

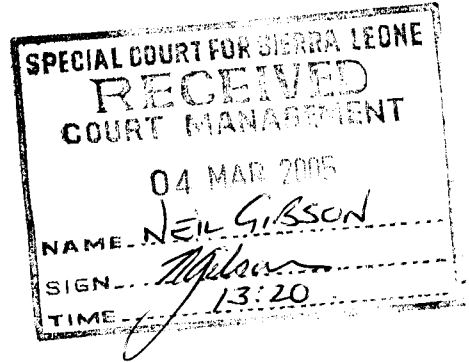
THE SPECIAL COURT FOR SIERRA LEONE Case No. SCSL-2004-16-PT

BEFORE:

Judge Teresa Doherty, Presiding
Judge Julia Sebutinde
Judge Richard Lissack

Registrar: Mr Robin Vincent

Date Filed: 4^k March 2005



The Prosecutor

-v-

ALEX TAMBA BRIMA also known as TAMBA ALEX BRIMA also known as GULLIT

BRIMA BAZZY KAMARA also known as IBRAHIM BAZZY KAMARA also known as ALHAJI IBRAHIM KAMARA

And

SANTIGIE BORBOR KANU ALSO KNOWN AS 55 also known as FIVE - FIVE also known as SANTIGIE KHANU also known as SANTIGIE BOBSON KANU also known as BORBOR SANTIGIE KANU

CASE NO. SCSL-2004-16-PT

RENEWED DEFENCE MOTION FOR DEFECTS IN THE FORM OF THE INDICTMENT AND APPLICATION FOR EXTENSION OF TIME (IF APPLICABLE)

Office of the Prosecutor

Luc Coté
Lesley Taylor
Boi-Tia Stevens
Millicent Stronge

Defence Counsel

Kevin Metzger
Glenna Thompson
Kojo Graham

1. The Defence notes the decision of Trial Chamber II, dated 2nd March 2005 and the Prosecution's response filed 3rd March 2005 in relation to the Original Defence Motion for Defects in the Form of the Indictment, dated 1st March 2005.
2. Any omission by the Defence in referring the Honourable Trial Chamber to what we submit is the proper basis for this motion is regretted. It is however our contention that the Rules as they stand provide support, in the form of rules 66(A)(ii) and 72(A), (B)(ii) and (F), for our original motion without an application for the extension of time.
3. Firstly, it is respectfully submitted that Rule 66(A)(ii) provides for the continuous disclosure by the Prosecution of material it intends to call. Indeed the Prosecution has availed itself of this provision by continuing to serve additional materials¹. Some of these additional materials have been obtained as recently as 11th to 12th February 2005.
4. Furthermore, it is submitted that the Prosecution has served a Further Consolidated Amended Indictment² and, respectfully, the effect of the Honourable Court's Decision does not take into account the right of the Defence to make Preliminary Motions pursuant to Rule 72(A). We respectfully submit that following the filing of this new Indictment and further disclosures the Defence ought properly to be allowed to file proper objections to the form of the Indictment as we have proposed by virtue of our earlier motion. In this case it appears that no consideration was given to the Defence in that there appears to have been no order relating to procedural matters following the filing of said new Indictment, although consideration was given to the "Order on Expedited Filing and Scheduling Order of the Trial Chamber on 7 February 2005"³.

¹ See Prosecution proposed order of first witnesses to be called and their statements, together with Annex A therein which details a number of statements which appear to have been taken as recently as 11th to 12th February 2005.

² Having withdrawn Counts 15 to 18 of the previous Consolidated Amended Indictment, arguably in breach of the letter of Rule 51(B) as the withdrawal was done in written form as opposed to in open court.

³ Decision on the Prosecution Application to Further Amend The Amended Consolidated Indictment by Withdrawing Counts 15-18

5. Additionally, it is submitted that the Decision of Trial Chamber I in the Issa Hasan Sesay case⁴ has clearly not been complied with in the case currently before this Chamber in that no amendments at all have been made to the form of the Further Consolidated Amended Indictment as recommended by Trial Chamber I in that case.
6. Further, or alternatively the Defence urges the Trial Chamber to allow an extension of time for the filing of this motion, in order that the Accused can continue to rely on his right to a fair trial within the contemplation of the Rules of Procedure.
7. It is further submitted that there has been non-compliance with the rules⁵ in that there would be an apparent breach of Rule 4 in that the President's order granting Hon. Judge Julia Sebutinde to exercise her function postdates the filing of the filed decision of Trial Chamber II..
8. The Defence notes with concern that the date on the face of the Decision is 2nd March 2005, which is also the date the decision was made. This pre dates the Prosecution's own response to the Defence motion which was filed on 3rd March.
9. In the circumstances the Trial Chamber is respectfully urged to reconsider its decision. Should the Chamber not be so inclined, then it is respectfully submitted that this motion be referred to the Appeal Chamber for its consideration under Rule 72(F), in view of the submitted non-compliance with Rule 4.
10. The original motion is reproduced in the following paragraphs.
11. The Defence submits this motion pursuant to Rule 72 (B) ii of the Rules of Procedure and Evidence of the Special Court for Sierra Leone.

⁴ Cited below

⁵ Pursuant to Rule 5 of the Rules of Procedure.

12. The Defence submits that the indictment⁶ as presently drafted contains wide allegations which make it extremely difficult for the Defence to know the case it has to meet. Prosecution ought to be able to particularise the allegations it makes.
13. This is made all the more difficult because the Prosecution has sought to allege an AFRC/RUF alliance, thus making it impossible to distinguish what the AFRC is supposed to have done, what the individual accused is alleged to have done and what acts the RUF are said to be responsible for. The Prosecution is invited to detail specifically the “armed attacks” it relies on and to sever the RUF connection it has hitherto relied on so as to afford the accused person a fair opportunity of defending himself against these allegations. The Defence wishes the Trial Chamber to note that the Prosecutions application for joinder of the AFRC and RUF cases was dismissed by Trial Chamber 1⁷. Notwithstanding that, the Prosecution appears to be seeking to lead evidence of crimes said to have been committed by the RUF in order to convict the AFRC accused persons. The Defence therefore asks that the Prosecution specify which crimes those they have charged committed as we respectfully submit they cannot answer for the crimes of others.
14. Furthermore the Defence would also submit that Paragraphs 33, 34, 35, 36, 37 and 38 are imprecise and non-specific in nature. Whilst the Defence case is that the accused person never involved himself in a common plan, purpose or design as alleged, or at all, the Defence is equally handicapped in not being able to decipher exactly what the case is against the Defendant. In particular it is submitted that paragraph 33 does not form the basis of an offence that falls within the mandate of this court. Furthermore paragraph 36 is particularly offensive in its all encompassing nature, rolling up the doctrines of superior, command and individual responsibility.
15. The Defence wishes it to be noted that quite apart from the generality of the allegations, the Prosecution has compounded this by asserting alternative but

⁶ Where indictment appears, this refers to the Further Consolidated Amended Indictment dated 18th February 2005.

⁷ See SCSL-03-09-PT-078

mutually exclusive forms of liability. The Prosecution is alleging that Tamba Brima's criminal liability is founded in command responsibility⁸ and individual criminal responsibility⁹ which also includes joint criminal responsibility. This uncertainty, clearly exhibited, is unfair to the Defence and hampers the Defence's preparation of its case. We therefore humbly request that the Prosecution use its best endeavours to bring clarity to the allegations against this accused.

16. The Defence submits that the indictment is vague, there is no mention of specific dates when the offences are alleged to have taken place, for example. This inhibits the accused in preparing his defence particularly in establishing alibi. The Prosecutor has instead relied on expansive time frames expressed for example in paragraph 44 of the indictment as

*'between about 25th May 1997 and about 19th February 1998.....'*¹⁰

The Defence will rely on the case of *Blaskic*¹¹ and *Prosecutor v Issa Hasan Sesay*¹². The Defence complains further that none of the victims of the alleged offences are named. The victims of the unlawful killing in counts 3 -5 are not named nor are the victims of 'widespread physical violence, including mutilations' in Counts 10 to 11 or the victims of abductions and forced labour in Count 13. This demonstrates further the imprecise nature of the indictment. Whilst the Defence understands the need for reasonable precautions, accepting the existence of Witness Protection Orders, it is respectfully submitted that the Prosecution ought properly to provide sufficient information in the indictment, or in a supplementary document, to place the accused in a position of knowing the case he has to meet.

17. The Defence would submit that the indictment should be drafted in such a way as to enable a Defendant to know with as much particularity as the circumstances permit about the case he has to meet. There should be better identification of

⁸ Article 6(3) of the Statute

⁹ Article 6 (1)

¹⁰ See for example paragraphs 43 and 44. This is repeated throughout the indictment.

¹¹ Decision on the Defence motion to dismiss the indictment based upon defects in the form thereof (vagueness/lack of adequate notice of charges - dated 4th April 1997.

¹² Decision and Order on Defence Preliminary Motion for Defects in the form of the Indictment dated 13th October 2003

specific incidents to what the various counts relate especially as to the events are said to have taken place. The Defence will rely on the case of *Rackham [1997] 2 Cr App R 222*.

18. The Defence also requests that the Prosecution should clarify the meaning of the phrase "...or who were no longer taking an active part in the hostilities"¹³. This definition, it is submitted fails to identify the persons or group of persons the Prosecution are referring to sufficiently so as to enable the Defence to assess the import of this phrase and commence potentially necessary and relevant investigations to refute the allegation made.
19. The Defence therefore seeks an order in relation to the following as regards each count against Tamba Brima:
- a. Counts 1 and 2 are, it is submitted, insufficiently precise and are therefore defective. Further, or in the alternative they appear to incorporate Counts 3 to 14, even to the extent that Paragraph 41 of the Indictment concedes this. The Defence submits that the Prosecution should be ordered to consider the duplicity in these allegations or state clearly where alternative, substantive, allegations are made in respect of the general formulation Counts 1 and 2.
 - b. Counts 6 to 9 suffer from a significant lack of particularisation and, as with all other counts, objection is taken to the use of the joint term "AFRC/RUF" on the basis that the Defence denies any joint participation with the RUF in relation to any allegation on this indictment.
 - c. Counts 10 to 11 again lack particularity. It is submitted that the Prosecution should properly list the incidents that are relied on so that the Defence is given a fair picture of the case it has to meet. As currently drafted the indictment serves the interest of the Prosecution in

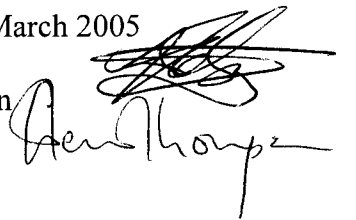
¹³ Paragraph 20 of the indictment.

that it leaves the possibility of widening the net once, or even after, evidence has been called.

- d. It is submitted that there is no prima facie evidence that the Accused was ever involved in the use of child soldiers as alleged in Count 12 or forced labour as alleged in Count 13. The Prosecutor is respectfully invited to particularise which particular acts or omissions are relied on against this Accused.

Respectfully submitted

This 4th day of March 2005
Kevin Metzger
Glenna Thompson

Handwritten signatures of Kevin Metzger and Glenna Thompson. The signature of Kevin Metzger is written over the name 'Kevin Metzger' and the signature of Glenna Thompson is written over the name 'Glenna Thompson'.

References

1. Terrance John Rackham v The Crown – already submitted
2. Prosecutor v Blaskic – readily available
3. Prosecutor v Issa Hasan Sesay — 13th October 2003 - readily available
4. Order pursuant to Rule 4 - dated 2nd March 2005 – readily available
5. Decision on Defence Motion for Defects in the Indictment. – readily available