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SCSL-2004-15-T

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SPECIAL COURT FOR SIERRA LEONE

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THE TRIAL CHAMBER

Before: Hon. Judge Benjamin Mutanga Itoe, Presiding Judge
Hon. Judge Bankole Thompson
Hon. Judge Pierre Boutet

Registrar: Robin Vincent

9th of December, 2004

Date:

PROSECUTOR

Against

Issa Sesay
Morris Kallon
Augustine Gbao
(Case No. SCSL-2004-15-T)

**KALLON - DECISION ON MOTION ON ISSUES OF URGENT CONCERN TO THE
ACCUSED MORRIS KALLON**

Office of the Prosecutor:

Luc Côté
Lesley Taylor

Defence Counsel for Issa Hassan Sesay:

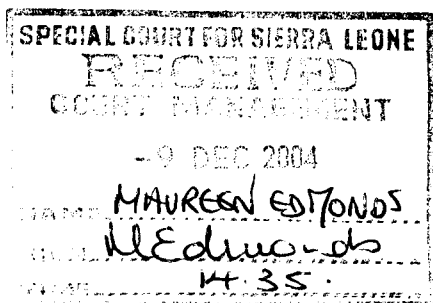
Wayne Jordash
Sareta Ashraph

Defence Counsel for Morris Kallon:

Shekou Touray
Melron Nicol-Wilson

Defence Counsel for Augustine Gbao:

Girish Thanki
Andreas O'Shea



THE TRIAL CHAMBER ("Trial Chamber") of the Special Court for Sierra Leone ("Special Court") composed of Hon. Judge Benjamin Mutanga Itoe, Presiding Judge, Hon. Judge Bankole Thompson and Hon. Judge Pierre Boutet;

SEIZED of the *Motion on Issues of Urgent Concern to Morris Kallon* ("Motion"), filed on the 1st of October, 2004;

NOTING the *Kallon – Order for Expedited Filing* of the 4th of October, 2004;

NOTING the Response to the Motion filed on the 8th of October, 2004 ("Response") by the Office of the Prosecutor ("Prosecution"); and the Reply thereto by the Defence filed on the 11th October, 2004 ("Reply");

NOTING the *Decision and Order on Prosecution Motion for Joinder* and the *Corrigendum* thereto of 28th of January, 2004 ("Joinder Decision");

NOTING the *Consolidated Indictment* filed by the Prosecution on the 5th of February, 2004;

NOTING the *Kallon – Decision on Motion for Quashing of Consolidated Indictment* of the 21st of April, 2004;

NOTING the *Decision on Prosecution Request for Leave to Amend the Indictment* of the 6th of May, 2004 and the *Corrigendum and Consequential Order* thereto of the 12th of May, 2004;

NOTING the *Scheduling Order for the Further Appearance of the Accused on the Amended Consolidated Indictment* of the 12th of May, 2004;

NOTING the *Amended Consolidated Indictment* filed by the Prosecution on the 13th of May, 2004;

NOTING the further initial appearance of the Accused Issa Sesay, Morris Kallon and Augustine Gbao on the Amended Consolidated Indictment on the 17th of May, 2004

NOTING the provisions of Rules 48, 50, 52 and 73 of the Rules of Procedure and Evidence ("Rules");

NOW CONSIDERS the matter on the basis of the written briefs of the Parties;

I. SUBMISSIONS OF THE PARTIES

A) *The Motion*

1. In this Motion, Counsel for the Second Accused, Morris Kallon, as a matter of urgency, raises four (4) issues of non-compliance by the Prosecution.¹ They are:

¹ Motion, para. 1.

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- (i) That the Consolidated Indictment was not served on the Second Accused in accordance with the provisions of Rule 52 of the Rules, as ordered by the Trial Chamber pursuant to its Joinder Decision;
- (ii) That there has been non-compliance with the Trial Chamber's Consequential Order of the 12th of May, 2004, instructing the Registrar to prepare a certified copy of the Amended Consolidated Indictment and serve it on the Second Accused in accordance with Rule 52 of the Rules;
- (iii) That the Second Accused was not properly arraigned before the Trial Chamber on the Amended Consolidated Indictment on which the trial proceedings are premised; and,
- (iv) That the Original Indictment against the Second Accused, on which he made his Initial Appearance before a Judge and was properly arraigned, has not been stayed by an Order of the Trial Chamber, despite the Trial Chamber's Joinder Decision that a Consolidated Indictment be prepared as the Indictment on which the joint trial shall proceed.

2. The Defence further submits that personal service on an Accused is not synonymous with service on Counsel; that service on a Sunday as attempted by Court Management Section on Sunday, the 16th of May 2004, is not supported by the Rules and practice of the Special Court; and that the Second Accused raised the above concerns at the earliest available opportunity when he appeared for his pleading on the Amended Consolidated Indictment. The Defence also contends that the absence of service of the Consolidated Indictment and the Amended Consolidated Indictment is fatal to the proceedings.²

3. The Defence also avers that because the Consolidated Indictment, later amended in the Amended Consolidated Indictment, contains new locations, extended time frames and bears a new case number, these Indictments are in both form and to some extent in substance, not the same as the Original Indictment on which the Second Accused made his Initial Appearance and plea. Therefore, the Defence submits that they have all the hallmarks of a fresh Indictment.³ In the view of the Defence, the present situation has the potential of a standby Indictment against the Accused at the hands of the Prosecution, should the Amended Consolidated Indictment be thrown out.⁴

4. The Defence, therefore, seeks the following relief:
- a. An Order staying the Original Indictment;
 - b. An Order that the Second Accused is not properly arraigned before the Court to proceed with his trial on the Amended Consolidated Indictment; and,
 - c. Further or other Consequential Orders as the Court may deem appropriate.

² *Id.*, paras 16-19.

³ *Id.*, para. 20.

⁴ *Id.*, para. 21. In addition, it is the Defence's submission that the Trial Chamber should have gone through the procedural steps of staying the Original Indictment in the absence of any indication on the part of the Prosecution to have it withdrawn at a later stage after consolidation.

B) The Response

5. The Prosecution contends that the Defence Motion should be dismissed in its entirety because the Amended Consolidated Indictment has been served and the Second Accused arraigned.

6. Referring to the transcripts of the appearance held on the 17th of May, 2004, in which the Designated Judge Pierre Boutet stated that the Amended Consolidated Indictment was deemed to have been served personally on all the Accused on Sunday, the 16th of May, 2004,⁵ the Prosecution submits that the Amended Consolidated Indictment was read to all the Accused and that following the refusal of all the Accused to enter a plea on the new Count 8, the Designated Judge deemed that all the Accused had entered a plea of not guilty to that specific count, in accordance with the Rules.⁶

7. The Prosecution further contends that the records of the appearance of the 17th of May, 2004 show that the urgent concerns enumerated in the Defence Motion are unfounded. It further avers that it is improper for the Second Accused to raise them in a motion more than four months after the fact.⁷ According to the Prosecution, the Trial Chamber has already heard twelve witnesses in this case, some of whom gave evidence relevant to the additional count of forced marriage. These witnesses, the Prosecution argues, were cross-examined by Counsel for the Second Accused and in so doing, Counsel did not demur from the position that the trial proceeding was premised on the Amended Consolidated Indictment.⁸

8. In addition, the Prosecution contends that even if there had been a failure of service of the Consolidated Indictment, the Second Accused has not suffered any prejudice.⁹ The Prosecution also asserts that the Consolidated Indictment contains no additional charges and that although the Amended Consolidated Indictment contains an additional charge, it is not substantially different from the Consolidated Indictment. The Prosecution states that both the Consolidated and the Amended Consolidated Indictment were served upon Counsel representing all the Accused.¹⁰

9. Finally, the Prosecution submits that in accordance with legal principles, trial on a subsequent indictment prevents retrial on a former indictment, thus the Defence's application for an Order for a Stay of the Original Indictment or Consolidated Indictment is unnecessary.

C) The Reply

10. In its Reply, the Defence reiterates that personal service on the Second Accused has not been effected in accordance with the Rules. It also contends that the Rules provide no room for a deeming provision as the Prosecution suggests by its reliance on the statement by the Designated Judge which deemed the Amended Consolidated Indictment to have been personally served.¹¹ It

⁵ Response, paras 17-18.

⁶ *Id.*, para. 20.

⁷ *Id.*, para. 21.

⁸ *Id.*

⁹ *Id.*, para. 22.

¹⁰ *Id.*, paras 22-25.

¹¹ Reply, paras 7-8.

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further avers that the fact of the Second Accused's participation in the trial at this stage, does not bar him from raising the relevant issues, nor is he barred from raising substantial issues relating to his arraignment.¹²

II. PROCEDURAL HISTORY

11. The Original Indictment against the Second Accused was approved by the Designated Judge Bankole Thompson on the 7th of March, 2004. Subsequently, in accordance with the Joinder Decision, the Prosecution filed on the 5th of February, 2004 a Consolidated Indictment against the Accused Sesay, Kallon and Gbao, as the indictment upon which the joint trial of the accused shall proceed.

12. On the 10th of February, 2004, the Second Accused filed a motion requesting the Consolidated Indictment to be quashed on the basis that it contained new allegations against all the Accused that effectively amended the Original Indictment. The Chamber dismissed the motion on the 21st of April, 2004, on the basis that, *inter alia*, the Consolidated Indictment did not contain new allegations but rather provided for additional specificity and the Second Accused would indeed benefit from such specificity.¹³

13. Subsequently, on the 12th of May, 2004, the Chamber granted the Prosecution's request to amend the Consolidated Indictment in order to add thereto a new count of Forced Marriage – Other Inhumane Act as new Count 8.¹⁴ Accordingly, pursuant to the provisions of Rule 50(B)(1) of the Rules, a further appearance of all the three Accused took place on the 17th of May, 2004 for the entering of their plea on the new count.

14. During that appearance, the Chief of Court Management Section, Mr. Leonard Dolphin gave sworn testimony to the Designated Judge Pierre Boutet that on the previous day, Sunday the 16th of April, 2004, he had gone to the Detention Centre of the Special Court in order to serve the Amended Consolidated Indictment on the Accused pursuant to the provisions of Rule 52 of the Rules. He stated that he was accompanied by interpreters who had copies of the Amended Consolidated Indictment in English and in Krio and an audiotape recording of the same Indictment translated into Krio. Mr. Dolphin also stated that all the Accused refused to accept service of the Amended Consolidated Indictment.¹⁵

15. In response, Defence Counsel for the Second Accused, Melron Nicol-Wilson, submitted that in the national jurisdiction of Sierra Leone it is not normal for service of court documents to be effected on a Sunday.¹⁶

16. Following that submission, the Designated Judge then declared as follows:

¹² *Id.*, paras 9-10.

¹³ *Prosecution v. Sesay, Kallon and Gbao*, Case No. SCSL04-15-PT, Decision on Motion for Quashing of Consolidated Indictment, 21 April 2004, para. 21.

¹⁴ See also *Prosecution v. Sesay, Kallon and Gbao*, Case No. SCSL04-15-PT, Request for Leave to Amend the Indictment, 9 February 2003.

¹⁵ *Prosecution v. Sesay, Kallon and Gbao*, Case No. SCSL04-15-T, Transcripts, 17 May 2004, pages 4-6.

¹⁶ *Id.*, page 6, lines 27-34.

“Counsel for Morris Kallon, I would like to refer you to the Rules of Evidence, 52, and there is no, I underline “no” limitation is imposed as to when service can be effected whether it’s on a Monday, Saturday or a Sunday. What is provided for is that service shall be done as soon as possible thereafter.

Given what I have heard, and the information provided to the Court, I would, in those circumstances, deem the services to have been personally effected in their own language on each and every one of these Accused; that is, Sesay, Kallon and Gbao. So for the purpose of these proceedings this morning, it would be deemed to have been served in their own language with the amended consolidated indictment. Thank you.

So we will now proceed with the appearance on the new count but I will ask the Court to read the [amended] consolidated indictment in total and when we get to the new count, I will ask you to stop at that time and read that count for each and every one ~ every accused and at that time, I will ask them to plead to that specific count.”¹⁷

17. The Designated Judges then ordered that the entire Amended Consolidated Indictment be read to the Accused, and the arraignment of each accused on the new Count 8. When asked to enter a plea, the Second Accused declared the following:

“I’m not prepared to enter a plea in this Court until I get the feedback from the submission of the Supreme Court of Sierra Leone. Then, if this consolidated indictment is bringing three of us together, it means reading it all over again. So I will not enter a plea just for one count.”¹⁸

18. In light of his refusal to enter a plea and pursuant to Rule 61 of the Rules, the Designated Judge entered a plea of not guilty for Count 8 on behalf of the Second Accused,¹⁹ as well as for the Accused Sesay and Gbao, who had also refused to enter any plea on the new count.²⁰

III. DELIBERATION

A) Non-Service of the Consolidated Indictment

19. The first specific issue to be addressed by the Chamber in the context of this Motion is that of the alleged failure to serve the Consolidated Indictment on the Second Accused in accordance with Rule 52 of the Rules and consistent with the Chamber’s Joinder Decision. Was there in fact and in law, failure to serve the Consolidated Indictment on the Second Accused? As to the service of an indictment upon an accused person within the jurisdiction of the Special Court, Rule 52 of the Court’s Rules pre-eminently governs. According to Rule 52:

“(A) Service of the indictment shall be effected personally on the accused at the time the accused is taken into the custody of the Special Court or as soon as possible thereafter.

(B) Personal service of an indictment on the accused is effected by giving the accused a copy of the indictment certified in accordance with Rule 47.”

¹⁷ *Id.*, page 8, lines 6-21.

¹⁸ *Id.*, page 22, lines 16-20.

¹⁹ *Id.*, lines 23-26.

²⁰ *Id.*, pages 19-20, page 23.

20. In a Separate Concurring Opinion to a recent Decision of this Chamber on this issue, it was observed that:

“...as a matter of statutory interpretation, Rule 52(B) governing the service of indictments within the jurisdiction of the Special Court for Sierra Leone departs from the acknowledged and recognized body of jurisprudence on the subject, both nationally and internationally. Under national criminal law systems and from international criminal law practice, the notion of “personal service” of legal process bears the extended legal meaning of service of the process in question on Counsel for the accused as the duly authorised legal representation, on record, for the said accused. In effect, based on the foregoing reasoning, it would be sufficient in law, for the purposes of “personal service”, if the Consolidated Indictment in question were served upon Counsel for the First Accused. By contrast, however, the legislative intent behind our Rule 52(B) was to adopt a restrictive rather than an extended legal connotation of “personal service” of indictments within the Special Court adversarial scheme. It does not fall within the judicial domain of the Trial Chamber to question the legislative wisdom behind the formulation of Rule 52(B) in its present form. Therefore, applying the golden rule of statutory interpretation, Rule 52(B) must be given its plain and literal meaning.”²¹

21. Guided by the foregoing proposition as to the legal effect of Rule 52 of the Rules, it is the considered view of this Chamber, following two recent Decisions²² on the issue, that the law of this tribunal makes it clearly mandatory for an accused person to be served a copy of the indictment personally at the time he or she is taken into the custody of the Court or as soon as possible thereafter. Rule 52(B) is quite explicit in its terms that “personal service” is to be effected by giving the accused a copy of the indictment approved in accordance with the aforesaid Rule. Consistent with this reasoning, and noting that in the context of this Motion the records of Court Management Section disclosed that the Second Accused was not personally served with the Consolidated Indictment as prescribed by Rule 52(B) but that service was effected on his counsel, the Chamber finds that there has been, in fact and in law, non-compliance with Rule 52(B) of the Rules in relation to the Second Accused’s entitlement to be personally served with a copy of the Consolidated Indictment in conformity with the Order of the Trial Chamber made pursuant to its Joinder Decision.

22. The Chamber further holds that such non-compliance does not procedurally invalidate the trial proceeding or any subsequent proceeding on two main grounds. The first is that such an omission or defect does not, without more, prejudice the right of the Second Accused to a fair trial based on the state of the official records and the fact that he has subsequently appeared to take his trial and that his Counsel have cross-examined extensively prosecution witnesses on his behalf. The second ground upon which we base the foregoing reasoning that infringement of Rule 52(B) does not invalidate the trial proceeding or any subsequent proceedings is that where an accused person has pleaded “not guilty” to a charge or charges in an indictment he shall, “without further form, be deemed to have put himself upon his trial, and after such a plea, it shall not be open to the accused, except with the leave of the Court, to object that he is not properly upon his trial, by reason of some defect, omission or irregularity relating to the depositions, or

²¹ *Prosecutor v. Norman, Fofana and Kondewa*, Case No. SCSL-04-14-T, Separate Concurring Opinion of Judge Bankole Thompson on Decision of First Accused’s Motion For Service and Arraignment on the Consolidated Indictment, 29 November 2004, para 3.

²² *Prosecutor v. Norman, Fofana and Kondewa*, Case No. SCSL-04-14-T, Decision on First Accused’s Motion for Service and Arraignment on the Consolidated Indictment, 29 November 2004; and *id.*, Decision on Second Accused’s Motion for Service and Arraignment on the Consolidated Indictment, 6 December 2004.

preliminary investigation, or any other matter arising out of the preliminary investigation.”²³ The Second Accused is therefore estopped from contending that he is not properly upon his trial having pleaded “not guilty” to the Original Indictment and its additional count in the Amended Consolidated Indictment.

23. In addition, worthy of note is that the Second Accused already challenged the validity of the Consolidated Indictment by filing a Motion to Quash the Consolidated Indictment, submitting that it is a new indictment. This Chamber has definitively disposed of these contentions in its *Kallon – Decision on Motion for Quashing of Consolidated Indictment* of the 21st of April, 2004, for which no leave to appeal has been sought by the Defence, stating in essence that the Consolidated Indictment only provides more specificity without containing any new crimes or charges. The Chamber, accordingly, is of the opinion that the Consolidated Indictment, now the Amended Consolidated Indictment, cannot, in law, be properly characterized as a new indictment.

B) Non-Service of the Amended Consolidated Indictment.

24. The second specific issue for determination by the Chamber is the alleged failure to serve personally the Amended Consolidated Indictment on the Second Accused consistent with the Chamber’s Consequential Order of the 12th May, 2004 instructing the Registrar to prepare a certified copy of the Amended Consolidated Indictment and serve it on the Second Accused. In disposing of this issue, the Chamber recalls the sworn testimony of Len Dolphin, Chief of Court Management Section that when he attempted to personally serve the Amended Consolidated Indictment on the Second Accused on 16th April 2004, the Second Accused refused to accept service. The Chamber accepts the evidence of the Chief of Court Management. It is the considered view of the Chamber, and we so hold, that where an accused person on whom it is sought to effect personal service of legal process acts in a manner with intent to frustrate, and does end up frustrating, personal service of such legal process, it does not lie in his mouth to complain that he was not personally served the said legal process. To grant him any such right is tantamount to the Court allowing itself to be an engine for abusing its own process. The complaint of the Second Accused on this issue is, therefore, frivolous and vexatious.

C) The Issue of Re-Arraignment

25. Having found that the failure to effect personal service upon the Second Accused in compliance with Rule 52(B) is not prejudicial to him and does not invalidate the trial proceeding and subsequent proceedings, and also that the claim, on the part of the Second Accused of omission to effect personal service on him of the Amended Consolidated Indictment is frivolous and vexatious, the Chamber does not deem it necessary or useful to examine the issue of the legal necessity of a re-arraignment on the Amended Consolidated Indictment.

²³ See Section 133(1) and (2) of the Sierra Leone Criminal Procedure Act 1965. Article 14(2) of the Statute of the Court authorizes recourse to the jurisprudence of Sierra Leone for guidance, albeit as a matter of discretion, whenever the Rules and Evidence of the Court “do not, or adequately provide for a specific situation.” It is crystal-clear that there is, at present, no rule of the Special Court on the legal effect or consequence of a plea of “not guilty” by an accused to an indictment as a matter of procedure. For instance, does non-compliance with a rule of procedure necessarily result in a nullity? Evidently, the Sierra Leone law does not adopt this approach. See also Article 20(3) of the Statute for recourse to the jurisprudence of the Supreme Court of Sierra Leone.

D) Staying of the Original Indictment

26. In the Chamber's view, the issue of staying the Original Indictment raised by the Second Accused is meretricious for the reason that, as a matter of law, the veiled suggestion of double jeopardy is misconceived. It is trite law that the Amended Consolidated Indictment merely "consolidated and superseded the Original individual separate indictments" including that of the Second Accused, "thus, as it were, extinguishing and relegating them into a state of legal oblivion."²⁴

IV. DISPOSITION

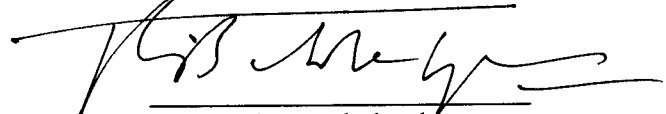
FOR ALL THE ABOVE REASONS,

THE CHAMBER DISMISSES the Motion in its entirety.

Hon. Judge Benjamin Mutanga Itoe, Presiding Judge, will append a dissenting opinion to this Decision.

Done in Freetown, Sierra Leone, this 9th day of December, 2004


Hon. Judge Pierre Boutet


Hon. Judge Bankole Thompson



²⁴ *Prosecutor v. Norman, Fofana and Kondewa*, Case No. SCSL-04-14-T, Separate Concurring Opinion of Judge Bankole Thompson on Decision on First Accused's Motion for Service and Arraignment on the Consolidated Indictment, 29 November 2004, para 23.