062) SCSL-11-02-T (414-424) 414

SPECIAL COURT FOR SIERRA LEONE

TRIAL CHAMBER II

Before:	Justice Teresa Doherty, Presiding Single Judge of Trial Chamber II
Registrar:	Ms. Binta Mansaray
Case No.:	SCSL-11-02-T
Date filed:	11 September 2012

PROSECUTOR **Against** **Hassan Papa Bangura**
Samuel Kargbo
Santigie Borbor Kanu
Brima Bazzy Kamara

PUBLIC
PROSECUTOR'S WRITTEN SUBMISSIONS

Office of the Independent Counsel:
Mr Robert L. Herbst

SPECIAL COURT FOR SIERRA LEONE
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Counsel for the Accused:
Mr Melron Nicol Wilson
Chief Charles A. Taku
Mr Kevin Metzger
Mr A.F. Serry Kamal

Office of the Principal Defender:
Ms Claire Carlton-Hanciles

1. These written submissions are respectfully submitted to supplement the oral submissions of 6 September in accordance with Court's grant of leave to all counsel to file such supplementary submissions.
2. I would like to make the following corrections or additions to the 6 September transcript of my oral remarks (I used the Confidential transcript to review what was said, but all corrections are to remarks made in public session):
3. Page 2382, line 22: "they" should be "he";
4. Page 2388, line 4: "apply" should be "applied";
5. Page 2398, line 7: "testimony" should be "credibility";
6. Page 2400, line 16: Insert at end of sentence: "They came to him.";
7. Page 2402, line 1: Insert at end of sentence: "According to Kanu, he was not even there. He was not called down, he did not use the phone.";
8. Page 2405, line 15: insert a comma after "Brima," and delete the comma after "Daniels";
9. Page 2407, line 1: insert "of" after "furtherance";
10. I offer below the following submissions in response to those of defence counsel. Where I have already responded to a point in my earlier written opposition to defence motions for judgment of acquittal, or in my oral submissions, I intend not to repeat that response but rather to incorporate here the earlier submissions.

Mr. Nicol-Wilson on behalf of the Accused Bangura

11. At 2415, Mr. Nicol-Wilson complained about this prosecution as a case which borders on issues of Sierra Leone's past, and suggested that it was delaying the country's enjoyment of peace for which so many people lost their lives. I say in response that contemptuous interference with this Court's administration of justice, by attempting to bribe and other wise interfere with a witness who has testified in a prior trial against those convicted and incarcerated in Rwanda, does nothing to advance the cause of peace or to redeem the many lives lost. Rather, such interference is a blight on the country which must be prosecuted to deter those who attempted it and others similarly situated from attempting to do so again.

12. At 2415, my learned friend calls such contempt a much lesser offense than the war crimes for which those in Rwanda were originally convicted. But such contempts attack the integrity of the very processes of this Court by which such war crimes were prosecuted and punished. They are therefore very serious offenses, and must be rooted out by investigation, prosecution and punishment. These proceedings are therefore critically important parts of the process by which this Court has administered justice in and for Sierra Leone and all its people.
13. At 2416, defence counsel suggested that there is no joint criminal enterprise in these contempt proceedings, and no guilt by association. I accept that no accused can be found guilty solely by association; each must be proved to have joined and participated in the charged contemptuous criminal plan or scheme with the requisite mens rea, i.e., knowingly and willfully as I defined those terms in earlier filings and again in my oral submissions last Thursday. There is clear sufficient proof of that here with respect to all three accused, as I noted in my Brief in opposition to the defence motions for judgment of acquittal at the close of the prosecution's case, and in my oral submissions at the close of all the evidence. One cannot deny that this was a joint criminal plan, and once each accused joined and participated in it, he became as guilty as his co-schemers and criminally responsible for their acts as well as his.
14. This kind of joint criminal enterprise, or co-perpetrator liability, was recognized in the ICTR Judgment in the *Stakic* case. That Judgment recognized that when one joins a common plan that involves the commission of a crime, and participates in the common purpose directly or indirectly, either individually or jointly with others, criminal liability may properly be imposed upon the accused. The common plan need not be explicitly expressed (although here it was, to 334 and Kargbo and others, by Bangura, Kanu and Kamara); it is enough if there is silent consent to reach a common goal. The requisite mens rea is present as long as the accused and the other participants in the joint criminal enterprise intended that the crime at issue be committed. These joint criminal enterprise liability principles are clearly satisfied here with respect to all three accused.

15. At 2417-18, defence counsel suggests that it is not criminal for a witness to come back to this Court and say "I regret to say what I told this Court was a lie." But there is not one whit of testimony in this case to suggest that when 334 was approached to recant his testimony, he was asked to consider whether in fact his prior testimony had been untruthful. Instead, the approach was to attempt to persuade 334 to recant his testimony merely to help his former comrades get released or their sentences reduced, and to do so in return for financial compensation, for himself and for his friends Kargbo and Bangura. It was entirely contemptuous and corrupt. As both 334 and Kargbo ultimately recognized, that is an obstruction of justice and an offense punishable by imprisonment. K for K recognized the same thing when he testified that if he had approached 334 himself, he would have subjected himself to imprisonment. As 334 pointed out on cross examination, when one is asked to recant or change truthful testimony given in court under oath in a prior proceeding, one is effectively being asked to lie. (Tr. 566-71, 652-53, 737). Indeed, 334 told Inv. Saffa and later noted in his sworn statement and testimony in court that he understood he was being asked to lie when he was asked to change his testimony. (PX P-3; Tr. 925-26).
16. At 2418, after calling his client a "truthful man," an observation utterly belied by the credible evidence in this case, defence counsel purported to give evidence from the bar about conversations with his client which were not elicited when Mr. Bangura was on the witness stand. I respectfully request that such "evidence" not be considered.
17. At 2419-20, defence counsel suggests that a senior commander in the Army did not speak to any of his men in English. However, defense counsel did not deal at all in his oral submission with the more telling point that his client falsely denied knowing English and even falsely denied going to school when his 26 May 2012 statement, obviously elicited under the careful supervision of that same defence counsel, states that Bangura not only went to school, but completed both primary and secondary school. It is telling because it is apparent to all concerned that Mr. Bangura was testifying falsely. It is simply indefensible.

18. At 2420, defence counsel not only unjustly impugned brother counsel Chief Taku, but also wrongfully suggested that Mr. Kargbo pleaded guilty "without proper legal advice[.]" Simply not true. Defence counsel also ignores the fact that any benefit Mr. Kargbo derives from his plea agreement with the prosecution will depend on this Court's evaluation of his truthfulness and credibility. Mr. Kargbo is therefore more likely, not less, to take care to make sure that his testimony is truthful in all material respects. This supports rather than undercuts his credibility and the reliability of his testimony in this case.
19. At 2420-21, defence counsel noted that Mr. Bangura did not actually give 334 any money, nor specify that the money that was being raised for 334 was coming from Bangura personally. This is irrelevant since the actual payment of money is not a prerequisite for conviction of the crimes charged; nor is it required that the money that the accused offered 334 personally come from any one of the accused; it is enough that money was offered as inducement for the proposed recantation.
20. At 2422-23, defence counsel, in desperation, alleged that the current contempt charges result from the desire of "the person or institution" that interviewed him in 2004 to punish him for declining at that time to become a prosecution witness against the Rwanda convicts. No one except the Independent Counsel made recommendations as to possible charges against Bangura; no one except the Trial Chamber determined to charge him. One can hardly credit the notion that either the Independent Counsel nor the Trial Chamber knew or cared whether Bangura had or had not become an OTP witness eight years ago.
21. At 2423, defence counsel offered the flimliest of excuses for not calling or attempting to call Mansaray: that the prosecution had indicated that it might object to his doing so, that time was limited, that Mansaray could add nothing to Bangura's case. If the last is true, it must be because Mr. Kargbo was telling the truth as to what was said at the meeting. The notion that Bangura said nothing because he was "surprised," became "spellbound" or "could not speak" is hardly consistent with what we know about Bangura and has little credence, and even less because it did not come from Bangura on the stand but rather in submission from his counsel.

22. Unlike defence counsel, at 2424, I find nothing unusual in Bangura's speaking to 334 on Kargbo's phone when he found out that Kargbo and 334 were together. As counsel himself noted, all three were very close friends. That severely undercuts the suggestion that 334 and Kargbo would go out of their way to falsely implicate Bangura. Bangura has only himself to blame for being held accountable for his criminal acts.

Mr. Metzger on Behalf of the Accused Kanu

23. Let us see which counsel is in fact the "cunning conjurer," who "moved the goalposts," in a fit of metaphor-mixing, albeit in the English rather than the "American language."
24. It was my learned friend who first reviewed the prison log book and served notice that he intended to introduce excerpts from that log into this case. Having "moved the goalposts" himself, and having chosen to enter those shark-infested waters (for his client), defence counsel has no right to complain about the consequences, which turned out to be deadly for Kanu. It does not take a handwriting expert to look at the three "Santigie"s in the prison log book and realize, contrary to Kanu's false testimony, that the 30 November entry are written in his hand, just like the other two he acknowledged, and just like the "Santigie" in his diaries. Nor does it take an expert to know that the signature of Kanu next to the 30 November entry is his just like every other signature of his in the log book which he acknowledged to be his. To conjure otherwise is simply not credible.
25. Equally meritless is defence counsel's suggestion, at 2434, that the prosecution was equivocal or "very vague" about the date of the "smoking gun" Kanu conversation with 334 on 30 November. My notes reflect that in opening statement, I stated unequivocally that we know from the Alegendra email and the prison phone records that that call must have occurred on 30 November 2010. (I do not have on my computer the 20 June 2012 transcript containing the opening statement, but I am confident that the transcript will reflect the substance of that statement). It may be worth reiterating that the Alagendra email was not "sprung"

on defence counsel shortly before trial, but was turned over to all counsel as soon as it was received, in 2011, long before this trial started. The phone records were also made available to counsel at the time of my Rule 66 Disclosures in July 2011. Accordingly, defence counsel's erroneous suggestion that the prosecution surprised him, or "moved the goalposts" with respect to the date of his client's call with 334, is itself the "conjuring" and "illusioning" of which counsel accuses the prosecution. The playing field has not shifted at all from the "start[of] the game," *see* Tr. 2434, and defence counsel knew or should have known very well where he stood on the field, and what he had to defend against. Indeed, from the Alagendra email which he does not deny reviewing when received, defence counsel had every reason, when he met with Mr. Sengabo and reviewed the prison log book, to look at the 30 November 2010 entry, whether he did so or not. The fact that he turned out to have no defence to the incriminating evidence against his client is not the fault of the prosecution, but of Kanu himself. Nothing was "swept under the rug," it was all disclosed and made available to counsel. 334 simply made a mistake about the date of the call when his initial statement was drafted with the help of Mr. Saffa, who had reviewed the Alagendra email but unfortunately did not have it before him during the statement-drafting process.

26. It is true that the prosecution believed it had a very powerful case, and proof beyond a reasonable doubt, from the testimony of 334, Kargbo, Daniels, Saffa, and the Alagendra email. That is still our belief today. But defence counsel having served notice of his intention to use the prison log book (but only up to November 29) in the defence case, one could hardly have expected the prosecution to stand by as a potted plant without looking itself at the prison log (all of it, including the November 30 entry). Nor is it fair to fault the prosecution for using what was now plain to see, *inter alia,* that Kanu had signed himself in and was present with Kamara, using the phone at precisely the time Kargbo and 334 (without benefit of either prison log or MTN phone records) put Kamara and Kanu on the phone with them as described in their testimony. When defence counsel wades into new waters, sometimes it does not work out as planned, nor does it always redound to the defence's benefit. This is such a case, but that

hardly justifies crying foul about it. When defence counsel persists in doing so, it is usually because one has no other defence to the evidence now before the Court, as here.

27. I find utterly unconvincing defence counsel's purported excuse for not putting to 334 the notion that he insulted Kanu's mother and thereby became enemies for life, at 2439-40. My learned friend was in Kilgali and Mpanga in May 2012 to meet with his client and Mr. Sengabo and to further investigate the case. There is no suggestion of any restriction on his ability to talk privately with his client, take instruction, and flesh out the defence(s) to be used at trial. If defence counsel did not know of this purported cornerstone of Kanu's defense, it was because Kanu did not tell him, not because of any lack of access to his client, or because the case was "fast-moving," or because telephone calls between lawyer and client were monitored. Blaming the prison authorities, or blaming the prosecution, may be second-nature to my learned friend, but it seems to be particularly inappropriate here as an excuse for not knowing what one's client is going to say on the witness stand, and for not putting the most important elements of such testimony before the prosecution witness involved.
28. At 2440, defence counsel suggests that he did suggest to 334 that he had something against Kanu, and was lying, and had no relationship with him. However, those quite general propositions are far different than putting to 334 the suggestion that because of the incident in 2000, and an insult to Kanu's mother, he and Kanu thereafter became enemies for life and never talked again, and that therefore Kanu would never have gotten on the phone with 334 as 334 and Kargbo both testified he did. This was indisputably not put to 334 (or to Kargbo). It should have been. Having failed to do so, the suggestion should have no weight in this Court's deliberations. The prosecution and the witness should not be put to the burden of having to have the witness testify again in rebuttal to address matters not put to him on cross-examination the first time.
29. There may be eight men convicted and serving prison sentences at Mpanga, as defence counsel suggested, at 2441-42. But when it comes to a petition for review of the convictions and sentences in the AFRC case, we all know we are

talking only about three men, the three convicted in the AFRC case. My learned friend's suggestion to the contrary is meritless. And the fact that Tamba Brima was not indicted does not restrict the prosecution from suggesting his involvement in the contemptuous scheme, or from presenting evidence of same through Mr. Kargbo, for example, especially in light of the extraordinary turn of events in the defence case concerning the Bangura witness statements.

30. My learned friend's submission about how Kanu spells his name and how it does not really matter, at 2442, is truly bizarre in light of the fact that it was defence counsel himself who raised the issue, suggesting that Kanu never spells his name without the "h" and suggesting that any writing of his name without the "h" could not possibly be his. The fact that Kanu later was forced to admit that such suggestion was false obviously has something to do with the "price of fish" in this case, as far as Kanu's credibility and consciousness of guilt is concerned. I also respectfully disagree with my learned friend that Kanu's habit of bolding over writing is "squat diddly,"[1] at 2443, in view of Kanu's habit of bolding over in the same way as the 30 November entry is bolded over, thus demonstrating Kanu's concern with it, thereby evidencing in still another way in this case his consciousness of guilt.

31. At 2451, defence counsel refers to 334's saying that he had a conversation with Mustapha on 15 November 2010. But this resulted from defence counsel's inadvertent misreading of the contact summary, PX-P-12. In doing so, he led 334, who initially could not recall whether he had contact with OTP on 15 November 2010, to think, and say, that (1) Mustapha called him on 15 November 2010 and (2) 334 told him on that date that he wanted to speak to OTP about something that he could not discuss on the phone, i.e., the approaches of the accuseds in this case. (Tr. 682-96). In fact, PX-P-12, properly read, reveals that the Mustapha OTP conversation occurred not on 15 November but rather on 30 November 2010, at or shortly before 3:52 p.m., not long before 334 texted and

[1] While my learned friend characterizes this as an American expression, it is not. Perhaps he is referring to the phrase "diddly squat," sometimes shortened to just "diddly." But no American would utter the words in reverse as he did.

called Ms. Alagendra and only days after the initial contact by Kargbo on or about 26 November 2010. The 15 November entry was actually the previous entry on the contact summary, documenting activity in September 2010. (Tr. 864-68, 873-77, 878-80, 945-46). This is further explained in the proffer by Ms. Hollis and accompanying letter that was disclosed to defense counsel in the defence case. Thus, there is no evidence that the unlawful approach to 334 was made significantly earlier in November 2010, although defence counsel inaccurately suggested to 334 because of the contact summary that there was. (Tr. 686-96). Nevertheless, what is most important is that 334 remembered that he had texted Ms. Alagendra on the same day that he had earlier had the meeting at PWD Junction in which he had spoken to Kanu, and the Alagendra email confirms that the Kanu conversation had occurred on 30 November 2010. (Tr. 690, 693-96).

32. Finally, my learned friend's contention to the contrary, at 2452-53, there is nothing duplicitous or inappropriate about the two separate counts against all three accused, one alleging interference by offering a bribe to 334, and the other alleging interference otherwise, without regard to the offer of a bribe. As noted in our Brief in opposition to defence motions for judgment of acquittal, at ¶ 37, and in our opening statement, the second count was complete when the accused first approached 334 through Kargbo and attempted to persuade him to change his testimony to assist them with their review proceeding.

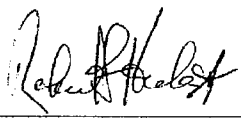
Mr. Serry-Kamal on Behalf of the Accused Kamara

33. My learned friend repeated many of the same arguments already addressed, I will simply reincorporate those responses here without repeating them.
34. At 2457-58, defence counsel notes that no telephone was found in the search of the Mpanga special wing, but he fails to note that a telephone charger and telephone air time was found, raising the question of why such items would be smuggled into the prison if there were no second telephone there somewhere. Moreover, in my oral submission, I identified a number of other ways that communications with Kargbo could have been had without the calls appearing in the MTN records or the prison log. I will not repeat them here. At 2458, defence

counsel stated that calls to Kargbo's phone were reflected in the MTN record only on 30 November. However, as we noted several times during the trial, the MTN record also reflects a call to Mr. Kargbo's phone on 7 December, right next to a call to Bangura's phone.

35. At 2460, defence counsel asserts that the telephone was used in a prison office, with a prison official and convict Isa Sesay present. However, my recollection of Mr. Sengabo's testimony was that, while that is the arrangement that obtains now and since late 2011, in 2010 the prisoners were permitted to talk in the large open area, with little or no monitoring by either Mr. Sesay or prison guards who did not understand Krio and who could not have effectively monitored the calls. Contrary to my learned friend's suggestion, at 2461, it is obvious why the prosecution found it unnecessary to call either Mr. Sesay or such prison guards as witnesses in this case.
36. At 2463-64, defence counsel suggested that the MTN phone record does not corroborate the conversation between Kamara and Kargbo relating to TF1-033. Respectfully, if I recall correctly, the prosecution witnesses testified that the conversation concerning TF1-033 occurred on the same day as the conversation between 334 and Kanu, which we know to be 30 November 2010. Accordingly, defence counsel is mistaken, as the three 30 November calls to Kargbo's phone are documented in the MTN phone record, at page 39 of 39.

Respectfully submitted,



Robert L. Herbst

Independent Counsel

Dated: 11 September 2012