

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

**THE REPUBLIC**  
**VS.**  
**LIBAN MOHAMED DAHIR & TWELVE (12) OTHERS**

Criminal Side No. 7 of 2012

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Mr. Michael Mulkerins for the Republic

Mr. Anthony Derjacques for all 13 Accused persons

**JUDGMENT**

**Gaswaga, J**

- [1] The thirteen (13) accused persons: Liban Mohamed Dahir (A1), Quraa Sarman Bilil (A2), Hassan Abdi Ali (A3), Abdi Malin Mohamed (A4), Bishar Muse Kaligirite (A5), Ahmed Mohamed Hussein (A6), Galad Yasen Abdishakur (A7), Ali Abdilali Aden (A8), Burhan Yasin Ahmed (A9), Mohamed Ali Said (A10), Abdi Khadur Mohamed (A11), Nurudin Muse Ahmed (A12), and Abdisala Adulahi Nuur (A13) before court now stand charged with two counts.

- [2] On count one, the accused are charged with the offence of piracy contrary to and punishable under section 65(4)(a) of the Penal Code read with section 23 of the same. The particulars allege that all the accused persons, on the 12<sup>th</sup> of January, 2012, on the high seas whilst in a private ship, with common intention, committed an act of violence or an act of depredation for private ends against persons on board another ship, *The Happy Bird*, by unlawfully discharging firearms at the said ship. On count two, all the accused are charged with the offence of piracy contrary to and punishable under section 65(4)(b) of the Penal Code read with section 23 of the same. The particulars allege that the said accused persons, on the 13<sup>th</sup> of January, 2012, on the high seas and with common intention, committed a voluntary act of participation in the operation of a ship with knowledge of facts making it a pirate ship.
- [3] All the thirteen (13) accused persons denied both counts and the prosecution called sixteen (16) witnesses to prove these charges beyond a reasonable doubt. However, before the trial proper, the fourteenth accused person, Absiye Adan Abisiye pleaded guilty and was sentenced to ten (10) years.
- [4] The following sections of the Seychelles Penal Code, Cap 158, and in particular section 65, **as amended by Act No. 2 of 2010**, are relevant to Counts I & II.

According to section 65(4) of the Penal Code, piracy is:

- (a) Any illegal act of violence or detention, or any act of depredation, committed for private ends by the crew or the passengers of a private ship or aircraft and directed-

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

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

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

Section 65(5) of the same states that:

A ship or aircraft shall be considered a **pirate ship** or 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).**

Section 23 of the Penal Code 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 such purpose an offence is committed of such a nature that its commission was probable consequence of the**

**prosecution of such purpose, each of them is deemed to have committed the offence.**

[5] It should be remarked at this point that this trial was fraught with a lot of objections, complaints and demands, most of which indeed unrealistic, that the court had to urgently deal with on a daily basis to be able to make progress in the case. These included some welfare and constitutional or human rights issues. The only two accused persons (A6 and A10) that spoke and understood English fairly well had initially rejected the services of the defence counsel that was allocated to them on a legal aid certificate, and they demanded for the court to find them lawyers they trusted from Somalia, if not, to allow them represent themselves. Further, during the defence case, Mahamed Ali Said (A10) intimated that he had twenty nine (29) witnesses to call from Somalia to testify on his behalf and that the court should make the necessary arrangements to bring them into the country. He neither provided the list of names nor the addresses of the said people. In its decision of 4<sup>th</sup> July, 2012, the court ruled that given the magnitude of the crime of piracy, the complexity of the law, legal procedures and technical evidence involved, coupled with the fact that the accused persons were not knowledgeable in law, a defence counsel, to serve and protect their interests and ensure that they receive a fair trial, would be imposed on them. It was interesting to note, however, that as the trial advanced, Mahamed Ali Said (A10) even moved closer to the defence counsel with whom they closely and constantly consulted till the end of the trial. The counsel-client relations quickly improved and Mahamed Ali Said (A10) could be seen acting as the main link between the defence counsel and the other accused persons, in addition to the Somali/English interpreter that was readily available to assist.

[6] Of importance to note also is that some of the accused persons are minors while others are adults. **Section 93(1) of the Children Act, Cap 28** allows adults and minors to be tried together before the Supreme Court if the facts are such that they committed the alleged offence together. In addition, a Probation officer had been availed to each one of the minor accused persons during the recording of their statements at police.

[7] Defence counsel had submitted that the courts in Seychelles lacked jurisdiction to hear this matter since the alleged attacks occurred in the Exclusive Economic Zone (EEZ) of Oman, which is a sovereign State, and not on the high seas. It has already been settled by this court that other than as regards resources, EEZs are counted as the high seas and the law of the coastal State does not apply - vide **Rep. Vs Mohamed Ahamed Dahir & Ten Others, Supreme Court, Criminal Side No. 51 of 2009, para 57**. Besides, pirates have long been declared as enemies of mankind who have placed themselves beyond the protection of any State and can therefore be arrested, tried and punished pursuant to the municipal law of any country. See. **In re Jure Gentium, 1934 P.C.** **Section 65(1) states thus:**

*“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.”*

[8] The facts giving rise to the above charges are briefly that at approximately 10:30 ZULU Time on January 11, 2012, Warrant Officer Davenport (PW-3), a crewman aboard an Australian Maritime Patrol and Reconnaissance Aircraft (MPRA) “*Coopers*,” sighted and photographed a suspect Pirate Action Group, or PAG, at a location 1359 N 05703 E.

Warrant Officer Davenport (PW-3) testified that the location of the vessels, the composition of the group, the presence of two hooked ladders atop the wheelhouse, the presence of a large amount of fuel, and the noticeable absence of fishing equipment were all factors in the decision to concentrate resources on investigation of this particular group. Photographic images (PE-4) were sent via data link to Garrett Braudhurst (PW-2), a geospatial imagery intelligence analyst at the MPRA's base of operations in Al-Minhat, United Arab Emirates. The suspected PAG consisted of one dhow towing two skiffs.

[9] The dhow was later identified from a database of known and suspected pirate vessels by Lt. Com. Haley (PW-7), an intelligence officer aboard the British warship *Fort Victoria*, as the *Yemani-18*. Comparison of the photographs in PE-4, taken by the Australian MPRA "Coopers," and PE-9, taken by the Leading Photographer aboard *Fort Victoria*, Kyle Heller (PW-8), clearly demonstrates that they are one and the same vessel. Furthermore, Lt. Com. Haley (PW-7) testified that he not only compared the images to each other but also compared both sets of imagery to the physical dhow after the boarding. It was also his evidence that he is fully satisfied of the identity of the *Yemani-18* as the dhow in both sets of imagery and the dhow that was detained by the *Fort Victoria*.

[10] According to Captain Alday (PW-1) his vessel, a liquid gas tanker called *The Happy Bird*, was attacked at position 1451.7 N 05632 E, on January 12, 2012 at approximately 12:15 local time. Captain Alday (PW-1) testified that his vessel was approached from behind on either side by two skiffs traveling at high speed. He noticed the skiffs when they were about 3 nm away. From their position in known pirate waters between Somalia

and the Arabian Peninsula; the nature of the approaching vessels—being two small skiffs—and the manner of their approach, from the rear on both sides and at high speed, the Captain deduced that his vessel was under attack from pirates.

[11] Captain Alday (PW-1) issued several alarms the net result of which was that all personnel took cover and the on board security team consisting of three armed guards took up a position to the rear of the bridge. Triggering the alarm also automatically broadcast an SOS communicating the position of the vessel to coalition forces and maritime traffic reporting agencies. Though some distance away, the *Carney* and *Fort Victoria*, American and British warships, responded to this distress call.

[12] When the skiffs had closed the distance between *The Happy Bird* and themselves to one thousand (1,000) meters, the Captain gave the security team permission to fire warning shots. The first group of warning shots did not deter the skiffs. The Captain testified that he heard gunfire from the skiffs after the first warning shots. No bullets, however, struck *The Happy Bird* or any of her crew. After a second group of warning shots the skiffs slowed and drew together apparently abandoning their attack. The entire engagement lasted approximately half an hour.

[13] The *Yemani-18* was physically capable of carrying out the attack on *The Happy Bird*. The site of the reported attack, 1451.7 N 05632 E is approximately one hundred fifty (150) miles southeast of Oman and one hundred seventy five (175) miles northeast of the island of Socatra. Warrant Officer Davenport (PW-3) testified that he had photographed the suspected PAG from his MPRA about sixty (60) miles from the position

at which *The Happy Bird* was attacked. Garrett Braudhurst (PW-2) estimated the distance from where the MPRA photographed the *Yemani-18* and the position at which *The Happy Bird* was attacked at seventy (70) miles northwest. Comparison of the coordinates—1359 N 05702 E and 1451.7 N 05632 E —confirms this analysis. The *Yemani-18* was approximately seventy (70) miles from *The Happy Bird* twenty-two hours before *The Happy Bird* was attacked.

- [14] Warrant Officer Davenport (PW-3) testified that in his considerable experience observing suspected PAGs from the air the speed of such a dhow is between five (5) and eight (8) knots. With twenty-two (22) hours<sup>1</sup> between the photographing of the *Yemani-18* and the attack on *The Happy Bird*, the *Yemani-18* had ample time to traverse the seventy (70) miles between their positions. Furthermore, Lt. Com. Haley's (PW-7) analysis of a Geographical Positioning System (GPS) device seized from on board the *Yemani-18* (PE-6) places the *Yemani-18* at 1450 N 05616 E, which Lt. Com. Haley testified is approximately nineteen (19) miles west of the site of the attack on *The Happy Bird*, three and a half (3.5) hours before the attack took place. Thus the evidence demonstrates that the *Yemani-18* was moving towards *The Happy Bird* and was within striking distance at the time of the attack. Furthermore, the photographs (PE-4) taken by the Australian MPRA, "Coopers," show the *Yemani-18* towing two skiffs and the testimony of Ahmed Mohamed Hussein (A6 and DW-1) indicates that one skiff was lost during the night of January 12, 2012 to January 13, 2012, the night after the attack. Thus, though detained with

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<sup>1</sup> The *Yemani-18* was photographed by the Australian MPRA "Coopers" at approximately 10:30 ZULU Time on January 11, 2012. The *Happy Bird* reported being attacked at 12:15 local time on January 12, 2012. ZULU Time is equivalent to GMT and is four hours behind local time. Therefore, 12:15 local time on January 12, 2012 was 08:15 ZULU Time on January 12, 2012 some twenty-one (21) hours and forty-five (45) minutes after 10:30 ZULU Time on January 11, 2012. Again we should not be confused by the fact that the current difference in time between Seychelles and the U.K. is only three hours. BST, British Summer Time, is GMT+1.



only one skiff in tow the following morning, the *Yemani-18* was equipped with two skiffs at the time *The Happy Bird* was attacked. Finally, two hooked boarding ladders (PE-17) and numerous weapons (PE-15), including eleven AK-47 variant rifles, RPGs and a large amount of live ammunition, were discovered on board the *Yemani-18*. Thus the *Yemani-18* was contained all the necessary tools to have carried out the attack as Capt. Alday (PW-1) testified that it occurred and was in a position to do so.

- [15] There is some evidence that the *Yemani-18* was the only PAG physically capable of having launched an attack on *The Happy Bird*. According to Warrant Officer Davenport (PW-3), the MPRA did not detect any other suspected PAGs in its patrol area on January 11, 2012. Captain Northwood (PW-4), commander of the anti-piracy task group that includes the *Fort Victoria* and the *Carney*, who was on board the *Fort Victoria* at the time, testified that his ships also did not detect any suspected PAGs, other than the *Yemani-18*, within one hundred (100) miles of *The Happy Bird*. Capt. Northwood (PW-4) and Lt. Com. Haley (PW-7) stated that from January 11, 2012 to January 13, 2012, there were only two other instances of suspected pirate activity. Firstly, there were unconfirmed reports of potential pirate activity near the coasts of Oman and Iran, which is several hundred miles to the northeast of the position at which *The Happy Bird* reported being attacked. Secondly, the *Fort Victoria* was involved in escorting the *Liquid Velvet* back to the coast of Somalia. Capt. Northwood (PW-4) testified that the *Liquid Velvet* is a merchant ship known to be under the control of pirates and possibly being used as a base for launching pirate attacks. Capt. Northwood (PW-4) and Lt. Com. Haley (PW-7) both testified that the *Liquid velvet* was hundreds

of miles to the southwest of the position at which *The Happy Bird* reported being attacked. Furthermore, given that the *Fort Victoria* was escorting the *Liquid Velvet* back to the Somali coast when it responded to the distress call from *The Happy Bird*, there were at least two warships between the *Liquid Velvet* and *The Happy Bird*. However, Captain Northwood (PW-4) testified that the area of ocean in which the Court must be satisfied that there could not have been another PAG that went undetected is some seven hundred fifty thousand (750,000 sq. mi.) square miles. Garrett Braudhurst (PW-2) was unable to say whether the MPRA would detect any PAG within this area.

- [16] However, testimony did not establish the dimensions of MPRA's search, which the court notes occurred some twenty-two (22) hours prior to the attack. Furthermore, the Captain Northwood (PW-4) was able to testify only that upon his arrival at the location of the *Yemani-18* no PAGs had been detected during his transit from the south or within one-hundred miles around the scene at the time of his arrival approximately twelve hours after the attack. Without the dimensions of the MPRA's search grid, the court cannot be satisfied that the *Yemani-18* and *The Happy Bird* were not near the edges of that search area leaving a nearby area of immense size unpatrolled. In the intervening twenty two (22) hours another PAG could easily have traversed an enormous distance and been responsible for the attack. Similarly, radar searches conducted by the *Fort Victoria* cannot have thoroughly covered the surrounding area until twelve hours later, leaving open the possibility that a PAG having attacked from outside the MPRA's search area, and therefore not being the *Yemani-18*, could have escaped before the *Fort Victoria* arrived. Another vessel, the *Carney*, arrived on the scene around dusk according

to Captain Northwood (PW-4); however, not only does this still leave some six (6) to seven (7) hours for another PAG to have made its escape, but no witness from the *Carney* was brought to court to testify to what may or may not have been detected by that vessel.

- [17] Captain Alday (PW-1) was not able to identify any skiffs or suspects but only say that *The Happy Bird* was attacked by two skiffs. Thus on the issue of whether the *Yemani-18* and only the *Yemani-18* could have attacked *The Happy Bird*, his testimony adds only that the number of skiffs that attacked *The Happy Bird* and the number of skiffs scene being towed by the *Yemani-18* are the same. This is of little evidentiary value since many PAGs carry two skiffs.
- [18] According to the testimony of Captain Northwood (PW-4) two vessels—the *Fort Victoria* and American warship the *Carney*—responded to the distress call from *The Happy Bird*. The *Carney*, being the faster vessel arrived at the scene first and located the *Yemani-18* at some time around dusk and began tracking the *Yemani-18* using the ship's radar system. The *Fort Victoria* arrived around midnight. The boarding, Captain Northwood (PW-4) testified, was carried out the following morning, in broad day light. The *Yemani-18* had continued to move throughout the night and in fact did not stop until it was physically boarded; however, according to Marine Pitt (PW-12), a member of the first boarding team, there was no violent resistance to the boarding.
- [19] Leading Regulator Carol Anne Morton Harrowsmith (PW-9) testified to having overseen the collection of evidence aboard the *Yemani-18*. Found onboard were eleven (11) AK-47 variant rifles, two (2) pistols, one (1) Rocket Propelled Grenade Launcher, a significant amount of ammunition

for all fourteen (14) weapons, ammunition carrying belts, military body webbing, one (1) pineapple grenade, one (1) anti-personnel grenade, a suspected Improvised Explosive Device (IED), two hooked boarding ladders, a large amount of fuel, a life jacket taken from a vessel known to have been captured by pirates in August, 2011 the *Fairchem Boger*, two (2) GPS units, an outboard motor for a skiff, cell phones, food and other personal property. The explosives—grenades, IED and RPG warheads—were deemed too dangerous to transport and destroyed at sea, but were tagged and photographed by Kyle Heller (PW-8) prior to their destruction. During the boarding, Captain Northwood (PW-4) testified that the skiff's tow rope became entangled in the dhow's propeller causing the skiff to be badly damaged. It was also destroyed at sea. Captain Northwood (PW-4) also testified that the dhow was turned over to the Yemani Coast Guard once it had been determined that the dhow was a private ship owned by a Yemani national. Photos of the evidence that was destroyed, the skiff, and the damage to the skiff, may be seen in PE-9.

[20] Notably absent aboard the *Yemani-18* was any fishing equipment, fish or evidence of fishing. This is particularly true since the statements of five of the accused, collectively admitted as PE-13 and taken by Corporal Natalie Payet (PW-14) and Detective Constable Timothy Horeau (PW-15) of the Seychelles Police, claim that they were fishing. No other purpose for their voyage was claimed by the accused persons who did not claim to be fisherman.

[21] The arms and ammunition, hooked boarding ladders and outboard motor were turned over by Leading Regulator Harrowsmith (PW-9) to Police Constable Hollander (PW-16), who testified to their safe keeping in his

possession and exhibited them to the Court. PC Hollander (PW-16), who has twelve years experience with firearms as a police armorer, was able to tell the Court, from visual inspection alone, that the eleven (11) AK-47 variant rifles and two (2) pistols had all been fired. He further testified that though rusty all the weapons were capable of firing. He did not, however, test any of the weapons and he could not say when the rifles and pistols had been fired. The weapons and ammunition were collectively exhibited as PE-15 and the engine and hooked boarding ladders as PE-17.

- [22] Comparison of the testimony of persons having had contact with a PAG, either as victims or intervening authorities, had before this Court in previous cases demonstrates that the composition of Somali pirate action groups and the behavior of their members follow certain norms. *See Republic vs. Abdugar Ahmed & Five (5) Others*, Supreme Court of Seychelles, Criminal Side 21 of 2011 (the *Gloria* case); *Republic vs. Mohamed Ise & Four (4) Others*, Supreme Court of Seychelles, Criminal Side No. 75 of 2010 (the *Talenduic* case); *Republic vs. Nur Mohamed Aden & Nine (9) Others*, Supreme Court of Seychelles, Criminal Side No. 75 of 2010 (the *Faith* case); *Republic vs. Abdi Ali & Ten (10) Others*, Supreme Court of Seychelles, Criminal Side No. 14 of 2010 (the *Intertuna II* case); *Republic vs. Mohamed Aweys Sayid & Eight (8) Others*, Supreme Court of Seychelles, Criminal Side No. 19 of 2010 (the *Galate* case); and, *Republic vs. Mohamed Dahir & Ten (10) Others*, Supreme Court of Seychelles, Criminal Side No. 51 of 2009 (the *Topaz* case). Judicial notice is therefore taken of certain commonalities described immediately below.

[23] Somali pirate action groups typically consist of a larger mother vessel, such as a dhow, and at least one skiff used for fast attacks. The mother vessel is used to carry supplies on which the entire group depends and also carries the personnel who typically board the skiff(s) only during attacks or in an effort to flee from authorities. At other times, the skiff(s) are towed. The smaller skiffs, which are equipped with powerful outboard motors, are typically capable of high speeds around twenty (25) knots while the larger, slower mother vessels, which is typically powered by an inboard engine, runs between five (5) and ten (10) knots.

[24] Several other common features have also been noted. PAGs typically carry heavy arms including AK-47 rifles, explosives and RPGs in order to frighten peaceful mariners into submission. The mother vessel is used to carry large amounts of fuel, food, personal items and personnel as PAGs typically operate in the open ocean shipping lanes rather than the traditional fishing grounds close to the Somali coast and must be able to patrol the ocean looking for targets. PAG crews are notorious for claiming to be innocent fisherman though they typically carry no nets, lines, tackle, bait, freezers or fish. PAGs also carry long, thin, hooked boarding ladders. This Court takes particular note of the type of ladders exhibited in PE-17 and often found on pirate vessels. The Court is of the opinion that such ladders lack an innocent purpose and are therefore key evidence of pirate activity as discussed in The Republic vs. Mohamed Abdi Jama & Six (6) Others, Supreme Court of Seychelles, Criminal Side 53 of 2011 (the *Alakrantxu* case).

[25] The attack itself is typically carried out by approaching the victim vessel from behind on both sides at high speed with two skiffs carrying armed attackers. If the attack is successful, the pirates use the hooked ladders to

climb aboard the victim vessel, take the crew hostage and steer the ship back to the Somali coast to be ransomed. If the attack is repulsed by authorities, or if the pirates are later intercepted by authorities, the pirates typically jettison their weapons and ladders. The level of violence varies from one PAG to another: some peacefully surrender when captured while others open fire.

[26] At the close of the prosecution's case, the defence made a motion of no case to answer with regards to Count I only. At this stage this Court was called upon to determine whether the prosecution had established a *prima facie* case in regards to each charged offense. The question at this stage is not whether the Court, if compelled to do so, would convict, but whether the prosecution has adduced evidence with regards to each essential element of the offence on which a reasonable fact finder could convict. See **Republic vs. Marengo SSC 110f 2003**, 6 April, 2004. Furthermore, the Court is to take the prosecution's evidence "at its highest".

[27] In support of that motion, the defence averred that Capt. Alday's (PW-1) testimony did not establish that the two skiffs that approached *The Happy Bird* on January 12, 2012 committed any act of violence or depredation since Capt. Alday (PW-1) admitted to being stressed and fearful and did not see any gunfire emanating from the skiffs but merely claimed to have heard gunfire. Capt. Alday (PW-1), the defence continued, has little experience with firearms and admitted that there is a great deal of ambient noise at sea including the ship's engines. The defence further argued that there was insufficient evidence to connect the two skiffs with the *Yemani-18* or any of the accused persons.

[28] Capt. Alday answered questions frankly and has no reason to lie. His testimony could reasonably be found to be reliable. A high speed approach from behind on both sides employing skiffs is not a peaceful approach but typical of pirate activity in the region. Surely peaceful mariners would not chase a ship down in this manner. Furthermore, Capt. Alday heard gunfire coming from the skiffs. Indeed Capt. Alday testified that he had no doubt that his vessel was under attack. Finally, there is enough evidence on the record, and discussed above, that a reasonable fact finder might determine that *The Happy Bird* was attacked by skiffs launched from the *Yemani-18*. There was a *prima facie* case that the two skiffs that attacked *The Happy Bird* were dispatched from the *Yemani-18*. Pursuant to section 183 and 184 of the Criminal Procedure Code, Cap 54, the motion was denied and all the accused invited to put up a defence on each one of the two counts. It is worth noting that despite defence counsel's advice to all the accused regarding their election, some of them opted to give evidence on oath.

[29] Having been instructed to be put on their defence and their respective rights read out to them, eleven (11) of the thirteen (13) accused persons chose to remain silent: Liban Mohamed Dahir (A-1), Quraa Sarman Bilil (A-2), Hassan Abdi Ali (A-3), Abdi Malin Mohamed (A-4), Bishar Muse Kaligirite (A-5), Galad Yasan Abdishakur (A-7), Ali Abdilali Aden (A-8), Burhan Yasin Ahmed (A-9), Abdi Khadur Mohamed (A-11), Nurudin Muse Ahmed (A-12), and Abdisala Adulahi Nur (A-13). The Constitution affords the accused the right to remain silent and no adverse inference is drawn from exercising that right. **Republic v. Aden SSC 75 of 2010, 11 February, 2011.** Ahmed Mohamed Hussein (A6) and Mohamed Ali Said (A10) chose to testify under oath. The accused



persons were also informed of their right to call any witnesses to testify on their behalf but none of them exercised that right.

[30] Ahmed Mohamed Hussein (A6) testified that he was forcibly drugged by injection and brought aboard the *Yemani-18* by one Omar Shalmo, who is not among the accused. Mr. Hussein testified that he emerged from drug induced sleep just hours before the *Yemani-18* and its crew were detained by the *Fort Victoria*. Mr. Hussein was unable to say how long he had been at sea or what may have occurred aboard the *Yemani-18* while he was drugged. Mr. Hussein repudiated his statement to police, in which he claimed to be a fisherman, and stated instead that he is a truck driver and that he had never before been at sea. He categorically stated that everything he had said to the police was totally false, and that what he was telling the court on oath was the truth.

[31] Mr. Hussein admitted that he was aboard the *Yemani-18* depicted in PE-9 and PE-4 and that it was from that vessel that he was detained with the twelve other accused persons and one Mr. Absiye, who is not among the accused. Mr. Hussein explained the difference in the number of skiffs depicted in PE-4 and PE-9 saying that the missing skiff came loose during the night and drifted away. He further admitted to ownership of one AK-47, (PE-10(88) second from the left), and one magazine containing thirty rounds of live ammunition. He claimed this weapon was his personal property and that he carried it all times for self-defense, not piracy. That Mr. Hussein was still in possession of his loaded AK-47 while aboard the *Yemani-18* makes his claim of having been forcibly drugged impossible to believe. This is also supported by his demeanor and selective manner of answering questions in cross-examination.

- [32] While Mr. Hussein did answer yes to the query “[a]re you a member of a pirate team?” it was clear from the exchange with the prosecutor, which led to that statement, that he was saying that because he believes that everyone thinks he is guilty, that he doesn’t have any chance to be acquitted even if he is innocent, and so, there is no point in denying it.
- [33] Mohamed Ali Said (A-10) accepted that he was detained by the Royal Navy but stated that he was not aboard the *Yemani-18*, that he was fishing near Harphoon near the mainland when he was detained. He testified that sixteen (16) persons were detained including all the other accused persons and that he believes the Royal Navy killed the two not brought to Seychelles and dumped them at sea. This allegation was however not supported by any evidence whatsoever.
- [34] Mr. Said insisted that he had never seen the *Yemani-18* or *The Happy Bird*. In response to all questions regarding the presence of certain incriminating objects and the lack of fishing gear aboard the *Yemani-18*, Mr. Said maintained that the *Yemani-18* was not his vessel. He testified that he had never used or carried a weapon and that he didn’t even know the AK-47 variant rifles depicted in PE-10(12&13). Mr. Said did accept that PE-10(70) is a photograph of him. He testified that the photographs of the accused shown in PE-10(61, 62, & 63) were not taken on a fuel barrel aboard the *Yemani-18*, but while they were sitting on a “cover” aboard the *Fort Victoria*.
- [35] Mr. Said’s testimony is wholly incompatible with all other evidence on the record. In order to accept his evidence, this Court would have to discount the evidence of all sixteen (16) witnesses for the prosecution and also the evidence of his fellow accused Mr. Hussein (A6), which is just

impossible in the circumstances. Clearly, Mr. Said's testimony must be disbelieved in its entirety.

[36] It is incumbent on this Court to remind itself of the dangers of conviction based wholly or in substantial part on circumstantial evidence. It has been generally held that before convicting on circumstantial evidence, the judge must be satisfied that the facts are incompatible with innocence so that an inference that the accused is or are guilty is not merely a permissive inference given the facts, but is the only logical inference given the facts. See Venchards, *The Law of the Seychelles through the Cases*, at page 265.

[37] After a consideration of all the evidence adduced by the prosecution, this Court cannot be satisfied beyond a reasonable doubt that the *Yemani-18* and only the *Yemani-18* could have committed the attack against *The Happy Bird*. The area is infested with similar PAGs. As discussed above, there is simply too much time and space unaccounted for. Anything could have happened during that time and within that space yet, the prosecution has not totally excluded that possibility or the possibility of existence of other circumstances which would weaken or destroy the inference of guilt. Though there seems to be some possibility and or suspicion of the *Yemani-18* and its skiffs being the vessels involved in the attack, that possibility is too remote for any court to base an inference of guilt. Suspicions, however high they may be, can never be a basis for conviction. Consequently, Count One must fail. All the accused persons are accordingly acquitted of Count One.

[38] Count Two— of piracy by voluntary participation in the operation of a pirate vessel—is a different matter. While it is difficult to prove that a

group of individuals intended to use their vessel to launch piratical attacks, this Court has already established that circumstantial evidence can establish beyond a reasonable doubt that such was the intention of a group. See The Republic vs. Mohamed Abdi Jama & Six (6) Others, Supreme Court of Seychelles, Criminal Side 53 of 2011. That evidence is a combination of factors including the presence of equipment suitable for carrying out pirate attacks, the absence of evidence of a legitimate trade, the composition of the group, the position of the vessels, and the behavior of the accused persons when approached by authorities.

[39] In this case, the accused were operating a dhow towing two skiffs, flying no flags, and carrying no official registration. This configuration is common in a pirate action group. The accused were on the high seas, in the shipping lanes far from local fishing grounds. Aboard their vessel, the *Yemani-18*, the accused had eleven (11) AK-47 variant assault rifles, two pistols, an RPG launcher and ample ammunition for all fourteen (14) weapons. The accused also had an attempted IED, a pineapple grenade and an antipersonnel grenade. Such weapons are commonly used in pirate attacks. The accused also had two hooked boarding ladders of a type not suitable for lawful activities and again commonly found aboard pirate vessels. Though most of the accused told police that they were fishermen, no fish or fishing equipment was discovered aboard their vessel. When approached by authorities, the accused barely acknowledged them and refused to stop despite warning fire being directed into the bow of their boat. According to testimony, the *Yemani-18* stopped only when physically boarded.

[40] In the case of Mohamed Jama (supra) the court had compared the offence of being in possession of slave trade equipment to the act of

carrying paraphernalia akin to piracy on the high seas, even without an attack on another vessel, as being for the sole purpose of executing piratical attacks. The possession of equipment specially used in slave trade such as more boilers or cooking apparatus of an unusual size or capable of being made larger and larger quantities of food items and water in casks or tanks than required for the crew, shackles, bolts, handcuffs, large quantities of ropes, nails, several small boats and oars etc could be comparable to the above listed piratical articles or equipment, like the hooked ladders, found on the dhow which was under the dominant control of all the accused in this case. See The Weathergale, 69 U.S. 375 (1864), The Kate, 69 U.S 350, 361 (1864), and The Sarah, 68 U.S 366 (1864), which authorities demonstrate how vessels specifically designed for ferrying slaves were seized on the basis of carrying equipment typically used in slave trade rather than equipment employed in there legitimate and innocent trade. Based on this and the surrounding circumstances, the courts were able to make an inference that the concerned vessels were involved in slave trade. It was stated in Mohamed Jama, para 50:

*"Carrying articles used in slave trade is analogous to being in possession of piracy equipment.....The purpose of such equipment articles is to provide the court with some measure of foreseeability.....Our law criminalizes voluntary participation in the operation of a pirate ship.....For slave trade, the treaty clearly listed down the articles or equipment to be look out for. In the present case, the discretion remains in the hands of the court to determine the factors that would prove that the vessel was a pirate ship.....The offence herein is not so vague that the manner of commission is unforeseeable because it requires intent to commit a piratical act. The equipment issue is about the mode of proving that intent. Equally important to consider is the fact that some items or articles on board could be used in both slave trade, or in this case piracy, as well as legitimate trade or innocent voyages. The legal reasoning behind possession of burglary and slave trade tools, coupled with circumstantial evidence and inferences would go a long way in facilitating*

*the process of establishing of criminal intent in piracy cases. It does not then require a successful attack on another ship for a conviction to be entered under sections 65(4)(b) and 65(5)(b). See In re Jure Gentium, [1934] A.C 586 (P.C) 587. However, some equipment, like the hooked ladders, was particularly designed to facilitate the commission of piratical activities and deserves special attention."*

[41] Under section 15 of the Penal Code, Cap 158, a person who is at least seven (7) years old but not yet twelve (12) years old cannot be held criminally responsible for any act or omission unless it is proved that at the time of the act or omission that person was capable of knowing that he ought not to do the act or make the omission. This Court interprets the use of word "**proved**" in section 15 to place the burden on the prosecution. It is on record that the prosecution has chosen not to challenge the accused persons' evidence concerning their ages. One of the accused, Burhan Yasin Ahmed (A9), indicated that he is eleven (11) years old. There being no other evidence of his age, the Court finds that he is eleven (11) years old. No proof concerning the capability of Burhan Yasin Ahmed (A9) to understand the wrongfulness of his conduct was offered as required by section 15 supra. Therefore, this court cannot legally convict him. It is immaterial whether there is incriminating evidence on the record. Burhan Yasin Ahmed (A9) is therefore acquitted on Count II.

[42] Accordingly, I hereby order that Burhan Yasin Ahmed be removed from custody. I further order the Government of the Republic Seychelles to take immediate steps and return Burhan Yasin Ahmed to his homeland, Somalia to be reunited with his family members as soon as possible. On this matter, the International Organisation for Migration (IOM) or the International Red Cross could be of assistance.

[43] Of the remaining accused persons, four claim status as minors, which may only be addressed in detail at a later stage, if at all convicted and sentenced. These four, however, have all indicated ages twelve (12) and above and therefore can be convicted if there is sufficient evidence. As it did in **The Republic vs. Mohamed Abdi Jama & Six (6) Others**, **Supreme Court of Seychelles, Criminal Side 53 of 2011**, this Court finds that by carrying such weaponry and pirate equipment, especially the hooked ladders, on the high seas in a pirate infested area, the skiffs and the dhow - on which all the accused persons were also found, are hereby confirmed to be pirate ships. See section 65(5)(b). Further, the composition of the accused's group and the nature of their behavior are incompatible with any inference other than the belief that the accused were operating pirate vessels. The accused were all voluntary participants in a common scheme, with common intention to use private vessels, over which they maintained dominant control at all material times, to attack peaceful shipping. None of them has claimed involuntary participation. Once on the high seas, with such vessels and equipment, and in such circumstances there is no logical inference one can make that is compatible with their innocence. The only logical inference, given the facts, is that the accused were operating a pirate ship lying in wait, searching for, or hoping to chance upon their victims.

[44] I find that the prosecution has proved all the ingredients of the offence herein beyond a reasonable doubt. Each of the accused persons, therefore, with the exception of Burhan Yasin Ahmed, are found guilty on Count II and accordingly convicted.



**DUNCAN GASWAGA**

**JUDGE**

Dated this 31<sup>st</sup> day of July, 2012.

**English/Somali Interpreters**

- (i) Abdullahi Yerrow Salat
- (ii) Said Sheikh Abdirahaman

**English/Creole Interpreters**

Danny Michel