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SCSL-11-02-PT
(124-134)

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SPECIAL COURT FOR SIERRA LEONE

TRIAL CHAMBER II

Before: Justice Teresa Doherty, Presiding Judge
Single Judge, Trial Chamber II

Registrar: Ms. Binta Mansaray

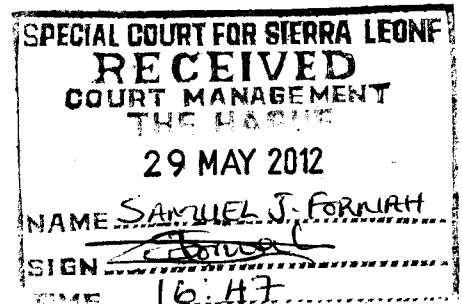
Case No. SCSL-11-02-PT

Date filed: 29 May 2012

The Independent Counsel

-v-

Hassan Papa Bangura
Samuel Kargbo
Santigie Borbor Kanu
Brima Bazzy Kamara



PUBLIC

DEFENCE PRE-TRIAL BRIEF ON BEHALF OF SANTIGIE BORBOR KANU FILED
PURSUANT TO SCHEDULING ORDER OF 1 MAY 2012

Independent Counsel:
Mr. Robert L. Herbst
Mr. Mohammed Bangura

Counsel for the Accused:
Mr. Melron Nicol-Wilson
Chief Charles A. Taku
Mr. Kevin A. Metzger
Mr. A.F. Serry Kamal

Office of the Principal Defender:
Mrs. Claire Carlton-Hanciles

INTRODUCTION

1. This Pre-trial Brief and filings are respectfully submitted pursuant to the Scheduling Order of 1st May 2012.
2. Counsel notes that the Defence is required by virtue of the Scheduling Order to file a statement of admitted facts and law, if any by 1 June 2012. Counsel also notes that pursuant to Rule 73 *bis* (B)(ii) of the Rules of Procedure and Evidence this requirement is limited to admissions and other matters that are not in dispute. Counsel further recognises the provisions of Rule 73 *bis* (F) and while not strictly required by said Scheduling Order to serve a Pre-Trial Brief has done so *de bene esse*.
3. Considering the above and the spirit of mutual disclosure accompanied by goodwill this filing is intended to comply with the Scheduling Order as well as to give as much information about the Defence case in order to assist in the efficient running of the forthcoming trial. The Defence nonetheless stands by the rights enshrined in Rule 73 *ter* (B) and does not intend, by filing the material contained herein, to abrogate the Defence rights encapsulated therein.

BACKGROUND

4. On 10 January 2011 the President of the Special Court for Sierra Leone dismissed the Public with Confidential Annexes Urgent Prosecution Motion for an Investigation into Contempt of the Special Court for Sierra Leone which had been filed by the Office of the Prosecution (OTP).¹
5. On 18 March 2011 Trial Chamber II granted the Prosecution's request to direct the Registrar, pursuant to Rule 77(C)(iii) of the Rules, to appoint an experienced independent counsel to investigate the allegations that a person or persons, may be in contempt of the Special Court. Trial Chamber II further directed that the independent counsel should

¹ *Prosecution v. Brima et al.*, SCSL-04-16-ES, Decision on Public with Annexes Urgent Prosecution Motion for an Investigation into Contempt of the Special Court for Sierra Leone.

report back to the Trial Chamber as to whether there are sufficient grounds for instigating contempt proceedings.²

6. On 24 May 2011 Trial Chamber II, having considered the Confidential under seal “Report of the Independent Counsel Robert L. Herbst Appointed Pursuant to the Decision of 18 March 2011”, dated 11 May 2011, ordered that an Order in lieu of Indictment as contained in Annex A of the decision be issued in respect of Hassan Papa Bangura (aka Bomblast), Samuel Kargbo (aka Sammy Ragga), Santigie Borbor Kanu and Brima Bazzy Kamara.³
7. On 15 July Santigie Borbor Kanu was, via videolink proceedings, arraigned before Trial Chamber II, Justice Theresa Doherty as Designated Judge presiding, together with the other Defendants in this case. Mr. Samuel Kargbo, who had entered into a plea arrangement with the Independent Counsel on 12 July 2011,⁴ pleaded guilty and a guilty verdict was rendered on the same occasion. Mr. Kanu pleaded not guilty to the two charges preferred against him. All other Defendants pleaded not guilty to the charges they faced.

THE CHARGES

8. Santigie Borbor Kanu is charged on Count 1 with “Knowingly and wilfully interfering with the Special Court’s administration of justice by offering a bribe to a witness who has given testimony before a Chamber in Violation of Rule 77(A)(iv). On Count 2 he is charged with “Knowingly and wilfully interfering with the Special Court’s administration of justice by otherwise interfering with a witness who has given testimony before a Chamber, in violation of Rule 77(A)(iv). The Particulars in the Order in Lieu of Indictment⁵ cite these offences as having been committed between 27 November and 16 December 2010.

² SCSL-04-16-ES, Decision on Public with Confidential Annexes Prosecution Motion for an Investigation into Contempt of the Special Court for Sierra Leone, 18 March 2011, pp15/16.

³ Decision on the Report of the Independent Counsel, SCSL-04-16-ES, 24 May 2011.

⁴ *Prosecutor v. Bangura et al.*, SCSL-2011-02-PT, Public with Annex Prosecutor’s Pre-Trial Brief and filings Pursuant to Scheduling Order of 1 May 2012.

⁵ Order in Lieu of Indictment annexed to the Decision on the Report of the Independent Counsel, SCSL-04-16-ES, 24 May 2011

9. It is the Prosecutor's case that, as regards Count 1 Mr Kanu offered a bribe to protected witness TFI-334 in return for the said witness recanting his testimony. In relation to Count 2 it is claimed that he attempted to influence protected witness TFI-3344 to recant his testimony. Both Counts allege that the manner in which Mr. Kanu committed these offences was directly by telephone or on or around 29 November 2010, and through instructions to Samuel Kargbo and Hassan Papa Bangura, aka Bomblast.

APPLICABLE LAW AND ESSENTIAL ELEMENTS OF THE CHARGES

10. In his pre-trial brief⁶ Independent Counsel sets out the relevant provisions of Rule 77 and the Defence concurs that Rule 77(a)(iv) and (v) form the basis of the charges against Mr. Kanu. The Prosecution must prove that the Defendant "knowingly and wilfully" acted in the manner complained of with the specific intent of interfering with the administration of justice of the Special Court⁷.
11. There is no allegation here that Mr. Kanu breached a specific order of the Court. In view of the foregoing statement it is respectfully submitted that the Issue for the Honourable Court is whether the Prosecution's case discloses a knowing and wilful act, or acts, by Mr. Kanu intended to interfere with the administration of justice with a view to causing witness TFI-334 to recant his evidence by giving an untruthful new account. It is clear that witness TFI-334 was not a protected witness at the time of these allegations having had his "prevailing protective measures" rescinded in their entirety on 14 April 2008.⁸ The Defence has simply followed the lead of the Honourable Judge and the Prosecutor in the continued use of the pseudonym for the purposes of these proceedings.
12. In general terms it is accepted that the Independent Counsel has stated the law correctly in the Pre-trial Brief.

⁶ Public with Annex Prosecutor's Pre-Trial Brief and Filings pursuant to Scheduling Order of 1 May 2012

⁷ *Independent Counsel v Brima Samura*, SCSL-2005-01, Judgement in Contempt Proceedings, para18/19.

⁸ *Prosecutor v Taylor*, SCSL-03-01-t-472, Decision on Confidential and Urgent Defence Motion to Rescind or Vary Protective Measures for Prosecution Witness TFI-334, 14 April 2008, Trial Chamber I

ISSUES OF LAW

13. The Defence submits that the motion brought by the OTP under rules 54, 73 and 77 was misconceived. Rule 54 is a general provision which permits a Judge or Trial Chamber to issue orders etc., as may be necessary for the purpose of an investigation or for the preparation or conduct of a trial. Nevertheless it is submitted that Rule 54 is concerned with a trial of which the Judge or Trial Chamber is seised. Accordingly, there being no such case in existence at the material time the OTP did not have *locus standi* to bring a motion under rule 54.

14. Rules 73 and 77 both fall within the provisions headed “Proceedings before Trial Chambers” and again, one would respectfully submit that these are not applicable in the instant case for the same reason as above. Rule 73 is clearly designed to deal with the procedure for motions before the Trial Chamber, designated Judge or the Appeals Chamber and ought not to have been used in the circumstances of this case.

15. It is respectfully submitted that Rule 77 clearly contemplates a live trial as opposed to one in which both trial and appeal has been concluded and in which there are no pending applications for a review. The case presently before Her Honour Judge Doherty, *qua* designated Judge, did not therefore exist at the time of the motion made by the OTP. The Trial Chamber was therefore “*functus officio*” at the time the alleged incidents took place.

16. Article 21 of the Statute of the Special Court of Sierra Leone provides some guidance in that it allows for a review after an appeal and Art 21.2 makes provision for a review to be submitted to the Appeals Chamber which can, if it finds the application meritorious (a) reconvene the Trial Chamber or (b) retain jurisdiction in the matter. Rule 120 provides for Review Proceedings in these circumstances.

17. In his Decision on the motion brought by the Prosecution, The President of the Special Court for Sierra Leone noted that Rule 77 sets out the procedure at every stage, from the time the allegation is made to the final appeal against conviction or acquittal.⁹ This underlines the clear interpretation that Rule 77 relates to a live case. The President also found that the OTP were aware that the matter was one for the Trial Chamber, as per paragraphs 16 of the prosecution motion, but had sought to invoke the President as no trial chamber was seised of the matter. This respectfully, is an overwhelming admission by the Prosecution that they considered the matter of jurisdiction and concluded that there was no other option but to try and obtain the ruling of the President of the Special Court for Sierra Leone on the issue of lack of jurisdiction.
18. The Defence submits that the clear interpretation of Rule 77, applying the principles of “*ejusdem generis*”, is that it can only relate to ongoing proceedings.
19. From the disclosures provided, together with Independent Counsel’s pre-trial Brief, it may well be that witness TFI-334 was used as an *Agent Provocateur*, quite apart from any personal reasons he may have had to report the matter to the OTP. The Defence reserves the right to pursue this line of inquiry and, accordingly makes formal request from the Prosecution for an unredacted and complete contact sheet relating to witness TFI-334.
20. The Honourable Court will be invited to consider the position of the Designated Judge in this case. In the *Samura* case, Trial Chamber II assigned the Contempt proceedings it had set in motion by its decision to Trial Chamber I.¹⁰ Undoubtedly the issue of conflict must have been one of the material factors in invoking the powers under Rule 77(D) to assign the case elsewhere.

⁹ *Prosecutor v Brima et al*, Decision on Public with Confidential Annexes Urgent Prosecution Motion for an Investigation into Contempt of the Special Court for Sierra Leone, SCSL-04-16-ES, 10 January 2011, para. 8.

¹⁰ *Prosecutor v. Brima et al*, Decision on the Report of the Independent Counsel Pursuant to Rules 77(C)(iii) and 77(D) of the Rules of Procedure and evidence, SCSL-04-16-T, 29 April 2005, Para.5.

21. The Defence assert that it is trite law that Legal \Professional Privilege attaches to the communications between lawyers/attorneys and their clients. In this case Independent Counsel propose to call evidence of such communications between the Rwanda convicts and (i) Mrs. Carlton-Hanciles (Principal Defender), (ii) Mr Andrew Daniels (erstwhile Defence Counsel for Mr. Kamara) and (iii) Mr. Ibrahim Mansaray (SCSL appointed Defence Counsel for the Rwanda convicts).
22. It is the Defence position that Counsel should not normally be called as a witness in relation to communications between Counsel and their client. It is respectfully submitted that the confidentiality and privilege between lawyer and client should not be torn asunder in this case.
23. The Court is reminded of the following provisions of the Code of Conduct, which are reproduced below for ease of reference, in connection with the proposition that evidence from Mrs Carlton-Hanciles and Messrs. Daniels and Mansaray should be excluded :-

Relevant Provisions in the Code of Conduct¹¹

Article 12(B) Counsel shall not call opposing counsel as a witness unless there is a compelling need for that testimony. If opposing counsel is called as a witness, counsel shall ensure that confidentiality and privilege is preserved, unless counsel is ordered to testify to a confidential or privileged matter by a Judge or a Chamber

Article 14(c) Defence Counsel shall not advise or assist a client to engage in conduct which Defence Counsel knows is in breach of the Agreement, the Statute, the Rules, the Directive or this Code

¹¹ Code of Professional Conduct for Counsel with the Right of Audience before the Special Court for Sierra Leone as adopted on 14 May 2005 and amended on 13 May 2006

Article 15A Defence Counsel shall at all times act in the best interests of the client and shall put such interests before his own interests or those of any other person, organisation or State. Where there is doubt as to the existence of such conflict, it shall be resolved against Defence Counsel's own interest. Where a conflict arises between the duty of Defence Counsel to act in the best interests of the client and the interests of justice, the latter shall prevail.

Article 17(A) With the exception of information which is already part of the public record, Defence Counsel shall respect the confidentiality of all information which has been entrusted to him in connection with his representation of a client, even after Defence Counsel has ceased to represent such client

Article 17(B) Whether or not the relationship of counsel and client continues, Defence Counsel shall preserve the confidentiality of his client's affairs and shall not:

(i) reveal to any other person information that has been entrusted to Defence Counsel in confidence, provided that Defence Counsel may reveal such information to his team; or

(ii) use such information to the client's detriment or to the advantage of Defence Counsel or another client of Defence Counsel.

Article 17 (C) Notwithstanding paragraph (B) and subject to Article 13 of this Code, Defence Counsel may reveal information which has been entrusted to him in confidence in any one of the following circumstances:

(i) where the client has been consulted and knowingly consents in writing

(ii) when essential to establish a defence to a criminal or disciplinary charge or civil claim instituted against Defence Counsel or Defence Counsel's team; or

(iii) when necessary to prevent an act which Defence Counsel reasonably believes : (a) is a criminal offence within the territory in which it may occur and/or (b) may result in death or substantial bodily harm to any person unless the information is disclosed.

ISSUES OF FACT

24. Save where expressly admitted the Defence takes issue with all aspects of the Prosecution case against Mr. Kanu. It is the Defence Case that contacting a witness with a view to induce that witness to change the testimony given at trial is not *simpliciter* a scenario that falls within the ambit of Rule 77. If, which is not admitted, the Court finds that Mr. Kanu made contact with any persons with a view to changing their testimony then, had Mr. Kanu believed that said person gave untruthful testimony to the court in the first instance a case under Rule 77 could not be made out as he would not have the requisite *mens rea*.
25. While Mr. Samuel Kargbo aka Ragga mentions telephone contact with the convicts in Rwanda he does not specifically state that Mr. Kanu had required him to make contact with any witnesses for any purpose. He states that he spoke to Bazy and Kanu without being specific as to the dates or what he said to whom. It is Mr. Kanu's case that he had no such conversation with Mr. Kargbo. If he did speak with Mr. Kargbo it was merely to greet him. Specifically Mr. Kanu denies speaking to either Mr. Kargbo or witness TFI-334 on 29th November 2010. For the avoidance of doubt, Mr. Kanu specifically denies offering a bribe to witness TFI-334 and further denies that he was aware that anyone was offering him a bribe or seeking to get him to change his testimony. Mr. Kanu will rely on his indigent status to support his contention that he had no money with which to bribe

anyone. Reliance is also placed on the fact that a record is kept of all funds accruing to him and how the same is disbursed.

26. The Defendant Kanu, will further state that on or around part of the material time in December he was taken to the King Faisal Hospital (KFH) in Kigali for treatment. He recalls that he was treated over a period of time and whilst his treatment as a daily outpatient was ongoing he was kept in the Kigali central Prison on a daily basis until he was eventually returned to Mpanga Prison. It is his recollection that during that time he only had access to a telephone when the same was handed to him by Mr. Hillary Sengabo, currently the Deputy Director of Mpanga Prison. The Defendant's recollection was that this was between 14 and 21 December 2010.

27. On 15 May 2012 the Defence obtained a statement from Mr. Sengabo which will confirm that Mr. Kanu was taken for treatment over a period of days to KFH. Mr. Sengabo will also deal with procedures relating to telephone facilities and their use and produce the list of authorised numbers for the relevant detained persons and excerpts of the relevant section of the manual log which records the use of telephone facilities. These will be filed as annexes to his statement, if required, in due course. Enquiries are ongoing in Kigali with KFH, who are suffering from data loss difficulties after changing their computer system in early 2011 and the Kigali central Prison for assistance with the dates of this visit or any other visits during the material time.

28. As at the time of this filing it is envisaged that the Defence will call Mr. Kanu and Mr. Sengabo. If further relevant material from records becomes available to the Defence it is likely that the Defence will seek to obtain a witness statement from the relevant party to produce such records and seek leave, if required, to call the witness.

STATEMENT OF CONTESTED MATTERS OF FACT AND LAW

29. All matters of law and fact raised above are contested as of this filing and the Defence agrees with the Prosecution's summary at paragraph 85 of the Pre-Trial Brief in so far as it relates to Mr. Kanu.

EXHIBITS

30. The Defence anticipates that it will introduce the manual log of telephone calls from Mpanga Prison together with associated material, such as the call logs from MTN, the service provider and any records that become available from Kigali Prison and/or King Faisal Hospital.

PROSECUTION'S REQUEST FOR RECIPROCAL DISCLOSURE

31. The Prosecutor may well recall that Defence contracts were suspended from around September 2011 and not re-instated until May 2012. Accordingly reciprocal disclosure has been affected by the constraints of instruction in this case. It is anticipated that this filing will provide the reciprocal disclosure that has been anticipated by the Prosecutor. Additionally the Defence renews its request for sight of the un-redacted contact sheets relating to witness TFI-334.

Respectfully submitted,



Kevin A. Metzger
Counsel for Santigie Borbor Kanu

Dated 29 May 2012