

041

SCSL-2003-06-PT-041

1055

(1055-1065)

**SPECIAL COURT FOR SIERRA LEONE
FREETOWN - SIERRA LEONE**

Before: Judge Bankole Thompson,
Designated Judge

Registrar: Robin Vincent

Date Filed: 9th June 2003

THE PROSECUTOR

Against

ALEX TAMBA BRIMA

also known as (aka) TAMBA ALEX BRIMA aka GULLIT

CASE NO. SCSL-2003-06-PT

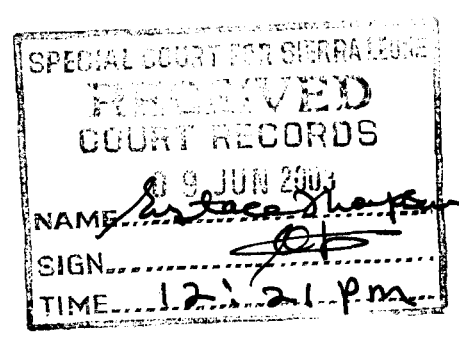
**DEFENCE REPLY TO PROSECUTION RESPONSE TO DEFENCE MOTION
FOR BAIL OR FOR PROVISIONAL RELEASE**

Office of the Prosecutor:

Defence Counsel:

The Prosecutor,
Luc Côté,
Nicholas Browne-Marke
Boi-Tia Stevens
Brenda J. Hollis, Senior Trial Counsel
The Director of Prisons of the Republic of Sierra Leone
The Officer in Charge - Special Court Detention Facility
Centre in Bonthe.
The Hon. Attorney General and Minister of Justice of the
Republic of Sierra Leone

Terence Michael Terry



**SPECIAL COURT FOR SIERRA LEONE
FREETOWN – SIERRA LEONE**

THE PROSECUTOR

Against

ALEX TAMBA BRIMA

also known as (aka) TAMBA ALEX BRIMA aka GULLIT

CASE NO. SCSL-2003-06-PT

**DEFENCE REPLY TO PROSECUTION RESPONSE TO DEFENCE MOTION
FOR BAIL OR FOR PROVISIONAL RELEASE**

Office of the Prosecutor:

Defence Counsel:

The Prosecutor,
Luc Côté,
Nicholas Browne-Marke
Boi-Tia Stevens
Brenda J. Hollis, Senior Trial Counsel
The Director of Prisons of the Republic of Sierra Leone
The Officer in Charge - Special Court Detention Facility
Centre in Bonthe.
The Hon. Attorney General and Minister of Justice of the
Republic of Sierra Leone

Terence Michael Terry

Argument in Reply: To Prosecution Response to Defence Motion for Bail OR Provisional Release

Defence submits as a preliminary issue that the response of the Prosecution which was dated the 5th day of June 2000 is fundamentally flawed and invalid for the simple reason that on the 5th day of June 2000 neither the Special Court for Sierra Leone was in existence nor was the Accused at that time facing any charges against his person by the Special Court. Indeed this preliminary issue the Defence submits goes to the root of the Prosecution's response and to that extent, the said response of the Prosecution so dated the 5th June 2000 ought to be disregarded and dismissed and/OR set aside in limine.

Assuming without conceding that notwithstanding this serious and fundamental error referred to in the immediate preceding paragraph, the trial Chamber or Judge of the Special Court for Sierra Leone holds otherwise and is inclined to consider the merits of the Prosecution's response to the Defence Motion for bail or for Provisional Release, then out of an abundance of caution Defence now submits the following in reply to the Prosecution's response:-

In reply to the prosecution's contention that by applying for bail in this case, the Accused has conceded to the legality of his arrest, the defence submits in reply that that is a non-sequitur as the contention of the Defence was predicated in Two-Stages namely: that so long as the order of Judge Bankole Thompson of the 7th March 2003 purporting to arrest the Accused Tamba Alex Brima is declared invalid, null and void, then the issue of bail becomes academic. The Defence submits that the thrust of Defence earlier submission regarding these two issues have with respect been misconceived by the Prosecution. The prosecution then in the alternative proceeded to submit that "should the Honourable Judge or Trial Chamber deem the legality of an arrest and detention of relevance to an application for bail, the prosecution hereby incorporates by reference the arguments on the validity of the Indictment against the Accused and the validity of the Warrant of Arrest and order for transfer and Detention of the Accused as contained in the prosecution's Response to Defence Motion for leave to issue Writ of Habeas Corpus which is annexed hereto as Attachment A".

The Defence in reply submits that the issue raised by the prosecution namely: The legality of an arrest and Detention being relevant to an application for bail is not and cannot be the only issue in this instant case. Defence submission was predicated on the assumption that if the Order of Judge Bankole Thompson of the 7th March 2003 was invalid, null and void at its inception then the question of bail would not arise; Put simply therefore, the legality of the arrest and detention of the Accused simpliciter is separate and distinct from the merits of the bail application. Defence further submits the stage of determining the bail application will not fall to be considered once the decision and consequential orders of Judge Bankole Thompson of 7th March 2003 are ultimately held not to stand for the reasons canvassed for setting aside and/OR vacating that particular Order of Judge Bankole Thompson of 7th March 2003 as contained in the Defence Motion for Bail OR Provisional Release dated the 23rd of May 2003.

Defence submits that the position is correctly stated by the Prosecution regarding Rule 65 of the Rules of Procedure and Evidence of the Special Court for Sierra Leone and Rule 65 of the ICTY Rules of Procedure and Evidence as amended on the 12th December 2002, (IT/32/REV.26). But Defence part company with the prosecution where the prosecution under paragraph 8 wrongly and incorrectly mentioned that the Defence at page 2 of its Motion, erroneously states that there is a requirement of “exceptional circumstances” under Rule 65 of the I.C.TY Rules. To put it rather mildly, the Defence submits that the Prosecution wrongly and rather misleadingly and totally out of context misconstrued what the Defence submitted relating to the issue of exceptional circumstances. To highlight what defence properly submitted Defence hereby reproduce that passage in extenso which reads as follows:-

“Indeed Rule 65(B) of the Rules of Procedure and Evidence of the Special Court for Sierra Leone is analogous to 65(B) of the International Tribunal for the former Yugoslavia in Rule 65(B) as afore-mentioned though in the International Tribunal for former Yugoslavia there is the additional requirement of proof of exceptional circumstances”. The operative words in that passage which the Prosecution with respect has misconstrued are though in the International Tribunal for former Yugoslavia there is the additional requirement of proof of exceptional circumstances.

Taking this quoted passage in its proper context Counsel for the defence acknowledged that the additional requirement of proof of exceptional circumstances is a matter to be considered in Yugoslavia. But Counsel for the Defence at no time submitted that the requirement of exceptional circumstances is applicable to an application for Bail under any provisions of the Rules of Procedure and Evidence of the Special Court for Sierra Leone.

Defence further submits that having regard to its submissions in the immediate preceding paragraphs it does not need to address Prosecution’s submission under 9. Furthermore Defence agrees with and in no way quarrels with the mandatory interpretation placed by the Prosecution as a result of the use of the word “shall” which appears in Rule 65(A) of the Rules of Procedure and Evidence of the Special Court for Sierra Leone.

The Prosecution then submits under paragraph 11 at page 3 that the burden is on the Accused to satisfy the Court that he should be released on bail. In reply Defence submits that that burden has been amply satisfied by the Accused Tamba Alex Brima based on the facts deposed to in his affidavit of 23rd May 2003.

As regards paragraph 12 at page 4 of the prosecution’s Response the Defence in reply submits that based on the affidavit of the Accused Tamba Alex Brima herein sworn to on the 23rd day of May 2003 the two-prong test envisaged under 65(B) were adequately satisfied and contrary to the submission of the Prosecution, the Defence submits in reply that the Accused in his affidavit in support of the bail application clearly fulfilled the requirement that he will appear for trial and if released, he will not pose a danger to any victim, witness or other person.

THE ACCUSED WILL APPEAR FOR TRIAL - Mention by the Prosecution under paragraph 13 at page 4 of its response that the Court should consider that it lacks its own means to execute a warrant of arrest, or to re-arrest an Accused who is released on bail; and that the Court must rely on the cooperation of states for the surveillance of an Accused who has been released is not of moment and clearly is a red-herring in the instant case.

Defence further submits that the foregoing two matters just mentioned may well be true and may well hold good in certain circumstances. But Defence submits in reply however that those two reasons taken singly and/OR cumulatively can hardly amount to valid reasons to justifiably negate the clear unequivocal statement on oath by the Accused herein Tamba Alex Brima in this instant case that he will at no time fail to appear for his trial before the Special Court for Sierra Leone.

The prosecution reference under paragraph 14 at page 4 of its response to the declarations made by Mr. Morie Lengor, former Investigator at the office of the prosecutor, Mr. Keith Biddle, former Inspector-General of the Sierra Leone Police and Mr. Brima Acha Kamara, Inspector-General of the Sierra Leone Police attached as Attachments B, C and D respectively is not of moment, at best totally irrelevant and unrelated to the instant bail application and furthermore are clearly without merit and begs the issue altogether.

Furthermore the Prosecution then mentioned and I quote that “This reality greatly adds to the difficulty of finding an Accused who flees and seeks to evade capture” That stance taken by the prosecution, the defence submits presupposes that the Accused will flee and seek to evade capture – a submission by the prosecution which the Defence now submits can only be speculative in its nature and content - nothing more nothing less.

Against that backdrop, Defence submits are the facts deposed to in the affidavit of Tamba Alex Brima sworn to on the 23rd day of May 2003 in support of the Accused Motion dated the 23rd of May 2003 that he will attend his trial at all times, and that his leaving the country will never arise as he only knows of one home. Indeed the sum total of the facts contained in his said affidavit amount to the fact that his umbilical cord is tied to Sierra Leone his father land, his wife, his son and members of his family who are all living in Sierra Leone, and he has nowhere else to go OR to flee to.

As regards paragraph 16 of the Prosecution’s response the same argument canvassed in reply by the Defence to paragraph 14 at page 4 of the Prosecution’s response applies mutatis mutandis to paragraph 16.

Reference to the recent escape of Johnny Paul Koroma mentioned at page 5, paragraph 16 of the Prosecution’s response has no bearing OR nexus to the Accused situation herein for the reasons already mentioned in the preceding paragraphs of the Defence reply.

Defence therefore submits that the escape of Johnny Paul Koroma as mentioned by the Prosecution in its response is totally a non-issue in so far as the Accused is concerned. As regards the position canvassed by the Prosecution under paragraph 17 at page 5 of its response again, the Defence in reply adopts the same reasons proffered in the preceding above paragraphs.

As regards the prosecution request that the Court should also consider that the subject Jurisdiction of the Court is limited to serious offences, meaning that, if convicted the Accused would likely face lengthy prison sentence and that this is especially true in the light of the high position the Accused is alleged to have held in the AFRC/RUF and this reality gives the Accused more reason to flee, the Defence in reply submits that is a non-sequitur and once again puts the Prosecution's position for the Court to refuse Bail OR Provisional Release in the realm of speculation.

If released, the Accused will not pose a danger to any victim, witness or other person.

As regards paragraph 19 at page 5 of the response of the prosecution, the prosecution submits that there are 2 major factors the Court should consider in determining if the Accused has met his burden of satisfying the Court that, if released, he will not pose a danger to any victim, witness or other person:- Firstly the fact that the Accused could likely face lengthy confinement the Prosecution also increases the risk that the Accused will if released on bail attempt to harm, intimidate OR harass potential witnesses is unsustainable. Defence therefore submits that this first factor verges on the realm of speculation on the particular facts of this instant case

Again in reply Defence submits that this is at best speculative. Furthermore the second factor mentioned by the Prosecution that the said risk is further heightened by the fact that the Accused now knows specific charges against him enabling him to identify the potential evidence against him may well be true to a limited extent, but the Defence will submit that that particular factor verges on the insignificance and also reaches the realm of speculation.

Paragraph 20 at page 6 of the Prosecution's response cannot really be seriously considered for the matters mentioned therein have no merit whatsoever to tilt the balance against admitting the Accused to bail OR Provisional Release.

In reply to paragraph 21 at page 6 of the Prosecution's response and at the risk of being repetitious, the Defence submits that the Accused has satisfied the Court that he would appear for trial, and, if released, will not pose a danger to any victim, witness OR other person and to that extent Defence submits with respect that the Accused bail application ought to succeed.

In response to paragraph 22 at page 6 of the Prosecution's response, the Defence agrees with the Prosecution that the Court has the discretion to deny the Accused's application for bail even if the Accused satisfies the Court of the above two prongs. However the Defence adds the following rider to wit that the discretion to deny the Accused's application for bail must be one arrived at according to law and within known acceptable principles in governing the exercise of discretion to grant OR deny the Accused bail before trial and/OR before conviction and the relevant factors specifically alluded to under the express provisions of the Rules of Procedure and Evidence of the Special Court for Sierra Leone.

In reply to paragraph 23 at page 6 of the Prosecution’s response, the Defence agrees with the Prosecution that the Rules of Procedure and Evidence of the Special Court for Sierra Leone provides that it must hear the state of the Country namely the Republic of Sierra Leone to which the Accused seeks to be released. What however Defence submits the rules do not state is what the Prosecution seeks to rely upon namely that Sierra Leone which is the Country to which the Accused seeks to be released has not stated in a properly authorized manner that it is prepared to accept responsibility for his attendance and appearance in Court.

Seriousness of the Crimes charged.

This issue regarding the seriousness of the crimes in respect of which the Accused is charged under International Humanitarian Law may well be a consideration but Defence submits that to treat this matter in isolation against the backdrop of allegations of the unlawful detention of the Accused which ought to be determined as a preliminary issue is with respect undoubtedly a matter to be considered by the Court.

Possibility of destruction of evidence

As regards paragraph 25 at page 7 of the Prosecution’s response, it was canvassed by the Prosecution that the Court should consider the possibility, that, if released, an Accused may alone, with co-Accused who remain at large, or with members of armed factions with whom the Accused is affiliated, destroy documentary evidence or “(efface) traces of alleged crimes”. In reply to that, it is submitted by Defence that the just quoted passage is not germane to the instant case for reference is made in that passage to co-Accused who remain at large. In this instant case when properly considered, there is no question of a co-Accused who remains at large. Defence submission in this regard is further buttressed by the fact that the indictment against the Accused does not include any co-Accused nor do any other indictment so far taken out by the Prosecution against any indictee for that matter specifically included or referred to any co-Accused. To that extent therefore, reference by the Prosecution that it is still investigating the case does not take this issue one step further.

Potential conspiracy with co-Accused who remain at large – The same argument again applies mutatis mutandis to paragraph 26 at page 7 of the Prosecution’s response namely: that in reply thereto the present indictment against the Accused does not include other co-Accused who remain at large with whom he could conspire.

The further reference by the Prosecution to one Johnny Paul Koroma is clearly a red-herring and not of moment. Whether or not the Accused was at the residence of Johnny Paul Kamara which is totally different from Johnny Paul Koroma is totally irrelevant and ought to be disregarded. It is to be noted that the Prosecution mentioned one Johnny Paul Kamara under paragraph 26 of page 7 at lines 22 to 23 of its response when earlier on it referred to one Johnny Paul Koroma under the same paragraph 26 thereby putting the Court to an election to decide which of these two names is the correct individual OR person it seeks to rely upon.

As regards paragraph 27 at pages 7 to 8 of the Prosecution's response the Defence submits in reply that in the light of the several above submissions by the Defence Counsel for and on behalf of the Accused, it is therefore beyond doubt that the Accused has met the burden which squarely rest upon him to satisfy the Court of the two-prong test set out in Rule 65 of the Rules Procedure and Evidence of the Special Court for Sierra Leone and has additionally gone the extra mile to satisfy the Court that the fact and circumstances of this instant case do warrant the exercise of its discretion in favour of releasing the Accused on bail.

The Affidavit of the Accused

Contrary to the assertions contained in paragraph 28 at page 8 of the Prosecution's response, the Defence submits that paragraphs 1 to 8 of the said Affidavit of the Accused herein Tamba Alex Brima is not only true, but also relevant to the bail application as the combined effect of those paragraphs give the chronological history of this case involving the Accused person and the relevant circumstances leading up to the application for bail OR Provisional Release.

In reply to paragraph 29 on page 8 of the response of the Prosecution to Defence motion for bail, the Defence submits that the assertions made in paragraphs 9 through 11 of the affidavit of the Accused are not misleading and are true to the best of the knowledge, information and belief of the Accused Tamba Alex Brima. In so far as the service of the warrant of arrest is concerned the Defence relies on the several submissions made in respect of this matter in the Defence motion for bail or for provisional release dated the 23rd of May 2003.

In respect of paragraph 30 at page 8 of the Prosecution's response, the Defence submits that whilst the Prosecution did recognize the assertions in paragraphs 13 to 16 of the Accused's affidavit and did emphasize that they are not insensitive to the unfavourable impact of criminal proceedings on the Accused's family, the Prosecution took the view that they are not sufficient basis to allow bail for the Accused. In reply to that submission, the Defence is not saying that those assertions taken on their own without more constitute sufficient basis to allow bail for the Accused but that those assertions ought with respect to be taken into consideration by the Court on the overall as factor OR factors to be properly weighed and evaluated in the exercise of the Court's discretion whether or not to allow bail to the Accused OR Provisional Release to him as the case may be.

In reply to paragraph 31 at page 8 of the response of the Prosecution, the Defence submits that the health problems mentioned by the Accused in the said affidavit are not only serious enough, but do constitute valid grounds for releasing him from the custody of the Special Court whether or not medical services are provided in the distant island of Bonthe where access to drugs and other important laboratory tests are non-existent for the purposes of a diabetic and high blood pressure patient as alleged by the Accused in his affidavit.

In this instant case, Defence submits it is easy to see what difficulty beset the accused in a far off island in Bonthe which apart from Helicopter services available once a week, entails his Defence Counsel traveling by land and sea for approximately a day to get there, and to that extent limits OR restrict adequate access of the accused to his Defence Counsel.

In reply to paragraph 32 at page 9 of the Prosecution's response, the Defence submits that the assertions in paragraphs 19 to 21 and 27 of the affidavit of the Accused are indeed sufficient to justify granting bail OR Provisional Release to the Accused and will further rely on the conditions on liberty mentioned by the Accused in paragraph 20 of the affidavit of the Accused which are indeed sufficient to guaranty the Accused's presence at the trial or that he will not contact or attempt to interfere with witnesses. To that extent the Defence will rely on arguments made above in this connection and in Defence motion dated the 23rd of May 2003 for bail or Provisional Release.

As regards paragraph 33 at page 9 of the Prosecution's response, the Defence will submit in reply that based on the several above submissions, it is beyond doubt that the Accused has met the two-prong test already referred to above to warrant the Court considering the length of pre-trial detention as a factor in its determination regarding whether or not to exercise its discretion in the favour of the Accused.

Furthermore Defence submits that the combined effect of the length of time so far spent in custody by the Accused and the strong possibility that he will continue to be in custody for a further six months or thereabout when the Court premises will perhaps be ready for the trial proper is a clear indication that such a situation violates his rights under Article 17(4) (Rights of the Accused) of the Special Court Agreement (Ratification) Act 2002.

In reply to paragraph 34 at page 9 of the Prosecution's response, Defence does not agree with the Prosecution's submission that there is no specific number of days of detention after which the Accused's right to trial without undue delay is automatically violated; and further submits that the factors so mentioned namely: "the nature and character of international tribunals, including the complexity of the cases involving charges such as those before this Court and the limited resources available to the Court are not to be put on the level of the Delphic oracle and therefore the Decision on Motion by Radosla .v. Brdanin with respect ought to be looked at on its own special facts and circumstances. Defence therefore submits that that case is totally distinguishable from the instant case.

Contrary to what is stated at page 9 paragraph 35 of the Prosecution's response, the Defence maintains and submits that the assertions in paragraph 30 of the affidavit of the Accused are well founded; and when properly considered with respect do warrant the Court to exercise its discretion to release the Accused on bail OR Provisional Release. Furthermore, whereas the Defence cannot lay lack of proper access by the accused to Counsel at the doorstep of the Registry OR Registrar, the Complaint however defence submits is that the present location of the Accused in Bonthe where he is presently detained is a distant island necessitating helicopter services, - 45 minutes one way by helicopter services and its availability only once a week after clearance from UNAMSIL

do constitute a serious impediment regarding appropriate access of the Accused to his Counsel which to all intent and purposes is not (emphasis mine) of the Registry's creation.

The matters referred to at page 9 paragraph 36 of the Prosecution's response is rather confused and with respect unintelligible but to the extent that the Defence can decipher the facts therein to suggest that the Accused's statements in paragraphs 9 and 11 of his affidavit are both misleading and false; the Defence submits in reply that such a position taken by the Prosecution is unsustainable; at best unsupportable; because it fails to descend into particulars to support such serious allegations of misleading and false statements. To that extent therefore, Defence submits that no weight should be given to what is canvassed in paragraph 36 of page 9 of the Prosecution's response.

Violation of practice directive for filing documents

In reply to paragraph 37 at page 10 of the Prosecution's response, relating to spacing and page requirement for written motions as allegedly provided for under the Special Court directive for filing documents, the Defence does not share the Prosecution's view as expressed therein and in anyway further submits that on the assumption that the Prosecution's position is correct these are matters that go to form and not substance. Furthermore, Defence submits that the Prosecution by filing its response to the Defence Motion of 23rd May 2003 has accordingly waived its right in so far as it relates to any alleged defect OR irregularity if at all to form complained against for the simple reason that it has filed its response to the Defence Motion for bail or Provisional Release and cannot thereafter be heard to complain on those issues.

CONCLUSION

In reply to the Prosecution's response on page 10 paragraph 38 of its response, Defence submits that the Accused has in no way failed to provide sufficient proof to satisfy the two-prong tests envisaged under Rule 65 of the Rules of Procedure and Evidence of the Special Court for Sierra Leone.

Furthermore Defence submits that in the light of the several submissions made on behalf of the Accused herein and having regard to the special facts and circumstances in this instant case, this is a proper case in which the Accused has satisfied the Court that it should with respect proceed to exercise its discretion in his favour in granting bail or provisional release as the case may be.

Done in Freetown the 9th day of June 2003.

For the Defence
Terence Michael Terry

**SPECIAL COURT FOR SIERRA LEONE
FREETOWN – SIERRA LEONE**

Before: Judge Bankole Thompson,
Designated Judge

Registrar: Robin Vincent

Date Filed: 9th June 2003

THE PROSECUTOR

Against

ALEX TAMBA BRIMA

also known as (aka) TAMBA ALEX BRIMA aka GULLIT

CASE NO. SCSL-2003-06-PT

**DEFENCE REPLY TO PROSECUTION RESPONSE TO DEFENCE MOTION
FOR BAIL OR FOR PROVISIONAL RELEASE**

Office of the Prosecutor:

Defence Counsel:

The Prosecutor,
Luc Côté,
Nicholas Browne-Marke
Boi-Tia Stevens
Brenda J. Hollis, Senior Trial Counsel
The Director of Prisons of the Republic of Sierra Leone
The Officer in Charge - Special Court Detention Facility
Centre in Bonthe.
The Hon. Attorney General and Minister of Justice of the
Republic of Sierra Leone

Terence Michael Terry