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SCSL-11-02-A
(043-050)

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SPECIAL COURT FOR SIERRA LEONE

APPEALS CHAMBER

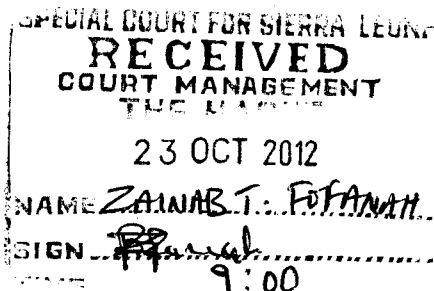
Before: Justice Shireen Avis Fisher, Presiding Judge
Justice Emmanuel Ayoola
Justice George Gelaga King
Justice Renate Winter
Justice Jon Kamanda
Justice Philip Nyamu Waki, Alternate Judge

Registrar: Ms. Binta Mansaray
Date filed: 22 October, 2012
Case No. SCSL-11-02-A

The Independent Counsel

-v-

Hassan Papa Bangura
Samuel Kargbo
Santigie Borbor Kanu
Brima Bazy Kamara



PUBLIC

NOTICE OF APPEAL IN RESPECT OF BRIMA BAZZY KAMARA

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

Prosecutor v. Hassan Papa Bangura et al- SCSL-11-02-A

1. This Notice of Appeal is filed on behalf of Brima Bazzy Kamara (Bazzy Kamara) pursuant to Article 20 of the Statute of the Special Court for Sierra Leone (the Statute) and Rule 108(B) of the Rules of Procedure and Evidence ("the Rules") following the judgment of Justice Theresa Doherty (sitting as a single Justice of Trial Chamber II) delivered at the Hague on 25th September 2012 and filed on 1st October 2012.¹ The sentencing judgment was delivered in Freetown on the 11th October 2012 and filed on the 16th October 2012.²
2. Bazzy Kamara was charged with three counts of contempt of the Special Court and was convicted on two of the three counts after a trial lasting approximately 5 (five) weeks with over two sessions of scheduled hearings at the Special Court for Sierra Leone (SCSL) sitting in Freetown and Kigali with a video link connection to Kigali, Rwanda and Freetown, Sierra Leone respectively.
3. **COUNT 1**³

Charged Bazzy Kamara with knowingly and willfully 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).

Particulars:

On or about 27th November to 16 December, from Mpanga prison, Rwanda, Bazzy Kamara offered a bribe to a protected witness TFI – 344, who gave testimony before Trial Chamber II in the proceedings of Prosecutor v Brima Kamara and Kanu, in return for recanting his previous testimony in that trial, both directly by telephone on or around 29th November, 2010, and through instructions to Samuel Kargbo and Hassan Papa Bangura.

4. **COUNT 2**⁴

Charged Bazzy Kamara with knowingly and willfully 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)9 (iv).

Particulars

¹ Prosecutor v. Bangura et al. SCSL-11-02-T-66, Judgement 25 September 2012

² SCSL-11-02-T-71

³ Order in Lieu of Indictment, 24 May 2011

⁴ Id.

On or about 27th November, 2010 to 16 December, 2010 from Mpanga Prison, Rwanda, Bazy Kamara attempted to influence protected witness TFI-334 who gave testimony before Trial Chamber II in the proceedings of the Prosecutor v. Brima Kamara and Kanu to recant his previous testimony in that trial, both directly by telephone in or around 29th November 2010 and through instructions to Samuel Kargbo, and Hassan Papa Bangura aka Bomblast.

5. COUNT 3⁵

Knowingly and willfully interfering with the Special Court's administration of justice by disclosing information relating to proceedings in knowing violation or of an order of a Chamber, in violation of Rule 77(A) (ii).

Particulars

On or about 29 November 2010 Brima Bazy Kamara from Mpanga Prison, Rwanda, disclosed confidential information in knowing violating of an order of Trial Chamber I (Prosecutor v. Sesay, Kallon and Gbao, SCSL 04-15-T-180) Decision on Prosecution Motion for Modification of Protective Measures, dated 5 July 2004) by revealing the identity of a protected witness TFI-033 to Samuel Kargbo during a telephone conversation.

6. The Prosecutor first filed a motion before the Office of the President of the Special Court on 17 December, 2010 alleging intimidation, bribery of and interference with witnesses who gave evidence in the Prosecutor v Alex Tamba Brima et al (AFRC) case before Trial Chamber II of the Special Court.⁶ That motion was dismissed. Subsequently the Prosecutor then filed the motion before Trial Chamber II.⁷ The Trial Chamber directed the Registrar to appoint an Independent Counsel to investigate these allegations pursuant to Rule 77©(iii) of the Special Court for Sierra Leone.⁸
7. On the 24th May, 2011 Trial Chamber II issued a decision on the report of the Independent Counsel and directed that Independent Counsel prosecute the four accused.⁹ The decision assigned the hearing of the case to Justice Theresa Doherty and annexed an "Order in Lieu of Indictment", charging all four Accused.

⁵ Id.

⁶ SCSL-04-16-ES-682

⁷ SCSL-04-16-ES-684

⁸ SCSL-04-16-ES-691

⁹ SCSL-04-16-ES-694

8. As stated in paragraph 2 above, Bazy Kamara was acquitted on Count 1 and was convicted on Counts 2 and 3 and sentenced to 2 years imprisonment to run consecutively with the present sentence he is serving at Mpanga Prison.
9. Being dissatisfied with aforesaid conviction Bazy Kamara hereby appeals to the Appeals Chamber of the Special Court on the following grounds:
 10. The Appellant will contend that he is charged separately on 3 counts in the "Order in Lieu of Indictment". Similarly all the other three accused were each separately charged in the same Order in lieu of indictment yet they were tried jointly in violation of Rule 48 (B) of the Rules of Practice and Procedure of the Special Court for Sierra Leone. This Rule provides:

"Person's who are separately indicted, accused of the same or different crimes committed in the course of the same transaction, may be tried together with leave granted by Trial Chamber pursuant to Rule 73".
 11. No motion was filed by the independent Counsel for leave for the separate crimes charged to be heard together. This led to the accused being treated as if they were acting jointly in pursuance of a common design. The accused Bazy was deprived of an opportunity of acquittal on all counts in the "Order in lieu of Indictment".
 12. Alternatively, the independent Counsel's refusal or failure to obtain leave of the Trial Chamber to proceed with the trial of the same or different crimes alleged to be committed in the course of the same transaction deprived the Trial Chamber of jurisdiction to hear this matter in form in which the trial proceeded.
 13. It is respectfully submitted that the Trial Chamber also erred pursuant to Rule 106(A)(a) and/or (b) when it concluded that it had jurisdiction to try the matter. This it is submitted to be a procedural error and/or a question of law which invalidates the decision against Bazy Kamara. The Trial Chamber erred in law when it concluded that it had jurisdiction to try this matter.¹⁰ At the end of the trial in Trial Chamber II and the filing of the appeal in the Appeal Chamber the Trial Chamber became *functus officio*. The Trial Chamber ceased to have jurisdiction over that case. There was no longer any matter proceeding before the Trial Chamber.
 14. The rights of Bazy Kamara during the course of the investigation were violated in that Rule 42(A)(ii) and Rule 43 were not observed by the

¹⁰ Transcript 16 June 2012, pp 24 -25 & 38-40

prosecutor. The report of the Independent Counsel was not read over to Bazy Kamara nor did he sign it. It is compounded by the fact that the Independent Counsel's report formed the basis for the "Order in lieu of Indictment". Even though the above rules were not observed contents of those documents were used by the Independent Counsel in evidence against the accused Bazy Kamara.

15. The decision to convict Bazy Kamara on grounds 2 and 3 of the Order in Lieu of Indictment is unreasonable and cannot be supported by the evidence adduced. The Trial Chamber II found Bazy Kamara not guilty of Count 1 i.e. knowingly and willfully 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).¹¹ In that Count the Court found that there was no communication between Bazy Kamara and TF1-334. That finding contradicts a finding of Guilt in Count 2.¹² If there was a finding that there was no communication in Count 1 on the 29th November 2010 a conviction of otherwise interfering with the same person on the same day is a contradiction.
16. The convict Bazy is serving his sentence at Mpanga Prison. His sole means of communication is by the MTN mobile phone in the custody of the prison authorities. Calls can only be made by the convicts under the supervision of the prison authorities as stated on the evidence. The MTN records (Exhibit 15) shows quite clearly that there was no call from Bazy to TF1-334. The same record shows that there was no call to Kargbo or Bangura from Bazy. The mobile call records of both Kargbo and Bangura in Freetown would have been an independent source to confirm whether Bazy called, TF1-334, or Kargbo (Ragga) or Bangura (Bomblast). In the absence of those records and in the absence of any MTN call records to that effect the case against Bazy Kamara cannot be said to have been proved beyond reasonable doubt.
17. In so far as Count 3 is concerned the witness testified specifically in court that the call to Samuel Kargbo (Ragga) was made on the 29th November 2010. Yet, there is no record of any telephone conversation on 29th November 2010. Bazy denied talking to Samuel Kargbo on the 29th November 2010. The MTN phone records (at Mpanga prison) support Bazy's denial. Samuel Kargbo's mobile telephone records in Sierra Leone were never tendered in evidence. Kargbo's (Ragga's) evidence is not borne out by the MTN records. His mobile phone records were not tendered in court. In the absence of those records, the prosecution failed to discharge the burden of proof beyond all reasonable doubt. Here there is an allegation, which is unsubstantiated and denial by the accused which is borne out by the MTN records. It is submitted that the conviction of Bazy on count 3 is unsafe, unsound, and unreasonable and cannot be supported by the evidence adduced by the prosecution.

¹¹ Prosecutor v. Bangura et al, SCSL -11-02-T-66, Judgment 25 September 2012

¹² Id.

18. The Learned Trial judge erred in law in her application of the rule in *Bourne v. Dunn* (1893) 6 R 67 per Lord Halsbury at pp. 76-77 which was followed in *Fenton* (1980) 71 Cr App R 307

“... nothing would be more unjust than not to cross-examine witnesses upon evidence which they have given, so as to give them notice, and to give them an opportunity of explanation and an opportunity very often to defend their own character, and not having given them such an opportunity to ask the jury afterwards to disbelieve what they have said, although not one question has been directed either to their credit or to the accuracy of the facts they have deposed to.”

19. It is submitted with respect that Samuel Kargbo (Ragga) who testified that he was told by Kamara to contact TFI 334 to ask him to recant his testimony was cross-examined by me on behalf of Bazy Kamara as to the truth of what he said and as to his credit. TFI- 334 was also cross-examined by me on behalf of Bazy Kamara. TFI-334 admitted that he never once spoke to Bazy Kamara. It is further submitted that in several portions of her judgment, the learned trial judge Justice Doherty said that the evidence was led by Bazy Kamara was not put to the witness Kargbo or Kamara. Samuel Kargbo it will be recalled pleaded guilty and offered to testify for the prosecution before he was sentenced. Although the Rules of Procedure and Practice of the Special court do not so dictate, yet in our own jurisdiction, the evidence of an accomplice needs to be corroborated in some material way. Further it is submitted that the burden of proof is on the prosecution. To discharge that burden the prosecution must prove his case beyond all reasonable doubt i.e so that the Court feels sure about the guilt of the accused.

20. It is submitted with respect that it was the duty of the prosecution to prove that telephone calls were received from the appellant Bazy Kamara before or on the 29th November 2010 which constituted the crime alleged. The prosecution failed to prove that. The only call report in the MTN records tendered by the prosecution were calls made on the 30th November, 2010. The prosecution gave no evidence about those 3 calls. The appellant testified about those three calls and explained where how and who made them. The burden of proof did not shift. It remained with the prosecution throughout.

Privilege

21. The Learned Trial Judge’s Decision to grant a subpoena to the Independent Counsel for Mr. Andrew Daniels to identify for the prosecution was wrong

and in breach of Bazy Kamara's lawyer/client professional privilege. It is respectfully submitted that the Learned Trial Judge wrongly granted the subpoena requested by the Independent Counsel for Mr. Andrew Daniel to testify for the prosecution pursuant to Rule 106 (A)(a) and/or (b) and that she erred in concluding that the rule in respect of client/privilege did not apply to Mr. Daniels conversation with Mr. Kamara and Brima. The Learned Trial Judge erred when she held that the lawyer/client privilege did not apply to Mr. Daniels communications with Mr. Alieu Tamba Brima and Bazy Kamara. It is submitted with respect, that there was nothing criminal about the conversation between Bazy Kamara and Mr. Daniels. The latter was not being asked to engage in any criminal enterprise. At best he was merely being informed about what they had discovered and what was being planned since he was willing to be appointed Counsel for the prisoners at Mpanga Prison in Rwanda. The information he testified about did not require him to be involved in any criminal enterprise.

22. The Legal Professional Privilege is a fundamental human right long established the common law and it ought never to have been breached. The effect of the breach is to lead to a miscarriage of justice as the evidence was used as evidence of a joint enterprise between Bazy Kamara and Kanu. The the purposes of obtaining and giving legal advice, and not to facts perceived by the legal adviser in the course of that relationship.

Sentence


23. On the 21st August 2012 the proceedings reopened in Kigali with a video link to Freetown. Defence evidence was heard and closing submissions were made on behalf of both the defence and prosecution during the period up to and including 6th September 2012.
24. Closing submissions were filed on behalf of all accuseds. On the 25th September 2012 the Learned Trial Judge delivered judgment convicting all three accused. In particular acquitting Kamara on count 1 and convicting him on counts 2 and 3. This judgment was delivered at the Hague by video link to Freetown and Kigali. It was subsequently filed on 1st October 2012.
25. A sentencing hearing in Freetown with a video link to Kigali, on 8th October 2012 was heard by the Single Judge who heard submissions from Counsel representing the accused prior to statements by the accused. The sentences were handed down on the 11th October 2012 and filed on the 16th October 2012. It is appellant Bazy Kamara hereby appeals against his sentence of 2 years imprisonment made to run consecutively with that of 45 years his is now

serving. It is submitted that the aforesaid sentence is inordinately high taking into account it would run consecutively with Bazy Kamara's sentence.

Relief Sought

- 1) That the conviction of the Appellant on Count 2 and Count 3 be set aside.
- 2) The Appellant be acquitted on Counts 2 and Counts 3.
- 3) Alternatively, that the whole trial be declared a mistrial and that the conviction be set aside.

Submitted by,



Abdul F Serry-Kamal
Counsel for Brima
Bazy Kamara