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SCSL-11-02-T
(406-413)

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SPECIAL COURT FOR SIERRA LEONE

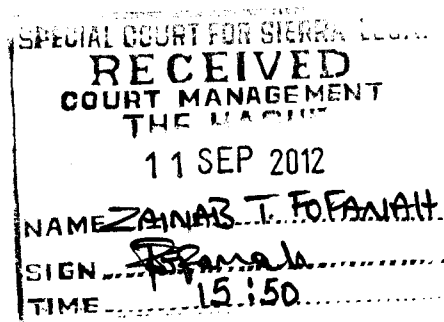
TRIAL CHAMBER II

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

Registrar: Ms. Binta Mansaray

Case No. SCSL-11-02-T

Date filed: 11 September 2012



The Independent Counsel

-v-

Hassan Papa Bangura
Samuel Kargbo
Santigie Borbor Kanu
Brima Bazzy Kamara

PUBLIC

FINAL ADDITIONAL CLOSING SUBMISSIONS ON BEHALF OF SANTIGIE BORBOR
KANU FOLLOWING CONCLUSION OF EVIDENCE

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

1. These submissions are filed by permission of the Learned Presiding Judge, Justice Theresa Doherty, following oral submissions on 6 September 2012 and pursuant to *Rule 86* of the Rules of Procedure and Evidence¹.
2. In summary, for reasons set out in the Defence Motion for Judgement of Acquittal² and oral submissions³ at the conclusion of the evidence, it is submitted that there is no evidence capable of supporting the allegation made by the Independent Counsel on either Count 1 or Count 2 of the Order in lieu of Indictment levied against Mr. Kanu.
3. Reliance is placed on the matters raised in the Motion for Judgement of Acquittal and if therefore they are not repeated *seriatim* herein in an effort to achieve brevity in these written submissions as it is clear that the Learned Judge will take all the submissions previously made into account when assessing the evidence in this case.

Specification/Particularisation of the Charges

4. It is respectfully submitted that the Independent Counsel has failed to properly specify the charge against Mr. Kanu in Count 2. In dismissing the Prosecution's request for contempt investigations of allegations that members of the Kanyabashi Defence team had approached four prosecution witnesses and attempted to make them change their mind not to testify for the Prosecution, the Chamber stated that:

*"..bearing in mind the principle of the presumption of innocence, any allegations of contempt are to be handled with due care. Consequently the Prosecution is to justify its request for investigations by **prima facie** satisfying the Trial Chamber*

¹ Rules of Procedure and Evidence of the Special Court of Sierra Leone, as amended

² *Prosecutor v Bangura et al*, SCSL-11-02-T-35

³ Oral submissions on behalf of Santigie Kanu, Transcript, 6 September, 2012, pp.69 to 96

that there are reasonable grounds to believe that contemptuous conduct may have taken place."⁴

5. It is respectfully submitted that Count 2 suffers from excessive vagueness as regards the allegation against Mr. Kanu, and that it ought therefore to be either dismissed, or a not guilty verdict ought to be entered against Mr. Kanu in view of the foregoing submissions.

Evidence falling outside the temporal scope of the Indictment

6. It is submitted that while reference may be made to events outside the temporal scope, the Trial Chamber ought only to consider such matters for historical purposes or as information and may not rely on any event as an independent basis of any count before it in this case.

Investigations

7. It has been established in evidence that material obtained in the course of investigation has been destroyed, or thrown away⁵. This amounts to a breach of *Rule 41(A)* of the rules and the Learned Judge is urged to take this into account when considering the weight of the evidence as regards the statements and notes relating to the witness Alimamy Bobson Sesay.
8. The Prosecution has sought to rely on the questioning of suspects in this case. It is respectfully submitted that there has been a failure to observe the provisions of *Rule 43* of the rules. In particular, the Defence contends that none of the 5 provisions of *Rule 43* has been complied with in the investigation by the Independent Counsel into these allegations. Accordingly, it is submitted that the Learned Judge should disregard any

⁴ *Prosecutor v Kanyabashi et al*, ICTR, para.6, 10 July 2001 Decision, in which the trial Chamber emphasises the onus of establishing the charge is borne by the prosecution, para.7, and indicates the low weight of hearsay evidence, para. 8.

⁵ Evidence of Joseph Saffa. Transcripts, pp 843 to 844 & 900 to 903

suggestions by the Independent Counsel regarding the interviews of the Accused persons as there was no audio or video recording of said interviews and the suspects were not offered the opportunity of reading or clarifying any notes taken, in direct contravention of *Rules 43 (i) to (v)*.

9. Reliance is also placed on *Rule 63(B)* of the rules as regards the Independent Counsel's questioning of the accused during his investigation in that the questioning was not audio or video recorded.
10. Accordingly it is submitted that no reliance can be placed on material the prosecution purports to rely on that comes from the interviews of the accused persons during the investigation into allegations of contempt.

Dispute as to evidence of handwriting evidence

11. The Prosecution appears to be inviting an assessment of handwriting as regards the entry on 30 November 2012 on the manual prison telephone log⁶ and attribute same to Mr. Kanu. It is respectfully submitted that, in the absence of a handwriting expert relied on by the Independent Counsel, any such reliance will amount to an attempt by the Prosecution to circumvent the Defendants fair trial rights under *Article 17* of the Statute of the Special Court for Sierra Leone. In particular, *Article 17(4) (g)* is violated by any attempt by the Prosecution to rely on an assessment of handwritten material emanating from cross-examination by the Independent Counsel. Accordingly the Learned Judge is urged to disregard all the Prosecution submissions in this regard.

The rule in *Brown v Dunne*

12. Independent Counsel suggests in his closing address that "...substantial elements of the accused' defences were not put to 334 so that he had no opportunity to address them."⁷

⁶ Exhibit P15

⁷ Transcript, p.2375, lines 10 to 12

It was always open to the Prosecution to apply to the Learned Judge to call evidence in rebuttal. Independent Counsel did not make any application to call evidence in rebuttal and therefore cannot properly rely on this point as supporting the prosecution case. Essentially, the Defence for Mr. Kanu had clearly put that there was no relationship between himself and Mr. Sesay and that the two of them had never spoken on the telephone whilst Kanu was imprisoned in Rwanda. Accordingly it is submitted that the essential elements of Mr. Kanu's case were put to the witness and that no issue arises that should cause an application of the rule in a manner adverse to Mr. Kanu.

13. Conversely, the Prosecution places reliance on the 'Alagendra email', without calling the author or tendering a statement from her to prove the accuracy of the time, date and content of the same. It is therefore respectfully submitted that the status of this email as evidence is questionable and further, that there can be very little weight attached to it as support for the prosecution case.

14. Complaint has also been made by the Independent Counsel that there it was not put to Mr. Sengabo in cross examination that he had 'manipulated' the manual phone log book (exhibit P15). In this regard it is respectfully submitted that Counsel could not put such an allegation to Mr. Sengabo without (a) giving evidence and (b) impugning him as a witness. In view of the history of Mr. Sengabo's involvement as a putative Defence witness, it would have been ethically wrong to seek to impugn him. It is submitted that the Defence case was put without seeking to embarrass or impugn the witness, particularly in light of the fact that Mr. Kanu's instructions were borne out of his suspicions, rather than fact. The Defence case remained clear throughout; that Mr. Kanu denied, calling and/or speaking to Mr. Sesay as well as signing the disputed entry in exhibit P.15. It would therefore be wrong, it is submitted, to apply the rule adversely to Mr. Kanu's interests in this situation.

Pademba Road Prison

15. The evidence relating to Mr. Kanu's incarceration at Pademba Road prison before being indicted by the Special Court for Sierra Leone is clear. Mr. Kanu testified that he was kept in a different wing from Mr. Kargbo, and clearly also Mr. Sesay. There is no evidence that the two of them were in communication whilst they were both in prison. Furthermore, despite Independent Counsel's comments on this matter, Mr Sesay, when he was led in evidence, was not asked about the level of contact he had with Mr. Kanu whilst they were both at Pademba Road prison. It is therefore respectfully submitted that there is no factual basis for the Independent Counsel's comment in closing which suggests that Kanu and 334 spoke on various occasions in prison.⁸

The 'smoking gun' call

16. It is respectfully submitted that the so called 'smoking gun' call is nothing other than an attempt to create a smokescreen by the use of a misnomer. The Prosecution case is irretrievably damaged by the fact that if a thorough examination of the MTN logs reveals the 3 calls to Mr. Kargbo's mobile telephone as occurring on 30 November 2010 then clearly Mr. Kargbo's story about being contacted on a number of occasions a few days before cannot be true.
17. It follows that the discussion with Mr. Sesay could not have occurred earlier than 30 November 2010 and that the two car trips with Mr. Sesay could not have happened on different days. If therefore the incontrovertible evidence of those telephone calls, being the first to Mr. Kargbo's phone, on 30 November is properly examined, then it becomes the evidence that gives the lie to the testimony of the prosecution witnesses, rather than supports the case against Mr. Kanu and others.
18. This evidence therefore fails to support the theory of a period of persistent contact with Messrs. Kargbo and Sesay, as has been alleged, at least at some stage, by the prosecution as being the basis for the inclusion of Count 2.

⁸ Transcript, p. 2386

19. Respectfully the hypothesis propounded by the prosecution on the so called 'smoking gun' call cannot sit comfortably with the evidence of witnesses called to prove the case because it fails to support the timeline and development of the 'plan' suggested when the case was opened by the Independent Counsel, prior to calling his evidence.

Santigie Borbor Kanu's evidence

20. The third accused gave evidence and was cross examined at length by the Independent Counsel. In essence his case is a simple one; he states that he did not speak to Alimamy Bobson Sesay at all and that he may have spoken to Samuel Kargbo when someone else passed the phone to him to say hello.
21. He has no clear recollection of calls made on 30 November 2010, but is certain that he never discussed a plan to get witnesses who had testified for the Prosecution to recant their evidence. He had given consideration to a pardon or early release, but again had not discussed this with others.
22. He produces the letter of 4 November 2010 from the Registrar⁹ and denies discussing a review of his case or rules 120 and 122 with the Registrar although others may have. In this, his testimony is supported by the documentation that was meant to accompany the 4 November 2010 letter¹⁰ and the 20 December letters from himself and others regarding legal representation. It is respectfully submitted that a thorough perusal of all these documents tends to support Mr. Kanu's testimony rather than undermine it.

Conclusions and Prayer

23. In all the circumstances of this case it is respectfully submitted that the Prosecution has not proven Mr. Kanu's guilt beyond reasonable doubt in respect of either of the charges

⁹ Exhibit D Kanu3

¹⁰ The 2 July letter, or memorandum, from the registrar, which had hitherto not reached the convicted persons despite having been sent twice before.

he faces before this Honourable court. It is submitted that Count 2 is insufficiently particularised so as to make it separate from Count 1 and the Honourable Court is invited to dismiss it.

24. Should it be determined that Count 2 is capable of independent existence, it is further submitted that in any event Mr Kanu is not guilty of the charges against him and the Honourable Court is hereby urged to record Not Guilty verdicts on each Count.

Respectfully submitted,



Kevin A. Metzger

Counsel for Santigie Borbor Kanu

Dated 11 September 2012