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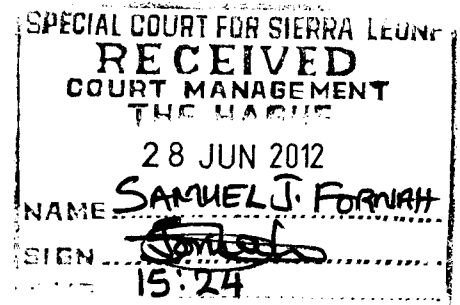
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SPECIAL COURT FOR SIERRA LEONE

TRIAL CHAMBER II

Before: Justice Teresa Doherty, Single Judge
Registrar: Binta Mansaray
Case No.: SCSL-2011-02-T
Date: 28 June 2012



PROSECUTOR

v.

Hassan Papa BANGURA
Samuel KARGBO
Santigie Borbor KANU
Brima Bazzy KAMARA

DECISION ON THE PROSECUTOR'S REQUEST FOR SUBPOENAS

Independent Counsel:
Robert Herbst

Counsel for Bangura:
Melron Nicol Wilson
Counsel for Kargbo:
Charles Taku
Counsel for Kanu:
Kevin Metzger
Counsel for Kamara
Abdul Serry Kamal

I, Justice Teresa Doherty, Single Judge of the Special Court for Sierra Leone (“Special Court”)

SEIZED of the “Prosecutor’s Additional Statement of Anticipated Trial Issues and Request for Subpoena” filed on 11 June 2012, in which the Independent Prosecutor requested that the Court issue a subpoena, pursuant to Rule 54 of the Rules of Procedure and Evidence (“the Rules”), to secure the appearance at trial of Andrew Daniels, and Claire Carlton-Hanciles, the Principal Defender.¹ The Prosecutor, addressing the Defence objection to this subpoena being issued on the grounds of the lawyer-client privilege in Rule 97, requested that this Trial Chamber recognise and apply a crime-fraud exception to the Rule.² The Prosecutor conceded that there was no explicit crime-fraud exception to the lawyer-client privilege in the Rules, nor any jurisprudence from the international tribunals directly addressing this particular issue; the Prosecutor noted, however, that this exception applied in the United Kingdom and the United States.³ The Prosecutor contended that it was essential for the Court to apply this principle, so that the use of lawyers by their clients to perpetrate crimes is neither facilitated nor encouraged.⁴ Finally, the Prosecutor argued that Daniels’ testimony should be admissible because Accused Brima Bazy Kamara was a former client who was seeking to have Daniels assigned a second time as counsel; thus, the Prosecutor contended, an lawyer-client relationship might not have existed.⁵

NOTING the “Defence Pre-Trial Brief on Behalf of Santigie Borbor Kanu Filed Pursuant to Scheduling Order of 1 May 2012” filed on 29 May 2012, wherein Counsel for Santigie Borbor Kanu opposed the issuance of a subpoena to Andrew Daniels and Claire Carlton-Hanciles.⁶ Counsel argued that the lawyer-client privilege “should not be torn asunder in this case.”⁷ Counsel drew the Court’s attention to Articles 12(b), 14(c), 15(a) and 17(a)(b) and (c) of the Code of Professional Conduct for Counsel with the Right of Audience before the Special Court for Sierra Leone (“Code of Conduct”) stating that these provisions supported the proposition that the evidence of Daniels should be excluded.⁸

¹ SCSL-2011-02-26-PT, para. 1.

² SCSL-2011-02-26-PT, para. 2.

³ SCSL-2011-02-26-PT, para. 3.

⁴ SCSL-2011-02-26-PT, para. 6.

⁵ SCSL-2011-02-26-PT, para. 4.

⁶ SCSL-2011-02-21-PT.

⁷ SCSL-2011-02-21-PT, paras. 21-22.

⁸ SCSL-2011-02-21-PT, para. 23.

NOTING the “Defence Pre-Trial Brief on Behalf of Brima Bazzy Kamara,” filed on 1 June 2012, wherein Counsel for Brima Bazzy Kamara opposed the issuance of a subpoena to Andrew Daniels and Claire Carlton-Hanciles,⁹ submitting that all conversations between Kamara and Daniels and Claire Carlton-Hanciles were within the framework of the lawyer-client privilege, and that the sanctity of the privilege should be upheld.¹⁰ Counsel averred that the lawyer-client privilege was “sacrosanct” and is “rarely abrogated by Courts and only then in exigent circumstances.”¹¹ Counsel also contended that this privilege is “the benchmark of the judicial system as it enables and empowers those seeking legal advice to speak freely without fear of disclosure.”¹²

NOTING FURTHER the oral submissions made by the Independent Counsel on 16 June 2012, wherein Counsel conceded that there is no crime-fraud exception to the lawyer-client privilege under Rule 97, nor is there jurisprudence on this particular issue from the international tribunals.¹³ Counsel noted, however, that there was recognition of a crime-fraud exception in the Code of Conduct, which provides that if a Defence lawyer knows of a crime to be committed or understands that his services are being used in furtherance of a crime, the privilege will be lost.¹⁴ Counsel noted that the crime-fraud exception is recognized in both the United States and the United Kingdom.¹⁵ Counsel further argued that, in the alternative, the lawyer-client privilege did not apply to communications between Andrew Daniels and Brima Bazzy Kamara because, although Kamara was a former client, Daniels had not been assigned as Kamara’s lawyer again.¹⁶

NOTING FURTHER the oral submissions made by Counsel for the Accused Brima Bazzy Kamara made on 16 June 2012, wherein Counsel noted that Andrew Daniels was on the team representing Kamara in a previous trial, and was expecting to be appointed pro bono counsel for defendants, and that therefore the lawyer-client privilege was in effect when the communications were made. Counsel further argued that as the privilege was vested in the client, only the client could waive this privilege, and Rule 97 has highlighted the exceptional circumstances under which this privilege can be waived.¹⁷

⁹ SCSL-2011-02-23-PT.

¹⁰ SCSL-2011-02-23-PT, para. 17.

¹¹ SCSL-2011-02-23-PT, para. 17.

¹² SCSL-2011-02-23-PT, para. 17.

¹³ Transcript 16 June 2012 pp. 46-48.

¹⁴ Transcript 16 June 2012 pp. 46-48, 74-76.

¹⁵ Transcript 16 June 2012 p. 48.

¹⁶ Transcript 16 June 2012 pp. 49-50.

¹⁷ Transcript 16 June 2012 pp. 57-58.

NOTING FURTHER the oral submissions made by Counsel for the Accused Santigie Borbor Kanu on 16 June 2012, wherein Counsel noted that in both international and national courts, the lawyer-client privilege attaches to the client, and not the lawyer; thus, it is the client who is entitled to waive the privilege.¹⁸ Article 14(A)(ii) states that Defence counsel must abide by a client's decisions concerning the objectives of trial, unless this is inconsistent with counsel's duties under the Code or counsel's best professional judgement.¹⁹ Therefore, Counsel contends, Article 17 provides that a lawyer *may* break the lawyer-client privilege *only* if the lawyer feels that the situation is inconsistent with his duties under the code, or his professional judgement, which is a subjective standard.²⁰ In any other situation, Counsel contends, it is only the client that has the right to break the privilege.²¹ Counsel argued that in this case there is no evidence that Andrew Daniels, as counsel, felt subjectively that the communication that was made was inconsistent with his duties under the Code of Conduct, and thus the lawyer-client privilege could not be waived under Article 17.²² Finally, Counsel submitted that Kamara contacted Daniels with the view of taking up proceedings as a lawyer, and thus the lawyer-client privilege applies in this case.²³

COGNISANT OF Article 17 of the Statute of the Special Court for Sierra Leone; Rules 54 , 72bis, 97 and 120 of the Rules; Articles 12, 14 and 17 of the Code of Professional Conduct for Counsel with the Right of Audience before the Special Court for Sierra Leone;

NOTING the Single Judge's "Interim Decision on Prosecutor's Additional Statement of Anticipated Trial Issues and Request for Subpoena," filed on 18 June 2012, in which the Single Judge stated that she did not consider that the lawyer-client privilege vested in a client by Rule 97 is absolute if the purpose of the communication is obtaining advice on the commission of a future crime - called, by the Prosecution, a "crime-fraud exception." Accordingly, the Single Judge granted the application to subpoena Andrew Daniels but sought submissions from Amicus Curiae in respect of the application of the exception to the Principle Defender. The Judge also indicated that she would give a fully reasoned decision on this exception, and whether the privileged existed between Daniels and the Accused at the time the communications were made;²⁴

¹⁸ Transcript 16 June 2012 p. 60.

¹⁹ Transcript 16 June 2012 p. 61.

²⁰ Transcript 16 June 2012 p. 62-64.

²¹ Transcript 16 June 2012 p. 62-64.

²² Transcript 16 June 2012 p. 64-65.

²³ Transcript 16 June 2012 p. 69-70.

²⁴ SCSL-2011-02-27-T.

HEREBY RENDER THIS DECISION based solely on the written pleadings and oral arguments;

APPLICABLE LAW

1. Rule 97 of the Rules of Procedure and Evidence (“Lawyer-Client Privilege”) provides:

All communications between lawyer and client shall be regarded as privileged, and consequently disclosure cannot be ordered, unless:

- (i) The client consents to such disclosure; or
- (ii) The client has voluntarily disclosed the content of the communication to a third party, and that third party then gives evidence of that disclosure;
- (iii) The client has alleged ineffective assistance of counsel, in which case the privilege is waived as to all communications relevant to the claim of ineffective assistance.

2. Article 17(C)(iii) of the Code of Professional Conduct for Counsel with the Right of Audience before the Special Court for Sierra Leone (“Confidentiality”) provides:

(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 of the following circumstances:

- (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.

3. Rule 72bis of the Rules of Procedure and Evidence (“General Provisions on Applicable Law”) provides:

The applicable laws of the Special Court include:

- (iii) general principles of law derived from national laws of legal systems of the world including, as appropriate, the national laws of the Republic of Sierra Leone, provided that those principles are not inconsistent with the Statute, the Agreement, and with international customary law and internationally recognized norms and standards.

BACKGROUND

4. The Accused Brima Bazzy Kamara and Santigie Borbor Kanu are indicted of contempt of the Special Court by bribing and attempting to interfere with a protected witness. Independent Counsel, appointed by the Registrar, alleges communications were made with, *inter alia*, Andrew Daniels and Claire Carlton-Hanciles, the Principal Defender, in furtherance of alleged crimes.

DELIBERATIONS

5. It is common ground between the parties that there is no precedent in the International Criminal Tribunals on the principle of whether lawyer-client privileged is lost, if the communications between the client and the lawyer is a communication in furtherance of a crime or fraud. I accept the submission of the Independent Counsel that Rule 72bis(iii) permits the Court to apply general principles of law from the national laws of legal systems of the world including, as appropriate, the national laws of the Republic of Sierra Leone, provided that those principles are not in consistent with the statute, etc. The Court is entitled to look at the laws in civil and common law jurisdictions and those of the Islamic and Hindus states.²⁵ Only case law from the common law jurisdictions has been submitted before me.
6. The provisions of Rule 97 appear in mandatory terms and state “all communication between lawyer and client shall be regarded as privileged.” The three exceptions provided in the Rule all allow the client to effect disclosure; there is no specific exception that a lawyer may make a disclosure of the communications between him/her and the client.
7. Two issues have been submitted before me: (1) that “no law, norms, or standards, inconsistent with the admission of communication made in furtherance of the scheme or attempt to bribe or interfere with witnesses or to interfere with the administration of justice, or to obtain legal advisers’ assistance in the aid of a scheme or attempt” is privileged and (2) that the time of the relevant communication between one of the Accused and Mr. Daniels,

²⁵The Prosecutor v. Alex Tamba Brima, Brima Bazzy Kamara and Santigie Borbor Kanu, Judgement, 20 June 2007, p. 581, *citing* Gerhard Werle, Principles of International Criminal Law, TMC Assar Press (2005), para. 123.

the Accused was former client and Mr. Daniels had not yet been assigned to him as a Counsel.

8. Counsel for Kanu submits that Special Court jurisprudence does not allow for a crime-fraud exception and refers to the Code of Conduct Article 14A(ii), stating that Defence Counsel shall abide by a client's decision concerning the objective of his or her presentation.
9. I accept that "legal professional privilege is a fundamental human right, long established in the common law. It is a necessary corollary of the right of any person to obtain skilled advice about the law"²⁶ and "an intention to override such rights must be expressly stated or appear by necessary implication."²⁷
10. In *R. v. Derbyshire Magistrate Court*, the history of the lawyer-client privilege was stated to concern the interaction between two aspects of the public interest in the administration of justice: the public interest in the official working of the legal system and the public interest in all relevant materials being available to the Courts when deciding cases.²⁸ That case reviewed case law in various jurisdictions including New Zealand, Canada, the United States and the United Kingdom, showing the wide acceptance of the privilege. The case traces concepts of privilege between lawyer and client to 1577 and reviews the development of its history through the successive centuries. However it also notes that the case of *R. v. Cox and Railton* "provides a well recognised exception. Otherwise the rule is absolute."²⁹
11. The case of the *R. v. Cox and Railton* concerned a communication between a lawyer and the partners of a firm seeking to evade the execution of a court judgment against the property of Railton.³⁰ They sought advice from the lawyer on a transaction that "it was alleged was a fraud intended to cheat M of the fruit of his execution." The UK House of Lords asked itself the question "if a client applies to a legal adviser for advice intended to facilitate or guide the client in a commission of a crime of fraud, the legal adviser being ignorant of the purpose for which his advice is wanted is communication between the two privileged?" It was held that "no such privilege existed" as "the result would be that a man intending to commit treason or

²⁶ *R (Morgan Grenfell & Co. Ltd) v. Special Commissioner of Income Tax* [2003] 1 AC 563.

²⁷ Transcript 16 June 2012, p. 61.

²⁸ *Derby Magistrates' Court, ex parte B* [1996] AC 487.

²⁹ *Derby Magistrates' Court, ex parte B* [1996] AC 487, *citing R. v. Cox and Railton* [1884] 14 QBD 153.

³⁰ *R. v. Cox and Railton* [1884] 14 QBD 153.

murder might safely take legal advice for the purposes of enabling himself to do so with impunity ..." The Court further held the consequences were "so monstrous as to reduce to an absurdity any principle or rule in which they were involved."³¹

12. In *O'Rourke v. Derbyshire and others*, the UK House of Lords held that no privilege from discovery can exist with regard to communication by a client or solicitor to get advice for the purpose of carrying out a fraud and, if such guilty purpose was in the client's mind when he sought the advice, "professional privilege is out of the question."³² However, it is not enough to allege fraud, there must be a *prima facie* case made out to show the fraud including allegations of fact which would lead a reasonable person to see a strong probability that there was fraud.
13. I consider that in the common law jurisdictions communications in furtherance of crime or fraud is a well-recognised exception to the principle of professional privilege.³³
14. Whilst the right to lawyer-client privileged has been recognised by many courts, including by the European Court of Human Rights, to be part of the right of privacy, those rights may be overridden by necessary implication.³⁴ I do not accept that because the wording of Rule 97 appears absolute that it cannot be overridden by necessary implication. I do not accept that there can be a recognised exception in cases of communication for purposes of fraud or crime accepted in the national jurisdictions of a large part of the legal world and a lower or less onerous application in the international tribunals. To hold that the communications between lawyer and client are absolute and brook no exceptions in the international tribunals when national tribunals steadfastly recognise an exception would be, to adopt the words of the House of Lords in *R. v. Cox and Railton*, "to reduce to absurdity any principle or rule in which it is involved."
15. Accordingly, I hold that the privilege vested in a client pursuant to Rule 97 of the Rules is not absolute and that discovery and disclosure can lie when the communication was in furtherance of a crime or fraud.

³¹ *R (Morgan Grenfell & Co. Ltd) v. Special Commissioner of Income Tax* [2003] 1 AC 563.

³² *O'Rourke v. Darbishire* [1920] AC 581.

³³ *Blackstone's Criminal Practice* [2006] Oxford University Press, § 9.19.

³⁴ *R (Morgan Grenfell & Co. Ltd) v. Special Commissioner of Income Tax* [2003] 1 AC 563.




16. Independent Counsel also raised the issue as to whether a lawyer-client relationship between one of the Accused and Daniels existed at the time that communication was made. It is not an issue that Daniels acted for the Accused in a case which is completed both in the first instance and on appeal and that Daniels was not retained thereafter. I fully accept that the lawyer-client privilege that existed between Daniels and Kamara throughout the trial and the subsequent appeal existed then and continues to exist now in relation to communications during the trial and appeal. I also find that that privilege cannot be waived unless, as provided by Rule 97, by the client himself.
17. It is a fundamental aspect of the lawyer-client relationship the privilege does not exist until the relationship is firmly established that is, usually when the parties have agreed on the representation of the client by the lawyer. The relationship cannot exist unilaterally.
18. I am satisfied on the submissions and arguments before me that Kamara had made a phone call to Daniels making an enquiry with the intention of seeking advice at sometime in the future on the Review provisions of the Special Court, presumably those provided in Rule 120 of the Rules. A preliminary enquiry does not establish an existing relationship and, on the facts before me, there was no relationship in existence. For this added reason, I consider that the relevant communications between Kamara and Daniels are not privileged.
19. I consider Counsel for Kanu's argument that Article 17 of the Code of Conduct enables a lawyer to provide a subjective standard to decide to breach the lawyer-client privilege inconsistent with his submission that it is "trite law that legal/professional privilege attaches to the communications between lawyers/attorneys and their clients." Article 17(c)(iii) of the Code of Conduct permits a counsel to "reveal information which has been entrusted to him in confidence ... when necessary to prevent an act which Defence Counsel reasonably believes is a criminal offence wherever the territory in which it may occur."
20. In other words, the confidentiality between Defence counsel and client may be breached by the counsel notwithstanding a client's privilege vested by Rule 97 if counsel believes a criminal offence may occur. To reach such an opinion, counsel must have received a

communication that is in furtherance of a crime. In my view, this is tantamount to an exception to the confidentiality if the communication is in furtherance of a crime.

21. I direct that the Sub-poena be issued requiring the attendance of Andrew Daniels to give evidence in this matter and issue a request to Amicus Curiae, Professor William Schabas, to file an amicus brief on the application of Rule 97 and the crime-fraud exception to the Principle Defender.

Done at Freetown, Sierra Leone, this 28th day of June 2012.



Justice Teresa Doherty
Single Judge

