Legislation	United Nations Convention on the Law of the Sea	Mauritius has signed and ratified the United Nations Convention on the Law of the Sea (UNCLOS). The UNCLOS has force of law in Mauritius by virtue of section 3 of the Maritime Zones Act.
	The Piracy and Maritime Violence Act	The Piracy and Maritime Violence Act is currently in force. The aim of the Act is to provide a comprehensive framework for prosecuting in Mauritius, persons suspected of having committed piracy and related offences. Schedule 2 of the Act incorporates *verbatim* Articles 100 to 107 of UNCLOS. The said Act also makes provision for maritime attack under section 3(3). Section 4 and 5 of the Act criminalise the offence of hijacking and destroying ships and endangering safe navigation respectively. For each of these offences, the Act provides for penal servitude for a term not exceeding 60 years. Section 7(1) of the Piracy and Maritime Violence Act provides for prosecution of an offence under the said Act to take place, at the sole discretion of the Director of Public Prosecutions, before a Judge without a jury or the Intermediate Court.
	Section 188C of the Courts Act – evidence in Court	Section 188C of the Courts Act makes provision for the circumstances under which out of Court statements in piracy cases would be admissible.
	Merchant Shipping (Security of Ships) Regulations 2019 and Ports (Security) Regulations 2021	The International Ship and Port Facility Security (ISPS) Code has been domesticated in Mauritius through the Merchant Shipping (Security of Ships) Regulations 2019 made under section 228 of the Merchant Shipping Act and the Ports (Security) Regulations 2021 made under section 65 of the Ports Act which provide for security of ships and ports, respectively.
Case Law	•Police v M A Adbeoulkader & others (2014 INT 312) •Police v M A Adbeoulkader & others (2014 INT 311) •Director of Public Prosecutions v M A Adbeoulkader & others (2015 SCJ 452) •Police v M A Adbeoulkader & others (2016 INT 324)	Mauritius has followed the footsteps of Seychelles and Kenya in initiating piracy cases. In fact pursuant to the Agreement signed by Mauritius and the European Union on 14th July 2011, twelve pirates of Somali nationality who were suspected of having committed an act of piracy off the coast of Somalia were transferred to Mauritius for prosecution. The case of Police v Mohamed Ali Abdeoulkader and ors 2014 INT 311, relating to the twelve pirates was heard in the Intermediate Court of Mauritius. The said Court found on 16th July 2016, the twelve Somali pirates guilty as charged and they were each

	•Police v M A Adbeoulkader & others (2016 INT 323) •Police v M A Adbeoulkader & others (2016 INT 322)	sentenced to five years penal servitude. Copies of Judgments delivered in this case are attached.
	Sunil Kumar Nandeshwar v Police (2020 PL3 2)	The accused who was charged with the offence of unlawful interference with the operation of a property of a ship likely to endanger its safe navigation, in breach of the Piracy and Maritime Violence Act, was denied bail by the District Court.
Practice – Measures taken by Mauritius	❖ National Piracy Contingency Plan ❖ Ship Security Alarm System Contingency Plan ❖ Coastal Radar Surveillance System ❖ Reception of SSAS alerts under ISPS Code of SOLAS 1974, as amended ❖ Mauritius is in compliance with LRIT requirements, Fulcrum Ltd is its Service provider ❖ Access given to EUNAVFOR for LRIT information on Mauritian registered vessels ❖ Armed guards allowed on Mauritius registered vessels upon request ❖ Setting up of a Marine Commando Unit within the National Coast Guard • Nomination of a Training Coordinator to Liaise with the Djibouti Regional Training Centre (DRTC) ❖ Attached to Mombasa PISC & sharing of information procedures in place. Daily and weekly communication checks ❖ Guidance provided to ship owners on the entry into force of the Piracy and Maritime Violence Act 2011 through a Notice to Mariners.	
Agreements entered into by Mauritius	Agreement with the European Union (EU)	An agreement was signed between Mauritius and the EU on 14 July 2011 for the transfer of suspected pirates and associated seized property from the European Union – led Naval Force (EUNAVFOR) to Mauritius. Hence, it was possible for Mauritius to carry out investigations and prosecute the twelve pirates mentioned earlier. The said Agreement also provides for the repatriation of transferred persons in cases of acquittal or non-prosecution, transfer for completion of sentence in another State or repatriation after having served their sentence in Mauritius.
	Agreement with the Government of the Republic of Somalia	On 25 May 2012, Mauritius signed an Agreement with the Government of the Republic of Somalia for the transfer of sentenced persons.
	Djibouti Code of Conduct	On 29 January 2009, the Djibouti Code of Conduct was adopted at a high-level meeting attended by States from the Western Indian Ocean, the Gulf of Aden and the Red Sea areas, convened in Djibouti by the International Maritime Organisation. The aim of the Djibouti Code of Conduct is to promote greater regional cooperation between signatories with a view to enhance their effectiveness in the prevention,

		interdiction, prosecution and punishment of persons involved in piracy and armed robbery against ships. The said Code also seeks to promote cooperation in sharing and reporting relevant information. The Djibouti Code of Conduct has already been praised as a milestone development and a central instrument in the development of regional capacity to combat piracy. Mauritius signed the Djibouti Code of Conduct on 23 March 2010.
	Amendments to the Djibouti Code of Conduct (Jeddah Amendment)	Following requests made by signatory States to the Djibouti Code of Conduct, the International Maritime Organization convened a meeting to update and upgrade the Code. This meeting was held in Jeddah, Saudi Arabia from 10 to 12 January 2017. The revised Code requires the formulation and harmonisation of policies to ensure the sustainable use of marine living resources. On 26 July 2018, Mauritius signed the Jeddah Amendment.
	EU-UNODC Joint Programme	The EU-UNODC Joint Programme on support to the Trial and Related Treatment of Piracy Suspects in Mauritius (2010) provides support to the Police and other Authorities.
Role of the International, regional and sub-regional	United Nations Security Council (UNSC)	In 2008, UNSC adopted no less than ten Chapter VII-based Resolutions (UNSCRs) aimed at containing the escalating threat of piracy and armed robbery against ships off the coast of Somalia. They are UNSCRs 1816,1838,1846 and 1851 of 2008. Their purpose is to give authorisation for States and regional organisations cooperating with the Somali Transitional Federal Government to enter Somalia's territorial water and make use of all necessary means such as disposing of boats, vessels, arms and equipment used in relation of piracy and deploying of military vessels. These resolutions also give permission to States and regional organisation cooperating with the Somalia Transitional Federal Government on giving notification to the Transitional Federal Government to use land based operations to fight piracy in Somalia. These resolutions were followed by resolutions UNSCRs 1863 and 1897 of 2009. In 2016 the Security Council adopted resolution 2316 (2016). The Security Council urged States and regional organisations to cooperate with each other by deploying naval vessels and military aircraft and by seizing boats, arms and related equipment used in committing the offence of piracy and armed robbery at sea. The Security Council commended the contributions of the European Union's Naval Force (EUNAVFOR) Operation ATALANTA, the NATO's Operation Ocean

		Shield, the Combined Maritime Forces' Combined Task Force 151, the African Union and the Southern African Development Community, as well as individual States for naval counter-piracy missions and protecting ships transiting through the region.
	International Maritime Organisation (IMO)	IMO has also joined the fight against piracy and has adopted many legal instruments. They are the SUA Convention, the International Ship and Port Facility Security Code, IMO Code of Practice for the Investigation of the Crimes of Piracy and Armed Robbery against Ships, and the requirement for Long-Range Identification and Tracking of Ships. Various resolutions have also been adopted and they include, inter alia, resolution A. 1002 (25), A. 1026 (26) and A.1044 (27) on piracy and armed robbery against ships in the waters off the coast of Somalia.
	Indian Ocean Commission	The Indian Ocean Commission (IOC) has been providing secretariat services to the Chair of *the Contact Group on Piracy off the Coast of Somalia* (CGPCS) since 2019. It also supported the meetings of the Strategic Planning Steering Group (SPSG), with a view to preparing a report for the reorientation of the CGPCS. At the 24th Plenary session of the CGPCS held on 27 January 2022, the report of the SPSG was adopted. The report proposes to develop a new strategic vision for the Contact Group and provide the core elements of a strategic framework that will enable the CGPCS to deal with emerging threats within the Indian Ocean region. Subsequently, it was agreed to reorient the Contact Group as a forum for strategic dialogue on maritime crime activities at sea in the Western Indian Ocean. The CGPCS has now been revamped into the 'Contact Group on Illicit Maritime Activities in the Western Indian Ocean' and its mandate now covers all forms of maritime crimes and not only piracy. The IOC has developed and set up the Western Indian Ocean architecture for maritime security under the *MASE programme* funded by the European Union. This architecture, which is an unprecedented cooperation experience in the field of maritime governance and security in the region, consists of two regional centres, namely the Regional Maritime Information Fusion Centre based in Madagascar and the Regional Coordination of Operations Centre based in Seychelles. The two centres are fully operational with the deployment of international liaison officers from signatory States. The architecture enables the monitoring, identification and analysis of vessels susceptible of

		transboundary maritime crimes, including illegal unreported and unregulated fishing, maritime pollution, piracy and trafficking.
	Maritime Security Centre Horn of Africa (MSCHOA).	MSCHOA manages EUNAVFOR Voluntary Registration Scheme (VRS) for vessels transiting off Somalia, and also administers an interactive website that enables EUNAVFOR to communicate the latest counter-piracy guidance to the Maritime Industry, and for shipping companies and operators to register their vessels' movements through the region. MSCHOA vessel movement registration specifically enables merchant ships to provide naval forces operating off Somalia with a vulnerability profile of the vessel. All this information is fed into a risk matrix formula producing a Vulnerable Risk Category for each vessel and disseminated daily to Task Force Partners on the shared communications system. This information is also fused on the common operational picture used by the Battle Watchkeeping Personnel. This information is used by warships and aircraft across the Voluntary Reporting Area. The data provided is collated and trends are analysed over months and years to support improvements and revisions to Best Management Practices (BMP) and other counter piracy advice to Industry Organizations. This information is vital in communicating to Governments the existing and future threats to shipping from piracy.
	Mercury	Mercury is the tool for sharing information and the mechanism for counter-piracy responders to coordinate any activity based on the information. There are two principal outputs from Mercury. (a) Naval forces respond to an incident. (b) Information is shared to the mariner through a recognised and internationally accepted format of Maritime Safety Information (MSI).

	United Kingdom Maritime Trade Operations (UKMTO)	UKMTO is the Position Reporting and Emergency Incident Response Interface with the merchant ships at sea. They have specific responsibilities in coordinating all communications verbally with the Bridge in an emergency in order to make this procedure clear and easy for the Master and Crew. This direct verbal communication enables a quick and accurate assessment of the classification of the incident which is then disseminated immediately on the shared communications systems which all Counter Piracy Naval Operations operating off Somalia monitor. Despite some of the automated location positions currently employed on Motor Vessels, this system remains the only way a vessel can ensure that naval forces know they are there. Vessels report daily to UKMTO with position related information.
	Piracy and Armed Robbery Prone Areas and Warning	All ships are advised to report all piracy and armed robbery incidents and suspicious sightings to local Authorities, their flag state and to the International Maritime Bureau (IMB) Piracy Reporting Centre. The IMB Piracy Reporting Centre broadcasts incidents of piracy and armed robbery incidents to all ships in the Indian Ocean Region (IOR) and Area of Responsibility (AOR) regions via InMARSAT Safety Net System.

(533e)

Police v Mohamed Ali Abdeoulkader and ors

2014 INT 311

IN THE INTERMEDIATE COURT OF MAURITIUS

Cause No.850/2013

In the matter of: -

Police

v

1. **Abdeoulkader Mohamed Ali**
2. **Said Mohamed Hassan**
3. **Ahmed Mohamed Ismael**
4. **Shafi Mohamed Osman**
5. **Hassan Salad Omar**
6. **Said Omar Farah**
7. **Mohamed Abdilahi Ahmed**
8. **Ali Hassan Mohamed**
9. **Abdi Mohamed Kidiye**
10. **Abdi Ahmed Yussuf**
11. **Abdillahi Mohamed Ahmed**
12. **Mahad Mohamed Ibrahim**

JUDGMENT

1. The twelve accused are charged with the offence of 'Act of Piracy on High Seas' in breach of sections 3(1)(a), 3(3) and 7 of the Piracy and Maritime Violence Act 2011. It is averred that on or about 5 January 2013 the twelve accused did *"on the high seas, around 240 Nautical Miles off the Somali Coast...wilfully and unlawfully commit an act of piracy, to wit an illegal act of violence directed against the MSC Jasmine, a*

Panama flag Merchant Vessel which was proceeding from Salalah/Oman to Mombassa/Kenya."

2. The particulars provided by the prosecution are that *"they fired gunshots and a Rocket Propelled Grenade at the MSC Jasmine"*.
3. The twelve accused pleaded not guilty to the charge and were assisted by respectively Messrs K. Raghunandan, A. Radhakissoon, R. K. Ramsaha, L. C. Nuckchady, V. Ramchurn, B. Padiachy, G. Bhanji Soni, N. C. Ramchurn, D. Ramful, L. E. Ribot, D. Ramano and H. Bansroopun, counsel.

4. Mrs S. Beekarry-Sunassee, Principal State Counsel, Mr A. A. Ramdahen, Mr M. S. Bhoyroo, Mr A. Joypaul and Ms A. Joree, State Counsel, appeared for the prosecution.

The case for the prosecution

5. The case for the prosecution is in a gist that on 5 January 2013, the MSC Jasmine, a container vessel, was on its way from Salalah, Oman to Mombasa, Kenya. Captain O. Kopanoy (W5) was the Master and Mr L. Mykola (W6), Second Officer. Security officers armed with semi-automatic weapons were on board because of the high-risk area. Around 2.00pm – when they were at 140NM from the Somali coast according to Mr Mykola – both officers were on the bridge when the security team leader informed the crew that a boat was approaching from starboard (right) side at 4NM distance. The automatic radar plotting aid (ARPA) could not pick it due to the state of the sea: Captain Kopanoy and Mr Mykola had visual contact only at first. They started emergency procedures as the craft was trying to approach, without radio contact, and at high speed, meaning an attack or an attempt at attack. The Jasmine increased its speed to 11.2 knots and the security team fired warning flares, but the skiff, which was travelling at about 19 knots, came closer. Captain Kopanoy sent an emergency signal via satellite.

6. Captain Kopanoy and Mr Mykola identified a white skiff, with some dark paint on the bow, and with weapons. The skiff moved from port to starboard, close and then away from the MSC Jasmine, the closest being about 180m. Captain Kopanoy saw about six

to eight persons on the skiff. Shots were fired from the skiff and two security guards on the MSC Jasmine fired back. At one point the security guards warned that a Rocket Propelled Grenade (RPG) was being fired from the skiff, and after some ten seconds, there was a sound of metal impact with the hull of the ship. The RPG did not explode. The firing and cross-firing lasted for about 30mn. Bullets, some of which were akin to AK47 bullets, removed paint, but did not damage the vessel and one bullet was found in a container. The skiff then stopped, whilst the MSC Jasmine moved south at 12.2 knots. At about 3NM, the skiff moved west/northwest towards the Somali coast at about 3 to 4NM: they lost visual and radar contact after 4NM and did not see the skiff gather speed. The attack had lasted 40 to 45mn, ending around 2.45pm. After 5 to 10mn Mr Mykola saw a craft, which had no fishing facilities or anything: it was on a bearing 330° north/northwest. A helicopter arrived around 3.45pm and Captain Kopanoy informed someone that they were safe, that a white skiff had attacked them and had gone westwards. Mr Mykola heard the security officers give the helicopter the approximate location and direction of the skiff. Captain Kopanoy took photographs during the attack, when the MSC Jasmine was approximately six cables away from the skiff and also took photographs of the bullets (Docs. AB, AB1, AC, AC1 to AC3). There was no report to Captain Kopanoy of any whaler towing a skiff.

7. On 5 January 2013, ENS F. A. Hendicks (W12) was in the Combat Information Centre (CIC) on the USS Halyburton, when he was made aware of a possible PAG (Pirate Attack Group) on the MSC Jasmine from a skiff, and the firing of a RPG missile, which missed. Helicopter Heartache 43 was launched and searched an area more than 200NM from Seychelles: it found the Jasmine and continued the search for any contacts that might resemble the skiff that attacked the vessel. Heartache 43 located a whaler with about ten persons on board, and a skiff, at more than 200NM from land, and later focused on where the skiff departed. The skiff moved at 20 to 30 knots, going westward, towards land: at that speed it would cover about 40 to 60NM in 2 hours. What the helicopter recorded was sent to the USS Halyburton in real time. The USS Halyburton shadowed the whaler and skiff all night. Heartache 43 did not locate any other contacts in the area. There is always the possibility that there were other vessels he did not see.

8. On 5 January 2013 around 3.00pm LCDR D. J. Clemons (W7) was in his office on the USS Halyburton when they got a distress call from the MSC Jasmine that pirates were attacking it. He was in contact with the commander of Heartache 43, Lt A. Haupt, by radio and relayed the information and requested the crew to take photos of the ship. It took the helicopter/his crew some 2 hours to reach the Jasmine after the said distress call on 5 January 2013. Mr Haupt made a visual assessment of the MSC Jasmine and said he did not see any pirates or any sign of damage. Heartache 43 sent real time images of the whaler and skiff. There was a rubber tyre hanging from the pole "eastern" side of the whaler, the purpose of which was to protect it from damage from a larger ship: the tyre is not a typical item to whalers and skiffs. He requested the helicopter to search 40 to 45NM around the MSC Jasmine, as most ships would travel at 10 to 15NM. The helicopter found a whaler towing a skiff with probably eight to ten persons on board, and barrels of fuel – see Docs. V, V1 to V4. Heartache 43 tracked the two vessels until about 5.30pm as it had a problem to fly at night. The USS Halyburton had the whaler and skiff on radar and the P3 remained with them all night. The USS Halyburton contacted the Surcouf on 5 January 2013.

9. On 5 January 2013 Lt. A. W. Haupt (W8) and his co-pilot, Officer Woodward, took off in Heartache 43 following the distress call that a small dirty white skiff with six to eight persons on board, had fired a RPG at the MSC Jasmine and then moved north west. He was in constant communication with the Halyburton during the flight. Heartache 43 is equipped with camera, radar (ATS1.87 Freer) and sensor, which were activated after take-off. The Halyburton had provided the position of the Jasmine, that is, northwest from it and travelling southwest and he reached it in 20mn. He did not know if "0307N 05150E" was the position of attack. The Jasmine said it was all right through radio. At 1NM from the Jasmine, the camera zoomed in: there was no major damage. Since they were provided with the time of the attack and the direction in which the small vessel went (north-west), he drew a circle 20NM in radius taking as base the point of attack, and decided to follow the radar track: they got a single contact, a white whaler, about 30ft long, with about eight people on board, 20 to 30NM north, and a skiff, as seen on Docs. V, V1 to V3. He agreed that Officer Woodward said in a statement that Heartache 43 returned to Halyburton due to a malfunctioning radar altimeter that inhibits night flight, but there were two separate systems.

10. Officer M. Höner (W16) flew the Jester, USS P-3 Charlie, on a surface search mission in the night of 5 January 2013 to search for possible PAG. He got information about a whaler and a skiff from Tasking Authorities. They reached the operations area where there was a reported pirate attack around 8.00pm. They identified two contacts on radar: a whaler towing a skiff, travelling at about 6 knots, 30NM north/northwest of the position he received. The speed of the whaler and skiff, the distance and time-lapse all matched. The skiff was empty. There were fourteen barrels, a long ladder and people on the whaler and no fishing equipment, therefore tripwires of a PAG. Pictures were extracted from a video stream (Docs. AA, AA1 and AA2 (infrared)). PAG consists of a mothership and one or two fast moving skiffs, and the whaler acted as a mothership. They tracked both contacts for about 20mn and then the whaler slowed down. Around 8.30pm, through radar and infrared camera, he saw two persons and one drum transferred to the skiff, and the whaler split from the skiff. The whaler moved north/northwest at 6 knots and the skiff at 10 knots. According to him the skiff could not travel at 19.2 knots for more than two minutes. A couple of hours later, the ladder was missing. They expanded the search to 60x60NM, but there were no other contacts in the area on the radar, which can detect very small pieces in the water. They tracked the skiff until 1.30am, and at times focused on the whaler with the radar.

11. On 6 January 2013 at 4.00am Mr Clemons got information that the P3 was tracking the skiff, which had separated from the whaler during the night and he took off in Heartache 43 at 5.30am to track the skiff. The British helicopter from the Surcouf, the Striker, joined him, and they split for the search, he taking the western and northern half. He found the skiff 5NM from the location given by the P3, and no other vessel: it was the same skiff he had tracked in the last position given by the P3. He made sure the Surcouf had a good visual identification of the skiff before he returned to the USS Halyburton. There were two persons on board the skiff, which was moving at about 5NM towards the northwest: there was no fishing equipment, but only barrels of fuel. He went back to the whaler, which was the same one tracked on the eve and started covering the boarding. There seemed to be a lot of people on the whaler, no radio and the poles and grappling hooks, were missing. He denied having picked up on the whaler as a matter of convenience as he did not find a skiff with eight persons. The

skiff and whaler found on 5 January 2013 were the ones seen on 6 January 2013 because they were continuously monitored.

12. Mr H. Lainé, Commanding Officer of the Surcouf (W18) received a distress call from the MSC Jasmine through Mercury chat on 5 January 2013. In his statement of 8 January 2013 he mentioned exchange of fire between MSC Jasmine and a white skiff and the skiff moving west after the attack. The surveillance, tracking, interception and boarding resulted from the helicopters pilots' conclusion that the whaler towing the white skiff they had located were the authors of the attack. The point of attack was at more than 200NM from the Somali coast. Pirates usually have a mothership, a whaler or a dhow, and a skiff, so finding a whaler and a skiff after the attack would have meant the authors of the attack. The helicopter, equipped with surface radar, and with excellent weather, would have had a large image and would have detected any other contact. The Commanding Officer of Operation Atalanta ordered them to the spot the Jasmine was attacked. They were communicating with the USS Halyburton, its helicopter and maritime patrol aircrafts. On 6 January 2013 the Striker took over surveillance of the skiff from the USS Halyburton helicopter, and later located the whaler. Mr Lainé ordered the interventions on the vessels: the boarding team took back the two persons on board the skiff and the ten persons on board the whaler to the Surcouf and all the exhibits from the two vessels were collected. The skiff could contain about ten persons. Mr Lainé obtained the authorisation, from Admiral de Paredes, Force Command of Operation Atalanta, to destroy the skiff and whaler as the former was too big to bring on board and the latter leaked. The destruction was not deliberate or to hide something.

13. According to French legal procedure, Mr Lainé had authority to retain the suspected pirates for 48 hours, after which the judge authorised him in writing to retain them for 120 hours (5 days) on three occasions. The arrest mentioned in the statement of PS Narain means *"appréhendé"*. On board the Surcouf the persons were medically examined, their property put in bags and their names ascertained. There were no complaints from them, but they refused to take food on two mornings. He is not aware that someone threw urine at Accused no.12. On 6 January 2013 the French authorities decided not to take jurisdiction and the European Union enquiries from signatories of the agreement on whether they would take over jurisdiction took 10 days. Mauritius

accepted after 15 days and it took 5 days to travel from off Somali coast to Djibouti. Docs. R1 to R79 were taken from the Heartache 43, Striker and Jester and Docs. Q, Q1 to Q4 were drawn following the information relayed on Mercury chat.

14. On 6 January 2013 Mr Hendicks led a Maritime Security Approach (MSA), to investigate the whaler, the only vessel in the area, based on piracy tripwires, that is, excessive drums, hooks and ladders, more weapons than usual, lack of fishing equipment, lot of cargo and excessive personnel for the vessel. There was no radio on board the whaler, so they switched to VHF (microphone & speaker). He asked questions through the interpreter: the crew stopped the engine and indicated they had no weapons on board. There were no GPS or other navigation instrument and no obvious sign of fishing gear or boxes of ice for fish. They did not find any weapon on board, which was unlikely for that area, as most fisherman carry rifles for protection. The Master said they were part of a group of whalers searching for a lost vessel. They noticed a lot of barrels and found blankets, a tarp, foodstuff and a life jacket, which the Master said he found floating in the water. It is difficult to identify whether it is the whaler they intercepted from Docs. V1 to V3. He cannot identify the whaler he boarded from Docs. R1 and R12. He cannot recall anything special about the skiff, but there were two persons on it when he first saw it briefly on camera. The purpose of chasing the whaler on 6 January 2013 was based on a preconceived idea that the whaler was involved in piracy activities, based on trip wires and its proximity to the incident area.

15. On 6 January 2013 at about 5.13am, Lt M. Curd (W22), Flight Commander of the Striker, was airborne to find a skiff and whaler reported by another unit. Heartache 43 gave him the position of the skiff. He found the single skiff going at 10 to 15 knots, fairly erratic, to the north/northwest, towards Somalia: he approached it and took photographs (Docs Y, Y1 and Y2). The skiff had a fairly distinctive mark – green paint – on the bow, contained two persons, one large drum, smaller plastic oil drums and an outboard motor in good condition, but no navigation or fishing equipment. They stopped the skiff and provided cover for the boarding team from the Surcouf. Later that day, he repeated the procedure for the whaler: he saw about five persons on board, lots of oil drums and no fishing or navigation equipment. He took photographs (Docs. Z, Z1 and Z2) and used a 'Stop' sign and hand signals to make it stop and the

persons move to the bow, and waited for the intervention team from the Surcouf to arrive. He also took the photographs marked as Docs. R1 to R3, R28 to R30 and R55. A skiff, jerry cans, a drum, plastic "bags" and an outboard motor does not necessarily mean a pirate ship, but the skiff had no ice-box and was very far from the coast and did not fit with a fishing pattern-of-life. In his experience, the first thing people who fail an act of piracy do is throw their weapons in the water.

16. On 6 January 2013 Officer F. Le Toulec (W21) was in charge of the team that intervened on the skiff in the morning and on the whaler in the afternoon, after the helicopter was airborne. They communicated with the Surcouf during the interventions. There was no interpreter with them on the skiff, but he came on board the whaler later. They checked for dangerous objects, questioned the persons, did a rub down search and searched the vessels. On the skiff there were two persons, as well as barrels of fuel, water, food, money and a telephone charger, and on the whaler, ten persons, fuel, food, a life-jacket, kitchen utensils and a SIM card, but no fishing or piracy equipment. The persons said they were fishermen looking for sharks, had been looking for a lost whaler for ten days and four barrels of fuel were for the second whaler: plastic restraints were put on them and they were transferred to the Surcouf. He is not aware of any complaints. The skiff and whaler could be exhibits. He took photographs and filmed the events on the skiff and gave instructions for photos to be taken. The exhibits were put in bags, and transferred to the hold of the Surcouf, under lock. He wore new latex gloves when he handled the exhibits. He identified Exhibits I to XIV as the ones he remitted to PS Narain, Doc. N as the Transfer of Exhibit Form he signed, and Docs. R5, R12 to R14, R31, R32, R40, R57, R58, R66 and R67 as the photographs he took. The detainees were in two groups and were confined to their quarters, except for certain periods. It may be that in not respecting the fasting of some of the suspects, the authority of the Surcouf ill-treated them. He is not aware if urine was thrown at Accused no.12's face.

17. On 6 January 2013, IC2 (SW) C. A. Blaine (W13), was at the CIC, on USS Halyburton: he was asked to transfer a recording from the HOSS camera to a CD-ROM. Heartache 43 was airborne about halfway between Seychelles and the coast of Somalia and was recording real time images and transmitting them to the ship via secure data link. He gave the CD to FC2 (SW) A. J. Ripa (W14), who confirmed such

reception and subsequent remittance to CTT2 J. A. Edwards (W15). They did not view the CD.

18. Mr Edwards confirmed that Mr Ripa gave him a CD-ROM of the video from the HOSS on 6 January 2013 around 9.00pm. He watched the video on a laptop and took four photographs from it (copies produced as Docs. V, V1 to V3): it showed a whaler towing a skiff, with approximately eight persons. He would not know if the CD-ROM remitted to him by Mr Ripa was the one given to him by Mr Blaine.

19. PS Narain (W1) was in Djibouti on 24 January 2013 and attended a briefing, held by the Commanding Officer of the Surcouf, about the PAG. He also collected fourteen plastic bags of exhibits from Mr Le Toulec, and sealed them in Mauritius Police Force (MPF) plastic bags and both signed on the exhibit bags, coded RBN1 to RBN14. He did not know where the exhibits were stored prior to Mr Le Toulec handing them to him or if any person had had access to them. Then they viewed recordings of the boarding of the suspect vessels and Mr Jerome Barbot remitted to him 6 DVDs, coded RNB15 to RNB20. He was also given documents, that is, a Transfer of Exhibits Form, Identification Sheet, 12 Transfer Folders, 4 Position Maps, 1 Position Evidence Map, 79 Photographs, Description of Photographs, Exhibits coded RBNI to RBN14, 5 CDs and 1 DVD coded RBN15 to RBN20, (Docs. N, N1, P, P1 to P11, Q, Q1 to Q4, R, R1 to R79 and S and Exhibits I to XVI).

20. When PS Narain met the twelve suspected pirates they appeared physically well: Mr Christopher Roberts, Legal Officer, took charge of them for the transfer to the airport. At the airport, PS Narain was handed the responsibility to bring them to Mauritius. They left Djibouti at 3.40am local time on 25 January 2013 and reached Mauritius on the same day at 6.40pm. There was no complaint from anyone during the trip.

21. When they arrived in Mauritius on 25 January 2013, PS Narain briefed the Commissioner of Police. PS Dawoojee (W25) cautioned all twelve accused that they were under arrest for the offence of 'attempt at piracy' against the MSC Jasmine on the high seas, off the coast of Somalia, and informed them of their Constitutional rights. Mr Abdirahman translated everything to them in Somali. They denied the

charge and opted to be legally represented. Accused nos.8 and 11 complained of ill-treatment by the French navy.

22. On 28 January 2013 PS Dawoojee took the exhibits, which had been under lock and key at the CCID, to the FSL for examination and collected them and a report on 3 April 2013: nobody tampered with the exhibits. The exhibits were kept in the CCID Exhibit Room until produced in Court. The SIM Card was examined at the IT Unit, Line Barracks, with the consent of Accused no.7 who signed a document, and in the presence of the interpreter Mr Mohammad, on 10 February 2013 (Docs. T and U).

23. The recording of the accused's statements was under video camera at the CCID: the questions were in English and translated to Somali by Mr Abdirahman and the replies in Somali were translated to English. PS Narain recorded the questions and answers in English. Mr Abdirahman wrote the questions and answers in Somali. Both PS Narain and PS Dawoojee denied that the interpreter took the statements they had recorded and made typed copies to produce same as official English translations in Court. There was no identification exercise done in Mauritius.

24. Mr S. S. Abdirahman, Interpreter, for the United Nations Office on Drugs and Crime (UNODC) (W27) was at the airport in Mauritius on 25 January 2013, during the handover exercise. He interpreted questions, cautioned the twelve suspected pirates, informed them of the offence and of their Constitutional rights. He also acted as interpreter during the recording of the statements of the twelve accused in the period January to May 2013: he translated questions from English to Somali and the answers from Somali to English, writing the questions and answers simultaneously, in the presence of counsel. In each statement he certified to the best of his knowledge that he translated the statement of each accused from Somali to English and that the statements were true and correctly recorded. The English versions were not based on the recordings of PS Narain and PS Dawoojee. The charge put to the accused was that they attempted to commit an act of piracy against the MSC Jasmine.

25. Mr S. R. Sohun, Forensic Scientist (W26) examined fourteen exhibits marked RBN1 to RBN14: tests for presence of blood, of gunshot residue and DNA analysis were done, per Doc. T. Only item RBN10A, a cream-coloured vest, tested positive for

gunshot residue. It was tested positive for a mixture of lead, barium and antimony particles (chemical elements) and for DNA. Lead, barium and antimony as a mixture would most commonly be used in ammunition. Skin cells were recovered from RNB10A and generated a DNA mixture profile of a minor contributor and a major contributor: Accused no.10 could not be excluded as the genetic contributor. There was the possibility of contamination during the handling of the suspected pirates. He could not say whether the person wearing item RBN10A actually discharged the firearm.

26. On 9 and 18 April 2013, in Mauritius, Lt. Commander J. Simpson (W24) remitted to PS Narain/CCID statements he collected from witnesses Clemons, Haupt, Woodward, Dane, Cox, Hendicks, Blaine, Ripa, Edwards, Höner and Sabin.

27. Flight Sergeant C. Roberts (W19) was employed as liaison officer at the EU Naval Force (EUNAVFOR) between October 2012 and May 2013, to assist with the handover and trial of suspected pirates. On 25 January 2013 he was on French ship Surcouf in the port of Djibouti and made arrangements for the handover, conducted by Captain Hughes Lainé, of twelve suspected pirates detained on the Surcouf. He signed a handover statement (Doc. W). Plastic restraints were applied to the suspected pirates, and they were escorted from the ship to a bus which took them to the airport. The suspected pirates were given a full briefing of what was happening through an interpreter. He then handed them over to PS Narain, checking each person against the dossier: they were taken to the aircraft by a private security team. PS Narain and he signed forms (originals and duplicates) for the transfer (Docs. X, X1 to X3). There were no complaints at any time.

The case for the defence

28. The defence closed its case without adducing any evidence.

29. The out-of-Court statements recorded from Accused nos.1 to 12 in Somali, and the English translations, were produced in Court by Mr S. S. Abdirahman, PS Narain and PS Dawoojee (Docs. A, A1 to A8, B, B1 to B3, C, C1 to C5, D, D1 to D5, E, E1 to

E5, F, F1 to F5, G, G1 to G8, L, L1 to L5, H, H1 to H5, J, J1 to J5, K, K1 to K5 and M, M1 to M5). The Somali versions were read out in Court.

30. In such defence statements, Accused nos.1 to 9 and Accused nos.11 and 12 denied the offence of act of piracy. Accused nos.1 and 2 admitted that they were on a skiff, said that on 5 January 2013 they were on a fishing expedition in a white skiff, on the high seas, and that they had food, nets and hooks on board and no means of communication, no weapons and no refrigerator, this per Accused no.2. They had exchanged the fish for 200lt of fuel in jerrycans and had thrown the nets in the sea, because according to Accused no.2, the skiff had technical problems and the engine was spoiled.

31. Accused nos. 3 to 9 and 11 and 12 denied the offence of act of piracy and either said that they did not have any skiff with them or that they had not seen any. They admitted that they were on a whaler. They said that they were fishermen and that on 5 January 2013 they were together on a white whaler, looking for a lost whaler, which had eight to thirteen persons on board. According to Accused no.7, who the other accused said was in charge of the whaler, which was owned by one Abdirahman, they were at 125NM off the coast. According to Accused no.12 they could go up to 300NM off the coast of Somalia as there was a shortage of fish along the coast. According to Accused no.7 the whaler could travel at about 5NM/hour.

32. Accused no.4 said they had food, fuel, water, coal, oil, and cooking equipment on board; Accused no.5 said they had fuel and drums of water; Accused no.6 said they had water, fuel and food; Accused no.7 said they had diesel, barrels of fuel and water, and no equipment and he denied that they disposed of a grappling hook; Accused no.8 said they had equipment, 10 drums of fuel, 3 drums of water, nets and hooks; Accused no.9 said that they had drums of fuel, water, 2 nets and 20 hooks, but no weapons and he denied that they disposed of ladder, poles and grappling hooks; Accused no.11 said they had fuel, water and their belongings and denied that they disposed of poles, etc; and Accused no.12 said that they had 10 drums of oil, 3 drums of water, nets and hooks, but no ladder or poles.

33. Accused no.4 could not say where the other whaler got lost; Accused no.5 said that the whaler had been lost for five days before they looked for it; Accused no.6 said that they had left Somalia ten days before; Accused no.7 said that they left Somalia on 20 and 26 December 2013 for fishing purposes and that they had been looking for the lost whaler for ten days; that they had been on a fishing expedition at first and they had taken fuel to the other whaler; that both whalers had taken the fish to the coast; and that they had left their equipment along the coast and had come back to sea for their equipment and to bring fuel to the other whaler on the high seas; Accused no.8 said that they had been on a fishing expedition for ten days before the arrest and that after five days, they did not see the whaler and looked for it and that they left their fishing equipment on land: Accused no.9 said they were looking for fish and for the lost whaler; Accused no.11 said they were looking for a lost whaler on Accused no.7's instructions and that he had seen a whaler two nights before the arrest; and Accused no.12 said that they were fishing for sharks and later that they were not going fishing, but to look for a lost whaler.

34. Accused nos.4 and 7 said that the former had purchased the life jacket found on board for five dollars. Accused no.9 said they purchased the life jacket from the market, and denied that Accused no.7 found it on the high seas one and half months ago.

35. Accused no.8 said that they kept the fish in a refrigerator on a whaler, whilst at the same time acknowledging that the whaler was not fitted with a refrigerator. Accused no.12 said there was no refrigerator on board and that they had transferred the fish to a skiff before going back fishing.

36. Accused no.7 said that the SIM card was his and that they had one mobile phone, which fell in sea near the coast, and that he gave the SIM card to someone to make a call when they were on land. Accused no.8 said they had two telephones on board the whaler, which got spoiled by sea water: he threw away his phone and the other one got lost at sea.

37. Accused no.7 complained of ill-treatment by the French navy.

38. Accused no.10 refused to answer all questions put to him, as well as the charge.

39. Accused nos.2, 3, 5, 6, 7, 8, 9 and 11 made statements from the dock. Accused nos.2 and 3 said that they were innocent and had not committed any crime.

40. Accused no.5 said he was innocent.

41. Accused no.6 said that he was innocent, has children and a wife and has no idea where they are at the moment.

42. Accused no.7 said that he was looking for a lost whaler and in the process, was brought in and his boat destroyed. They were earning their livelihood and the boat they used to earn a livelihood was destroyed.

43. Accused no.8 said that he was innocent and had not committed any crime. He has a wife and children and does not know their thereabouts.

44. Accused no.9 said he was innocent and had not committed any crime and is asking the Court to give him his freedom.

45. Accused no.11 said he was innocent and had not committed any crime. He has a family (wife and children) and he does not know where they are living up to now.

Discussion

46. The twelve accused are charged with the offence of 'act of piracy' under section 3(1) of the Piracy and Maritime Violence Act: an information dated 4 June 2013 was lodged on the same date before the Intermediate Court. Act of piracy may be constituted by several acts as provided under section 3 of the Piracy and Maritime Violence Act. However, the elements of the particular act of piracy as chosen by the prosecution are as follows:

    1. An act of piracy, to wit: an illegal act of violence;
    2. Wilfully and unlawfully committed by the twelve accused parties;
    3. Directed against the MSC Jasmine;

4. On the high seas;
5. For private ends.

47. Before considering the elements of the offence proper, we will address a couple of issues that arose in the written submissions filed.

Jurisdiction

48. Section 7 of the Piracy and Maritime Violence Act provides that:

> (1) Notwithstanding any other enactment, prosecution for an offence under this Act shall, at the sole discretion of the Director of Public Prosecutions, take place before a Judge without a jury or the Intermediate Court.
>
> (2) Notwithstanding any other enactment, the Intermediate Court shall have jurisdiction to inflict penal servitude for a term not exceeding 40 years where a person is convicted of an offence under this Act

49. Mr Nuckchady, counsel for Accused no.4, has in his written submissions reiterated the argument that this Court does not have jurisdiction to try the accused parties, which point was raised by Mr Bansropun, counsel for Accused no.12, on 9 October 2013.

50. The Court refers the defence to its Ruling (Ruling no. 3) delivered on the same day and reiterates it.

Act of piracy/Attempt at piracy

51. There have been submissions from some quarters of the defence that the evidence on record would, at most, constitute an attempt at piracy and not the full offence of piracy. Evidence which will be considered further below, shows there was an attack by persons on a skiff in so much as there were gunshots fired. This reasoning is

however flawed in the light of section 3(3) of the Piracy and Maritime Violence Act which gives the definition of the several acts which constitutes 'an act of piracy' and one of which is as follows:

> "act of piracy" means –
>
> (a) an illegal act of violence or detention, or any act of depredation 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 persons or property on board such ship or aircraft, as the case may be; or"

52. For all intents and purposes, it is clear that the prosecution has chosen to prosecute the twelve Accused parties for an 'act of piracy', the act being as per section 3(3)(a)(i) of the Piracy and Maritime Violence Act.

53. Now, all that the prosecution need prove is that amongst other elements constituting the act of piracy as per this definition, there was an illegal act of violence directed against the MSC Jasmine. There is no need for the attack to be completed and the shipping vessel hijacked and robbed by the alleged pirates for the act of piracy to be completed.

54. This has been settled in view of the wide definition given by the Act itself which is consistent with the definition given to 'act of piracy' in Article 101 of UNCLOS.

55. It is interesting to also note that a similar discussion arose as early as in 1934 before the Privy Council in ***Re Piracy Jure Gentium*** **(1934) AC 586** and which reads as follows:

> "the question whether actual robbery is an essential element of the crime of piracy *jure gentium* or whether a frustrated attempt to commit a piratical robbery is not equally piracy *jure gentium* is referred to the Judicial Committee for their hearing and consideration"

56. After having reviewed several cases and academic works, the Privy Council answered the above question as follows:

> "... that the better view and the proper answer to give to the question addressed to them is that stated at the beginning, namely, that actual robbery is not an essential element in the crime of piracy jure gentium and that a frustrated attempt to commit piratical robbery is equally piracy jure gentium"

57. Similarly, in the light of the definitions of acts which constitute an act of piracy under the local Piracy and Maritime Violence Act and under which the prosecution has chosen to prosecute the twelve accused, it suffices to prove an illegal act of violence, amongst other essential elements of this definition of 'act of piracy' so that even if there has been no robbery, no taking over of the ship, no hijacking, it matters not. All that matters is that there must be evidence of an illegal act of violence directed against the MSC Jasmine, and this is extant beyond reasonable doubt in this matter.

58. The same conclusion as regards the definition of the 'act of piracy' including any illegal act of violence was reached by the United States District Court for the Eastern District of Virginia, in ***United States of America v Mohammed Modin Hasan & Four Others*** **(CR 2:10cr56/2010) USS Nicholas case.**

An act of piracy, to wit: an illegal act of violence

59. Coming back to the elements of the offence, the offence of 'act of piracy' is provided for at section 3(1) of the Piracy and Maritime Violence Act, which reads as follows:

> "Any person who commits –
>
> (a) an act of piracy; or
>
> (b) a maritime attack,
>
> shall commit an offence and shall, on conviction, be liable to penal servitude for a term not exceeding 60 years."

60. The defence submitted that the prosecution has not proved that it was the twelve accused who committed the act of piracy, inasmuch as Captain Kopanoy and Second

Officer Mykola described the vessel which attacked them as a single small white skiff containing six to eight persons, and that it was a whaler, with ten persons, with a skiff in tow, that were located and apprehended by the concerted search party of the US, German, British and French forces. The defence has also submitted that prosecution witnesses agreed that it was the pilots of the helicopters who triggered the capture of the twelve accused on board the whaler and skiff and that there was a preconceived idea that they were the perpetrators of the act of piracy.

61. It is agreed that as per section 3(3) of the Piracy and Maritime Violence Act, there are be several acts which may constitute an 'act of piracy' and the prosecution has chosen to prosecute the twelve accused for an 'act of piracy' as per section 3(3)(i)(a) of the said Act, which reads as follows:

> In this section "act of piracy" means –
>
> (a) an illegal act of violence or detention, or any act of depredation 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 persons or property on board such ship or aircraft, as the case may be; or
>
> (ii) against a ship, aircraft, persons or property on board the ship or aircraft, as the case may be, in a place outside the jurisdiction of a State;
>
> (b) any act of voluntary participation in the operation of a ship or of an aircraft, with knowledge of facts making it a pirate ship or aircraft; or
>
> (c) any act of inciting or of intentionally facilitating an act described in paragraph (a) or (b);

62. Section 3(3) of the Piracy and Maritime Violence Act is akin to Article 101 of the UNCLOS, as follows:

> Piracy consists of any of the following acts:
>
> (a) any illegal acts 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 ship or aircraft;

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

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

(c) any act of inciting or of intentionally facilitating an act described in subparagraph (a) or (b).

63. The prosecution has also provided the particulars of the 'illegal act of violence' as being that *'they fired gunshots and a RPG grenade at the MSC Jasmine'*. Thus, this is the illegal act of violence which the prosecution has averred and therefore must prove beyond reasonable doubt against the twelve accused parties.

64. In ***Re Piracy Jure Gentium*** **(1934) AC 586** it was said that:

> "piracy is more of an offence to do with stealing of property (vessel and cargo) for private ends at the high sea than assaulting or causing injures to the crew which is incidental to the main criminal act. We must therefore understand that the assailants main aim is to seize, rob and take control of or hold the vessel and its cargo and crew for a ransom... it is not surprising that any other form of damage was not occasioned on Topaz because the accused would have frustrated their own efforts; to destroy what they were all out to find and hijack."

65. Amongst the prosecution witnesses who deposed before us, the only eye-witnesses of the attack of the MSC Jasmine were the Captain and his Second Officer, Messrs Kopanoy and Mykola and from their evidence, there can be no dispute that their ship was attacked when they were on the way to Mombasa, Kenya, on 5 January 2013, around 2.00pm. Both were on the bridge going about their duties when the security team leader informed them of an approaching vessel at high speed – about 19 knots – from the starboard side and they were able to see it when it was at a distance of approximately 1NM from their ship, Mr Mykola using binoculars at that time. Both identified the vessel as a white skiff with a dark patch on the bow: we bear in mind though that neither mentioned the dark patch in the statement they put up after the

incident.

66. We are aware that whilst Mr Mykola said that the closest the white skiff came to their ship was 180 metres, Mr Kopanoy said the closest he saw it was at 300 to 400 metres. We find that this is not detrimental to the credibility of the two witnesses as to the presence of the skiff there, since it is to be noted that Mr Kopanoy said *he* saw the skiff at its closest at some 300 metres.

67. Both witnesses said that the skiff fired at the MSC Jasmine. The presence of bullets collected on deck – as supported by the photographs Mr Kopanoy took – see Docs. AC and AC1 – and lodged in containers support the evidence of Messrs Kopanoy and Mykola that the MSC Jasmine was being fired at.

68. Mr Kopanoy was cross-examined about the possibility of the bullets emanating from the security guards' weapons. It stands to reason that bullets found on the MSC Jasmine could hardly have been fired from people *on* that ship, since this would have entailed the security guards directing their weapons towards the Jasmine, which is not likely.

69. We note however that there is no evidence of an RPG having been fired at the MSC Jasmine, since Messrs Kopanoy and Mykola said that that the security guards shouted about an on-coming RPG: such evidence is hearsay. Mr Kopanoy heard what he termed "a big noise" and Mr Mykola heard what he described as a "really loud sound of metal contact with the ship's hull": however, it is to be borne in mind that Mr Kopanoy said that the Jasmine did not sustain any major damage.

70. Whilst it is undisputed that there were gunshots fired at MSC Jasmine as per the evidence on record from Messrs Mykola and Kopanoy, these two witnesses were also clear in stating that there were six to eight persons in the skiff. They could not say who fired the gunshots.

71. Mr Padiachy, counsel for Accused no.6, submitted that there is an issue whether his client was rightly charged as a co-author, as there is no evidence that he was on the skiff, which allegedly attacked the MSC Jasmine. He further submitted that the

prosecution must prove that Accused no.6 has « *exécuté physiquement, matériellement les actes constitutifs du délit* ». He cited the case of ***Ghurburn and Ors v R*** [1990 SCJ 339] in support of his submissions. The issue that arises here is whether all twelve accused parties can be convicted for the act of piracy as averred by the prosecution.

72. The prosecution has submitted that this is entirely possible since all twelve accused parties had the required *'mens rea'* and common intention when they attacked the MSC Jasmine.

73. At the outset, it has to be said that the prosecution has relied on several judgments of the Seychelles Court to show the existence of common intention. However, we have to highlight the fact that these jurisprudence are of no avail since the Seychelles jurisdiction has a specific section in its penal code which makes it an offence to commit an offence with common intention (section 23 of the Penal Code of Seychelles). This foreign legal provision is clearly not applicable in our Courts and the reference to cases where the said provision of the Seychelles Penal Code have been applied is obviously not relevant to the present case.

74. This does not mean that there is no such legal concept under our law. The concept of co-authorship exists and there are several pronouncements of the Supreme Court. In ***A. G. Fakira v The State*** [2012 SCJ 466] the Supreme Court explained:

> On this issue Counsel quoted the following extract from **Paniapen & Anor v. R** [1981 MR 254] –
>
> > "To constitute a common purpose, it is not necessary that there should be a pre-arranged plan. The common purpose may be formed on the spur of the moment, and even after the offence has already commenced."
>
> and the following from ***R v Hungsraz*** [1970 MR 74]
>
> > "When considering the question of common purpose, it must not be overlooked that, in principle, its existence does not depend on any agreement between co-delinquents anterior to the commission of

any offence. The association of purpose can be formed instantaneously, on the spur of the moment. This is how Garraud aptly describes the situation which is created when several persons unite in the commission of an offence [Traité Théorique et Pratique du Droit Pénal Français, t. 3 p. 4]:

> *Une situation plus pratique est celle des délits commis en réunion, mais sans entente préalable. La participation criminelle suppose une coopération de force et d'activités en vue d'un résultat commun: des individus se réunissent pour commettre un délit, un vol, un assassinat, un empoisonnement.*
>
> *Il y a, la plupart du temps, entre eux, une sorte de convention d'association, ou, s'il est difficile de la dégager, si les coparticipants ont agi sous l'empire d'une inspiration subite, du moins ils ont eu l'intention commune de favoriser, par leur propre activité, celle de leurs compagnons."*

The concept of co-authorship which our Courts have consistently applied is the requirement of simultaneousness of the act of the co-author and mutual assistance to an author of a crime. The following excerpts from Garraud in **Carrimbaccus v. Syndic of the Pailles Canal** [1900 MR 75] aptly describes the legal point –

> *Il (le Code) considère comme étant seul auteur celui qui a exécuté physiquement, matériellement, les actes constitutifs de délit. Parmi les complices, le Code pénal comprend au contraire, tous les agents qui ont participé au délit par des faits déterminés, qui n'en constituent pas l'exécution ou le commencement d'exécution, mais a raison desquels la perpétration de l'acte, ou une adhésion à l'acte peut être imputée – Garraud Traité du Droit Pénal Français Vol 2, para 245, p 405, Ed. 1916.*

Il appartient aux tribunaux de distinguer dans les actes de complicité ceux qui extrinsèques à l'acte coupable, tendent à en préparer, faciliter et réaliser la consommation, et ceux qui, par la simultanéité d'action et l'assistance réciproque, constituent la perpétration même [Page 78].

L'auteur est celui qui commet les actes matériels constitutifs du crime ou du délit ou ceux qui sont nécessaires à cette exécution : par exemple dans le vol, l'auteur est l'individu qui s'empare des valeurs ou qui aide à l'effraction du coffre-fort ... Le complice est celui qui accomplit des actes qui, sans faire partie de l'exécution du délit ou être nécessaires à cette exécution, le facilitent par une aide ou une assistance. Il n'est que complice, par exemple celui qui aide l'auteur d'un vol en faisant le guet ou en tenant une échelle ... Les actes d'aide ou d'assistance dans la consommation d'un délit ne sont pas les actes du délit [Page 161]. »

75. Thus, it is clear that for the twelve accused to be convicted under the present information, the prosecution must prove beyond reasonable doubt that the twelve accused are co-authors, who acted with a common purpose in the commission of the *'actes matériels constitutifs du crime'*.

76. The *'actes matériels constitutifs'* of the offence under scrutiny is undoubtedly the illegal act of violence. Consequently, in the light of the above authorities, there would not be any predicament to find that the six to eight accused parties who were in the skiff had the common purpose to commit the illegal act of violence and therefore that they acted as co-authors.

77. The same conclusion cannot however be reached as regards the other four to six persons who were on the whaler at the material time, so that there clearly cannot be simultaneousness of the act of the co-authors and mutual assistance to an author of a crime in view of the significant distance between the skiff and the whaler. At best, they are accomplices who have « accomplit des actes qui, sans faire partie de

l'exécution du délit ou être nécessaires à cette exécution, le facilitent par une aide ou une assistance. »

78. Be that as it may, the offence of piracy is constituted in a number of ways as provided by section 3(3)(c) of the Piracy and Maritime Violence Act and one of which is as follows:

> "any act of inciting or of intentionally facilitating an act described in paragraph (a) or (b);"

79. Thus, the four to six persons who were on the whaler could have been prosecuted for an 'act of piracy', but pursuant to section 3(3)(c) of the Piracy and Maritime Violence Act as accomplices and not under section 3(3)(a)(i) of the said Act as presently styled in the information before us.

80. The situation is comparable to a case of larceny being committed by five persons in a bungalow and two others who drove the other five to the locus and were waiting in a lorry outside, on the road. Even if only one of the five persons was involved in breaking the safe, the four others would definitely be charged and convicted as co-authors since they would all form an essential part of the execution of the offence of larceny, whereas those waiting in the lorry, at some distance, would only be charged as accomplices.

81. The above conclusion brings us to another difficulty in the case for the prosecution, namely the issue of identification. The question that arises is who was in the skiff at the material time of the attack, so as to make a distinction between the co-authors of the attack and the accomplices, and the ensuing charge against them as co-authors and accomplices respectively.

82. In fact, there is no evidence whatsoever as to who were in the skiff at the material time of attack. Messrs Kopanoy and Mykola did not identify the persons who were in the skiff and they were also unsure about the number of persons who were in the skiff at the material time.

83. Thus, we do not have any evidence of the persons or exact number of persons who were on the skiff at the material time, so as to be sure that they were co-authors in the act of piracy as per the averment in the present information.

84. We find that it would be most unreasonable and unfair to find all twelve accused parties guilty as co-authors when we have clear evidence that not all of them formed part of the illegal act of violence, since some were in a whaler at significant distance from the skiff. The vessel that Mr Mykola saw after the attack was not identified further than it was a craft without fishing or other equipment.

85. Therefore, we find that the Prosecution has failed to prove its case as averred under the present information against all twelve accused parties beyond reasonable doubt.

Directed against the MSC Jasmine

86. The evidence of Messrs Kopanoy and Mykola about the manner in which the attack was carried out by the small white skiff leaves no doubt in our minds that the act of piracy/illegal act of violence was directed against the MSC Jasmine. The approach of the skiff, at high speed, without any contact, radio or otherwise, and its move from starboard to port and vice versa, and the persistent shots from quite a distance and while approaching the ship, indicate that its target was the Jasmine.

On the High Seas

87. The prosecution has averred that the illegal act of violence has been committed *"on the high seas, around 240 Nautical Miles off the Somali Coast"*.

88. Mr Radhakissoon, counsel for Accused no.2, has submitted that the prosecution did not prove that the act of piracy was committed on the high seas. The prosecution submitted on the other hand that there is ample evidence to the effect that the act of piracy occurred on the high seas.

89. The definition of 'high seas' is given at section 2 of the Piracy and Maritime Violence Act, as follows:

"high seas –

(a) has the same meaning as in UNCLOS; and

(b) includes the EEZ;"

90. The following definition has been given to 'high seas' at Article 86 of the UNCLOS.

> "The provisions of this Part apply to all parts of the sea that are not included in the economic zone, in the territorial sea or in the internal waters of a State, or in the archipelagic waters of an archipelagic State. This article does not entail any abridgement of the freedoms enjoyed by all States in the exclusive economic zone in accordance with article 58."

91. It should be noted that the definition given to 'high seas' under the Piracy and Maritime Violence Act also encompasses the EEZ and the definition of EEZ as per section 2 of the Piracy and Maritime Violence Act is as follows:

> ""EEZ" has the same meaning as in the Maritime Zones Act;"

92. The definition of EEZ is given at section 2 of the Maritime Zones Act, namely:

> ""EEZ" means the exclusive economic zone of Mauritius, as defined in section 14;"

93. Thus when our legislators included the EEZ in the definition of 'high seas' in the Piracy and Maritime Violence Act, they were referring to the Mauritian EEZ only.

94. Bearing in mind the extent of the definition of high seas under the Act, we will now analyse the evidence on record to assess whether the Prosecution has proved beyond reasonable doubt this element of the offence.

95. Mr Mykola, who was on board the MSC Jasmine on 5 January 2013 round 2.00pm said that they were *"pretty close to 140 miles away from the Somali coast"* at the time of the attack, whereas Mr Kopanoy was never examined about the position of their

ship at that time. Clearly, this means that the attack occurred in the EEZ of Somalia, so that the evidence adduced by the prosecution does not satisfy the definition of high seas as per section 2 of the Piracy and Maritime Violence Act. We have to stress that Mr Mykola was a straightforward witness whose words were never put to serious challenge and who always remained composed during his deposition.

96. We note by the way that the prosecution admitted in their summary of the evidence that Mr Mykola said the MSC Jasmine was some 140 miles away from the Somali coast at the alleged time of attack (page 25 of the written submissions of the prosecution), but submitted that he said they were about 240NM from the Somali coast (page 52 of the written submissions of the prosecution).

97. Mr Hendicks gave the approximate distance of the USS Halyburton at more than 200NM from land, and said that Heartache 43 searched an area more than 200NM from the Seychelles; Mr Clemons said that the USS Halyburton was *"roughly 260 miles offshore"* when the distress call was received, but did not give the longitude and latitude of the MSC Jasmine at the time and said in cross-examination that the helicopter/crew reached the Jasmine 2 hours 24mn after the distress call; Mr Haupt said he reached the MSC Jasmine some 20mn after the distress call in Heartache 43, although he could not confirm if "0307N 05150E" was the position of attack; and Mr Lainé said in cross-examination that the attack was at more than 200NM off the coast of Somalia.

98. All these witnesses had second hand information about the position of the MSC Jasmine at the time of the attack, and were not certain of the distance from land, notwithstanding sophisticated equipment. We find that whilst Mr Mykola was straightforward in his testimony, the other witnesses for the prosecution did not have this quality. They were in contradiction with each other as to where the alleged attack occurred and when some of even stated it was about 200NM, this could also mean plus or minus 200NM with the consequence that it could again be within the EEZ of Somalia.

99. We take into account that whilst Accused nos.2, 3, 7 and 11 admitted that they were on the high seas on 05 January 2013 around 2.00pm, that is, at the time of the attack,

Accused nos.1, 5, 6 and 12 said they were in the territorial waters of Somalia, Accused no.4 that he could not remember where he was at that time and Accused no.9 that he was at sea.

100. Be that as it may, in the light of the consistent testimony from Mr Mykola, an experienced navigator, who was on the MSC Jasmine whilst it was under attack, we find we cannot doubt his words when he stated that the ship was some 140NM off the Somali coast. On the basis of his evidence, we find that the prosecution has failed to prove beyond reasonable doubt one of the essential elements of the offence under section 3 of the Piracy and Maritime Violence Act, namely that the act of piracy committed against the MSC Jasmine occurred on the high seas

For private ends

101. Mr Ramful, counsel for Accused no.9, has submitted that the information does not disclose an offence known in law as the prosecution has failed to aver and to prove that the act of piracy was for private ends.

102. Mr S. Bhoyroo, State Counsel, referred the Court to their submissions at page 52 and added that the Information as drafted avers the elements of the offence in line with section 3(1) of the Piracy and Maritime Violence Act, and that they need not aver 'for private ends'.

103. What an information should contain is stipulated at section 125 of the District and Intermediate Courts (Criminal Jurisdiction) Act, which reads as follows:

> (1) The description in the information of any offence in the words of the enactment creating such offence, with the material circumstances of the offence charged, shall be sufficient.
>
> (2) Any exception, exemption, proviso, or qualification, whether it does or does not accompany the description of the offence in the law creating such offence, may be proved by the defendant but need not be specified in the information or proved by the prosecutor.

104. At page 4 of their written submissions the prosecution list the elements of the offence of 'act of piracy' under Mauritian Law, and item b reads as follows:

"b. The illegal act must be committed for private ends."

105. By submitting so the prosecution considers 'for private ends' to be an element of the offence of 'act of piracy', which seems inconsistent with their submissions in Court that 'for private ends' need not be averred in the information.

106. We note that the prosecution has averred in the information that the 'act of piracy' was committed through an illegal act of violence, on the high seas and directed against the MSC Jasmine, thereby using the wording of section 3(3)(a)(i) of the Piracy and Maritime Violence Act, with the exception of the words 'for private ends".

107. We are of the view that 'for private ends' is an element of the offence of 'act of piracy' similar to 'illegal act of violence', 'high seas' and 'directed against the MSC Jasmine'.

108. In the light of all the preceding paragraphs, we find that the Information against the twelve accused does not describe the offence for which the twelve accused are charged *"in the words of the enactment creating such offence, with the material circumstances of the offence charged"*. We find that the fact that the prosecution did not aver 'for private ends' results in the information not being in conformity with the requirements of section 125 of the District and Intermediate Courts (Criminal Jurisdiction) Act and of section 10 of the Constitution.

109. There are a few issues that arose during the trial and we shall consider them at this stage.

The Exhibits

110. Mr Le Toulec has explained how he or his team secured exhibits from the whaler and skiff – mentioning the use of latex gloves when he handled the said exhibits – and secured them in plastic bags. We have no reason to doubt the testimony

of that witness that those exhibits were under lock and key in the hold of the Surcouf until he remitted them to PS Narain and that no one tampered with them.

111. We equally have no reason to doubt the word of PS Narain that the exhibits were always in his custody on the journey from Djibouti to Mauritius until he locked them in the CCID exhibit room; and that he later removed them for examination at the FSL and locked them again in the said exhibit room after examination, up to the point they were removed to be produced in Court. We also accept as true his testimony that nobody interfered with the exhibits.

The Police Inquiry – Defence statements

112. It was put to witnesses Abdirahman, Narain and Dawoojee that the English versions of the defence statements produced in Court were typed copies of the versions recorded by the Mauritian police officers, which they denied. We have no reason to doubt the testimony of these three witnesses that Mr Abdirahman's typed English versions of the defence of the twelve accused are translations of the Somali versions.

Destruction of whaler and skiff

113. Mr Lainé was questioned about the reason for the destruction of the whaler and skiff (Mr Le Toulec admitted that they could be important exhibits) and the procedure adopted to obtain the authorisation for such destruction.

114. The prosecution has submitted that this Court *"cannot pronounce itself on an issue of foreign law (French law) on which Mauritian Court has no jurisdiction."*

115. We note that Mr Lainé said that the Loi 2011-13 would apply for the *« rétention »* of suspected pirates on board of a French warship – the Surcouf – but would not apply for the destruction of vessels suspected to have been used in an act of piracy and seized by the French navy, more specifically, personnel of the French warship Surcouf. He further said that he was acting under directions from the Force Command of Operation Atalanta when he ordered the destruction of the whaler and skiff.

116. We agree that we are not competent to decide on the issue whether Mr Lainé acted in contravention of Article 4 of Loi 2013-11 or not. However, we feel duty bound to say, as a Court of Law, hearing the Trial of twelve accused suspected of having committed an act of piracy, who were apprehended by the French navy and then transferred to Mauritian jurisdiction under transfer agreements with the European Union and with the United Kingdom, that invoking French law for one aspect of the operation and not for the other appears inconsistent.

117. We are of the view that the case of **Kuruma, Son of Kaniu v R [1955] A.C 197** and ***R v Sang* [1980] A.C 420** cited by the prosecution on the admissibility of evidence illegally obtained would be of no relevance here, since the whaler and skiff were not produced before this Court.

"Rétention"/Detention

118. The defence has during the trial raised the issue of the illegality of the detention of the twelve accused on board the Surcouf.

119. There is undisputed evidence to the effect that the twelve Accused parties were arrested on 6 January 2013 and *'retenus'* as per Commandant Lainé, until they were handed over to PS Narain on 25 January 2013, to be brought before the Mauritian authorities to be investigated and tried for the offence of act of piracy.

120. The starting point in these matters would necessarily be the UNCLOS, which has the status of Customary International law. Article 110 provides for right to visit of warships on vessels suspected to be engaged in piracy. The said article reads as follows:

> "1. Except where acts of interference derive from powers conferred by treaty, a warship which encounters on the high seas a foreign ship, other than a ship entitled to complete immunity in accordance with articles 95 and 96, is not justified in boarding it unless there is reasonable ground for suspecting that:
>
> (a) the ship is engaged in piracy;

(b) the ship is engaged in the slave trade;

(c) the ship is engaged in unauthorized broadcasting and the flag State of the warship has jurisdiction under article 109;

(d) the ship is without nationality; or

(e) though flying a foreign flag or refusing to show its flag, the ship is, in reality, of the same nationality as the warship.

2. In the cases provided for in paragraph 1, the warship may proceed to verify the ship's right to fly its flag. To this end, it may send a boat under the command of an officer to the suspected ship. If suspicion remains after the documents have been checked, it may proceed to a further examination on board the ship, which must be carried out with all possible consideration.

3. If the suspicions prove to be unfounded, and provided that the ship boarded has not committed any act justifying them, it shall be compensated for any loss or damage that may have been sustained.

4. These provisions apply mutatis mutandis to military aircraft.

5. These provisions also apply to any other duly authorized ships or aircraft clearly marked and identifiable as being on government service."

121. There is no doubt that both the USS Halyburton and the Surcouf were warships pursuant to the definition of warship under article 29 of the UNCLOS, which stipulates that:

> "For the purposes of this Convention, "warship" means a ship belonging to the armed forces of a State bearing the external marks distinguishing such ships of its nationality, under the command of an officer duly commissioned by the government of the State and whose name appears in the appropriate service list or its equivalent, and manned by a crew which is under regular armed forces discipline."

122. Therefore, the members of the Surcouf had the right to visit the skiff and whaler for the purposes of investigating the suspicion that they were engaged in piracy.

123. The members of the Surcouf were also allowed to seize the vessels and arrest

those found in the skiff and whaler pursuant to article 105 of UNCLOS which reads as follows:

> "On the high seas, or in any other place outside the jurisdiction of any State, every State may seize a pirate ship or aircraft, or a ship or aircraft taken by piracy and under the control of pirates, and arrest the persons and seize the property on board. The courts of the State which carried out the seizure may decide upon the penalties to be imposed, and may also determine the action to be taken with regard to the ships, aircraft or property, subject to the rights of third parties acting in good faith."

124. It follows from this moment that any decision to retain, detain those persons would fall under the laws of the flag state of the warship and in the present matter it is French law since the Surcouf belongs to the French navy. According to Commandant Lainé who was in charge of the Surcouf, he had written authorisation for the retention of those twelve persons from the French Judicial authorities under the French laws governing such situations.

125. In matters concerning the deprivation of liberty, the governing principles under our law are contained in section 5 of the Constitution, which would also be the operative principles in this case, since the trial of these twelve accused parties is being held in Mauritius. In any event, our provisions are similar to the European Conventions of Human Rights and this has been acknowledged by the Privy Council in the case of ***D. Hurnam v The State*** **[2004] PRV 53** in which it was held that:

> "...Secondly, sections 5(1) and (3) and section 10(2)(a) bear a very close resemblance to articles 5(1) and (3) and 6(2) of the European Convention on Human Rights. This is not surprising since, as has been pointed out, Chapter II of the Constitution reflects the values of, and is in part derived from, the European Convention: Neeyamuthkhan v Director of Public Prosecutions [1999] SCJ 284(a); Deelchand v Director of Public Prosecutions [2005] SCJ 215, para 4.14; Rangasamy v Director of Public Prosecutions (Record No 90845, 7 November 2005, unreported). It is indeed noteworthy that the European Convention was extended to Mauritius while it was still a Crown

Colony, before it became independent under the 1968 Constitution: see European Commission of Human Rights, Documents and Decisions (1955-1957), p 47. Thus the rights guaranteed to the people of Mauritius under the European Convention were rights which, on independence, "have existed and shall continue to exist" within the terms of section 3. This is a matter of some significance: while Mauritius is no longer a party to the European Convention or bound by its terms, the Strasbourg jurisprudence gives persuasive guidance on the content of the rights which the people have enjoyed and should continue to enjoy..."

126. Thus, the Strasbourg jurisprudence is acknowledged to have persuasive authority in matters of fundamental rights and freedom.

127. Section 5(1) of the Constitution of Mauritius reads as follows:

> "(1) No person shall be deprived of his personal liberty save as may be authorised by law –
>
> ...
>
> (e) upon reasonable suspicion of his having committed, or being about to commit, a criminal offence ..."

128. The corresponding provision under ECHR is Article 5, namely:

> "1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:
> (...)
>
> (c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so;"

129. We find that the case of ***Medvedyev and Others v France*, App no. 3394/03,**

[2010] ECHR, judgment delivered on 29 March 2010, to be particularly relevant. In the said case, it was held that:

> "76. The Court reiterates that Article 5 of the Convention protects the right to liberty and security. This right is of the highest importance "in a democratic society" within the meaning of the Convention (see, among many other authorities, De Wilde, Ooms and Versyp v. Belgium, 18 June 1971, § 65, Series A no. 12, and Winterwerp v. the Netherlands, 24 October 1979, § 37, Series A no. 33).
>
> 77. All persons are entitled to the protection of this right, that is to say, not to be deprived, or continue to be deprived, of their liberty (see Weeks v. the United Kingdom, 2 March 1987, § 40, Series A no. 114), save in accordance with the conditions specified in paragraph 1 of Article 5.
>
> 78. The list of exceptions to the right to liberty secured in Article 5 § 1 is an exhaustive one (see Quinn v. France, 22 March 1995, § 42, Series A no. 311, and Labita v. Italy [GC], no. 26772/95, § 170, ECHR 2000- IV), and only a narrow interpretation of those exceptions is consistent with the aim of that provision (see Engel and Others v. the Netherlands, 8 June 1976, § 58, Series A no. 22, and Amuur, cited above, § 42).
>
> 79. The Court further reiterates that where the "lawfulness" of detention is in issue, including the question whether "a procedure prescribed by law" has been followed, the Convention refers essentially to national law but also, where appropriate, to other applicable legal standards, including those which have their source in international law. In all cases it establishes the obligation to conform to the substantive and procedural rules of the laws concerned, but it also requires that any deprivation of liberty be compatible with the purpose of Article 5, namely, to protect the individual from arbitrariness (see, among many other authorities, Bozano v. France, 18 December 1986, § 54, Series A no. 111; Amuur, cited above, § 50; Assanidze v. Georgia [GC], no. 71503/01, § 171, ECHR 2004-II; Ilaşcu and Others, cited above, § 461; McKay v. the United Kingdom [GC], no. 543/03, § 30, ECHR 2006-X; and Mooren, cited above, § 76).

80. The Court stresses that where deprivation of liberty is concerned it is particularly important that the general principle of legal certainty be satisfied. It is therefore essential that the conditions for deprivation of liberty under domestic and/or international law be clearly defined and that the law itself be foreseeable in its application, so that it meets the standard of "lawfulness" set by the Convention, a standard which requires that all law be sufficiently precise to avoid all risk of arbitrariness and to allow the citizen – if need be, with appropriate advice – to foresee, to a degree that is reasonable in the circumstances of the case, the consequences which a given action may entail (see, among other authorities, Amuur, cited above; Steel and Others v. the United Kingdom, 23 September 1998, § 54, Reports 1998- VII; Baranowski v. Poland, no. 28358/95, §§ 50-52, ECHR 2000-III; and Jėčius v. Lithuania, no. 34578/97, § 56, ECHR 2000-IX).

130. Hence, the detention should not only be as per domestic law but also in compliance with the rule of law so as to prevent arbitrariness. Furthermore, we should always bear in mind that the right to liberty as guaranteed under section 5 of the Constitution and Article 5 of the ECHR is of the highest importance in a democratic society.

131. The law under which the twelve accused parties were retained in the words of Commandant Lainé is *'LOI n° 2011-13 du 5 janvier 2011 relative à la lutte contre la piraterie et à l'exercice des pouvoirs de police de l'Etat en mer'*. Article 6 of the said Loi amends the French Code de la Defense, by introducing section 3 (Articles 1521-11 à 1521-18) . For our purposes, Articles 1521-12 and 1521-14 read as follows:

« Lorsque des mesures de restriction ou de privation de liberté doivent être mises en œuvre, les agents mentionnés à l'article L. 1521-2 en avisent le préfet maritime ou, outre-mer, le délégué du Gouvernement pour l'action de l'Etat en mer, qui en informe dans les plus brefs délais le procureur de la République territorialement compétent.

Avant l'expiration du délai de quarante-huit heures à compter de la mise en

œuvre des mesures de restriction ou de privation de liberté mentionnées à l'article L. 1521-12 et à la demande des agents mentionnés à l'article L. 1521-2, le juge des libertés et de la détention saisi par le procureur de la République statue sur leur prolongation éventuelle pour une durée maximale de cent vingt heures à compter de l'expiration du délai précédent.

Ces mesures sont renouvelables dans les mêmes conditions de fond et de forme durant le temps nécessaire pour que les personnes en faisant l'objet soient remises à l'autorité compétente. »

Le juge des libertés et de la détention statue par ordonnance motivée insusceptible de recours. Copie de cette ordonnance est transmise dans les plus brefs délais par le procureur de la République au préfet maritime ou, outre-mer, au délégué du Gouvernement pour l'action de l'Etat en mer, à charge pour celui-ci de la faire porter à la connaissance de la personne intéressée dans une langue qu'elle comprend. »

132. Without examining such a piece of foreign law and assessing whether it is consistent with the provisions of our Constitution under section 5(1) which stipulates '*as may be authorised by law'*, we have looked at the present laws under which the twelve accused were detained and we have found no provisions as regards contact with a lawyer or family. In short, these twelve persons were kept completely incommunicado during the several days on board the Surcouf, based on the domestic French laws mentioned by the Commandant. Thus, several question marks might be raised as to whether, and in fact, the detention was not arbitrary.

133. With respect to the stipulation under section 5(3) of the Constitution that any person arrested or detained shall be brought without undue delay before a court, we have found the following paragraphs from ***Medvedyev and Others*** (supra) to be particularly helpful as regards the general principles governing this right to a person arrested and detained:

"1. General principles

117. The Court reiterates that Article 5 of the Convention is in the first rank of

the fundamental rights that protect the physical security of an individual, and that three strands in particular may be identified as running through the Court's case-law: the exhaustive nature of the exceptions, which must be interpreted strictly and which do not allow for the broad range of justifications under other provisions (Articles 8 to 11 of the Convention in particular); the repeated emphasis on the lawfulness of the detention, procedurally and substantively, requiring scrupulous adherence to the rule of law; and the importance of the promptness or speediness of the requisite judicial controls under Article 5 §§ 3 and 4 (see McKay, cited above, § 30).

118. The Court also notes the importance of the guarantees afforded by Article 5 § 3 to an arrested person. The purpose of this provision is to ensure that arrested persons are physically brought before a judicial officer promptly. Such automatic expedited judicial scrutiny provides an important measure of protection against arbitrary behaviour, incommunicado detention and ill-treatment (see, among other authorities, Brogan and Others, cited above, § 58; Brannigan and McBride v. the United Kingdom, 26 May 1993, §§ 62-63, Series A no. 258-B; Aquilina v. Malta [GC], no. 25642/94, § 49, ECHR 1999-III; Dikme v. Turkey, no. 20869/92, § 66, ECHR 2000- VIII; and Öcalan, cited above, § 103).

119. Article 5 § 3, as part of this framework of guarantees, is structurally concerned with two separate matters: the early stages following an arrest, when an individual is taken into the power of the authorities, and the period pending any trial before a criminal court, during which the suspect may be detained or released with or without conditions. These two limbs confer distinct rights and are not on their face logically or temporally linked (see T.W. v. Malta [GC], no. 25644/94, § 49, 29 April 1999).

120. Taking the initial stage under the first limb, which is the only one at issue here, the Court's case-law establishes that there must be protection, through judicial control, of an individual arrested or detained on suspicion of having committed a criminal offence. Such control serves to provide effective safeguards against the risk of ill-treatment, which is at its greatest in this early stage of detention, and against the abuse of powers bestowed on law

enforcement officers or other authorities for what should be narrowly restricted purposes and exercisable strictly in accordance with prescribed procedures. The judicial control must satisfy the following requirements (see McKay, cited above, § 32):

(a) Promptness

121. The judicial control on the first appearance of an arrested individual must above all be prompt, to allow detection of any ill-treatment and to keep to a minimum any unjustified interference with individual liberty. The strict time constraint imposed by this requirement leaves little flexibility in interpretation, otherwise there would be a serious weakening of a procedural guarantee to the detriment of the individual and the risk of impairing the very essence of the right protected by this provision (see Brogan and Others, cited above, § 62, where periods of four days and six hours in detention without appearance before a judge were held to be in violation of Article 5 § 3, even in the special context of terrorist investigations).

...

129. The Court points out that in the Brogan and Others case it held that a period of detention in police custody amounting to four days and six hours without judicial review fell outside the strict constraints permitted by Article 5 § 3, even though it was designed to protect the community as a whole from terrorism (see Brogan and Others, cited above, § 62). It also found a period of seven days without being brought before a judge incompatible with Article 5 § 3 (see Öcalan, cited above, §§ 104-05).

130. The Court observes, however, that it did accept, in the Rigopoulos decision (cited above), which concerned the interception on the high seas by the Spanish customs authorities, in the context of an international drug trafficking investigation, of a ship flying the Panamanian flag and the detention of its crew for as long as it took to escort their ship to a Spanish port, that a period of sixteen days was not incompatible with the notion of "promptness" required under Article 5 § 3 of the Convention, in view of the

existence of "wholly exceptional circumstances" that justified such a delay. In its decision, the Court noted that the distance to be covered was "considerable" (the ship was 5,500 km from Spanish territory when it was intercepted), and that a forty-three-hour delay caused by resistance put up by the ship's crew "could not be attributed to the Spanish authorities". It concluded that it had been "materially impossible to bring the applicant physically before the investigating judge any sooner", while taking into account the fact that once he had arrived on Spanish soil the applicant had been immediately transferred to Madrid by air and brought before the judicial authority on the following day. Lastly, the Court considered "unrealistic" the applicant's suggestion that, under an agreement between Spain and the United Kingdom to prevent illicit traffic in narcotic drugs, instead of being diverted to Spain the ship could have been taken to Ascension Island, which was approximately 1,600 km from where it was intercepted.

131. In the present case, the Court notes that at the time of its interception the Winner was also on the high seas, off the coast of the Cape Verde islands, and therefore a long way from the French coast, comparable to the distance in the Rigopoulos case. There was nothing to indicate that it took any longer than necessary to escort it to France, particularly in view of the weather conditions and the poor state of repair of the Winner, which made it impossible for it to travel any faster. In addition, the applicants did not claim that they could have been handed over to the authorities of a country nearer than France, where they could have been brought promptly before a judicial authority. As to the idea of transferring them to a French naval vessel to make the journey faster, it is not for the Court to assess the feasibility of such an operation in the circumstances of the case, particularly as it has not been established that the frigate was capable of accommodating all the crew members in sufficiently safe conditions."

134. In the present matter, the twelve persons were deprived of their liberty from 6 to 24 January 2013 on board the Surcouf, which is more than in the case of the case of ***Medvedyev and Others*** or that of ***Rigopoulos*** mentioned in the former case, so that we need to consider whether this detention also falls within the justification applied in the

case of ***Medvedyev and Others***, namely, "wholly exceptional circumstances", which might therefore justify the obvious delay.

135. We note that the Surcouf as per Commandant Lainé, was somewhere between Seychelles and Somalia, on the high seas. We do not find it to be comparable with the considerable distance that had to be covered by the vessels in the cases of ***Rigopoulos*** or ***Medvedyev and Others***. Moreover, we take into consideration the fact that France had already refused to try the twelve persons so that there was no question of bringing them to France. Moreover, there is no evidence whatsoever of sea conditions having being rough, which would have prevented the swift navigation of the French vessel to the nearest land. Thus, these twelve accused parties could have been brought to land within a shorter delay either to Kenya, Seychelles or even Mauritius. There is no doubt that the French Navy or other military vessels present in the region in the operation against piracy had such transport facilities, including air transport, to bring them much sooner before a judicial authority. It is here that the dissenting opinion in the case ***Medvedyev and Others*** bears all its importance, in assessing whether the French navy did all that was reasonable to shorten the delay. The relevant paragraphs read as follows:

> "4. In Brogan and Others v. the United Kingdom (29 November 1998, § 62, Series A no. 145-B) the Court held that a period of detention in police custody amounting to four days and six hours without judicial review fell outside the strict constraints permitted by Article 5 § 3, notwithstanding the fact that it was aimed at protecting the community as a whole from terrorism. It has also found in Öcalan v. Turkey ([GC], no. 46221/99, ECHR 2005-IV) that a period of seven days' detention without being brought before a judge was incompatible with Article 5 § 3.
>
> 5. We acknowledge that the Court in Rigopoulos v. Spain ((dec.), no. 37388/97, ECHR 1999-II) found that a period of sixteen days was not incompatible with the notion of "promptness" as required under Article 5 § 3 of the Convention in view of the "wholly exceptional circumstances" that were involved therein. In that case, the Spanish customs authorities, in the context of an international drug trafficking investigation, intercepted on the high seas a

vessel flying the Panamanian flag and its crew was detained for as long as it took to escort the vessel to a Spanish port. In our view, however, the facts in Rigopoulos are entirely distinguishable from those of the instant case. Most significantly, in Rigopoulos, there was an independent Central Investigating Court and not a public prosecutor supervising the proceedings on board the ship on the day of interception. The very next day its crew members were informed of their situation and advised of their rights. Within two days the court had ordered the crew to be remanded in custody. On the following day they were apprised of that decision and invited to name the persons they wanted to have informed of their detention. This information was communicated to the respective embassies of the States of which the crew members were nationals. Three days after the boarding, the independent investigating court issued an order regularising the crew's situation in accordance with the Spanish Code of Criminal Procedure. One week after the interception, the applicant had access to the services of a lawyer. Finally, it must be noted that the lawfulness of the detention with regard to Article 5 § 1 was never in issue in the Rigopoulos case.

6. We do not exclude the possibility that there may, at times, exist "wholly exceptional circumstances" which might justify a period that is, in principle, at variance with the provisions of Article 5 § 3. However, in our view, such circumstances would need to be established, clearly, and to be more than simply "special" or "exceptional". The notion of "wholly exceptional circumstances" connotes, if not "insurmountable" or "insuperable", then, at least, circumstances in which the authorities could not reasonably envisage or execute any other measures in order to comply with their obligations under the Convention.

7. The Government argued that the weather conditions at the relevant time and the poor state of repair of the Winner accounted for the very slow speed of the vessel and, thus, for the protracted period of time that passed before its crew was brought before a judge. Such factors may explain the delay involved, but they do not justify it. There was no evidence adduced before the Court that the French authorities had even considered, let alone examined, any other options

which would have enabled the applicants to have been brought promptly before a judge.

8. In our view, it seems that various possibilities were open to the French authorities which they might have considered as a means of ensuring respect for and vindication of the applicants' rights under Article 5 § 3. For example, from the moment the frigate Lieutenant de vaisseau Le Hénaff set out from Brest to intercept the Winner (which had been under observation by the American, Greek and Spanish authorities on suspicion of transporting illegal drugs, thus leading to a request by the Central Office for the Repression of Drug Trafficking ("the OCRTIS") for authorisation to intercept), it was reasonably foreseeable that the services of a judicial officer would be required during the course or in the immediate follow-up to the planned interception. In such circumstances, some consideration might have been given to having a judge join the frigate in Brest, or even later in Spain, when the OCRTIS experts went on board.

9. Alternatively, some consideration might have been given to transporting the crew back to Brest on board a naval vessel. (We note that, having left Brest, it took the Lieutenant de vaisseau Le Hénaff only six days to reach the location of the Winner). Having regard to the state of repair of the intercepted vessel, it is surprising that the authorities decided to keep its crew on board when they must have known that, as a result, it would take a long time to bring them before a judge. Nor, indeed, would it appear that any thought was given to airlifting those deprived of their liberty to France. This option has been used by the French authorities in cases of piracy on the high seas and it might also have been considered in this one."

136. The last line of the above extract is highly relevant in that it mentions the fact that in cases of piracy, the option of airlifting those deprived of their liberty has been used in the past. The question that arises is why this option was not considered in the present matter, so as to shorten the delay significantly. We do not find that the present matter was met with "wholly exceptional circumstances" which warranted the twelve accused parties being detained or retained, and therefore deprived of their liberty for

such a long period on board of the Surcouf.

137. We also have to stress that there is no evidence whatsoever that during this period of detention on board the Surcouf they were informed of their situation and advised of their rights, as well as invited to give the names of those they wanted to inform of their whereabouts or even have access to lawyers. It is to be noted that these facilities were made available in the case of ***Rigopoulos*** as is evident from the above extract.

138. All these circumstances make it clear that there is a flagrant breach of the requirement guaranteed under section 5(3) of the Constitution as well as article 5(3) of the ECHR so that they were not brought without undue delay before a Court and that there was no "wholly exceptional circumstances" justifying same.

139. This finding in itself is so grave that it would have warranted the stay of proceedings outright against all twelve Accused in view of a flagrant breach of a fundamental right of the highest importance in a democratic society.

Conclusion

140. Be that as it may, for all the reasons given above, namely the failure to prove the elements of 'high seas' and 'illegal act of violence committed by the twelve accused', and the non-averment of 'for private ends' in the information, we find that the prosecution has not proved the case against the twelve accused beyond reasonable doubt.

141. We accordingly dismiss the Information against the twelve accused.

W. V. Rangan
Magistrate

M. I. A. Neerooa
Magistrate

Intermediate Court (Criminal Division)

This 06 November 2014

(533 d)

Police v Mohamed Ali Abdeoulkader and ors

2014 INT 312

IN THE INTERMEDIATE COURT OF MAURITIUS

Cause No.850/2013

In the matter of: -

Police

v

1. **Abdeoulkader Mohamed Ali**
2. **Said Mohamed Hassan**
3. **Ahmed Mohamed Ismael**
4. **Shafi Mohamed Osman**
5. **Hassan Salad Omar**
6. **Said Omar Farah**
7. **Mohamed Abdilahi Ahmed**
8. **Ali Hassan Mohamed**
9. **Abdi Mohamed Kidiye**
10. **Abdi Ahmed Yussuf**
11. **Abdillahi Mohamed Ahmed**
12. **Mahad Mohamed Ibrahim**

JUDGMENT

1. The twelve accused are charged with the offence of 'Act of Piracy on High Seas' in breach of sections 3(1)(a), 3(3) and 7 of the Piracy and Maritime Violence Act 2011. It is averred that on or about 5 January 2013 the twelve accused did *"on the high seas, around 240 Nautical Miles off the Somali Coast...wilfully and unlawfully commit an act of piracy, to wit an illegal act of violence directed against the MSC Jasmine, a*

Panama flag Merchant Vessel which was proceeding from Salalah/Oman to Mombassa/Kenya."

2. The particulars provided by the prosecution are that *"they fired gunshots and a Rocket Propelled Grenade at the MSC Jasmine"*.
3. The twelve accused pleaded not guilty to the charge and were assisted by respectively Messrs K. Raghunandan, A. Radhakissoon, R. K. Ramsaha, L. C. Nuckchady, V. Ramchurn, B. Padiachy, G. Bhanji Soni, N. C. Ramchurn, D. Ramful, L. E. Ribot, D. Ramano and H. Bansroopun, counsel.

4. Mrs S. Beekarry-Sunassee, Principal State Counsel, Mr A. A. Ramdahen, Mr M. S. Bhoyroo, Mr A. Joypaul and Ms A. Joree, State Counsel, appeared for the prosecution.

The case for the prosecution

5. The case for the prosecution is in a gist that on 5 January 2013, the MSC Jasmine, a container vessel, was on its way from Salalah, Oman to Mombasa, Kenya. Captain O. Kopanoy (W5) was the Master and Mr L. Mykola (W6), Second Officer. Security officers armed with semi-automatic weapons were on board because of the high-risk area. Around 2.00pm – when they were at 140NM from the Somali coast according to Mr Mykola – both officers were on the bridge when the security team leader informed the crew that a boat was approaching from starboard (right) side at 4NM distance. The automatic radar plotting aid (ARPA) could not pick it due to the state of the sea: Captain Kopanoy and Mr Mykola had visual contact only at first. They started emergency procedures as the craft was trying to approach, without radio contact, and at high speed, meaning an attack or an attempt at attack. The Jasmine increased its speed to 11.2 knots and the security team fired warning flares, but the skiff, which was travelling at about 19 knots, came closer. Captain Kopanoy sent an emergency signal via satellite.

6. Captain Kopanoy and Mr Mykola identified a white skiff, with some dark paint on the bow, and with weapons. The skiff moved from port to starboard, close and then away from the MSC Jasmine, the closest being about 180m. Captain Kopanoy saw about six

to eight persons on the skiff. Shots were fired from the skiff and two security guards on the MSC Jasmine fired back. At one point the security guards warned that a Rocket Propelled Grenade (RPG) was being fired from the skiff, and after some ten seconds, there was a sound of metal impact with the hull of the ship. The RPG did not explode. The firing and cross-firing lasted for about 30mn. Bullets, some of which were akin to AK47 bullets, removed paint, but did not damage the vessel and one bullet was found in a container. The skiff then stopped, whilst the MSC Jasmine moved south at 12.2 knots. At about 3NM, the skiff moved west/northwest towards the Somali coast at about 3 to 4NM: they lost visual and radar contact after 4NM and did not see the skiff gather speed. The attack had lasted 40 to 45mn, ending around 2.45pm. After 5 to 10mn Mr Mykola saw a craft, which had no fishing facilities or anything: it was on a bearing 330° north/northwest. A helicopter arrived around 3.45pm and Captain Kopanoy informed someone that they were safe, that a white skiff had attacked them and had gone westwards. Mr Mykola heard the security officers give the helicopter the approximate location and direction of the skiff. Captain Kopanoy took photographs during the attack, when the MSC Jasmine was approximately six cables away from the skiff and also took photographs of the bullets (Docs. AB, AB1, AC, AC1 to AC3). There was no report to Captain Kopanoy of any whaler towing a skiff.

7. On 5 January 2013, ENS F. A. Hendicks (W12) was in the Combat Information Centre (CIC) on the USS Halyburton, when he was made aware of a possible PAG (Pirate Attack Group) on the MSC Jasmine from a skiff, and the firing of a RPG missile, which missed. Helicopter Heartache 43 was launched and searched an area more than 200NM from Seychelles: it found the Jasmine and continued the search for any contacts that might resemble the skiff that attacked the vessel. Heartache 43 located a whaler with about ten persons on board, and a skiff, at more than 200NM from land, and later focused on where the skiff departed. The skiff moved at 20 to 30 knots, going westward, towards land: at that speed it would cover about 40 to 60NM in 2 hours. What the helicopter recorded was sent to the USS Halyburton in real time. The USS Halyburton shadowed the whaler and skiff all night. Heartache 43 did not locate any other contacts in the area. There is always the possibility that there were other vessels he did not see.

8. On 5 January 2013 around 3.00pm LCDR D. J. Clemons (W7) was in his office on the USS Halyburton when they got a distress call from the MSC Jasmine that pirates were attacking it. He was in contact with the commander of Heartache 43, Lt A. Haupt, by radio and relayed the information and requested the crew to take photos of the ship. It took the helicopter/his crew some 2 hours to reach the Jasmine after the said distress call on 5 January 2013. Mr Haupt made a visual assessment of the MSC Jasmine and said he did not see any pirates or any sign of damage. Heartache 43 sent real time images of the whaler and skiff. There was a rubber tyre hanging from the pole "eastern" side of the whaler, the purpose of which was to protect it from damage from a larger ship: the tyre is not a typical item to whalers and skiffs. He requested the helicopter to search 40 to 45NM around the MSC Jasmine, as most ships would travel at 10 to 15NM. The helicopter found a whaler towing a skiff with probably eight to ten persons on board, and barrels of fuel – see Docs. V, V1 to V4. Heartache 43 tracked the two vessels until about 5.30pm as it had a problem to fly at night. The USS Halyburton had the whaler and skiff on radar and the P3 remained with them all night. The USS Halyburton contacted the Surcouf on 5 January 2013.

9. On 5 January 2013 Lt. A. W. Haupt (W8) and his co-pilot, Officer Woodward, took off in Heartache 43 following the distress call that a small dirty white skiff with six to eight persons on board, had fired a RPG at the MSC Jasmine and then moved north west. He was in constant communication with the Halyburton during the flight. Heartache 43 is equipped with camera, radar (ATS1.87 Freer) and sensor, which were activated after take-off. The Halyburton had provided the position of the Jasmine, that is, northwest from it and travelling southwest and he reached it in 20mn. He did not know if "0307N 05150E" was the position of attack. The Jasmine said it was all right through radio. At 1NM from the Jasmine, the camera zoomed in: there was no major damage. Since they were provided with the time of the attack and the direction in which the small vessel went (north-west), he drew a circle 20NM in radius taking as base the point of attack, and decided to follow the radar track: they got a single contact, a white whaler, about 30ft long, with about eight people on board, 20 to 30NM north, and a skiff, as seen on Docs. V, V1 to V3. He agreed that Officer Woodward said in a statement that Heartache 43 returned to Halyburton due to a malfunctioning radar altimeter that inhibits night flight, but there were two separate systems.

10. Officer M. Höner (W16) flew the Jester, USS P-3 Charlie, on a surface search mission in the night of 5 January 2013 to search for possible PAG. He got information about a whaler and a skiff from Tasking Authorities. They reached the operations area where there was a reported pirate attack around 8.00pm. They identified two contacts on radar: a whaler towing a skiff, travelling at about 6 knots, 30NM north/northwest of the position he received. The speed of the whaler and skiff, the distance and time-lapse all matched. The skiff was empty. There were fourteen barrels, a long ladder and people on the whaler and no fishing equipment, therefore tripwires of a PAG. Pictures were extracted from a video stream (Docs. AA, AA1 and AA2 (infrared)). PAG consists of a mothership and one or two fast moving skiffs, and the whaler acted as a mothership. They tracked both contacts for about 20mn and then the whaler slowed down. Around 8.30pm, through radar and infrared camera, he saw two persons and one drum transferred to the skiff, and the whaler split from the skiff. The whaler moved north/northwest at 6 knots and the skiff at 10 knots. According to him the skiff could not travel at 19.2 knots for more than two minutes. A couple of hours later, the ladder was missing. They expanded the search to 60x60NM, but there were no other contacts in the area on the radar, which can detect very small pieces in the water. They tracked the skiff until 1.30am, and at times focused on the whaler with the radar.

11. On 6 January 2013 at 4.00am Mr Clemons got information that the P3 was tracking the skiff, which had separated from the whaler during the night and he took off in Heartache 43 at 5.30am to track the skiff. The British helicopter from the Surcouf, the Striker, joined him, and they split for the search, he taking the western and northern half. He found the skiff 5NM from the location given by the P3, and no other vessel: it was the same skiff he had tracked in the last position given by the P3. He made sure the Surcouf had a good visual identification of the skiff before he returned to the USS Halyburton. There were two persons on board the skiff, which was moving at about 5NM towards the northwest: there was no fishing equipment, but only barrels of fuel. He went back to the whaler, which was the same one tracked on the eve and started covering the boarding. There seemed to be a lot of people on the whaler, no radio and the poles and grappling hooks, were missing. He denied having picked up on the whaler as a matter of convenience as he did not find a skiff with eight persons. The

skiff and whaler found on 5 January 2013 were the ones seen on 6 January 2013 because they were continuously monitored.

12. Mr H. Lainé, Commanding Officer of the Surcouf (W18) received a distress call from the MSC Jasmine through Mercury chat on 5 January 2013. In his statement of 8 January 2013 he mentioned exchange of fire between MSC Jasmine and a white skiff and the skiff moving west after the attack. The surveillance, tracking, interception and boarding resulted from the helicopters pilots' conclusion that the whaler towing the white skiff they had located were the authors of the attack. The point of attack was at more than 200NM from the Somali coast. Pirates usually have a mothership, a whaler or a dhow, and a skiff, so finding a whaler and a skiff after the attack would have meant the authors of the attack. The helicopter, equipped with surface radar, and with excellent weather, would have had a large image and would have detected any other contact. The Commanding Officer of Operation Atalanta ordered them to the spot the Jasmine was attacked. They were communicating with the USS Halyburton, its helicopter and maritime patrol aircrafts. On 6 January 2013 the Striker took over surveillance of the skiff from the USS Halyburton helicopter, and later located the whaler. Mr Lainé ordered the interventions on the vessels: the boarding team took back the two persons on board the skiff and the ten persons on board the whaler to the Surcouf and all the exhibits from the two vessels were collected. The skiff could contain about ten persons. Mr Lainé obtained the authorisation, from Admiral de Paredes, Force Command of Operation Atalanta, to destroy the skiff and whaler as the former was too big to bring on board and the latter leaked. The destruction was not deliberate or to hide something.

13. According to French legal procedure, Mr Lainé had authority to retain the suspected pirates for 48 hours, after which the judge authorised him in writing to retain them for 120 hours (5 days) on three occasions. The arrest mentioned in the statement of PS Narain means *"appréhendé"*. On board the Surcouf the persons were medically examined, their property put in bags and their names ascertained. There were no complaints from them, but they refused to take food on two mornings. He is not aware that someone threw urine at Accused no.12. On 6 January 2013 the French authorities decided not to take jurisdiction and the European Union enquiries from signatories of the agreement on whether they would take over jurisdiction took 10 days. Mauritius

accepted after 15 days and it took 5 days to travel from off Somali coast to Djibouti. Docs. R1 to R79 were taken from the Heartache 43, Striker and Jester and Docs. Q, Q1 to Q4 were drawn following the information relayed on Mercury chat.

14. On 6 January 2013 Mr Hendicks led a Maritime Security Approach (MSA), to investigate the whaler, the only vessel in the area, based on piracy tripwires, that is, excessive drums, hooks and ladders, more weapons than usual, lack of fishing equipment, lot of cargo and excessive personnel for the vessel. There was no radio on board the whaler, so they switched to VHF (microphone & speaker). He asked questions through the interpreter: the crew stopped the engine and indicated they had no weapons on board. There were no GPS or other navigation instrument and no obvious sign of fishing gear or boxes of ice for fish. They did not find any weapon on board, which was unlikely for that area, as most fisherman carry rifles for protection. The Master said they were part of a group of whalers searching for a lost vessel. They noticed a lot of barrels and found blankets, a tarp, foodstuff and a life jacket, which the Master said he found floating in the water. It is difficult to identify whether it is the whaler they intercepted from Docs. V1 to V3. He cannot identify the whaler he boarded from Docs. R1 and R12. He cannot recall anything special about the skiff, but there were two persons on it when he first saw it briefly on camera. The purpose of chasing the whaler on 6 January 2013 was based on a preconceived idea that the whaler was involved in piracy activities, based on trip wires and its proximity to the incident area.

15. On 6 January 2013 at about 5.13am, Lt M. Curd (W22), Flight Commander of the Striker, was airborne to find a skiff and whaler reported by another unit. Heartache 43 gave him the position of the skiff. He found the single skiff going at 10 to 15 knots, fairly erratic, to the north/northwest, towards Somalia: he approached it and took photographs (Docs Y, Y1 and Y2). The skiff had a fairly distinctive mark – green paint – on the bow, contained two persons, one large drum, smaller plastic oil drums and an outboard motor in good condition, but no navigation or fishing equipment. They stopped the skiff and provided cover for the boarding team from the Surcouf. Later that day, he repeated the procedure for the whaler: he saw about five persons on board, lots of oil drums and no fishing or navigation equipment. He took photographs (Docs. Z, Z1 and Z2) and used a 'Stop' sign and hand signals to make it stop and the

persons move to the bow, and waited for the intervention team from the Surcouf to arrive. He also took the photographs marked as Docs. R1 to R3, R28 to R30 and R55. A skiff, jerry cans, a drum, plastic "bags" and an outboard motor does not necessarily mean a pirate ship, but the skiff had no ice-box and was very far from the coast and did not fit with a fishing pattern-of-life. In his experience, the first thing people who fail an act of piracy do is throw their weapons in the water.

16. On 6 January 2013 Officer F. Le Toulec (W21) was in charge of the team that intervened on the skiff in the morning and on the whaler in the afternoon, after the helicopter was airborne. They communicated with the Surcouf during the interventions. There was no interpreter with them on the skiff, but he came on board the whaler later. They checked for dangerous objects, questioned the persons, did a rub down search and searched the vessels. On the skiff there were two persons, as well as barrels of fuel, water, food, money and a telephone charger, and on the whaler, ten persons, fuel, food, a life-jacket, kitchen utensils and a SIM card, but no fishing or piracy equipment. The persons said they were fishermen looking for sharks, had been looking for a lost whaler for ten days and four barrels of fuel were for the second whaler: plastic restraints were put on them and they were transferred to the Surcouf. He is not aware of any complaints. The skiff and whaler could be exhibits. He took photographs and filmed the events on the skiff and gave instructions for photos to be taken. The exhibits were put in bags, and transferred to the hold of the Surcouf, under lock. He wore new latex gloves when he handled the exhibits. He identified Exhibits I to XIV as the ones he remitted to PS Narain, Doc. N as the Transfer of Exhibit Form he signed, and Docs. R5, R12 to R14, R31, R32, R40, R57, R58, R66 and R67 as the photographs he took. The detainees were in two groups and were confined to their quarters, except for certain periods. It may be that in not respecting the fasting of some of the suspects, the authority of the Surcouf ill-treated them. He is not aware if urine was thrown at Accused no.12's face.

17. On 6 January 2013, IC2 (SW) C. A. Blaine (W13), was at the CIC, on USS Halyburton: he was asked to transfer a recording from the HOSS camera to a CD-ROM. Heartache 43 was airborne about halfway between Seychelles and the coast of Somalia and was recording real time images and transmitting them to the ship via secure data link. He gave the CD to FC2 (SW) A. J. Ripa (W14), who confirmed such

reception and subsequent remittance to CTT2 J. A. Edwards (W15). They did not view the CD.

18. Mr Edwards confirmed that Mr Ripa gave him a CD-ROM of the video from the HOSS on 6 January 2013 around 9.00pm. He watched the video on a laptop and took four photographs from it (copies produced as Docs. V, V1 to V3): it showed a whaler towing a skiff, with approximately eight persons. He would not know if the CD-ROM remitted to him by Mr Ripa was the one given to him by Mr Blaine.

19. PS Narain (W1) was in Djibouti on 24 January 2013 and attended a briefing, held by the Commanding Officer of the Surcouf, about the PAG. He also collected fourteen plastic bags of exhibits from Mr Le Toulec, and sealed them in Mauritius Police Force (MPF) plastic bags and both signed on the exhibit bags, coded RBN1 to RBN14. He did not know where the exhibits were stored prior to Mr Le Toulec handing them to him or if any person had had access to them. Then they viewed recordings of the boarding of the suspect vessels and Mr Jerome Barbot remitted to him 6 DVDs, coded RNB15 to RNB20. He was also given documents, that is, a Transfer of Exhibits Form, Identification Sheet, 12 Transfer Folders, 4 Position Maps, 1 Position Evidence Map, 79 Photographs, Description of Photographs, Exhibits coded RBNI to RBN14, 5 CDs and 1 DVD coded RBN15 to RBN20, (Docs. N, N1, P, P1 to P11, Q, Q1 to Q4, R, R1 to R79 and S and Exhibits I to XVI).

20. When PS Narain met the twelve suspected pirates they appeared physically well: Mr Christopher Roberts, Legal Officer, took charge of them for the transfer to the airport. At the airport, PS Narain was handed the responsibility to bring them to Mauritius. They left Djibouti at 3.40am local time on 25 January 2013 and reached Mauritius on the same day at 6.40pm. There was no complaint from anyone during the trip.

21. When they arrived in Mauritius on 25 January 2013, PS Narain briefed the Commissioner of Police. PS Dawoojee (W25) cautioned all twelve accused that they were under arrest for the offence of 'attempt at piracy' against the MSC Jasmine on the high seas, off the coast of Somalia, and informed them of their Constitutional rights. Mr Abdirahman translated everything to them in Somali. They denied the

charge and opted to be legally represented. Accused nos.8 and 11 complained of ill-treatment by the French navy.

22. On 28 January 2013 PS Dawoojee took the exhibits, which had been under lock and key at the CCID, to the FSL for examination and collected them and a report on 3 April 2013: nobody tampered with the exhibits. The exhibits were kept in the CCID Exhibit Room until produced in Court. The SIM Card was examined at the IT Unit, Line Barracks, with the consent of Accused no.7 who signed a document, and in the presence of the interpreter Mr Mohammad, on 10 February 2013 (Docs. T and U).

23. The recording of the accused's statements was under video camera at the CCID: the questions were in English and translated to Somali by Mr Abdirahman and the replies in Somali were translated to English. PS Narain recorded the questions and answers in English. Mr Abdirahman wrote the questions and answers in Somali. Both PS Narain and PS Dawoojee denied that the interpreter took the statements they had recorded and made typed copies to produce same as official English translations in Court. There was no identification exercise done in Mauritius.

24. Mr S. S. Abdirahman, Interpreter, for the United Nations Office on Drugs and Crime (UNODC) (W27) was at the airport in Mauritius on 25 January 2013, during the handover exercise. He interpreted questions, cautioned the twelve suspected pirates, informed them of the offence and of their Constitutional rights. He also acted as interpreter during the recording of the statements of the twelve accused in the period January to May 2013: he translated questions from English to Somali and the answers from Somali to English, writing the questions and answers simultaneously, in the presence of counsel. In each statement he certified to the best of his knowledge that he translated the statement of each accused from Somali to English and that the statements were true and correctly recorded. The English versions were not based on the recordings of PS Narain and PS Dawoojee. The charge put to the accused was that they attempted to commit an act of piracy against the MSC Jasmine.

25. Mr S. R. Sohun, Forensic Scientist (W26) examined fourteen exhibits marked RBN1 to RBN14: tests for presence of blood, of gunshot residue and DNA analysis were done, per Doc. T. Only item RBN10A, a cream-coloured vest, tested positive for

gunshot residue. It was tested positive for a mixture of lead, barium and antimony particles (chemical elements) and for DNA. Lead, barium and antimony as a mixture would most commonly be used in ammunition. Skin cells were recovered from RNB10A and generated a DNA mixture profile of a minor contributor and a major contributor: Accused no.10 could not be excluded as the genetic contributor. There was the possibility of contamination during the handling of the suspected pirates. He could not say whether the person wearing item RBN10A actually discharged the firearm.

26. On 9 and 18 April 2013, in Mauritius, Lt. Commander J. Simpson (W24) remitted to PS Narain/CCID statements he collected from witnesses Clemons, Haupt, Woodward, Dane, Cox, Hendicks, Blaine, Ripa, Edwards, Höner and Sabin.

27. Flight Sergeant C. Roberts (W19) was employed as liaison officer at the EU Naval Force (EUNAVFOR) between October 2012 and May 2013, to assist with the handover and trial of suspected pirates. On 25 January 2013 he was on French ship Surcouf in the port of Djibouti and made arrangements for the handover, conducted by Captain Hughes Lainé, of twelve suspected pirates detained on the Surcouf. He signed a handover statement (Doc. W). Plastic restraints were applied to the suspected pirates, and they were escorted from the ship to a bus which took them to the airport. The suspected pirates were given a full briefing of what was happening through an interpreter. He then handed them over to PS Narain, checking each person against the dossier: they were taken to the aircraft by a private security team. PS Narain and he signed forms (originals and duplicates) for the transfer (Docs. X, X1 to X3). There were no complaints at any time.

The case for the defence

28. The defence closed its case without adducing any evidence.

29. The out-of-Court statements recorded from Accused nos.1 to 12 in Somali, and the English translations, were produced in Court by Mr S. S. Abdirahman, PS Narain and PS Dawoojee (Docs. A, A1 to A8, B, B1 to B3, C, C1 to C5, D, D1 to D5, E, E1 to

E5, F, F1 to F5, G, G1 to G8, L, L1 to L5, H, H1 to H5, J, J1 to J5, K, K1 to K5 and M, M1 to M5). The Somali versions were read out in Court.

30. In such defence statements, Accused nos.1 to 9 and Accused nos.11 and 12 denied the offence of act of piracy. Accused nos.1 and 2 admitted that they were on a skiff, said that on 5 January 2013 they were on a fishing expedition in a white skiff, on the high seas, and that they had food, nets and hooks on board and no means of communication, no weapons and no refrigerator, this per Accused no.2. They had exchanged the fish for 200lt of fuel in jerrycans and had thrown the nets in the sea, because according to Accused no.2, the skiff had technical problems and the engine was spoiled.

31. Accused nos. 3 to 9 and 11 and 12 denied the offence of act of piracy and either said that they did not have any skiff with them or that they had not seen any. They admitted that they were on a whaler. They said that they were fishermen and that on 5 January 2013 they were together on a white whaler, looking for a lost whaler, which had eight to thirteen persons on board. According to Accused no.7, who the other accused said was in charge of the whaler, which was owned by one Abdirahman, they were at 125NM off the coast. According to Accused no.12 they could go up to 300NM off the coast of Somalia as there was a shortage of fish along the coast. According to Accused no.7 the whaler could travel at about 5NM/hour.

32. Accused no.4 said they had food, fuel, water, coal, oil, and cooking equipment on board; Accused no.5 said they had fuel and drums of water; Accused no.6 said they had water, fuel and food; Accused no.7 said they had diesel, barrels of fuel and water, and no equipment and he denied that they disposed of a grappling hook; Accused no.8 said they had equipment, 10 drums of fuel, 3 drums of water, nets and hooks; Accused no.9 said that they had drums of fuel, water, 2 nets and 20 hooks, but no weapons and he denied that they disposed of ladder, poles and grappling hooks; Accused no.11 said they had fuel, water and their belongings and denied that they disposed of poles, etc; and Accused no.12 said that they had 10 drums of oil, 3 drums of water, nets and hooks, but no ladder or poles.

33. Accused no.4 could not say where the other whaler got lost; Accused no.5 said that the whaler had been lost for five days before they looked for it; Accused no.6 said that they had left Somalia ten days before; Accused no.7 said that they left Somalia on 20 and 26 December 2013 for fishing purposes and that they had been looking for the lost whaler for ten days; that they had been on a fishing expedition at first and they had taken fuel to the other whaler; that both whalers had taken the fish to the coast; and that they had left their equipment along the coast and had come back to sea for their equipment and to bring fuel to the other whaler on the high seas; Accused no.8 said that they had been on a fishing expedition for ten days before the arrest and that after five days, they did not see the whaler and looked for it and that they left their fishing equipment on land: Accused no.9 said they were looking for fish and for the lost whaler; Accused no.11 said they were looking for a lost whaler on Accused no.7's instructions and that he had seen a whaler two nights before the arrest; and Accused no.12 said that they were fishing for sharks and later that they were not going fishing, but to look for a lost whaler.

34. Accused nos.4 and 7 said that the former had purchased the life jacket found on board for five dollars. Accused no.9 said they purchased the life jacket from the market, and denied that Accused no.7 found it on the high seas one and half months ago.

35. Accused no.8 said that they kept the fish in a refrigerator on a whaler, whilst at the same time acknowledging that the whaler was not fitted with a refrigerator. Accused no.12 said there was no refrigerator on board and that they had transferred the fish to a skiff before going back fishing.

36. Accused no.7 said that the SIM card was his and that they had one mobile phone, which fell in sea near the coast, and that he gave the SIM card to someone to make a call when they were on land. Accused no.8 said they had two telephones on board the whaler, which got spoiled by sea water: he threw away his phone and the other one got lost at sea.

37. Accused no.7 complained of ill-treatment by the French navy.

38. Accused no.10 refused to answer all questions put to him, as well as the charge.

39. Accused nos.2, 3, 5, 6, 7, 8, 9 and 11 made statements from the dock. Accused nos.2 and 3 said that they were innocent and had not committed any crime.

40. Accused no.5 said he was innocent.

41. Accused no.6 said that he was innocent, has children and a wife and has no idea where they are at the moment.

42. Accused no.7 said that he was looking for a lost whaler and in the process, was brought in and his boat destroyed. They were earning their livelihood and the boat they used to earn a livelihood was destroyed.

43. Accused no.8 said that he was innocent and had not committed any crime. He has a wife and children and does not know their thereabouts.

44. Accused no.9 said he was innocent and had not committed any crime and is asking the Court to give him his freedom.

45. Accused no.11 said he was innocent and had not committed any crime. He has a family (wife and children) and he does not know where they are living up to now.

Discussion

46. The twelve accused are charged with the offence of 'act of piracy' under section 3(1) of the Piracy and Maritime Violence Act: an information dated 4 June 2013 was lodged on the same date before the Intermediate Court. Act of piracy may be constituted by several acts as provided under section 3 of the Piracy and Maritime Violence Act. However, the elements of the particular act of piracy as chosen by the prosecution are as follows:

    1. An act of piracy, to wit: an illegal act of violence;
    2. Wilfully and unlawfully committed by the twelve accused parties;
    3. Directed against the MSC Jasmine;

4. On the high seas;
5. For private ends.

47. Before considering the elements of the offence proper, we will address a couple of issues that arose in the written submissions filed.

Jurisdiction

48. Section 7 of the Piracy and Maritime Violence Act provides that:

> (1) Notwithstanding any other enactment, prosecution for an offence under this Act shall, at the sole discretion of the Director of Public Prosecutions, take place before a Judge without a jury or the Intermediate Court.
>
> (2) Notwithstanding any other enactment, the Intermediate Court shall have jurisdiction to inflict penal servitude for a term not exceeding 40 years where a person is convicted of an offence under this Act

49. Mr Nuckchady, counsel for Accused no.4, has in his written submissions reiterated the argument that this Court does not have jurisdiction to try the accused parties, which point was raised by Mr Bansropun, counsel for Accused no.12, on 9 October 2013.

50. The Court refers the defence to its Ruling (Ruling no. 3) delivered on the same day and reiterates it.

Act of piracy/Attempt at piracy

51. There have been submissions from some quarters of the defence that the evidence on record would, at most, constitute an attempt at piracy and not the full offence of piracy. Evidence which will be considered further below, shows there was an attack by persons on a skiff in so much as there were gunshots fired. This reasoning is

however flawed in the light of section 3(3) of the Piracy and Maritime Violence Act which gives the definition of the several acts which constitutes 'an act of piracy' and one of which is as follows:

> "act of piracy" means –
>
> (a) an illegal act of violence or detention, or any act of depredation 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 persons or property on board such ship or aircraft, as the case may be; or"

52. For all intents and purposes, it is clear that the prosecution has chosen to prosecute the twelve Accused parties for an 'act of piracy', the act being as per section 3(3)(a)(i) of the Piracy and Maritime Violence Act.

53. Now, all that the prosecution need prove is that amongst other elements constituting the act of piracy as per this definition, there was an illegal act of violence directed against the MSC Jasmine. There is no need for the attack to be completed and the shipping vessel hijacked and robbed by the alleged pirates for the act of piracy to be completed.

54. This has been settled in view of the wide definition given by the Act itself which is consistent with the definition given to 'act of piracy' in Article 101 of UNCLOS.

55. It is interesting to also note that a similar discussion arose as early as in 1934 before the Privy Council in ***Re Piracy Jure Gentium*** **(1934) AC 586** and which reads as follows:

> "the question whether actual robbery is an essential element of the crime of piracy *jure gentium* or whether a frustrated attempt to commit a piratical robbery is not equally piracy *jure gentium* is referred to the Judicial Committee for their hearing and consideration"

56. After having reviewed several cases and academic works, the Privy Council answered the above question as follows:

> "... that the better view and the proper answer to give to the question addressed to them is that stated at the beginning, namely, that actual robbery is not an essential element in the crime of piracy jure gentium and that a frustrated attempt to commit piratical robbery is equally piracy jure gentium"

57. Similarly, in the light of the definitions of acts which constitute an act of piracy under the local Piracy and Maritime Violence Act and under which the prosecution has chosen to prosecute the twelve accused, it suffices to prove an illegal act of violence, amongst other essential elements of this definition of 'act of piracy' so that even if there has been no robbery, no taking over of the ship, no hijacking, it matters not. All that matters is that there must be evidence of an illegal act of violence directed against the MSC Jasmine, and this is extant beyond reasonable doubt in this matter.

58. The same conclusion as regards the definition of the 'act of piracy' including any illegal act of violence was reached by the United States District Court for the Eastern District of Virginia, in ***United States of America v Mohammed Modin Hasan & Four Others*** **(CR 2:10cr56/2010) USS Nicholas case.**

An act of piracy, to wit: an illegal act of violence

59. Coming back to the elements of the offence, the offence of 'act of piracy' is provided for at section 3(1) of the Piracy and Maritime Violence Act, which reads as follows:

> "Any person who commits –
>
> (a) an act of piracy; or
>
> (b) a maritime attack,
>
> shall commit an offence and shall, on conviction, be liable to penal servitude for a term not exceeding 60 years."

60. The defence submitted that the prosecution has not proved that it was the twelve accused who committed the act of piracy, inasmuch as Captain Kopanoy and Second

Officer Mykola described the vessel which attacked them as a single small white skiff containing six to eight persons, and that it was a whaler, with ten persons, with a skiff in tow, that were located and apprehended by the concerted search party of the US, German, British and French forces. The defence has also submitted that prosecution witnesses agreed that it was the pilots of the helicopters who triggered the capture of the twelve accused on board the whaler and skiff and that there was a preconceived idea that they were the perpetrators of the act of piracy.

61. It is agreed that as per section 3(3) of the Piracy and Maritime Violence Act, there are be several acts which may constitute an 'act of piracy' and the prosecution has chosen to prosecute the twelve accused for an 'act of piracy' as per section 3(3)(i)(a) of the said Act, which reads as follows:

> In this section "act of piracy" means –
>
> (a) an illegal act of violence or detention, or any act of depredation 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 persons or property on board such ship or aircraft, as the case may be; or
>
> (ii) against a ship, aircraft, persons or property on board the ship or aircraft, as the case may be, in a place outside the jurisdiction of a State;
>
> (b) any act of voluntary participation in the operation of a ship or of an aircraft, with knowledge of facts making it a pirate ship or aircraft; or
>
> (c) any act of inciting or of intentionally facilitating an act described in paragraph (a) or (b);

62. Section 3(3) of the Piracy and Maritime Violence Act is akin to Article 101 of the UNCLOS, as follows:

> Piracy consists of any of the following acts:
>
> (a) any illegal acts 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 ship or aircraft;

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

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

(c) any act of inciting or of intentionally facilitating an act described in subparagraph (a) or (b).

63. The prosecution has also provided the particulars of the 'illegal act of violence' as being that *'they fired gunshots and a RPG grenade at the MSC Jasmine'*. Thus, this is the illegal act of violence which the prosecution has averred and therefore must prove beyond reasonable doubt against the twelve accused parties.

64. In ***Re Piracy Jure Gentium*** **(1934) AC 586** it was said that:

> "piracy is more of an offence to do with stealing of property (vessel and cargo) for private ends at the high sea than assaulting or causing injures to the crew which is incidental to the main criminal act. We must therefore understand that the assailants main aim is to seize, rob and take control of or hold the vessel and its cargo and crew for a ransom... it is not surprising that any other form of damage was not occasioned on Topaz because the accused would have frustrated their own efforts; to destroy what they were all out to find and hijack."

65. Amongst the prosecution witnesses who deposed before us, the only eye-witnesses of the attack of the MSC Jasmine were the Captain and his Second Officer, Messrs Kopanoy and Mykola and from their evidence, there can be no dispute that their ship was attacked when they were on the way to Mombasa, Kenya, on 5 January 2013, around 2.00pm. Both were on the bridge going about their duties when the security team leader informed them of an approaching vessel at high speed – about 19 knots – from the starboard side and they were able to see it when it was at a distance of approximately 1NM from their ship, Mr Mykola using binoculars at that time. Both identified the vessel as a white skiff with a dark patch on the bow: we bear in mind though that neither mentioned the dark patch in the statement they put up after the

incident.

66. We are aware that whilst Mr Mykola said that the closest the white skiff came to their ship was 180 metres, Mr Kopanoy said the closest he saw it was at 300 to 400 metres. We find that this is not detrimental to the credibility of the two witnesses as to the presence of the skiff there, since it is to be noted that Mr Kopanoy said *he* saw the skiff at its closest at some 300 metres.

67. Both witnesses said that the skiff fired at the MSC Jasmine. The presence of bullets collected on deck – as supported by the photographs Mr Kopanoy took – see Docs. AC and AC1 – and lodged in containers support the evidence of Messrs Kopanoy and Mykola that the MSC Jasmine was being fired at.

68. Mr Kopanoy was cross-examined about the possibility of the bullets emanating from the security guards' weapons. It stands to reason that bullets found on the MSC Jasmine could hardly have been fired from people *on* that ship, since this would have entailed the security guards directing their weapons towards the Jasmine, which is not likely.

69. We note however that there is no evidence of an RPG having been fired at the MSC Jasmine, since Messrs Kopanoy and Mykola said that that the security guards shouted about an on-coming RPG: such evidence is hearsay. Mr Kopanoy heard what he termed "a big noise" and Mr Mykola heard what he described as a "really loud sound of metal contact with the ship's hull": however, it is to be borne in mind that Mr Kopanoy said that the Jasmine did not sustain any major damage.

70. Whilst it is undisputed that there were gunshots fired at MSC Jasmine as per the evidence on record from Messrs Mykola and Kopanoy, these two witnesses were also clear in stating that there were six to eight persons in the skiff. They could not say who fired the gunshots.

71. Mr Padiachy, counsel for Accused no.6, submitted that there is an issue whether his client was rightly charged as a co-author, as there is no evidence that he was on the skiff, which allegedly attacked the MSC Jasmine. He further submitted that the

prosecution must prove that Accused no.6 has *« exécuté physiquement, matériellement les actes constitutifs du délit »*. He cited the case of ***Ghurburn and Ors v R*** [1990 SCJ 339] in support of his submissions. The issue that arises here is whether all twelve accused parties can be convicted for the act of piracy as averred by the prosecution.

72. The prosecution has submitted that this is entirely possible since all twelve accused parties had the required *'mens rea'* and common intention when they attacked the MSC Jasmine.

73. At the outset, it has to be said that the prosecution has relied on several judgments of the Seychelles Court to show the existence of common intention. However, we have to highlight the fact that these jurisprudence are of no avail since the Seychelles jurisdiction has a specific section in its penal code which makes it an offence to commit an offence with common intention (section 23 of the Penal Code of Seychelles). This foreign legal provision is clearly not applicable in our Courts and the reference to cases where the said provision of the Seychelles Penal Code have been applied is obviously not relevant to the present case.

74. This does not mean that there is no such legal concept under our law. The concept of co-authorship exists and there are several pronouncements of the Supreme Court. In ***A. G. Fakira v The State*** [2012 SCJ 466] the Supreme Court explained:

> On this issue Counsel quoted the following extract from **Paniapen & Anor v. R** [1981 MR 254] –
>
> > "To constitute a common purpose, it is not necessary that there should be a pre-arranged plan. The common purpose may be formed on the spur of the moment, and even after the offence has already commenced."
>
> and the following from ***R v Hungsraz*** [1970 MR 74]
>
> > "When considering the question of common purpose, it must not be overlooked that, in principle, its existence does not depend on any agreement between co-delinquents anterior to the commission of

any offence. The association of purpose can be formed instantaneously, on the spur of the moment. This is how Garraud aptly describes the situation which is created when several persons unite in the commission of an offence [Traité Théorique et Pratique du Droit Pénal Français, t. 3 p. 4]:

> *Une situation plus pratique est celle des délits commis en réunion, mais sans entente préalable. La participation criminelle suppose une coopération de force et d'activités en vue d'un résultat commun: des individus se réunissent pour commettre un délit, un vol, un assassinat, un empoisonnement.*
>
> *Il y a, la plupart du temps, entre eux, une sorte de convention d'association, ou, s'il est difficile de la dégager, si les coparticipants ont agi sous l'empire d'une inspiration subite, du moins ils ont eu l'intention commune de favoriser, par leur propre activité, celle de leurs compagnons."*

The concept of co-authorship which our Courts have consistently applied is the requirement of simultaneousness of the act of the co-author and mutual assistance to an author of a crime. The following excerpts from Garraud in **Carrimbaccus v. Syndic of the Pailles Canal** [1900 MR 75] aptly describes the legal point –

> *Il (le Code) considère comme étant seul auteur celui qui a exécuté physiquement, matériellement, les actes constitutifs de délit. Parmi les complices, le Code pénal comprend au contraire, tous les agents qui ont participé au délit par des faits déterminés, qui n'en constituent pas l'exécution ou le commencement d'exécution, mais a raison desquels la perpétration de l'acte, ou une adhésion à l'acte peut être imputée – Garraud Traité du Droit Pénal Français Vol 2, para 245, p 405, Ed. 1916.*

Il appartient aux tribunaux de distinguer dans les actes de complicité ceux qui extrinsèques à l'acte coupable, tendent à en préparer, faciliter et réaliser la consommation, et ceux qui, par la simultanéité d'action et l'assistance réciproque, constituent la perpétration même [Page 78].

L'auteur est celui qui commet les actes matériels constitutifs du crime ou du délit ou ceux qui sont nécessaires à cette exécution : par exemple dans le vol, l'auteur est l'individu qui s'empare des valeurs ou qui aide à l'effraction du coffre-fort ... Le complice est celui qui accomplit des actes qui, sans faire partie de l'exécution du délit ou être nécessaires à cette exécution, le facilitent par une aide ou une assistance. Il n'est que complice, par exemple celui qui aide l'auteur d'un vol en faisant le guet ou en tenant une échelle ... Les actes d'aide ou d'assistance dans la consommation d'un délit ne sont pas les actes du délit [Page 161]. »

75. Thus, it is clear that for the twelve accused to be convicted under the present information, the prosecution must prove beyond reasonable doubt that the twelve accused are co-authors, who acted with a common purpose in the commission of the *'actes matériels constitutifs du crime'*.

76. The *'actes matériels constitutifs'* of the offence under scrutiny is undoubtedly the illegal act of violence. Consequently, in the light of the above authorities, there would not be any predicament to find that the six to eight accused parties who were in the skiff had the common purpose to commit the illegal act of violence and therefore that they acted as co-authors.

77. The same conclusion cannot however be reached as regards the other four to six persons who were on the whaler at the material time, so that there clearly cannot be simultaneousness of the act of the co-authors and mutual assistance to an author of a crime in view of the significant distance between the skiff and the whaler. At best, they are accomplices who have « accomplit des actes qui, sans faire partie de

l'exécution du délit ou être nécessaires à cette exécution, le facilitent par une aide ou une assistance. »

78. Be that as it may, the offence of piracy is constituted in a number of ways as provided by section 3(3)(c) of the Piracy and Maritime Violence Act and one of which is as follows:

> "any act of inciting or of intentionally facilitating an act described in paragraph (a) or (b);"

79. Thus, the four to six persons who were on the whaler could have been prosecuted for an 'act of piracy', but pursuant to section 3(3)(c) of the Piracy and Maritime Violence Act as accomplices and not under section 3(3)(a)(i) of the said Act as presently styled in the information before us.

80. The situation is comparable to a case of larceny being committed by five persons in a bungalow and two others who drove the other five to the locus and were waiting in a lorry outside, on the road. Even if only one of the five persons was involved in breaking the safe, the four others would definitely be charged and convicted as co-authors since they would all form an essential part of the execution of the offence of larceny, whereas those waiting in the lorry, at some distance, would only be charged as accomplices.

81. The above conclusion brings us to another difficulty in the case for the prosecution, namely the issue of identification. The question that arises is who was in the skiff at the material time of the attack, so as to make a distinction between the co-authors of the attack and the accomplices, and the ensuing charge against them as co-authors and accomplices respectively.

82. In fact, there is no evidence whatsoever as to who were in the skiff at the material time of attack. Messrs Kopanoy and Mykola did not identify the persons who were in the skiff and they were also unsure about the number of persons who were in the skiff at the material time.

83. Thus, we do not have any evidence of the persons or exact number of persons who were on the skiff at the material time, so as to be sure that they were co-authors in the act of piracy as per the averment in the present information.

84. We find that it would be most unreasonable and unfair to find all twelve accused parties guilty as co-authors when we have clear evidence that not all of them formed part of the illegal act of violence, since some were in a whaler at significant distance from the skiff. The vessel that Mr Mykola saw after the attack was not identified further than it was a craft without fishing or other equipment.

85. Therefore, we find that the Prosecution has failed to prove its case as averred under the present information against all twelve accused parties beyond reasonable doubt.

Directed against the MSC Jasmine

86. The evidence of Messrs Kopanoy and Mykola about the manner in which the attack was carried out by the small white skiff leaves no doubt in our minds that the act of piracy/illegal act of violence was directed against the MSC Jasmine. The approach of the skiff, at high speed, without any contact, radio or otherwise, and its move from starboard to port and vice versa, and the persistent shots from quite a distance and while approaching the ship, indicate that its target was the Jasmine.

On the High Seas

87. The prosecution has averred that the illegal act of violence has been committed *"on the high seas, around 240 Nautical Miles off the Somali Coast"*.

88. Mr Radhakissoon, counsel for Accused no.2, has submitted that the prosecution did not prove that the act of piracy was committed on the high seas. The prosecution submitted on the other hand that there is ample evidence to the effect that the act of piracy occurred on the high seas.

89. The definition of 'high seas' is given at section 2 of the Piracy and Maritime Violence Act, as follows:

"high seas –

(a) has the same meaning as in UNCLOS; and

(b) includes the EEZ;"

90. The following definition has been given to 'high seas' at Article 86 of the UNCLOS.

> "The provisions of this Part apply to all parts of the sea that are not included in the economic zone, in the territorial sea or in the internal waters of a State, or in the archipelagic waters of an archipelagic State. This article does not entail any abridgement of the freedoms enjoyed by all States in the exclusive economic zone in accordance with article 58."

91. It should be noted that the definition given to 'high seas' under the Piracy and Maritime Violence Act also encompasses the EEZ and the definition of EEZ as per section 2 of the Piracy and Maritime Violence Act is as follows:

> ""EEZ" has the same meaning as in the Maritime Zones Act;"

92. The definition of EEZ is given at section 2 of the Maritime Zones Act, namely:

> ""EEZ" means the exclusive economic zone of Mauritius, as defined in section 14;"

93. Thus when our legislators included the EEZ in the definition of 'high seas' in the Piracy and Maritime Violence Act, they were referring to <u>the Mauritian EEZ only</u>.

94. Bearing in mind the extent of the definition of high seas under the Act, we will now analyse the evidence on record to assess whether the Prosecution has proved beyond reasonable doubt this element of the offence.

95. Mr Mykola, who was on board the MSC Jasmine on 5 January 2013 round 2.00pm said that they were *"pretty close to 140 miles away from the Somali coast"* at the time of the attack, whereas Mr Kopanoy was never examined about the position of their

ship at that time. Clearly, this means that the attack occurred in the EEZ of Somalia, so that the evidence adduced by the prosecution does not satisfy the definition of high seas as per section 2 of the Piracy and Maritime Violence Act. We have to stress that Mr Mykola was a straightforward witness whose words were never put to serious challenge and who always remained composed during his deposition.

96. We note by the way that the prosecution admitted in their summary of the evidence that Mr Mykola said the MSC Jasmine was some 140 miles away from the Somali coast at the alleged time of attack (page 25 of the written submissions of the prosecution), but submitted that he said they were about 240NM from the Somali coast (page 52 of the written submissions of the prosecution).

97. Mr Hendicks gave the approximate distance of the USS Halyburton at more than 200NM from land, and said that Heartache 43 searched an area more than 200NM from the Seychelles; Mr Clemons said that the USS Halyburton was *"roughly 260 miles offshore"* when the distress call was received, but did not give the longitude and latitude of the MSC Jasmine at the time and said in cross-examination that the helicopter/crew reached the Jasmine 2 hours 24mn after the distress call; Mr Haupt said he reached the MSC Jasmine some 20mn after the distress call in Heartache 43, although he could not confirm if "0307N 05150E" was the position of attack; and Mr Lainé said in cross-examination that the attack was at more than 200NM off the coast of Somalia.

98. All these witnesses had second hand information about the position of the MSC Jasmine at the time of the attack, and were not certain of the distance from land, notwithstanding sophisticated equipment. We find that whilst Mr Mykola was straightforward in his testimony, the other witnesses for the prosecution did not have this quality. They were in contradiction with each other as to where the alleged attack occurred and when some of even stated it was about 200NM, this could also mean plus or minus 200NM with the consequence that it could again be within the EEZ of Somalia.

99. We take into account that whilst Accused nos.2, 3, 7 and 11 admitted that they were on the high seas on 05 January 2013 around 2.00pm, that is, at the time of the attack,

Accused nos.1, 5, 6 and 12 said they were in the territorial waters of Somalia, Accused no.4 that he could not remember where he was at that time and Accused no.9 that he was at sea.

100. Be that as it may, in the light of the consistent testimony from Mr Mykola, an experienced navigator, who was on the MSC Jasmine whilst it was under attack, we find we cannot doubt his words when he stated that the ship was some 140NM off the Somali coast. On the basis of his evidence, we find that the prosecution has failed to prove beyond reasonable doubt one of the essential elements of the offence under section 3 of the Piracy and Maritime Violence Act, namely that the act of piracy committed against the MSC Jasmine occurred on the high seas

For private ends

101. Mr Ramful, counsel for Accused no.9, has submitted that the information does not disclose an offence known in law as the prosecution has failed to aver and to prove that the act of piracy was for private ends.

102. Mr S. Bhoyroo, State Counsel, referred the Court to their submissions at page 52 and added that the Information as drafted avers the elements of the offence in line with section 3(1) of the Piracy and Maritime Violence Act, and that they need not aver 'for private ends'.

103. What an information should contain is stipulated at section 125 of the District and Intermediate Courts (Criminal Jurisdiction) Act, which reads as follows:

> (1) The description in the information of any offence in the words of the enactment creating such offence, with the material circumstances of the offence charged, shall be sufficient.
>
> (2) Any exception, exemption, proviso, or qualification, whether it does or does not accompany the description of the offence in the law creating such offence, may be proved by the defendant but need not be specified in the information or proved by the prosecutor.

104. At page 4 of their written submissions the prosecution list the elements of the offence of 'act of piracy' under Mauritian Law, and item b reads as follows:

"b. The illegal act must be committed for private ends."

105. By submitting so the prosecution considers 'for private ends' to be an element of the offence of 'act of piracy', which seems inconsistent with their submissions in Court that 'for private ends' need not be averred in the information.

106. We note that the prosecution has averred in the information that the 'act of piracy' was committed through an illegal act of violence, on the high seas and directed against the MSC Jasmine, thereby using the wording of section 3(3)(a)(i) of the Piracy and Maritime Violence Act, with the exception of the words 'for private ends".

107. We are of the view that 'for private ends' is an element of the offence of 'act of piracy' similar to 'illegal act of violence', 'high seas' and 'directed against the MSC Jasmine'.

108. In the light of all the preceding paragraphs, we find that the Information against the twelve accused does not describe the offence for which the twelve accused are charged *"in the words of the enactment creating such offence, with the material circumstances of the offence charged"*. We find that the fact that the prosecution did not aver 'for private ends' results in the information not being in conformity with the requirements of section 125 of the District and Intermediate Courts (Criminal Jurisdiction) Act and of section 10 of the Constitution.

109. There are a few issues that arose during the trial and we shall consider them at this stage.

The Exhibits

110. Mr Le Toulec has explained how he or his team secured exhibits from the whaler and skiff – mentioning the use of latex gloves when he handled the said exhibits – and secured them in plastic bags. We have no reason to doubt the testimony

of that witness that those exhibits were under lock and key in the hold of the Surcouf until he remitted them to PS Narain and that no one tampered with them.

111. We equally have no reason to doubt the word of PS Narain that the exhibits were always in his custody on the journey from Djibouti to Mauritius until he locked them in the CCID exhibit room; and that he later removed them for examination at the FSL and locked them again in the said exhibit room after examination, up to the point they were removed to be produced in Court. We also accept as true his testimony that nobody interfered with the exhibits.

The Police Inquiry – Defence statements

112. It was put to witnesses Abdirahman, Narain and Dawoojee that the English versions of the defence statements produced in Court were typed copies of the versions recorded by the Mauritian police officers, which they denied. We have no reason to doubt the testimony of these three witnesses that Mr Abdirahman's typed English versions of the defence of the twelve accused are translations of the Somali versions.

Destruction of whaler and skiff

113. Mr Lainé was questioned about the reason for the destruction of the whaler and skiff (Mr Le Toulec admitted that they could be important exhibits) and the procedure adopted to obtain the authorisation for such destruction.

114. The prosecution has submitted that this Court *"cannot pronounce itself on an issue of foreign law (French law) on which Mauritian Court has no jurisdiction."*

115. We note that Mr Lainé said that the Loi 2011-13 would apply for the *« rétention »* of suspected pirates on board of a French warship – the Surcouf – but would not apply for the destruction of vessels suspected to have been used in an act of piracy and seized by the French navy, more specifically, personnel of the French warship Surcouf. He further said that he was acting under directions from the Force Command of Operation Atalanta when he ordered the destruction of the whaler and skiff.

116. We agree that we are not competent to decide on the issue whether Mr Lainé acted in contravention of Article 4 of Loi 2013-11 or not. However, we feel duty bound to say, as a Court of Law, hearing the Trial of twelve accused suspected of having committed an act of piracy, who were apprehended by the French navy and then transferred to Mauritian jurisdiction under transfer agreements with the European Union and with the United Kingdom, that invoking French law for one aspect of the operation and not for the other appears inconsistent.

117. We are of the view that the case of **Kuruma, Son of Kaniu v R [1955] A.C 197** and ***R v Sang* [1980] A.C 420** cited by the prosecution on the admissibility of evidence illegally obtained would be of no relevance here, since the whaler and skiff were not produced before this Court.

"Rétention"/Detention

118. The defence has during the trial raised the issue of the illegality of the detention of the twelve accused on board the Surcouf.

119. There is undisputed evidence to the effect that the twelve Accused parties were arrested on 6 January 2013 and *'retenus'* as per Commandant Lainé, until they were handed over to PS Narain on 25 January 2013, to be brought before the Mauritian authorities to be investigated and tried for the offence of act of piracy.

120. The starting point in these matters would necessarily be the UNCLOS, which has the status of Customary International law. Article 110 provides for right to visit of warships on vessels suspected to be engaged in piracy. The said article reads as follows:

> "1. Except where acts of interference derive from powers conferred by treaty, a warship which encounters on the high seas a foreign ship, other than a ship entitled to complete immunity in accordance with articles 95 and 96, is not justified in boarding it unless there is reasonable ground for suspecting that:
>
> (a) the ship is engaged in piracy;

(b) the ship is engaged in the slave trade;

(c) the ship is engaged in unauthorized broadcasting and the flag State of the warship has jurisdiction under article 109;

(d) the ship is without nationality; or

(e) though flying a foreign flag or refusing to show its flag, the ship is, in reality, of the same nationality as the warship.

2. In the cases provided for in paragraph 1, the warship may proceed to verify the ship's right to fly its flag. To this end, it may send a boat under the command of an officer to the suspected ship. If suspicion remains after the documents have been checked, it may proceed to a further examination on board the ship, which must be carried out with all possible consideration.

3. If the suspicions prove to be unfounded, and provided that the ship boarded has not committed any act justifying them, it shall be compensated for any loss or damage that may have been sustained.

4. These provisions apply mutatis mutandis to military aircraft.

5. These provisions also apply to any other duly authorized ships or aircraft clearly marked and identifiable as being on government service."

121. There is no doubt that both the USS Halyburton and the Surcouf were warships pursuant to the definition of warship under article 29 of the UNCLOS, which stipulates that:

> "For the purposes of this Convention, "warship" means a ship belonging to the armed forces of a State bearing the external marks distinguishing such ships of its nationality, under the command of an officer duly commissioned by the government of the State and whose name appears in the appropriate service list or its equivalent, and manned by a crew which is under regular armed forces discipline."

122. Therefore, the members of the Surcouf had the right to visit the skiff and whaler for the purposes of investigating the suspicion that they were engaged in piracy.

123. The members of the Surcouf were also allowed to seize the vessels and arrest

those found in the skiff and whaler pursuant to article 105 of UNCLOS which reads as follows:

> "On the high seas, or in any other place outside the jurisdiction of any State, every State may seize a pirate ship or aircraft, or a ship or aircraft taken by piracy and under the control of pirates, and arrest the persons and seize the property on board. The courts of the State which carried out the seizure may decide upon the penalties to be imposed, and may also determine the action to be taken with regard to the ships, aircraft or property, subject to the rights of third parties acting in good faith."

124. It follows from this moment that any decision to retain, detain those persons would fall under the laws of the flag state of the warship and in the present matter it is French law since the Surcouf belongs to the French navy. According to Commandant Lainé who was in charge of the Surcouf, he had written authorisation for the retention of those twelve persons from the French Judicial authorities under the French laws governing such situations.

125. In matters concerning the deprivation of liberty, the governing principles under our law are contained in section 5 of the Constitution, which would also be the operative principles in this case, since the trial of these twelve accused parties is being held in Mauritius. In any event, our provisions are similar to the European Conventions of Human Rights and this has been acknowledged by the Privy Council in the case of ***D. Hurnam v The State*** **[2004] PRV 53** in which it was held that:

> "...Secondly, sections 5(1) and (3) and section 10(2)(a) bear a very close resemblance to articles 5(1) and (3) and 6(2) of the European Convention on Human Rights. This is not surprising since, as has been pointed out, Chapter II of the Constitution reflects the values of, and is in part derived from, the European Convention: Neeyamuthkhan v Director of Public Prosecutions [1999] SCJ 284(a); Deelchand v Director of Public Prosecutions [2005] SCJ 215, para 4.14; Rangasamy v Director of Public Prosecutions (Record No 90845, 7 November 2005, unreported). It is indeed noteworthy that the European Convention was extended to Mauritius while it was still a Crown

Colony, before it became independent under the 1968 Constitution: see European Commission of Human Rights, Documents and Decisions (1955-1957), p 47. Thus the rights guaranteed to the people of Mauritius under the European Convention were rights which, on independence, "have existed and shall continue to exist" within the terms of section 3. This is a matter of some significance: while Mauritius is no longer a party to the European Convention or bound by its terms, the Strasbourg jurisprudence gives persuasive guidance on the content of the rights which the people have enjoyed and should continue to enjoy..."

126. Thus, the Strasbourg jurisprudence is acknowledged to have persuasive authority in matters of fundamental rights and freedom.

127. Section 5(1) of the Constitution of Mauritius reads as follows:

> "(1) No person shall be deprived of his personal liberty save as may be authorised by law –
>
> ...
>
> (e) upon reasonable suspicion of his having committed, or being about to commit, a criminal offence ..."

128. The corresponding provision under ECHR is Article 5, namely:

> "1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:
>
> (...)
>
> (c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so;"

129. We find that the case of ***Medvedyev and Others v France*, App no. 3394/03,**

[2010] ECHR, judgment delivered on 29 March 2010, to be particularly relevant. In the said case, it was held that:

> "76. The Court reiterates that Article 5 of the Convention protects the right to liberty and security. This right is of the highest importance "in a democratic society" within the meaning of the Convention (see, among many other authorities, De Wilde, Ooms and Versyp v. Belgium, 18 June 1971, § 65, Series A no. 12, and Winterwerp v. the Netherlands, 24 October 1979, § 37, Series A no. 33).
>
> 77. All persons are entitled to the protection of this right, that is to say, not to be deprived, or continue to be deprived, of their liberty (see Weeks v. the United Kingdom, 2 March 1987, § 40, Series A no. 114), save in accordance with the conditions specified in paragraph 1 of Article 5.
>
> 78. The list of exceptions to the right to liberty secured in Article 5 § 1 is an exhaustive one (see Quinn v. France, 22 March 1995, § 42, Series A no. 311, and Labita v. Italy [GC], no. 26772/95, § 170, ECHR 2000- IV), and only a narrow interpretation of those exceptions is consistent with the aim of that provision (see Engel and Others v. the Netherlands, 8 June 1976, § 58, Series A no. 22, and Amuur, cited above, § 42).
>
> 79. The Court further reiterates that where the "lawfulness" of detention is in issue, including the question whether "a procedure prescribed by law" has been followed, the Convention refers essentially to national law but also, where appropriate, to other applicable legal standards, including those which have their source in international law. In all cases it establishes the obligation to conform to the substantive and procedural rules of the laws concerned, but it also requires that any deprivation of liberty be compatible with the purpose of Article 5, namely, to protect the individual from arbitrariness (see, among many other authorities, Bozano v. France, 18 December 1986, § 54, Series A no. 111; Amuur, cited above, § 50; Assanidze v. Georgia [GC], no. 71503/01, § 171, ECHR 2004-II; Ilaşcu and Others, cited above, § 461; McKay v. the United Kingdom [GC], no. 543/03, § 30, ECHR 2006-X; and Mooren, cited above, § 76).

80. The Court stresses that where deprivation of liberty is concerned it is particularly important that the general principle of legal certainty be satisfied. It is therefore essential that the conditions for deprivation of liberty under domestic and/or international law be clearly defined and that the law itself be foreseeable in its application, so that it meets the standard of "lawfulness" set by the Convention, a standard which requires that all law be sufficiently precise to avoid all risk of arbitrariness and to allow the citizen – if need be, with appropriate advice – to foresee, to a degree that is reasonable in the circumstances of the case, the consequences which a given action may entail (see, among other authorities, Amuur, cited above; Steel and Others v. the United Kingdom, 23 September 1998, § 54, Reports 1998- VII; Baranowski v. Poland, no. 28358/95, §§ 50-52, ECHR 2000-III; and Jėčius v. Lithuania, no. 34578/97, § 56, ECHR 2000-IX).

130. Hence, the detention should not only be as per domestic law but also in compliance with the rule of law so as to prevent arbitrariness. Furthermore, we should always bear in mind that the right to liberty as guaranteed under section 5 of the Constitution and Article 5 of the ECHR is of the highest importance in a democratic society.

131. The law under which the twelve accused parties were retained in the words of Commandant Lainé is *'LOI n° 2011-13 du 5 janvier 2011 relative à la lutte contre la piraterie et à l'exercice des pouvoirs de police de l'Etat en mer'*. Article 6 of the said Loi amends the French Code de la Defense, by introducing section 3 (Articles 1521-11 à 1521-18) . For our purposes, Articles 1521-12 and 1521-14 read as follows:

« Lorsque des mesures de restriction ou de privation de liberté doivent être mises en œuvre, les agents mentionnés à l'article L. 1521-2 en avisent le préfet maritime ou, outre-mer, le délégué du Gouvernement pour l'action de l'Etat en mer, qui en informe dans les plus brefs délais le procureur de la République territorialement compétent.

Avant l'expiration du délai de quarante-huit heures à compter de la mise en

œuvre des mesures de restriction ou de privation de liberté mentionnées à l'article L. 1521-12 et à la demande des agents mentionnés à l'article L. 1521-2, le juge des libertés et de la détention saisi par le procureur de la République statue sur leur prolongation éventuelle pour une durée maximale de cent vingt heures à compter de l'expiration du délai précédent.

Ces mesures sont renouvelables dans les mêmes conditions de fond et de forme durant le temps nécessaire pour que les personnes en faisant l'objet soient remises à l'autorité compétente. »

Le juge des libertés et de la détention statue par ordonnance motivée insusceptible de recours. Copie de cette ordonnance est transmise dans les plus brefs délais par le procureur de la République au préfet maritime ou, outre-mer, au délégué du Gouvernement pour l'action de l'Etat en mer, à charge pour celui-ci de la faire porter à la connaissance de la personne intéressée dans une langue qu'elle comprend. »

132. Without examining such a piece of foreign law and assessing whether it is consistent with the provisions of our Constitution under section 5(1) which stipulates '*as may be authorised by law*', we have looked at the present laws under which the twelve accused were detained and we have found no provisions as regards contact with a lawyer or family. In short, these twelve persons were kept completely incommunicado during the several days on board the Surcouf, based on the domestic French laws mentioned by the Commandant. Thus, several question marks might be raised as to whether, and in fact, the detention was not arbitrary.

133. With respect to the stipulation under section 5(3) of the Constitution that any person arrested or detained shall be brought without undue delay before a court, we have found the following paragraphs from ***Medvedyev and Others*** (supra) to be particularly helpful as regards the general principles governing this right to a person arrested and detained:

"1. General principles

117. The Court reiterates that Article 5 of the Convention is in the first rank of

the fundamental rights that protect the physical security of an individual, and that three strands in particular may be identified as running through the Court's case-law: the exhaustive nature of the exceptions, which must be interpreted strictly and which do not allow for the broad range of justifications under other provisions (Articles 8 to 11 of the Convention in particular); the repeated emphasis on the lawfulness of the detention, procedurally and substantively, requiring scrupulous adherence to the rule of law; and the importance of the promptness or speediness of the requisite judicial controls under Article 5 §§ 3 and 4 (see McKay, cited above, § 30).

118. The Court also notes the importance of the guarantees afforded by Article 5 § 3 to an arrested person. The purpose of this provision is to ensure that arrested persons are physically brought before a judicial officer promptly. Such automatic expedited judicial scrutiny provides an important measure of protection against arbitrary behaviour, incommunicado detention and ill-treatment (see, among other authorities, Brogan and Others, cited above, § 58; Brannigan and McBride v. the United Kingdom, 26 May 1993, §§ 62-63, Series A no. 258-B; Aquilina v. Malta [GC], no. 25642/94, § 49, ECHR 1999-III; Dikme v. Turkey, no. 20869/92, § 66, ECHR 2000- VIII; and Öcalan, cited above, § 103).

119. Article 5 § 3, as part of this framework of guarantees, is structurally concerned with two separate matters: the early stages following an arrest, when an individual is taken into the power of the authorities, and the period pending any trial before a criminal court, during which the suspect may be detained or released with or without conditions. These two limbs confer distinct rights and are not on their face logically or temporally linked (see T.W. v. Malta [GC], no. 25644/94, § 49, 29 April 1999).

120. Taking the initial stage under the first limb, which is the only one at issue here, the Court's case-law establishes that there must be protection, through judicial control, of an individual arrested or detained on suspicion of having committed a criminal offence. Such control serves to provide effective safeguards against the risk of ill-treatment, which is at its greatest in this early stage of detention, and against the abuse of powers bestowed on law

enforcement officers or other authorities for what should be narrowly restricted purposes and exercisable strictly in accordance with prescribed procedures. The judicial control must satisfy the following requirements (see McKay, cited above, § 32):

(a) Promptness

121. The judicial control on the first appearance of an arrested individual must above all be prompt, to allow detection of any ill-treatment and to keep to a minimum any unjustified interference with individual liberty. The strict time constraint imposed by this requirement leaves little flexibility in interpretation, otherwise there would be a serious weakening of a procedural guarantee to the detriment of the individual and the risk of impairing the very essence of the right protected by this provision (see Brogan and Others, cited above, § 62, where periods of four days and six hours in detention without appearance before a judge were held to be in violation of Article 5 § 3, even in the special context of terrorist investigations).

...

129. The Court points out that in the Brogan and Others case it held that a period of detention in police custody amounting to four days and six hours without judicial review fell outside the strict constraints permitted by Article 5 § 3, even though it was designed to protect the community as a whole from terrorism (see Brogan and Others, cited above, § 62). It also found a period of seven days without being brought before a judge incompatible with Article 5 § 3 (see Öcalan, cited above, §§ 104-05).

130. The Court observes, however, that it did accept, in the Rigopoulos decision (cited above), which concerned the interception on the high seas by the Spanish customs authorities, in the context of an international drug trafficking investigation, of a ship flying the Panamanian flag and the detention of its crew for as long as it took to escort their ship to a Spanish port, that a period of sixteen days was not incompatible with the notion of "promptness" required under Article 5 § 3 of the Convention, in view of the

existence of "wholly exceptional circumstances" that justified such a delay. In its decision, the Court noted that the distance to be covered was "considerable" (the ship was 5,500 km from Spanish territory when it was intercepted), and that a forty-three-hour delay caused by resistance put up by the ship's crew "could not be attributed to the Spanish authorities". It concluded that it had been "materially impossible to bring the applicant physically before the investigating judge any sooner", while taking into account the fact that once he had arrived on Spanish soil the applicant had been immediately transferred to Madrid by air and brought before the judicial authority on the following day. Lastly, the Court considered "unrealistic" the applicant's suggestion that, under an agreement between Spain and the United Kingdom to prevent illicit traffic in narcotic drugs, instead of being diverted to Spain the ship could have been taken to Ascension Island, which was approximately 1,600 km from where it was intercepted.

131. In the present case, the Court notes that at the time of its interception the Winner was also on the high seas, off the coast of the Cape Verde islands, and therefore a long way from the French coast, comparable to the distance in the Rigopoulos case. There was nothing to indicate that it took any longer than necessary to escort it to France, particularly in view of the weather conditions and the poor state of repair of the Winner, which made it impossible for it to travel any faster. In addition, the applicants did not claim that they could have been handed over to the authorities of a country nearer than France, where they could have been brought promptly before a judicial authority. As to the idea of transferring them to a French naval vessel to make the journey faster, it is not for the Court to assess the feasibility of such an operation in the circumstances of the case, particularly as it has not been established that the frigate was capable of accommodating all the crew members in sufficiently safe conditions."

134. In the present matter, the twelve persons were deprived of their liberty from 6 to 24 January 2013 on board the Surcouf, which is more than in the case of the case of ***Medvedyev and Others*** or that of ***Rigopoulos*** mentioned in the former case, so that we need to consider whether this detention also falls within the justification applied in the

case of ***Medvedyev and Others***, namely, "wholly exceptional circumstances", which might therefore justify the obvious delay.

135. We note that the Surcouf as per Commandant Lainé, was somewhere between Seychelles and Somalia, on the high seas. We do not find it to be comparable with the considerable distance that had to be covered by the vessels in the cases of ***Rigopoulos*** or ***Medvedyev and Others***. Moreover, we take into consideration the fact that France had already refused to try the twelve persons so that there was no question of bringing them to France. Moreover, there is no evidence whatsoever of sea conditions having being rough, which would have prevented the swift navigation of the French vessel to the nearest land. Thus, these twelve accused parties could have been brought to land within a shorter delay either to Kenya, Seychelles or even Mauritius. There is no doubt that the French Navy or other military vessels present in the region in the operation against piracy had such transport facilities, including air transport, to bring them much sooner before a judicial authority. It is here that the dissenting opinion in the case ***Medvedyev and Others*** bears all its importance, in assessing whether the French navy did all that was reasonable to shorten the delay. The relevant paragraphs read as follows:

> "4. In Brogan and Others v. the United Kingdom (29 November 1998, § 62, Series A no. 145-B) the Court held that a period of detention in police custody amounting to four days and six hours without judicial review fell outside the strict constraints permitted by Article 5 § 3, notwithstanding the fact that it was aimed at protecting the community as a whole from terrorism. It has also found in Öcalan v. Turkey ([GC], no. 46221/99, ECHR 2005-IV) that a period of seven days' detention without being brought before a judge was incompatible with Article 5 § 3.
>
> 5. We acknowledge that the Court in Rigopoulos v. Spain ((dec.), no. 37388/97, ECHR 1999-II) found that a period of sixteen days was not incompatible with the notion of "promptness" as required under Article 5 § 3 of the Convention in view of the "wholly exceptional circumstances" that were involved therein. In that case, the Spanish customs authorities, in the context of an international drug trafficking investigation, intercepted on the high seas a

vessel flying the Panamanian flag and its crew was detained for as long as it took to escort the vessel to a Spanish port. In our view, however, the facts in Rigopoulos are entirely distinguishable from those of the instant case. Most significantly, in Rigopoulos, there was an independent Central Investigating Court and not a public prosecutor supervising the proceedings on board the ship on the day of interception. The very next day its crew members were informed of their situation and advised of their rights. Within two days the court had ordered the crew to be remanded in custody. On the following day they were apprised of that decision and invited to name the persons they wanted to have informed of their detention. This information was communicated to the respective embassies of the States of which the crew members were nationals. Three days after the boarding, the independent investigating court issued an order regularising the crew's situation in accordance with the Spanish Code of Criminal Procedure. One week after the interception, the applicant had access to the services of a lawyer. Finally, it must be noted that the lawfulness of the detention with regard to Article 5 § 1 was never in issue in the Rigopoulos case.

6. We do not exclude the possibility that there may, at times, exist "wholly exceptional circumstances" which might justify a period that is, in principle, at variance with the provisions of Article 5 § 3. However, in our view, such circumstances would need to be established, clearly, and to be more than simply "special" or "exceptional". The notion of "wholly exceptional circumstances" connotes, if not "insurmountable" or "insuperable", then, at least, circumstances in which the authorities could not reasonably envisage or execute any other measures in order to comply with their obligations under the Convention.

7. The Government argued that the weather conditions at the relevant time and the poor state of repair of the Winner accounted for the very slow speed of the vessel and, thus, for the protracted period of time that passed before its crew was brought before a judge. Such factors may explain the delay involved, but they do not justify it. There was no evidence adduced before the Court that the French authorities had even considered, let alone examined, any other options

which would have enabled the applicants to have been brought promptly before a judge.

8. In our view, it seems that various possibilities were open to the French authorities which they might have considered as a means of ensuring respect for and vindication of the applicants' rights under Article 5 § 3. For example, from the moment the frigate Lieutenant de vaisseau Le Hénaff set out from Brest to intercept the Winner (which had been under observation by the American, Greek and Spanish authorities on suspicion of transporting illegal drugs, thus leading to a request by the Central Office for the Repression of Drug Trafficking ("the OCRTIS") for authorisation to intercept), it was reasonably foreseeable that the services of a judicial officer would be required during the course or in the immediate follow-up to the planned interception. In such circumstances, some consideration might have been given to having a judge join the frigate in Brest, or even later in Spain, when the OCRTIS experts went on board.

9. Alternatively, some consideration might have been given to transporting the crew back to Brest on board a naval vessel. (We note that, having left Brest, it took the Lieutenant de vaisseau Le Hénaff only six days to reach the location of the Winner). Having regard to the state of repair of the intercepted vessel, it is surprising that the authorities decided to keep its crew on board when they must have known that, as a result, it would take a long time to bring them before a judge. Nor, indeed, would it appear that any thought was given to airlifting those deprived of their liberty to France. This option has been used by the French authorities in cases of piracy on the high seas and it might also have been considered in this one."

136. The last line of the above extract is highly relevant in that it mentions the fact that in cases of piracy, the option of airlifting those deprived of their liberty has been used in the past. The question that arises is why this option was not considered in the present matter, so as to shorten the delay significantly. We do not find that the present matter was met with "wholly exceptional circumstances" which warranted the twelve accused parties being detained or retained, and therefore deprived of their liberty for

such a long period on board of the Surcouf.

137. We also have to stress that there is no evidence whatsoever that during this period of detention on board the Surcouf they were informed of their situation and advised of their rights, as well as invited to give the names of those they wanted to inform of their whereabouts or even have access to lawyers. It is to be noted that these facilities were made available in the case of ***Rigopoulos*** as is evident from the above extract.

138. All these circumstances make it clear that there is a flagrant breach of the requirement guaranteed under section 5(3) of the Constitution as well as article 5(3) of the ECHR so that they were not brought without undue delay before a Court and that there was no "wholly exceptional circumstances" justifying same.

139. This finding in itself is so grave that it would have warranted the stay of proceedings outright against all twelve Accused in view of a flagrant breach of a fundamental right of the highest importance in a democratic society.

Conclusion

140. Be that as it may, for all the reasons given above, namely the failure to prove the elements of 'high seas' and 'illegal act of violence committed by the twelve accused', and the non-averment of 'for private ends' in the information, we find that the prosecution has not proved the case against the twelve accused beyond reasonable doubt.

141. We accordingly dismiss the Information against the twelve accused.

W. V. Rangan
Magistrate

M. I. A. Neerooa
Magistrate

Police v M A Abdeoulkader & Ors

2016 INT 322

IN THE INTERMEDIATE COURT OF MAURITIUS

Cause No.850/2013

In the matter of: -

Police

v

(1) Abdeoulkader Mohamed Ali
(2) Said Mohamed Hassan
(3) Ahmed Mohamed Ismael
(4) Shafi Mohamed Osman
(5) Hassan Salad Omar
(6) Said Omar Farah
(7) Mohamed Abdilahi Ahmed
(8) Ali Hassan Mohamed
(9) Abdi Mohamed Kidiye
(10) Abdi Ahmed Yussuf
(11) Abdillahi Mohamed Ahmed
(12) Mahad Mohamed Ibrahim

JUDGMENT

(1) The twelve Accused are charged with the offence of 'Act of Piracy on High Seas' in breach of sections 3(1)(a), 3(3) and 7 of the Piracy and Maritime Violence Act 2011. They pleaded not guilty to the charge and were all assisted by counsel.

(2) On 6 November 2014 the Intermediate Court dismissed the case against all twelve Accused parties.

(3) The Director of Public Prosecution appealed against the decision of the Intermediate Court and on 18 December 2015 the Supreme Court remitted the case back to the Intermediate Court directing it *"to proceed in the light of our pronouncements in law, with its determination on an amended information curing the defect pinpointed in the present judgment and giving the respondents ample opportunity to present their defence to the amended information, and if necessary to cross examine further the prosecution witnesses or call other witnesses in their defence."*

(4) The Supreme Court also said *"It is our view that in fairness to the respondents, they should be given the opportunity to plead anew to an amended information with the element of "for private ends" and to adduce further evidence which they may wish to adduce."*

(5) The Supreme Court said *"It is common ground that "for private ends" is a constitutive element of the offence of piracy under customary international law and under article 101 of UNCLOS."* but went on to say that the failure of the prosecution to aver the element of 'for private ends' *"... was not such as to render the information so bad that the proceedings were a nullity."* The Supreme Court further said *"There are compelling reasons in the present case for the trial Court to have proceeded to cure the omission according to the guidelines set out in Venkiah. It could have amended the information and given the respondents the opportunity to plead anew and to adduce evidence, if need be. Such a course of action would also have served the interests of justice."*

(6) Accordingly an amendment was brought to the charge, to include the element of *'private ends'*, without any objection from the defence. The information now discloses an offence in law and reads as follows: "*on or about the 5th day of January in the year 2013, on the high seas, around 240 Nautical Miles off the Somali Coast... did wilfully and unlawfully commit an act of piracy, to wit an illegal act of violence for private ends by the crew of a private ship directed against the MSC Jasmine, a Panama flag Merchant Vessel which was proceeding from Salalah/Oman to Mombassa/Kenya."*

(7) The prosecution called LCDR Donald J. Clemons (witness no.7) and Lt. Alex W. Haupt (witness no.8) and tendered them for cross-examination.

(8) The defence did not adduce evidence.

(9) The case was also remitted to the Intermediate Court because *"...it did not consider whether the skiff and the whaler intercepted were the very vessels which participated in the attack or whether they were 'at the wrong place at the wrong moment.'"* and because it failed *"to say specifically and clearly whether the respondents were the ones who carried out the attack on the MSC Jasmine or they were innocent fishermen plying their occupation"*.

(10) We refer to paragraph 57 of our Judgment where we found there was an attack, but since we also found that the issue of co-authorship and identification had remained unsolved, the twelve Accused parties could not be found guilty as per the present Information.

(11) On the issue of identification and co-authorship, in the light of the pronouncement of the Supreme Court to the effect that *"If the evidence and version of the prosecution are retained, it is amply proved that the occupants of the whaler and those of the skiff had to act together to carry out the PAG and they were on a 'common enterprise', the participation of each member of the group being essential to the commission of the attack. In view of the nature of the operation on the high seas and the involvement of each member of the group, be it on board of the whaler or the skiff, in the perpetration of the alleged attack, they could only be co-authors and not mere accomplices. The trial Court erred in concluding that the occupants of the whaler are "at best accomplices..." and that the prosecution should have led evidence as to the identity of the occupants of the skiff who were the only ones who perpetrated the attack. The appeal must also succeed on Grounds 2, 3 and 5 namely of the grounds of appeal and grounds 3 and 9 of the additional grounds which are well taken."*, we now find that there is no difficulty whatsoever to find all that twelve Accused are co-authors and that the issue of identification has now become a dead issue.

(12) We need none the less say that our judgment was based on tried and tested authorities on co-authorship. In fact, in the most recent case of ***N. Agathe v State*** [2016 SCJ 231], the Supreme Court again affirmed the principles used by this trial Court.

(13) However, we also understand that there are distinct schools of thoughts on this issue in French jurisprudence. Be that as it may, we are bound by the specific pronouncements in law made by the Supreme Court.

(14) The case was remitted to us to make a determination on the *"pivotal issue"* namely whether the twelve Accused parties were the ones who attacked the MSC Jasmine or were innocent fisherman, i.e., to choose between the two versions before this Court. We find the case of ***J. B. Bernard v The State*** [2012 SCJ 31] relevant. One of the grounds of appeal before the Supreme Court was that the trial Court should have accepted the appellant's version. Domah J. (as he was then) and Chan Kan Cheong J. had this to say:

> "[11] This ground assumes that a criminal case is decided by the trial court on the choice of versions, as between that of the prosecution and that of the defence. That is a misapplication of the fundamentals as regards the quantum of proof obtaining in a criminal case. On a criminal charge, the trial court should not be concerned with preferring one version to another. It should be concerned with whether the prosecution has been able to prove its case beyond reasonable doubt."
>
> (the same principle was affirmed in the case of ***J. Roussety v The State*** [2016 SCJ 27])

(15) Thus, we find that rather than choosing between the two versions before this Court, we must find whether the Prosecution has proved its case against the twelve Accused parties beyond reasonable doubt.

(16) Following the pronouncement in law of the Supreme Court as regards co-authorship and identification and after having considered the evidence adduced before us and in the light of our own findings of facts in our Judgment dated 5 November 2014 we cannot but find that the persons in the whaler and skiff, the twelve Accused parties, are the ones who perpetrated the attack on the MSC Jasmine, therefore the act of piracy against the said vessel.

(17) Based on the above, we find that the Prosecution has proved its case against the twelve Accused parties beyond reasonable doubt.

(18) We have reached this conclusion despite the fact that we still do not find any RPG having been fired against the MSC Jasmine as averred by the Prosecution in the information. In fact, at paragraph 69 of our Judgment, we found the following:

"69. We note however that there is no evidence of an RPG having been fired at the MSC Jasmine, since Messrs Kopanoy and Mykola said that the security guards shouted about an incoming RPG: such evidence is hearsay. Mr Kopanoy heard what he termed 'a big noise' and Mr Mykola heard what he described as a 'really loud sound of metal contact with the ship's hull': however, it is to be borne in mind that Mr Kopanoy said that the Jasmine did not sustain any major damage."

(19) Thus, we cannot rely on hearsay evidence since the security guards were never called as witnesses during the trial. Moreover, there is no evidence of any damage on the ship, which might have been consistent with a 'really loud sound of metal contact with the ship's hull'. It is clear that this part of particulars of the illegal act of violence has not been proved.

(20) However, based on the case of ***Director of Public Prosecutions v Bholah*** **[2011] UKPC 44**, and since this part of particulars of the illegal act of violence was never averred, so that it did not form part of the averments in the information, there is no need for any amendment.

(21) We have also considered the fact that the evidence before this Court is to the effect that the offence took place some 140 NM off the Somali Coast and not 240 NM as averred under the present information. However, since both of these distances are considered as High Seas, we find that there is no prejudice to the Defence case and hence in the light of ***Venkiah v R*** [1984 MR 63] we amend the information so as to delete '240 NM' and substitute it therefore by '140 NM', which now reads 'around 140 NM off the Somali Coast' and bring the information in accordance with the evidence on record. Since we find that there is no prejudice to all twelve Accused parties, we find no reason to read anew the amended information to the twelve Accused parties.

(22) As regards the submissions in relation to the failure to comply with the rules of hot pursuit, we simply need to stress that the skiff and whaler were found at the material times on the High Seas and not 'within the internal waters, the archipelagic waters, the territorial sea or contiguous zone of the Pursuing State' – vide article 111 of the UNCLOS, so that the right of hot pursuit is not applicable in this instance. We have also considered the fact that given the distance off the Somali Coast, it might be within the EEZ of Somalia so that the provisions of article 111(2) of the UNCLOS would apply. However, we note that the Supreme Court made the following observations in its Judgment:

"It is also brought to our attention on appeal that Somalia claimed an EEZ only on 30 June 2014 whereas the alleged offence took place on 5 January 2013. At the time of the alleged offence, Somalia had no EEZ.

Ground of appeal 4 and grounds 1 and 2 of the additional grounds are therefore well taken. The trial Court erred in dismissing the information on the ground that the prosecution has failed to prove that the alleged act of piracy took place on the high seas."

(23) We therefore find that since Somalia did not have any EEZ at the material time and since the Supreme Court has already determined that the attack took place in the High Seas, Article 111 is not applicable in the present matter, since the hot pursuit must be commenced within the territorial seas or, under article 111(2), within the EEZ of the Coastal State.

(24) Furthermore, this right of hot pursuit is applicable only to the competent authorities of the coastal State who have good reason to believe that the ship has violated the laws and regulations of that State and the hot pursuit is in respect of a foreign ship. However, if we consider the spot where the skiff was located at the material time, we find that the Coastal State would have been Somalia and since the skiff and whaler were both from Somalia, we find that the right of hot pursuit as envisaged by article 111 is not applicable in this case.

(25) We therefore find the Prosecution's case against all twelve Accused parties proved beyond reasonable doubt, so that we now find all twelve Accused parties guilty as charged.

W. V. Rangan
Ag. Vice-President

A. I. Neerooa
Magistrate

Intermediate Court
This 14 July 2016

533h

Police v M A Abdeoulkader & Ors

2016 INT 323

IN THE INTERMEDIATE COURT OF MAURITIUS

Cause No.850/2013

In the matter of: -

Police

v

(1) Abdeoulkader Mohamed Ali
(2) Said Mohamed Hassan
(3) Ahmed Mohamed Ismael
(4) Shafi Mohamed Osman
(5) Hassan Salad Omar
(6) Said Omar Farah
(7) Mohamed Abdilahi Ahmed
(8) Ali Hassan Mohamed
(9) Abdi Mohamed Kidiye
(10) Abdi Ahmed Yussuf
(11) Abdillahi Mohamed Ahmed
(12) Mahad Mohamed Ibrahim

JUDGMENT

(1) The twelve Accused are charged with the offence of 'Act of Piracy on High Seas' in breach of sections 3(1)(a), 3(3) and 7 of the Piracy and Maritime Violence Act 2011. They pleaded not guilty to the charge and were all assisted by counsel.

(2) On 6 November 2014 the Intermediate Court dismissed the case against all twelve Accused parties.

(3) The Director of Public Prosecution appealed against the decision of the Intermediate Court and on 18 December 2015 the Supreme Court remitted the case back to the Intermediate Court directing it *"to proceed in the light of our pronouncements in law, with its determination on an amended information curing the defect pinpointed in the present judgment and giving the respondents ample opportunity to present their defence to the amended information, and if necessary to cross examine further the prosecution witnesses or call other witnesses in their defence."*

(4) The Supreme Court also said *"It is our view that in fairness to the respondents, they should be given the opportunity to plead anew to an amended information with the element of "for private ends" and to adduce further evidence which they may wish to adduce."*

(5) The Supreme Court said *"It is common ground that "for private ends" is a constitutive element of the offence of piracy under customary international law and under article 101 of UNCLOS."* but went on to say that the failure of the prosecution to aver the element of 'for private ends' *"... was not such as to render the information so bad that the proceedings were a nullity."* The Supreme Court further said *"There are compelling reasons in the present case for the trial Court to have proceeded to cure the omission according to the guidelines set out in Venkiah. It could have amended the information and given the respondents the opportunity to plead anew and to adduce evidence, if need be. Such a course of action would also have served the interests of justice."*

(6) Accordingly an amendment was brought to the charge, to include the element of *'private ends'*, without any objection from the defence. The information now discloses an offence in law and reads as follows: "*on or about the 5th day of January in the year 2013, on the high seas, around 240 Nautical Miles off the Somali Coast... did wilfully and unlawfully commit an act of piracy, to wit an illegal act of violence for private ends by the crew of a private ship directed against the MSC Jasmine, a Panama flag Merchant Vessel which was proceeding from Salalah/Oman to Mombassa/Kenya."*

(7) The prosecution called LCDR Donald J. Clemons (witness no.7) and Lt. Alex W. Haupt (witness no.8) and tendered them for cross-examination.

(8) The defence did not adduce evidence.

(9) The case was also remitted to the Intermediate Court because *"...it did not consider whether the skiff and the whaler intercepted were the very vessels which participated in the attack or whether they were 'at the wrong place at the wrong moment.'"* and because it failed *"to say specifically and clearly whether the respondents were the ones who carried out the attack on the MSC Jasmine or they were innocent fishermen plying their occupation"*.

(10) We refer to paragraph 57 of our Judgment where we found there was an attack, but since we also found that the issue of co-authorship and identification had remained unsolved, the twelve Accused parties could not be found guilty as per the present Information.

(11) On the issue of identification and co-authorship, in the light of the pronouncement of the Supreme Court to the effect that *"If the evidence and version of the prosecution are retained, it is amply proved that the occupants of the whaler and those of the skiff had to act together to carry out the PAG and they were on a 'common enterprise', the participation of each member of the group being essential to the commission of the attack. In view of the nature of the operation on the high seas and the involvement of each member of the group, be it on board of the whaler or the skiff, in the perpetration of the alleged attack, they could only be co-authors and not mere accomplices. The trial Court erred in concluding that the occupants of the whaler are "at best accomplices..." and that the prosecution should have led evidence as to the identity of the occupants of the skiff who were the only ones who perpetrated the attack. The appeal must also succeed on Grounds 2, 3 and 5 namely of the grounds of appeal and grounds 3 and 9 of the additional grounds which are well taken."*, we now find that there is no difficulty whatsoever to find all that twelve Accused are co-authors and that the issue of identification has now become a dead issue.

(12) We need none the less say that our judgment was based on tried and tested authorities on co-authorship. In fact, in the most recent case of ***N. Agathe v State*** [2016 SCJ 231], the Supreme Court again affirmed the principles used by this trial Court.

(13) However, we also understand that there are distinct schools of thoughts on this issue in French jurisprudence. Be that as it may, we are bound by the specific pronouncements in law made by the Supreme Court.

(14) The case was remitted to us to make a determination on the *"pivotal issue"* namely whether the twelve Accused parties were the ones who attacked the MSC Jasmine or were innocent fisherman, i.e., to choose between the two versions before this Court. We find the case of ***J. B. Bernard v The State*** [2012 SCJ 31] relevant. One of the grounds of appeal before the Supreme Court was that the trial Court should have accepted the appellant's version. Domah J. (as he was then) and Chan Kan Cheong J. had this to say:

> "[11] This ground assumes that a criminal case is decided by the trial court on the choice of versions, as between that of the prosecution and that of the defence. That is a misapplication of the fundamentals as regards the quantum of proof obtaining in a criminal case. On a criminal charge, the trial court should not be concerned with preferring one version to another. It should be concerned with whether the prosecution has been able to prove its case beyond reasonable doubt."

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W. V. Rangan
Ag. Vice-President

A. I. Neerooa
Magistrate

Intermediate Court
This 14 July 2016

Police v M A Abdeoulkader & Ors

2016 INT 324

IN THE INTERMEDIATE COURT OF MAURITIUS

Cause No.850/2013

In the matter of: -

Police

v

(1) Abdeoulkader Mohamed Ali
(2) Said Mohamed Hassan
(3) Ahmed Mohamed Ismael
(4) Shafi Mohamed Osman
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JUDGMENT

(1) The twelve Accused are charged with the offence of 'Act of Piracy on High Seas' in breach of sections 3(1)(a), 3(3) and 7 of the Piracy and Maritime Violence Act 2011. They pleaded not guilty to the charge and were all assisted by counsel.

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W. V. Rangan
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