, which they had however admitted was a very large area of the sea. The equipment on the helicopter was capable of searching a distance of up to 50 NM from any given point according to Lt M. Hinkdjaer, and the total distance flown by the helicopter was 850NM, with a coverage area of 17,000 SNM.

Defence Version:-

26. All the 7 Appellants had made exculpatory statements to the Seychelles police which were admitted without any objection by the defence as to their voluntariness. We have noticed a marked similarity in their statements. Although the statement of each Appellant is admissible only against the maker, in cases of piracy this Court is of the view that we can consider the statements made by all the Appellants together when assessing the probability and truthfulness of the version given by each of the Appellants. What is noteworthy is that all the Appellants had admitted that they had all voluntarily and as part of a group gone out fishing in the whaler in which they were subsequently arrested by the Danish authorities. We therefore agree with the observation made by the learned Trial Judge that “Since all the Appellants had taken up the position that they were fishermen who had gone out to sea together as a group voluntarily on the whaler there was no challenge as to their voluntary participation in the operation of the whaler. None of them had taken up the position that they had not been voluntarily participating as a group or that they were working in the whaler under duress.”
27. According to the statements, all of them had gone out fishing on a boat named ‘Volvo’. This is a reference to the whaler. They had no GPS on their boat to guide them and claimed that they had not seen or knew what a GPS was. When questioned about the fishing equipment they had said that some got lost at sea while there was some on the boat. Each of them had described their status and duties on the whaler, one as the captain, one as a cook, another as the mechanic and the others on the boat, to make, throw and pull the nets. They had been at sea for a considerable period of time, one specifying the period as 10 and another as 11 days while others not referring to it. The boat had developed engine problems and had drifted further towards the sea due to bad weather conditions, when they had been arrested by a Danish vessel. They all claim they were not pirates and had not attacked any ship. They had found a small boat (this is a reference to the skiff) at sea and in it they had found fuel and a small black object in a plastic bag (this is a reference to the GPS found on the whaler inside a black plastic bag). All of them had denied knowing that the object was a GPS; and that is including the 3rd Appellant who was the captain of the whaler. The small boat had been

found according to some of the Appellants about two to three days prior to their arrest by the Danish authorities. According to the Appellants the outboard engine on the small boat had not been working and it had been repaired by them. According to the 2nd Appellant they had been using the skiff for two days prior to their arrest. The question that arises is as to why they continued to drift in the mid ocean if there was a way of getting back to the shore on the skiff, and also because they had mobile phones with them. According to the Danish navy personnel, 6 mobile phones were found on the whaler. It is also difficult to conceive that no one of the Appellants knew what a GPS was and this makes the defence version improbable. The 3rd Appellant had said that they were prosecuted while on board the Danish vessel but later released and promised compensation.

28. All the Appellants in their dock statements had stated that they are fishermen of Somali origin who got lost at sea and had been detained by Danish authorities. They had stated that they were prosecuted by Denmark on board the Esbern-Snare, for being pirates and released as there was no evidence. They had also been promised compensation and repatriation to Somalia by the Danish authorities but it had not happened.

Are the Appellants entitled to raise the plea of “autrefois acquit”?:-

29. Ground (d) was filed by way of an amendment to the original grounds of appeal as this Court at a Pre-hearing of the appeal on the 11th of November 2016, drew the attention of both the Counsel for the Defence and the Republic that that the issue of a previous trial of the Appellants had been raised at the trial before the Supreme Court by the Appellants in their dock statements. It had been referred to at paragraphs 30 - 32 of the Final Submissions on behalf of the Prosecution before the Supreme Court and paragraph (h) of the Final Submissions on behalf of the Defence before the Supreme Court and also at paragraph 30 of the judgment of the Supreme Court. It had been the submission of the Prosecution that “the accused were initially charged with a violation of the Danish Penal Code, in relation to the attack on the M/V Torm Kansas and that the Danish Public Prosecutor abandoned the prosecution before the Danish courts on 28th November 2013...they were simply told the prosecution would not continue... It is also accepted that the accused have been awarded

compensation by the Danish courts...However, this award is not a reflection on the guilt or otherwise of the accused...Under Danish law, an award of compensation is made to any person, detained for any offence, if proceedings are not then continued.” (emphasis by us). In the Final Submissions on behalf of the Defence before the Supreme Court the defence had argued that since prosecution in Denmark dropped the charges against the Appellants and had ordered the payment of monetary compensation of 3,000 dollars as damages for unlawful detention all the Appellants should be considered as having been cleared of the offence of piracy and absolved accordingly. The learned Trial judge had in adopting the Prosecution argument had in our view correctly stated that “the accused were not tried in the Danish courts and thereafter acquitted...the prosecution in Denmark was abandoned”. (emphasis by us)

30. **Article 19(5) of the Constitution** states: “*A person who shows that the person has been tried by a competent court for an offence and either convicted or acquitted shall not be tried again for that offence or for any other offence of which the person could have been convicted at the trial for that offence, save upon the order of a superior court in the course of appeal or review proceedings relating to the conviction or acquittal.*” (emphasis by us). An essential prerequisite for the application of article 19(5) of the Constitution is that the Appellants should have been tried and convicted or acquitted.
31. The Appellants in this case had not been tried and convicted or acquitted by the Danish Courts. Filing of charges does not amount to an accused being tried. Further the Appellants had been charged only in relation to the attack on the M/V Torm Kansas before the Danish courts and not for the attack on the Zhongji 1 or operating a pirate ship, the subject matter of the second and third counts. In Denmark according to section 1018 of their Administration of Justice Act in case of pre-trial detention or even arrest without subsequent conviction, i.e. acquittal or abandonment – the person concerned is entitled to monetary compensation, both for actual losses (which must be proved) and for the injury in the very deprivation of liberty without the necessity for proof. **Section 1018 of the Administration of Justice Act of Denmark** states: “*1018(1) any person who has been arrested or held in custody as part of a criminal prosecution is entitled to compensation for the damage suffered thereby if the*

charges are withdrawn or the accused is acquitted.”It is for this reason that the Appellants had been compensated.

32. Further the “**Dual Sovereignty Doctrine**” may be considered as an exception to the “**Double Jeopardy Clause**” in article 19 (5) of the Constitution and a person may be charged twice in different states for the same crime. In the US case of **Moore v. Illinois, Heath v. Alabama, 474 U.S. 82, 88 (1985)** it was said that “[a]n offence, in its legal signification, means the transgression of a law.” Consequently, when the same act transgresses the laws of two sovereigns, “it cannot be truly averred that the offender has been twice punished for the same offence; but only that by one act he has committed two offences, for each of which he is justly punishable.” This principle in our view would apply more fully in a case of this nature where the accused had not been punished in the State they had first been charged.
33. We hold that the Appellants are not entitled to raise the plea of *autrefois acquit* and therefore dismiss ground (d) of appeal.
34. One of the main contentions of the defence is that no one had identified any of the Appellants doing any specific acts of violence and that no weapons or ammunition had been found on them at the time of their arrest. It is not necessary to prove any specific acts committed by each of the Appellants. It suffices if it can be proved that each one of the Appellants had a role to play in the operation of the whaler and the skiff. The Appellants’ own statements show that each of them had a role to play in the operation of the whaler as captain, mechanic and those involved in the making, throwing and pulling of the nets. None of them had said that they had been subject to any form of duress. When the Court disbelieves the defence version that they were innocent fishermen stranded in the mid ocean without any recourse, it is perfectly entitled for the Court to determine that they were all involved in acts of piracy as charged on the basis of the prosecution evidence. It is apparent from the evidence of the Commander of Esbern-Snare that the skiff had reached the whaler before the warship got near it. Thus the Appellants had ample time to dispose of anything they wanted which would give rise to suspicion on their part.

Conviction under counts 1 and 2:-

35. The GPS evidence led in this case undoubtedly in our view places the Appellants whaler and skiff on the high seas near the ships, M/V Zhongji No. 1 and Torm Kansas on the dates as set out in counts 1 and 2. The whaler and skiff have to be considered as one unit of a Pirate Action Group (PAG) in view of the fact that when detected the skiff was being towed by the whaler and it was persons from the whaler that had boarded the skiff prior to the skiff going in the direction of the trawler. Also the GPS found on the whaler shows that it had been in close proximity to the Zhongji 1 and Torm Kansas at the time the said vessels were attacked by the skiff. According to the evidence of the personnel from both the Zhongji 1 and Torm Kansas it is clear that the skiff that attacked them had the same colours of the skiff that went on to attack the trawler and later taken into custody by personnel from Esbern –Snare. According to the evidence from personnel on board the Esbern-Snare no other skiffs and whalers had been detected in the area during the search operation by Esbern-Snare. The Appellants have admitted that they were voluntarily participating in the operation of the whaler, which was a private ship. According to their statements made to the police all of them had a role to play in the operation of the whaler as captain, mechanic, cook and those involved in making, throwing and pulling of nets. The defence evidence does not say that their fishing errand at sea was not for private ends. Their evidence that they were lost at sea becomes an improbability and a falsehood when taken in conjunction with the evidence of the Captain and Master-in-Charge of Zongji 1 and Torm Kansas, namely A. O. Sreenarayanan and Karna Bandlamundi respectively, and the security personnel on board the two ships, who had testified as to the attack on their vessels. The said attacks in our view were illegal acts of violence and thus amount to acts of piracy.

36. The word ‘violence’ is wide enough to cover any illegal act of force and thus it does not have to be of a particular severity. The offence of piracy can be established even if the alleged acts of violence did not succeed and there had been no damage to the vessel that was attacked or any injury to anyone in the vessel. In the case of **Re Piracy Jure Gentium (1934) AC 586** it was said: *‘an actual robbery is not an essential element of the crime. A frustrated attempt to commit an act of piracy will constitute piracy jure gentium.’* In the

Kenyan case of **Hassan M. Ahmed v Republic, Crim. Appeals No 198–207(High Court, Kenya at Mombasa)**, the accused were convicted of piracy although nobody sustained injuries and there was no damage to the vessel. We are therefore satisfied that the conviction in respect of counts one and two cannot be disturbed.

Conviction under count 3:-

37. Our satisfaction that counts 1 and 2 had been proved and the convictions in respect of those counts can be sustained, necessarily establishes most of the elements of count three, save the issues whether each of the Appellants had knowledge of the fact that they were operating a pirate ship and whether all of them had a role to play in the operation of the whaler and skiff. The conviction on counts 1 and 2 shows that the Appellants had committed illegal acts of violence against Zhongji 1 and Torm Kansas and the whaler and the skiff remained under their control at the time of their arrest. The attempted attack on the trawler as witnessed by those on board the Esbern Snare shows that they intended to use the whaler and skiff to commit further piratical acts on ships passing by. None of the Appellants had stated either in their police statements or dock statements that they were not aware that the whaler was a pirate vessel or had been duped or forced to join it or that they had wanted to get out of the whaler subsequently on finding out that it was a pirate ship and thus withdraw themselves from being on the whaler and committing the offence of piracy. Their admission that the GPS was on the skiff, which they had come across by chance at sea but yet did not know that it was a GPS is hard to believe when taken into consideration that they were 6 mobiles with them, which shows that they certainly were not a group of ignorant fishermen. The fact that all of them had admitted that each of them had a role to play on the whaler as captain, mechanic, cook, making, throwing and pulling the nets shows all the Appellants were involved in the operation of the whaler. Once the Trial Court disbelieved the Appellants version that they were innocent fishermen who got lost at sea, it was perfectly logical as stated earlier to arrive at the conclusion that they were members of a Pirate Action Group (PAG).
38. In order to conclude that the Appellants were voluntarily participating in the operation of a ship (the whaler) with knowledge of facts making it a pirate ship and not as a fishing vessel

as claimed by them; the learned trial Judge had itemized the following items of evidence:

- ❖ there was no fishing gear or cold storage facilities in the whaler,
- ❖ at the time of the arrest the whaler had been towing a skiff with a powerful outboard engine (60 hp)
- ❖ that prior to their arrest it had been observed by persons on Esbern-Snare that the skiff being boarded by persons from the whaler and that the skiff heading in the direction of a trawler that was passing by,
- ❖ on arrival of the Esbern-Snare where the trawler was, the skiff had changed course and headed back to the whaler, and more importantly,
- ❖ that the GPS device found aboard the whaler on analysis by Claus Anderson indicated readings of close proximity to Zhongji 1 and Torm Kansas at the time when the said ships were attacked.

We are in total agreement with the learned Trial Judge as to his reasoning for the conviction of the Appellants on count 3. In addition the following factors also have a bearing in making a finding under count 3, namely:

- ❖ the whaler and skiff when arrested were located far from any fishing grounds as borne out from the evidence, namely, about 500 nautical miles from the Somali coast.
- ❖ the Appellants' admission that they were at sea during the period of the attacks on Zhongji 1 and Torm Kansas.
- ❖ the Appellants had not said anything in their police statements or dock statements as to their fishing activities before or after been carried to the deep ocean by the winds, especially in view of the fact that no fish had been found on board the whaler at the time of its arrest. They had not said that any trans-shipment of fish took place in the mid ocean.
- ❖ The whaler was extremely small as could be seen from the photographs produced in this case and unlikely that 9 fishermen went out fishing in it.
- ❖ the finding of a large amount of fuel on board the whaler and the skiff

- ❖ the GPS found on the whaler had WPs connected to places where pirate activities usually takes place.

39. In view of what has been stated above we are satisfied that the conviction in respect of counts one and two cannot be disturbed. We therefore have no hesitation in dismissing the appeal against conviction.
40. We have considered the ground of appeal pertaining to sentence, namely that it is manifestly harsh and excessive and wrong in principle. Each of the offences with which the Appellants stood charged attracted a maximum penalty of 30 years and a fine of Seychelles Rupees 1 million, all of which could have been imposed as to be consecutive. But the Court in the instant case had only imposed a sentence of 14 years on each of the counts and that to run concurrently. We find that the learned Trial Judge had taken into consideration the mitigating factors that the Appellants were first offenders, familial persons who have been away from their families for a considerable period of time, that that the acts of piracy committed by the Appellants had not resulted in any injury to any person and that there had been no damage to any of the vessels that were attacked. The fact that there had been no injury to any person or no damage to any vessel was not as a result of a withdrawal from going ahead with the attacks due to a change of heart by the Appellants. It was due to the attacks being successfully repulsed by the security personnel on board the Zhongji 1 and Torm Kansas. This was a case where the Appellants had attacked two vessels, namely Zhongji 1 and Torm Kansas and apparently tried to attack a third vessel, namely the trawler before they were arrested by the Danish authorities. Counsel for the Appellants in his written submissions filed before the Court had said that “no direct damage was caused to the national economy”. In sentencing those who are convicted of piracy we cannot think in nationalistic terms as argued by Counsel for the Appellants for pirates are considered as ‘hostis humanis’. We therefore agree with the Trial Judge who stated that: “Piracy on the high seas has global and international repercussions. In addition to the dangers and risks to life, piracy has adversely affected the trading abilities of many States, thus undermining and weakening the economies of countries.” The learned Trial Judge had considered the use of a juvenile by the adult offenders as an aggravating factor. At a time when child soldiers and

child slaves are been used by adults a strong message should go out that those involved in recruiting children to commit crimes will be dealt with severely. We therefore see no basis for interfering with the sentences imposed on the Appellants and dismiss the appeal against the sentence.

41. Consequently we dismiss the appeal both against conviction and sentence of all the Appellants.

A.Fernando (J.A)

I concur:. M. Twomey (J.A)

I concur:. J. Msoffe (J.A)

Signed, dated and delivered at Palais de Justice, Ile du Port on 09 December 2016