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SCSL-11-02-T
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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: 04 October 2012

The Independent Counsel

-V-

Hassan Papa Bangura
Samuel Kargbo
Santigie Borbor Kanu
Brima Bazzy Kamara



PUBLIC

SANTIGIE BORBOR KANU DEFENCE SENTENCING BRIEF

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Mr. Melron Nicol-Wilson
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1. This brief is filed pursuant to Rule 100(A) of the Special Court Rules of Procedure and Evidence (The Rules) and consequent upon the Defendant's conviction by virtue of the judgement of Justice Doherty, sitting as a single judge of the trial chamber, delivered at The Hague on 25 September 2012.

Introduction

2. On 25 September 2012 the Defendant Santigie Borbor Kanu was convicted after a trial lasting some 5 weeks over two sessions of two Counts, of contempt of the Special Court consequent upon the judgement mentioned in paragraph 1 above.
3. Count 1 related to a charge of knowingly and wilfully interfering with the Special Court's administration of Justice by offering to bribe a witness who has given testimony before a Chamber in violation of Rule 77(A)(iv) while Count 2 related to a charge of 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, also in violation of Rule 77(A)(iv).¹
4. The conduct complained of was an attempt to get Mr. Alimamy Bobson Sesay to recant the testimony he had given in the AFRC² trial.

Evidential Matters

5. In the aforementioned Judgement the following findings were made against Mr. Kanu:
 - i. That he had spoken to both Kargbo and Sesay, the first two Prosecution witnesses.³

¹ SCSL-11-02-T-66, Judgement in Contempt Proceedings, 25 September 2012, para. 656.

² Armed Forces Revolutionary Council.

³ SCSL-11-02-T-66, Judgement in Contempt Proceedings, 25, September 2012, para 656.

- ii. That he had spoken to Sesay and conveyed that the latter was to revisit his evidence and that finance and payment would be forthcoming in a manner that was intended to influence Sesay.⁴
 - iii. That Kargbo spoke to Sesay solely on Kamara and Kanu's instruction.⁵
6. When he testified in Court, Mr. Kargbo agreed that in his statement he did not say that Mr. Kanu asked him to get Mr. Sesay or any other person to change his statement.⁶ Nevertheless Mr. Kargbo went on to claim that Mr. Kanu had spoken to him about Mr. Sesay recanting his testimony.⁷ In view of the requirement that the evidence must be accepted by the Court beyond reasonable doubt, it is respectfully submitted that the equivocal nature of this statement means that the sentencing judge can take into account the witness' uncertainty on this point when considering the part Mr. Kanu played in this offence.
7. The finding that Mr. Kanu spoke to Mr. Sesay is based, *inter alia*, on evidence given by Mr. Sesay in examination in Chief that Kanu said "...you are our brother....Please, because we've gotten advice from some of our lawyers that the only way is if we can talk to some of you people who can at least cause us to be released or reduce our prison term.... We sent Sammy for us to be able to talk to you....we are still trying to work out our modalities. We're trying to work out how best we can put things in place..... so please, we want you to cooperate with us. Please help us."⁸ In Cross examination Mr. Sesay said that Mr. Kanu had told him, in that phone call, "*Eh, Bobby, you are – you are our brother. We want you to help us. ...Please help us as a brother. We are relying on you....he asked me if Sammy had explained everything to me, and he said, Please, Bobby help us. You are our brother, help us.*"⁹

⁴ SCSL-11-02-T-66, Judgement in Contempt Proceedings, 25 September 2012, para. 664.

⁵ SCSL-11-02-T-66, Judgement in Contempt Proceedings, 25 September 2012, para. 665.

⁶ Transcript, 22 June 2012, pp. 224-226.

⁷ Ibid p. 226.

⁸ Transcript, 25 June 2012, p. 449.

⁹ Transcript, 27 June 2012, page 655

8. Taking these two excerpts together, it is submitted that Mr. Kanu's words were more in the form of a plea than anything else. It is therefore possible to suggest that while this one conversation with Mr. Sesay may have supported a finding of guilt, the actual words spoken or action taken by Mr. Kanu cannot be said to be the most serious contemplated by Rule 77(A)(iv). There is no suggestion that Mr. Kanu ever lent himself to any threats to any of the parties or did anything more than implore them to help him, and his brothers.
9. It is respectfully submitted that the findings of fact leading to the Guilty verdicts pronounced against Mr. Kanu support the contention that his role in the activity complained of by the Prosecution was limited to the conversation that Mr. Sesay testified he had with the Defendant over the telephone while the former was at PWD and possibly general conversation with Mr. Kargbo in support of the plan suggested by the Prosecution.

Applicable Rules

10. The Learned Judge has had the benefit of an *Amicus Curiae* Brief¹⁰ filed by the Office of the Prosecutor in the Senessie case before the Special Court which sets out the applicable law and sentencing practice at the SCSL and other tribunals, focusing especially on Sub-Rule 77(A)(iv). Accordingly this brief will limit itself to matters relevant to sentencing in the instant case.
11. Rule 77(G) establishes the maximum penalty that may be imposed on a person found to be in contempt of the Special Court. Rule 77(C)(iii) is the applicable rule for determining the sentencing regime, in view of the fact that this case arises out of an order in lieu of an indictment issued by Trial Chamber II. Accordingly the relevant maximum penalty is a term of imprisonment for seven years or a fine not exceeding 2 million Leones.¹¹

¹⁰ SCSL-11-01-T-16, cf. Para 2.

¹¹ 2 million Leones is the relevant financial penalty in view as, at the time of the order in lieu of indictment the 18th Plenary of Judges had not yet amended the rule to 20 million Leones.

12. Rule 101,¹² which sets out the factors and considerations a Judge or Chamber shall take into account when determining sentence, is applicable consequent upon the provisions of Rule 77(E), which state that Parts IV to VII of the rules shall apply, as appropriate, to proceedings under Rule 77.

Submissions

13. The Learned Judge ruled in the Senessie case that in cases of contempt a sentence must adequately serve the purposes of retribution and deterrence and that she is entitled to consider the matter of rehabilitation.¹³ As Mr. Kanu continues to serve his sentence imposed by the Special Court, it may be that this latter factor is not a primary matter for consideration, but his comportment, which is submitted to have been excellent, during his sentence may assist the Court when it comes to consider the issue of sentence and the length of any custodial sentence it may choose to impose.
14. It is worth noting that there is a dearth of material, certainly within the Special Court jurisprudence, in relation to Rule 77(A)(iv) offences, the only other trial under this rule in which a Defendant has been convicted being the Senessie case. The only other case related to the wives and a friend of the three AFRC Accused persons.¹⁴ In the latter case another person¹⁵ was charged, but eventually acquitted. The sentence of a one-year probationary period in which the contemnors had to respect all conditions imposed or face other punishment passed as regards the wives and friend is said to have reflected that this was an isolated incident with lack of forethought together with the remorse shown by guilty pleas.¹⁶
15. The Learned Judge will not need to be reminded of the concurrent sentences of 2 years' imprisonment passed on Eric Senessie on eight counts of contempt of the Special Court

¹² Rule 101(B)(i) provides that the Trial Chamber shall take into account the factors mentioned in Article 19(2) of the statute as well as (i) aggravating factors, (ii) mitigating circumstances and (iii) the extent to which any penalty imposed by a court of any State on the convicted person for the same act has already been served, by reference to Article 9(3) of the Statute.

¹³ SCSL-11-01-T-20, Sentencing Judgement in Prosecutor v Senessie, para. 5.

¹⁴ Brima Contempt Judgement, Prosecutor v Brima et al, SCSL-04-16-T-237, as cited in the *Amicus Curiae* brief.

¹⁵ Brima Samura.

¹⁶ *Amicus curiae* brief, SCSL-11-01-T-16, para. 8.

by knowingly and wilfully interfering with the Special Court's administration of justice.¹⁷ These sentences were imposed on Mr. Senessie to take into account the multiplicity of offences,¹⁸ and the persistence of the Defendant¹⁹ in the criminal enterprise.

16. It is respectfully submitted that Mr. Kanu's case can be significantly distinguished from Mr. Senessie's in view of the submissions about his involvement above; his activity can only be said to be limited to one witness, Mr. Sesay, and his interaction with Mr. Kargbo can only, at its most damaging, be said to have amounted to encouraging the latter to try and convince the former. It is accordingly submitted that in considering the proper sentence to pass on Mr. Kanu for these offences, the Learned Judge ought to have regard to the fact that his culpability, must of necessity, be lesser than that of Mr. Senessie.

17. One of the significant factors in the Prosecution case has been that the contumacious activity is alleged to have been in support of a review of the sentences of the accused persons or a commutation of their sentence. In this regard it is submitted that this case can be further distinguished from the Senessie case in which Appeal proceedings have not yet been concluded. In the present case the circumstances are that the Defendant Kanu and his AFRC co-accused have exhausted their trial and appeal procedures. It is therefore the case that the only recourse to a review of their case would have to be by virtue of Rule 120 of the Special Court's Rules of Procedure. For the avoidance of doubt it is submitted that Rule 122 does not apply unless the request for review is successful. Following this line of argument, any potential benefit of a completed plan to get Mr. Sesay to change his statement, would not automatically have resulted in the overturning of the AFRC convictions. In the circumstances, when considering the gravity of the offence it is submitted that this plan could be seen as a preparatory plan which, in itself, is unlikely to have had the effect of successfully interfering with the Special Court's administration of Justice.

¹⁷ Prosecutor v Eric Senessie, SCSL-11-01-T-20, Sentencing Judgement.

¹⁸ Ibid, para. 15, where it is stated that one of the most distinguishing features of this case was the number of former witnesses who were approached by Senessie with a view to having them recant their evidence.

¹⁹ Ibid, para. 18, where it is stated that there was 'determination and planning on the part of the Defendant' and para. 22.

18. The Amicus Curiae brief lists a number of cases from the International Tribunals, in particular reference is made to a number of contempt cases at footnote 27 to paragraph 14. While it is correct to say that sentencing practices in other cases has consistently punished Rule 77(A)(iv) violations with terms of imprisonment, it is undoubtedly the case that the sentences have varied from periods of 3 months to three years. In the *Šešelj* case, for example, referred to by the Office of the Prosecutor, the sentence of 2 years' imprisonment for the third contempt case was imposed for persistent contumacious behaviour and in the light of two previous convictions for the same offence.²⁰
19. It is submitted that the facts of Mr. Kanu's case are significantly distinguishable from the *Šešelj* case and that the sentence in that case suggests an upper limit for sentence in particularly reprehensible behaviour which arose out of failure to comply with Tribunal orders which is over and above the criminality alleged in this case.

Mitigation

20. The convicted contemnor, Kanu, is currently serving his sentence imposed by the Special Court at Mpanga prison, Rwanda. He is impecunious, subject to the provisions for funds made for him under the terms of his agreement and will find it difficult, if not impossible to satisfy a financial penalty were the Single Judge minded to levy one.
21. Should it be the case that it is considered that only a custodial sentence would meet the justice of this case, the Defence would like to make the following submissions:
- i. As a serving prisoner, any custodial sentence will affect any considerations likely to be given to early release.

²⁰ *Prosecutor v Šešelj*, IT-03-67-R77.4

- ii. The likelihood of early release being considered is still many years away and not likely to be before he has served at least 20 years of his sentence.²¹ Any sentence passed on Kanu to run consecutively with his current sentence will have the likely effect of increasing the period before he would become eligible for parole in a manner that would be out of proportion to the demands of justice.
 - iii. Any sentence passed on Kanu to run consecutively with his current sentence is also likely to have the effect complained of in the paragraph above.
 - iv. As a convicted person, he is more likely to have grasped at any and all straws available to have his sentence reduced, hence his involvement in this offence.
 - v. His role in the plan was limited as discussed above to speaking to Mr. Sesay.
 - vi. He did not make an offer of money to Mr. Kargbo, neither did he speak to Mr. Kargbo regarding Mr. Sesay recanting his testimony, as aforesaid.
 - vii. It is more likely that he was a part of the plan rather than the architect or developer of same.
22. In all the circumstances of the case, the Honourable Court is invited to treat Mr. Kanu with as much leniency as possible taking into account the mitigating features in his case and to be merciful, with the consideration always that, as in Portia's plea in William Shakespeare's Merchant of Venice²²:

The quality of mercy is not strain'd

It droppeth as the gentle rain from heaven

Upon the place beneath. It is twice blest:

It blesseth him that gives and him that takes

²¹ See 2 July 2010 letter to Santigi Kanu, SCSL-11-02-T-57, p. 380, paragraph 2 of letter.

²² The Merchant of Venice, William Shakespeare, Act Four, Scene 1.

Conclusion

23. Counsel, on behalf of Mr. Kanu, therefore respectfully urges the Court not to impose a further custodial sentence on him, or if the Court feels unable to accede to this plea, at the very least to impose upon him the least sentence possible in the circumstances.

Respectfully Submitted,



Kevin A. Metzger

Counsel for Santigie Borbor Kanu

Dated 04 October 2012