

**IN THE SUPREME COURT OF SEYCHELLES**

**REPUBLIC**

**V**

- 1. FARAD AHMED JAMA**
- 2. MUHAMUD MOHED HASSAN**
- 3. SAED HUSSAIN SAID**
- 4. MOHAMED DAHIR OMAR**
- 5. ABDULAH I IBRAHIM ROBLE**
- 6. FAISAL AHMED OMAR**
- 7. MOHAMED ABSHIR JAMA**
- 8. MUSTAFA BASHIR AIP**
- 9. HAYAN OMAR SABRIYE**
- 10. MOHAMED MOHAMED OMAR**
- 11. SAED MOHAMUD AHMED**
- 12. ABDIRHAMEN ADAM ABDIRHAMEN**
- 13. AHMED MOHED ISMAIL**
- 14. SAID MOHAMUD ABDIRZAK**
- 15. BASHIR BOOTAN MEHEID**

**Criminal Side No: 16 of 2012**

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Mr. M. Mulkerrins State Counsel for the Republic

Mrs. K. Domingue Attorney at Law for the Accused

## JUDGMENT

### Burhan J,

[1] The 15 accused in this case have been charged as follows;

*“Count 1*

*Piracy contrary to Section 65(1) of the Penal Code read with Section 23 of the Penal Code and punishable under section 65 of the Penal Code.*

*The particulars of the offence are that Farad Ahmed Jama, Muhamud Mohed Hassan, Saed Hussain Sai, Mohamed DAhir Omar, Abdulahi Ibrahim Roble, Faisal Ahmed Omar, Mohamed Abshir Jama, Mustafa Bashir Aip, Hayan Omar Sabriye, Mohamed Mohamed Omar, Saed Mohamud Ahmed, Abdirhamen Adam Adbirhamen, Ahmed Mohed Ismail, Said Mohamud Adbirzak and Bashir Bootam Meheid on the 5<sup>th</sup> January 2012 on the high seas with common intention committed an act of piracy with violence or detention committed for private ends against persons on board another vessel namely the MV Sunshine by unlawfully attacking the said vessel whilst armed with weapons.*

*Count 2*

*Piracy contrary to Section 65(1) of the Penal Code read with Section 23 of the Penal Code and punishable under section 65 of the Penal Code.*

*The particulars of the offence are that Farad Ahmed Jama, Muhamud Mohed Hassan, Saed Hussain Sai, Mohamed DAhir Omar, Abdulahi Ibrahim Roble, Faisal Ahmed Omar, Mohamed Abshir Jama, Mustafa Bashir Aip, Hayan Omar Sabriye, Mohamed Mohamed Omar, Saed Mohamud Ahmed, Abdirhamen Adam Adbirhamen, Ahmed Mohed Ismail, Said Mohamud Adbirzak and Bashir Bootam Meheid on or about 1<sup>st</sup> January 2012 on the high seas with common intention committed an act of piracy with violence or detention committed for private ends against persons on board another vessel namely the Al Molai by unlawfully taking control of the said vessel whilst armed with firearms.*

*Count 3*

*Piracy contrary to Section 65(4)(b) of the Penal Code read with Section 23 of the Penal Code and punishable under section 65 of the Penal Code.*

*The particulars of the offence are that Farad Ahmed Jama, Muhamud Mohed Hassan, Saed Hussain Sai, Mohamed DAhir Omar, Abdulahi Ibrahim Roble, Faisal Ahmed Omar, Mohamed Abshir Jama, Mustafa Bashir Aip, Hayan Omar Sabriye, Mohamed Mohamed Omar, Saed Mohamud Ahmed, Abdirhamen Adam Adbirhamen, Ahmed Mohed Ismail, Said Mohamud Adbirzak and Bashir Bootam Meheid on 5<sup>th</sup> January 2012 on the high seas with common intention committed and act of piracy namely voluntary participation in the operation of a ship namely the Al Molai with knowledge of facts making it a pirate ship.*

[2] **The Law**

Section 65 of the Penal Code as amended by Act 2 of 2010 which was the law in force at the time of this incident reads as follows;

(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.

(2) Notwithstanding the provisions of section 6 and any other written law, the courts of Seychelles shall have jurisdiction to try an offence of piracy whether the offence is committed within the territory or Seychelles or outside the territory of Seychelles.

(3) Any person who attempts or conspires to commit, or incites, aids and abets, counsels or procures the commission of, an offence contrary to section 65(1) commits an offence and shall be 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; or
- c) Any act described in paragraph (a) or (b) which, except for the fact that it was committed within a maritime zone of Seychelles, would have been an act of piracy under either of those paragraphs.

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

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

(6) A ship or aircraft may retain its nationality although it has become a pirate ship or a pirate aircraft. The retention or loss of nationality shall be determined by the law of the State from which such nationality was derived.

(7) Members of the Police and Defence Forces of Seychelles shall on the high seas, or may in any other place outside the jurisdiction of any State, seize a pirate ship or pirate aircraft, or a ship or an aircraft taken by piracy and the control of pirates and arrest the persons and seize the property on board. The Seychelles Court shall hear and determine the case against such persons and order the action to be taken as regards the ships, aircraft or property seized accordingly to the law.

It appears that sections 65(4) (a) (i) (ii) and (b) of the Penal Code are similar to the definition given to piracy in Article 101 of UNCLOS (*United Nations Convention on the Law of the Sea effective 16<sup>th</sup> November 1994*)

[3] **Analysis of the Evidence of the Prosecution**

When one analyses the evidence led by the prosecution, the evidence of Stanislav Usushev Captain of the MV Sunshine clearly indicates that persons in a small white boat (identified as a skiff) approached his vessel at a rapid speed. Although no damage was done to the vessel, it is clear from his evidence that the persons approaching his vessel in a faster skiff at an approximated speed of 24 knots were armed and had given chase to his vessel MV Sunshine and had gradually gained on the larger and heavier MV Sunshine an oil tanker which was travelling at a speed of 13 knots.

[4] He had thereafter seen them directing a Rocket Propelled Grenade (RPG) launcher at the bridge of his vessel. These acts by the persons approaching in the skiff clearly indicate the intention of the persons on the skiff to attack the said vessel MV Sunshine which was an oil tanker. Witness had clearly seen a person on the said skiff directing a lethal weapon namely a Rocket Propelled Grenade Launcher (RPG) at the vessel MV Sunshine. Evidence of the lethality of a Rocket Propelled Grenade launcher was led by the prosecution through the evidence of ##### a naval officer familiar with weapons aboard the cruiser Mobile Bay. All this evidence clearly indicates that acts of violence were committed by the persons on the skiff on the vessel MV Sunshine.

- [5] The evidence of Captain Stanislav Usushev indicates that he had observed through his binoculars that the persons in the skiff approaching his vessel were armed with Klashnikov rifles and had a ladder. They were dressed in Khaki and green trousers and one wore a white T shirt. His evidence is corroborated by the evidence of the 3<sup>rd</sup> officer Dymitro Tykhonin who was on the bridge with him. He too had observed through his binoculars that the persons in the approaching skiff whose skin colour were black were armed with weapons. Mr. Dymitro further stated the Captain had seen the RPG being pointed and had told them to go to the deck below. It is also apparent from the evidence of these two witnesses that according to the BMP (Best Management Practice) manual, protective measures had been taken by sending the crew down to the citadel a protected area and avoidance action had been taken and the security precaution of firing their water cannons had been done to thwart any illegal act of violence on their vessel.
- [6] It is further borne out in their evidence that they had radioed for help and the timely arrival of a naval helicopter had stopped any further illegal act of violence and damage being committed on their vessel. Both witnesses identified the video footage as depicting the incidents narrated by them and identified MV Sunshine and the approaching skiff from the video footage taken by the approaching helicopter. Further it is evident from their evidence and document log entry P1 that at the time of the incident the vessel MV Sunshine was in the high seas.
- [7] It is apparent from the evidence of Commander ##### a helicopter pilot in aircraft 703 on board the US air craft carrier ##### which was in the Arabian Sea conducting routine surveillance that he was airborne

at the time of receipt of information that a piracy was in progress on MV Sunshine. Their helicopter was the first that arrived on the scene and he had seen a small skiff on the stern side of the ship MV Sunshine. They noticed the said ship was firing its water cannons. Their cameras in the helicopter were recording events and when they approached the skiff they noticed that the skiff had become still in the water. As they climbed higher and orbited around the skiff they noticed the persons in the skiff raise their hands in surrender. It is clear from his evidence that there were no other skiffs in the vicinity.

- [8] Lieutenant ##### further stated that while he was flying over the skiff they noticed an object that appeared to be a rifle. They noticed a person in the skiff pull an orange tarpaulin over the rifle. Thereafter they noticed the man throw two objects into the water as they noticed the splash. All these acts were recorded by cameras on his helicopter. They were informed that another ship a cruiser the “Mobile Bay” had been instructed to send a boarding party onto the skiff and they were instructed to check out another vessel which was 10 miles South of where the incident of piracy had occurred. Another helicopter had come to relieve them and they left only when the next airplane had their sensors focused on the skiff. He had briefed the pilot of the relieving helicopter of the incidents up to date and had informed him there was a possibility of a rifle being aboard the skiff. He stated that the relieving helicopter was being flown by pilot ##### who was piloting helicopter 617 also from the warship #####. Witness reviewed the video footage and stated the footage depicted his evidence and what happened on that date and witness identified the weapon which was in the skiff which was clearly visible in the video footage. It is clear from the

evidence before court that there was continuous surveillance of the skiff by the helicopters of witnesses ##### and #####.

- [9] This fact is further corroborated by the evidence of witness ##### who stated he was a lieutenant in the US Navy and was a helicopter pilot of aircraft 617 aboard the aircraft carrier ##### and he affirmed the fact he had relieved ##### and observed the skiff. The skiff was dead (still) in the water and the persons in the skiff had their hands on the head. He was present observing the team of the Mobile Bay boarding the skiff after approaching it in a small boat also referred to as a rib. When he detached from the area the boarding team from the Mobile Bay had already boarded the skiff. He too had observed the persons on the skiff throwing things aboard. Witness identified the video footage which corroborated his evidence.
- [10] Witness ##### stated he was the communication officer on board the Cruiser Mobile Bay and in this incident he was the boarding officer on the VBSS (Visit Board Search Seize) team that boarded the skiff on the 5<sup>th</sup> of January 2012. He stated they had received information that the MV Sunshine was being attacked by pirates. On approaching the skiff there was compliance by those on board to the verbal commands given. They had jumped on board the skiff and handcuffed the six individuals on board and questioned them. He was the lead questioner and the answers given were relayed back to the cruiser Mobile Bay.
- [11] The persons aboard the skiff who were of Somali origin when asked what they were doing had replied having fun, conducting fishing and navigating

by following oil tankers. On searching the skiff they had found a tank of gas, an outboard engine, several tarps and bags, some pills, a single point axe and a caliber 7.62 shell case. Thereafter they had provided the persons on the skiff water and MRE (Meals Ready to Eat). All the time the events were being photographed by members of the team. He had on orders received thereafter painted a serial number on the skiff in order to identify it if they came across it again and thereafter released it. He identified the marking placed on the skiff from the photographs shown to him as C 263/5/1/MOB. It was painted by one of the boarding members on the port side bow and on the engine cover. They noticed the engine was not working. They had attempted to start the engine for them but were unable to do so. They had thereafter left after giving the persons aboard the skiff the nearest directions to the land.

- [12] Witness stated that to his knowledge while they were there with the skiff 3 helicopters had been there on rotation. Witness ##### after viewing the video footage explained that P3 disc 4 and 5 and photographs marked P2 depicting the events leading to the boarding of the skiff by his team. He identified the 1<sup>st</sup> 2<sup>nd</sup> 4<sup>th</sup> and 5<sup>th</sup> accused. Another member of the boarding team ##### testified to the fact that he was aboard the rib and part of the VBSS team that boarded the skiff. He corroborated the evidence of witness ##### and from his knowledge of weapons described the lethality of a Rocket Propelled Grenade launcher and identified the shell casing found on the skiff as being from a 7.62 calibre. He too further identified the 1<sup>st</sup> 2<sup>nd</sup>, 4<sup>th</sup>, 5<sup>th</sup> and 8<sup>th</sup> accused in open court as being persons they had seen on the skiff when they had boarded it. Further identification of

the persons on board the skiff was done by way of the photographs taken at the scene.

[13] From the evidence of these officers it is clear that the skiff that committed illegal acts of violence on the MV Sunshine was kept under continuous surveillance as it lay adrift near the MV Sunshine by the helicopters of witnesses ##### and ##### who had observed the boarding of the same skiff by the naval officers of the Mobile Bay. Thereafter the evidence of the boarding team indicates that there were Somalis on board the said skiff who were identified as being the 1<sup>st</sup> 2<sup>nd</sup> 4<sup>th</sup> 5<sup>th</sup> and 8<sup>th</sup> accused in the case. Further a marking C263/5/1MOB had been made on the skiff for future identification and the skiff left adrift after providing assistance in the form of meals and directions.

[14] The evidence of Lieutenant ##### clearly establishes the fact that he was operating as a helicopter pilot on helicopter 612 from the warship John C Stennis to provide an over watch to the US Mobile Bay's visit, board and search teams when they were interacting with a skiff suspected of piracy. While observing the Mobile Bay boarding team interacting with the persons in the skiff, he noticed an Iranian dhow in the vicinity which seemed strange considering the activity which was going on. Witness stated he also found it suspicious that an Iranian dhow be seen so close to US warships in that part of the sea. He had begun moving his cameras in his helicopter over the Iranian dhow and attempted to record some intelligence on it and reported the information via radio to the commanding officer on board the #####. He was asked to return back to the ##### to refuel while another helicopter remained over watch.

- [15] When he returned to the same skiff the 2<sup>nd</sup> time he was asked to increase his altitude and to remain undetected. He could see the Mobile Bay boarding team departing and also the Iranian fishing dhow from his high altitude and though the skiff was very small they had maintained a camera on the skiff and orbiting the latitude and longitude, they confirmed that there were no other ships entering. When the Mobile Bay was moving out from the area the skiff started its engines and attempted to get out of the area at which time they had begun to record its movements. He had noted it was heading towards the Iranian fishing dhow. Witness had noticed the skiff go towards the Iranian dhow circle round it turn and come alongside and slow down and throw lines over and begin to tie up to the stern of the Iranian dhow. They saw personnel transferring from the skiff to the dhow and some minor cargo. They had maintained watch for around 45 minutes after which they were relieved by aircraft 703 and they departed to refuel.
- [16] Witness Kendrick identified the imagery shown on P3 disc 7. He stated that the Mobile Bay boarding team, the skiff and the Iranian dhow were in close proximity to each other and he was able to from his elevation to simultaneously investigate the dhow. He further stated that due to the height they were and the fact that the skiff was stationary and the presence of clouds, it was difficult to see the skiff and therefore had to use infra red camera. He stated for a short period 15 minutes there was a time he could not physically see the skiff but during this time he was able to note from his instruments that there were no other vessels in the vicinity.

- [17] Therefore when one considers the evidence of this witness it is apparent that other than the skiff and the Iranian Dhow and the US naval vessels there were no other vessels in the vicinity. Further as the boarding party from the Mobile Bay had left the skiff , witness had continued to observe the skiff and noticed the moment the Mobile Bay had left the area, the skiff had started its engines and gone towards an Iranian dhow which was close by and gone alongside its stern and tied up with the Iranian dhow. He also noticed personnel transferring from the skiff to the Iranian dhow and minor cargo too being moved from the skiff to the Iranian dhow. Therefore it is apparent from the evidence of this witness that the Somali persons on board the suspects skiff had after the boarding party from the Mobile Bay left the skiff and were out of sight, started the engine of the skiff and linked up with an Iranian Dhow situated a few miles away.
- [18] Lieutenant ##### who was assigned to helicopter aircraft scout 700 aboard the aircraft carrier ##### stated he was in radio contact with helicopter loose foot 612 of witness ##### which was orbiting around the Iranian fishing dhow. When he arrived he too observed the suspect vessel a skiff was tied up to a larger vessel the Iranian Dhow. He was in the area for about 20 minutes and was relieved by helicopter call sign scout 711 from the USS Kidd whose commander was ##### and Co pilot Lieutenant #####.
- [19] Witness ##### stated he was a helicopter pilot who piloted MH60 helicopter. He was deployed in January 2012 on board the USS Kidd. His evidence was that he had kept the Iranian Dhow identified as the Al Molai under surveillance and noticed the skiff in tow to the dhow. After observing

for some time they had flown lower and noticed the Iranian flag on the dhow and a couple of skiffs aboard. The USS Kidd had deployed two boats for boarding the skiff. They observed as the boarding team from the USS Kidd boarded the said vessel Al Molai. Thereafter they had left to refuel. He too identified the video footage shown to him. It is clear from the evidence of witness helicopter pilots Lieutenants ##### and ##### that they had continued surveillance of the Iranian Dhow and the skiff in tow after pilot ##### had seen the skiff tie up with the Iranian Dhow. They continued their aerial surveillance until naval officers from the USS Kidd boarded the Iranian Dhow Al Molai in two boats.

- [20] When one considers the evidence of witnesses #####, ##### and NCIS (Naval Criminal Investigative Service) agent ##### of the initial boarding party from the USS Kidd that boarded the Al Molai, it is apparent that the accused who are Somalis in this case were taken into custody from the Iranian Dhow Al Molai while they were hiding in various parts of the ship. The 1<sup>st</sup> 2<sup>nd</sup> 4<sup>th</sup> 5<sup>th</sup> and 8<sup>th</sup> accused who were identified as being on the skiff that had committed illegal acts of violence on the MV Sunshine were also arrested on the Al Molai together with the skiff they had used which had been tied to the rear of the Al Molai. It was revealed that it was the intention of the 10<sup>th</sup> accused who was aboard to get 2.5 to 4 million US dollars for ransom from the vessel MV Sunshine and it was the breaking of the boarding ladder on the skiff that prevented them doing so. It is clear from the evidence of these witnesses that the skiff tied to the dhow had the same markings given by the boarding team from Mobile Bay on the skiff that had attacked the MV Sunshine. Further the evidence of witness ##### who kept the skiff that committed the illegal act of violence under

surveillance after the boarding party from Mobile Bay left had observed it start up its engines and proceed and finally tie up with the Iranian Dhow identified later as the Al Molai which was a few miles away from where the MV Sunshine incident had occurred and therefore on the high seas. He had also observed personnel and cargo from the skiff being transferred aboard the Al Molai.

[21] Therefore from this evidence it is apparent that the Somalis who committed the illegal acts of violence on the MV Sunshine were part of a larger team that were aboard the Al Molai. Further the evidence of the aforementioned witnesses clearly show that weapons namely AK 47 rifles, ammunition and a pistol and 2 more skiffs were found on the Al Molai and considering all these facts specially the fact that the Somalis who committed the illegal acts of violence on MV Sunshine were observed joining this larger vessel and had gone into hiding when the team from USS Kidd got aboard the Al Molai and the fact that there were two more similar skiffs aboard the Al Molai, it is clear that the Al Molai was being used as a base or mother ship for skiffs to launch attacks and commit illegal acts of violence or piracy on other ships and the Somalis that committed the acts of violence on MV Sunshine were part of a larger group of armed persons of Somali origin who were aboard the Al Molai.

[22] Section 23 of the Penal Code sets out what common intention is.

*“When two or more persons form a common intention to prosecute an unlawful purpose in conjunction with one another, and in the prosecution of such purpose an offence is committed of such a nature that its commission*

*was a probable consequence of the prosecution of such purpose, each of them is deemed to have committed the offence.”*

[23] It must be remembered that section 23 lays down a principle of joint liability in the commission of a criminal act and is not a manner of committing an offence. Common intention envisages a sharing of similar intention entertained by the accused persons. Common intention requires a common meeting of minds or a sharing of similar intention before the offence is committed. Common intention could be proved by showing the conduct of the accused, that the two or more accused by reason of actually participating in the crime, some overt or obvious act, active presence, pre plan and preparation as well as immediate conduct after the offence was committed. Thus the preceding, prevailing and succeeding conduct of the accused could be analysed to determine whether they acted with common intention.

[24] When one considers the evidence that the skiff that committed the illegal acts of violence on MV Sunshine was seen linking with the Al Molai which was awaiting dead (still) in the water, it is clear that the Somalis on both the skiff and Al Molai who were armed were acting on a prearranged plan and in a concerted manner. This evidence on the concerted conduct of the Somalis on the skiffs and Al Molai clearly indicates that they were acting with common intention as set out in section 23 of the Penal Code. The evidence in this case clearly indicates that the Somalis aboard the skiff and the Al Molai had the common intention to commit illegal acts of violence and seize and detain ships.

[25] This court is satisfied on the aforementioned analysis of the evidence of the prosecution that the Somali persons identified namely the 1<sup>st</sup> 2<sup>nd</sup> 4<sup>th</sup> 5<sup>th</sup> 8<sup>th</sup> who were aboard the skiff a private vessel, committed for private ends on the 5<sup>th</sup> of January 2012 illegal acts of violence on the MV Sunshine captained by Stanislav Usushev on the high seas. Further on consideration of the evidence of the prosecution this court is satisfied that the accused identified aboard the skiff namely the 1<sup>st</sup> 2<sup>nd</sup> 4<sup>th</sup> 5<sup>th</sup> and 8<sup>th</sup> accused were part of a larger team that were aboard the Al Molai were acting with common intention to prosecute an unlawful purpose namely piracy of MV vessel Sunshine, in conjunction with one another refer *Republic v Abdi Ali & Ors SC Criminal Side 14 of 2010*.

[26] It is also apparent from the evidence of naval engineer ##### and the officers who boarded the Al Molai that the crew of the Al Molai were the 13 Iranians aboard it and not the 15 Somalis. The manner in which the Iranian crew had behaved as described by witnesses, clearly indicates that they were grateful and beholden to the US navy for taking away the Somalis and getting their ship and freedom back for them to set sail home. Further in the statements under caution given by the 3<sup>rd</sup> 7<sup>th</sup> 9<sup>th</sup> 11<sup>th</sup> 14<sup>th</sup> and 15<sup>th</sup> accused marked as exhibits in the case and which were not retracted and not repudiated, the accused admit the weapons on board the Al Molai were their own weapons. In fact there is evidence to indicate that there were bullet holes in the pilot house of the vessel Al Molai. The Al Molai was flying the Iranian flag and on considering the evidence of the officers of the boarding team and the aforementioned facts this court is satisfied beyond reasonable doubt that the Al Molai was an Iranian vessel with an Iranian crew that were

under the control and being detained by the 15 accused Somalis who were aboard the vessel.

[27] Further the evidence of NCIS agents ##### and ##### clearly establish the sequence of events that occurred after the 15 accused Somalis in this case were taken into custody. The Miranda rights were read out to them and offer to inform their consulate and even the services of a lawyer were offered to all the accused. The fact that the accused were treated properly during the time they were held in detention is further corroborated by the evidence of interpreter Ibrahim Ibrahim. The chain of evidence of the all the exhibits taken into custody during the entire operation was meticulously set out in the evidence of agent ##### up to the time the exhibits and the suspects were handed over to the Seychelles police. The evidence of Sergeant Agathine and Radley Moncherie completed the chain of custody of all exhibits taken over from agent ##### to the time the exhibits were produced in court.

[28] The admissions agreed to by both parties signed by both counsel and explained to the accused dated 21<sup>st</sup> October 2012 have also been taken into consideration. On consideration of the evidence as a whole, I am satisfied the chain of custody of the exhibits in this case have been established beyond reasonable doubt by the prosecution and the same suspects arrested aboard the Al Molai have been produced before this court as accused in this case. The statements under caution recorded by the Seychelles police from each of the accused were also produced by the prosecution.

- [29] I observe the aforementioned material evidence of the prosecution stands corroborated by video footage and photographs and is not of a contradictory nature. I further note that though witnesses were subject to cross examination there were no material contradictions in their evidence. I therefore proceed to accept the evidence of the prosecution.
- [30] I am therefore satisfied that the prosecution has proved beyond reasonable doubt all the material elements of charge 1 as set out in the particulars of the offence namely that all the fifteen accused with common intention had on the 5<sup>th</sup> day of January 2012 committed illegal acts of violence for private ends against persons on board vessel namely the MV Sunshine by unlawfully attacking the said vessel whilst armed with weapons.
- [31] While the prosecution has led direct evidence to establish count 1 beyond reasonable doubt, the prosecution relies on circumstantial evidence to establish counts 2 and 3. Having considered the evidence of the prosecution as a whole I am satisfied that the evidence in respect of count 2 and 3 establishes beyond reasonable doubt that the inculpatory facts are incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis other than that of the guilt of the accused. I am also satisfied that there are no other co-existing circumstances which would weaken or destroy the inference of guilt based on circumstantial evidence. I am satisfied the prosecution has successfully exclude any alternative possibility that might point to the innocence of the accused.

[32] On an analysis of the prosecution evidence in its entirety there is no doubt in the mind of this court that the 15 accused Somalis in this case who were aboard the Iranian dhow the Al Molai had taken control over the said ship by violent means and by the use of firearms and were detaining the Iranian crew of the Al Molai and were using the said Al Molai as a mother ship to commit other acts of piracy and therefore all the accused who were aboard the Al Molai were voluntarily participating in the running and the operation of the Al Molai as a pirate vessel.

[33] I am therefore satisfied that the prosecution has proved beyond reasonable doubt all the material elements of charge 2 and 3 as set out in the particulars of the offence, namely that all the accused acting in common intention had committed an act of piracy with violence or detention for private ends against persons aboard another vessel namely the Al Molai by unlawfully taking control of the vessel whilst being armed with firearms and thereafter with common intention committed an act of piracy namely voluntary participation in the operation of the ship Al Molai with knowledge of facts making it a pirate ship.

[34] **Analysis of the Defence Case**

All 15 accused in defence chose their right to remain silent. In terms of article 19 of the Constitution of the Republic of Seychelles no adverse inference will be drawn from the exercise of such a right by the 15 accused. Learned counsel for the accused made oral and written submissions on their behalf.

[35] One of the main contentions of learned counsel for the defence in respect of count 1 is that there was no physical attack on the MV Sunshine as none of the witnesses including the Captain of the MV Sunshine Stanislav Usushev or the 3<sup>rd</sup> officer Dymitro Tykhonin had stated that they were attacked nor had any of the other prosecution witnesses witnessed an attack or boarding of the MV Sunshine. It is to be noted that the definition of the word piracy as contained within section 65 (4) of the Penal Code does not contain the words attack for the purpose of boarding but refers to “*any illegal act of violence or detention or any act of depredation...*” In lieu of this definition it is the view of this court that there is no necessity for the prosecution to establish a boarding or attempted boarding of a private ship. It is apparent from the facts of the case as deponed by the prosecution witness that the intention of the armed persons on board the fast approaching skiff was to attack the MV Sunshine and by directing the Rocket Propelled Grenade launcher on the bridge of MV Sunshine performed an act of violence against persons on board the ship which act was likely to endanger the safe navigation of the ship MV Sunshine. There is no doubt in the mind of this court that the act of directing or pointing a Rocket Propelled Grenade launcher on the bridge of a private vessel at sea as set out in the circumstances of this case is an illegal act of violence and it cannot in anyway be considered to be a legal act or an act of non violence. Therefore this court is satisfied on considering the evidence as a whole that illegal acts of violence were committed by the accused on the skiff on the MV Sunshine. For the aforementioned reasons defence submissions in this regard bear no merit. Further this court is satisfied that the act of directing the RPG launcher on the bridge of the MV Sunshine is in itself an act of violence falling under section 65(1) of the Penal Code and not an attempted act of

violence as submitted by learned counsel coming under section 65(3) of the Penal Code as it is clear from the surrounding evidence the intention was to endanger the safe navigation of the said vessel.

[36] Learned counsel next contended that the 6 accused aboard the skiff stated they were out having “fun” and while doing so had engine trouble and the US military left and did not arrest them after boarding their skiff as they believed the accused and realised they had not committed any offence. Firstly directing a RPG on the bridge of a ship under the circumstances mentioned by the witnesses cannot be considered to be a “fun” activity. It is apparent from the evidence of Lieutenant ##### that the boarding team from Mobile Bay were ordered to leave the skiff after making an identification mark on the skiff. The evidence of pilot ##### was that he was ordered at the same time to conduct covert surveillance of the skiff and to fly high and ensure that he was not seen by the skiff. This therefore clearly was a strategy adopted by the higher US naval authorities to release the skiff while observing covertly where it would go which eventually paid dividends. This clearly is the only inference one could come to when considering the evidence of these officers specially the evidence of #####. Therefore learned counsel for the defence contention that they were released as they had not done anything wrong cannot be accepted in the light of the evidence before court as though the skiff and Somalis aboard were apparently released they were being monitored by helicopters of the US navy flying out of sight overhead.

[37] The next contention of learned counsel was that the prosecution relied on hearsay evidence to prove counts 2 and 3 as none of the Iranian crew aboard the Al Molai were called to give evidence in the case. This court has already

given reasons for finding the 15 accused guilty on these two counts and considered the circumstances when convicting on circumstantial evidence. The evidence relied on by court was based on facts directly seen by the witnesses. The bullet holes near the pilot house of the Al Molai though on its own would be insufficient for a conviction when taken with all the other bits and pieces of circumstantial evidence clearly in the view of this court sustains a conviction based on circumstantial evidence on counts 2 and 3 refer case of *Pollock CB in R v Exhall (1866) 4 F&F 922 at 928*. The pieces of circumstantial evidence relied on by court to state a few, the evidence of ##### that of the suspect skiff C263/5/1 MOB linking with the Al Molai was direct evidence of witness #####, the boarding of the Al Molai and the Somalis been seen in hiding aboard the vessel, the fact that there were similar skiffs aboard the Al Molai, the joy of the Iranian crew being released were all incidents witnessed and perceived by the witnesses themselves and not hearsay evidence as contended by learned counsel for the defence. The admission by some accused in their non retracted or non repudiated statements that the weapons found aboard the Al Molai belonged to them cannot be considered to be hearsay evidence. For the aforementioned reasons this courts finds no merit in the defence contention that all the accused should be acquitted of count 2 and 3 as the evidence is only hearsay and unsubstantiated.

- [38] In the light of all the above findings by court the defence contention that the 15 accused were out fishing with the Iranian crew and fun riding following tankers and were carrying weapons for their own protection cannot be accepted. For all the aforementioned reasons the defence of the accused stands rejected.

[39] As this court is satisfied beyond reasonable doubt that the material elements of all three charges against the accused have been proved beyond reasonable doubt all 15 accused are found guilty of all the charges against them and convicted of same.

**M. BURHAN**

**JUDGE**

Dated this 2<sup>nd</sup> day of November 2012

Note the names of all United States military personnel in this judgement should not be published.

**M. BURHAN**

**JUDGE**

**Dated this 02<sup>nd</sup> day of November 2012**

**IN THE SUPREME COURT OF SEYCHELLES**

**REPUBLIC**

**V**

- 1. FARAD AHMED JAMA**
- 2. MUHAMUD MOHED HASSAN**
- 3. SAED HUSSAIN SAID**
- 4. MOHAMED DAHIR OMAR**
- 5. ABDULAH I IBRAHIM ROBLE**
- 6. FAISAL AHMED OMAR**
- 7. MOHAMED ABSHIR JAMA**
- 8. MUSTAFA BASHIR AIP**
- 9. HAYAN OMAR SABRIYE**
- 10. MOHAMED MOHAMED OMAR**
- 11. SAED MOHAMUD AHMED**
- 12. ABDIRHAMEN ADAM ABDIRHAMEN**
- 13. AHMED MOHED ISMAIL**
- 14. SAID MOHAMUD ABDIRZAK**
- 15. BASHIR BOOTAN MEHEID**

**Criminal Side No: 16 of 2012**

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Mr. M. Mulkerrins State Counsel for the Republic

Mrs. K. Domingue Attorney at Law for the Accused

## SENTENCE

### Burhan J.

I have considered the plea in mitigation made by learned counsel for the defence.

Learned counsel has brought to the notice of court that the accused who have been convicted on all three counts are 1<sup>st</sup> offenders and several of them are family persons who have been away from their families for a considerable period of time. Further two of the convicted accused namely the 7<sup>th</sup> and 8<sup>th</sup> accused are juveniles and according to the ages given in the statements under caution 15 years of age. Learned counsel has also brought to the notice of court that in instances where there was no actual injury or damage caused during the acts of piracy, courts have imposed less severe sentences than in instances where actual violence and damage has resulted. Cases referred to *R v Abdi Ali & Ors* and *R v Houssein Mohammed Osman & Ors*, and several other cases.

Whilst considering the factors in mitigation, court must also take into consideration the serious ramifications of the offence of piracy and also consider the far reaching consequences of such acts of piracy on the high seas. 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 attack on the oil tanker MV Sunshine with the use of a Rocket Propelled Grenade launcher could have endangered the life of persons aboard the vessel and being an oil tanker if damage had been caused, it would also have resulted in serious environmental consequences as well. The piracy committed on the Iranian dhow a fishing vessel clearly indicates that even the fishing industry, a livelihood of millions of persons

throughout the world has been adversely affected. It should be borne in mind it was due to the timely intervention of the US navy that damage was not caused to the vessel MV Sunshine and the piracy committed on the Al Molai was of a very much more serious nature as the evidence shows that violence was used, the Iranian crew aboard were detained and the Al Molai was the base from which other attacks were being launched by the accused.

The use of juveniles by the adult offenders in such violent acts of piracy is an aggravating factor which in my view should enhance the punishment to be meted out to the other adult offenders.

All fifteen accused have been convicted on all three counts. Count 1 is in respect of an act of piracy committed on MV Sunshine, while counts 2 and 3 are in respect of acts of piracy committed on MV AL Molai. Each of the three counts attract a maximum penalty of 30 years imprisonment and a fine of Seychelles Rupees I million. Further this court has the power to make each of the sentences run consecutively.

Having considered the aforementioned facts, the seriousness of the offences and the background facts and circumstances of the case as borne out by the evidence and the mitigation plea of learned counsel for the accused, I proceed to pass sentence on the convicted accused as follows;

Each of the convicted accused namely FARAD AHMED JAMA (A1), MUHAMUD MOHED HASSAN(A2), SAED HUSSAIN SAID (A3), MOHAMED DAHIR OMAR(A4), ABDULAH I IBRAHIM ROBLE(A5), FAISAL AHMED OMAR(A6), HAYAN OMAR SABRIYE (A9), MOHAMED MOHAMED OMAR (A10), SAED MOHAMUD AHMED(A11), ABDIRHAMEN ADAM ABDIRHAMEN(A12) AHMED MOHED ISMAIL

(A13), SAID MOHAMUD ABDIRZAKA (A14), BASHIR BOOTAN MEHEID (A15) are sentenced as follows;

Count 1

A term of 12 years imprisonment

Count 2

A term of 18 years imprisonment

Count 3

A term of 18 years imprisonment.

I make order that these three terms of imprisonment run concurrently. Time spent in remand and detention i.e. from the 6<sup>th</sup> of January 2012 to be counted as part of the sentence.

This court notes that two of the convicted accused namely MOHAMED ABSHIR JAMA (A7), MUSTAFA BASHIR AIP (A8) are 15 years of age. Having considered the possibilities in sentencing set out in section 94(1) of the Children's Act as amended by Act 7 of 2005, this court is of the view that the said alternatives referred to in section 94(1) cannot be reasonably applied, considering the serious nature of the offence and as the two juveniles in this instant case are foreign nationals and do not have parents or guardians residing within the Seychelles. Therefore this court proceeds to sentence each of the convicted accused namely MOHAMED ABSHIR JAMA (A7), MUSTAFA BASHIR AIP (A8) as follows;

Count 1

A term of 3 years imprisonment.

Count 2

A term of 4 years imprisonment.

Count 3

A term of 4 years imprisonment.

All sentences to run concurrently.

The prison authorities to be informed that the two convicted juveniles must be kept in a separate place from any adult offender, while serving their term of imprisonment.

Time spent in remand and detention i.e from the 6<sup>th</sup> of January 2012 to be counted as part of the sentence.

This court makes order that all exhibits other than the personal belongings of the accused should be forfeited.

Right of appeal explained to the accused.

**M.N.BURHAN**

**JUDGE**

**SUPREME COURT SEYCHELLES**

**5<sup>TH</sup> November 2012**