SCSL-04-14-T
(10899-10909)

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

Date: 29th November, 2004

PROSECUTOR Against SAM HINGA NORMAN
MOININA FOFANA
ALLIEU 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

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I. Introduction

1. As regards the merits of the instant Motion, I entirely agree with and endorse the conclusion and Order as set out in the majority Decision of the Chamber written by my learned brother, the Hon. Judge Pierre Boutet on the specific issues raised by the First Accused in his application to the Court. I have, however, found it judicially compelling and necessary to adopt my own reasoning and put forward my own reasons in support in a Separate Concurring Opinion because this is an area where the law, in some respects, remains intolerably unclear, if not confusing. In addition, it seems to me that the specific issues raised by this Motion are extremely complex and controversial both in terms of legal theory and practice. Hence, my considered position that while it is of utmost importance for the Chamber to pronounce its authoritative position on them, yet is equally necessary to recognise the diverse legal perspectives from which the issues can be approached. I have also articulated in paragraphs 7-10 my own considered appreciation of the evolving jurisprudence of the Special Court governing pleadings in an indictment as expounded in a series of seminal Decisions of the Court in the year 2003, under two main heads: (i) the régime of rules generally governing the framing of indictments, and (ii) the specific issue of defects in the form of the indictment especially as regards particularity and specificity in the context of international criminality. This would seem to be an opportune time for the Chamber to restate this Court's adaptations of the key principles on this aspect of the law. In supporting the majority Decision, let me indicate that I adopt in their entirety the reproduction of (1) the Submissions of the Accused, (2) The Prosecution's Response, and (3) The First Accused's Reply as detailed in that Decision.

II. Non-Service of the Consolidated Indictment

2. Let me, now address the first specific issue for determination. It is that of the alleged omission to serve the Consolidated Indictment. The contention of the First Accused on this issue is that he was not served the said document in the manner stipulated by law. Clearly, the law of this tribunal makes it mandatory for an accused person to be served a copy of the indictment personally at the time the accused is taken into the custody of the Court or as soon as possible thereafter. To this effect is Rule 52(A) of this Court's Rules of Procedure and Evidence. In the context of Rule 52, "personal service" is effected by giving the accused a copy of the indictment approved in accordance with Rule 52(B) of the aforesaid Rules of Procedure and Evidence.

3. In my considered view, 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 some national criminal law systems and in 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 representative, 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.

4. Having thus articulated the law on this specific issue, it remains for me to ascertain from the records whether the First Accused was personally served with the Consolidated Indictment. Based on a Memorandum[1] from Court Management that the First Accused was not personally served with the Consolidated Indictment, and that service was effected upon his counsel, I find that there has been a breach of Rule 52(B) in relation to the First 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 in this case of the 22nd day of January 2004.[2] Conceding the finding of non-compliance with Rule 52(B), it is my considered opinion that such non-compliance is not fatal for the reason that it has not in any way derogated from the right of the First Accused to a fair trial or caused any prejudice to him, taking into account all the procedural steps taken by him subsequent to the making of his opening statement in court and his decision to represent himself and having participated actively in the cross-examination of some prosecution witnesses against him as noted in the majority Decision.

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[1] NG/CMS/LO/045/04 – Service of Consolidated Indictment, 9 November, 2004.

[2] See *Prosecutor against Sam Hinga Norman, Moinina Fofana, Allieu Kondewa,* Decision and Order on Prosecution Motion for Joinder, para 35(3).

III. Alleged Differences Between the Original Indictment and the Consolidated Indictment

5. The second key issue raised by the Motion that needs to be addressed is whether there are major differences between the First Accused's *Original* Indictment and the *Consolidated* Indictment. After a meticulous comparison of both accusatory instruments, the inference seems irresistible that the latter accusatory instrument, to wit, the *Consolidated* Indictment, embodies certain new material factual allegations within existing counts as highlighted in the majority Decision of the Chamber. There is, therefore, merit in the First Accused's contention that the *Consolidated* Indictment confronts him with "a considerably extended indictment period of an additional 20 months, until December 1999, and additional geographic locations."[3] For an avoidance of doubt, ***I stress that it is not my view that the Consolidated Indictment contains new offences or crimes against the First Accused. Nor is it my hypothesis that because the Consolidated Indictment incorporates new expanded factual allegations, it is therefore a new accusatory instrument.*** Consistent with accepted national criminal law and international criminal law approaches, I adhere to the view that a *consolidated* indictment that does not incorporate additional crimes or offences authorised pursuant to a joinder decision is simply a consolidating and superseding accusatory instrument taking the place of the *original* indictments.

6. It is, however, equally important to determine whether these new material expanded factual allegations within existing counts are of such a nature as to prejudice the right of the First Accused to a fair trial on the *Consolidated* Indictment? To answer this key question, it seems necessary, first to recapitulate the principles governing pleadings in an indictment designed to reflect the peculiar and special juridical features of the Special Court for Sierra Leone, and crafted out of the evolving jurisprudence of our contemporary predecessor international criminal tribunals, the International Criminal Tribunal for Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR).

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[3] Motion para 8.

Principles Governing the Pleading of an Indictment

7. In its seminal Decision entitled *Decision and Order on Defence Preliminary Motion for Defects in the Form of the Indictment*[4], this Chamber opined as follows:

> "The fundamental requirement of an indictment in international law as a basis for criminal responsibility underscores its importance and nexus with the principle of *nullum crimen sine lege* as a *sine qua non* of international criminal responsibility. Therefore, as the foundational instrument of criminal adjudication, the requirements of due process demand adherence, within the limits of reasonable practicability, to the régime of rules governing the framing of indictments. The Chamber notes that the rules governing the framing of indictments within the jurisdiction of the Special Court are embodied in the Founding Instruments of the Court."

8. Highlighting the specific relevant governing statutory provisions, the Chamber noted thus:

> "Firstly, according to Article 17(4)(a) of the Court's Statute, the accused is entitled to be informed "promptly" and "in detail" of the nature of the charges against him. Secondly, Rule 47(C) of the Rules of Procedure and Evidence of the Special Court expressly provides that:
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> > The indictment shall contain, and be sufficient if it contains, the name and particulars of the suspect, a statement of each specific offence of which the named suspect is charged and a short description of the particulars of the offence. It shall be accompanied by a Prosecutor's case summary briefly setting out the allegations he proposes to prove in making his case."[5]

9. Furthermore, by a process of logical deduction from existing authorities of a persuasive nature, the Chamber proceeded to infer from the evolving jurisprudence of ICTY and ICTR, thirteen specific principles governing the framing of indictments,[6] and reasoned that:

> "Based generally on the evolving jurisprudence of sister international tribunals, and having particular regard to the object and purpose of Rule 47(C) of the Special Court Rules of Procedure and Evidence which, *in its plain and ordinary meaning*, does not

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[4] *The Prosecutor against Issa Hassan Sesay* (Case No. SCSL-2003-05-PT) 13th day of October, 2003. para 5.
[5] Id. para 5.
[6] Id., See especially paragraph 7 where the said propositions are set out in detail.

> require an unduly burdensome or exacting degree of specificity in pleading an indictment, but is logically consistent with the foregoing propositions of law, the Chamber considers it necessary to state that in framing an indictment, the degree of specificity required must necessarily depend upon such variables as (i) the nature of the allegations, (ii) the nature of the specific crimes charged, (iii) the scale or magnitude on which the acts or events allegedly took place, (iv) the circumstances under which the crimes were allegedly committed, (v) the duration of time over which the said acts or events constituting the crimes occurred, (vi) the time span between the occurrence of the events and the filing of the indictment, (vii) the totality of the circumstances surrounding the commission of the alleged crimes."[7]

10. In adapting those principles to the unique and peculiar features of the Court, as a war crimes tribunal, the Chamber had this to say:

> "In this regard, it must be emphasized that where the allegations relate to ordinary or conventional crimes within the setting of domestic or national criminality, the degree of specificity required for pleading the indictment may be much greater than it would be where the allegations relate to unconventional or extraordinary crimes for example, mass killings, mass rapes and wanton and widespread destruction of property (in the context of crimes against humanity) and grave violations of international humanitarian law within the setting of international criminality."[8]

11. Evidently, the foregoing principles constitute the foundational elements of our evolving jurisprudence on the subject of the régime of rules governing the framing of indictments charging crimes falling within the jurisdiction of the Special Court for Sierra Leone. It is of interest to note that the principles as developed in the seminal Decision of the Court were applied in two subsequent Decisions of this Chamber, to wit, *The Prosecutor against Santigie Borbor Kanu*,[9] and *The Prosecutor against Allieu Kondewa*[10]. In *Kanu*, the Chamber reiterated the specificity doctrine as to the framing of indictments in exercise of the Special Court's jurisdiction as not being unduly exacting and burdensome, as to amount to a requirement to adduce evidence in an accusatory document.

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[7] Id., para 8.
[8] Id., para 9.
[9] Decision and Order on Defence Preliminary Motion for Defects in the Form of the Indictment, (Case No. SCSL-2003-13-PT) 19th day of November, 2003.
[10] Decision and Order on Defence Preliminary Motion for Defects in the Form of the Indictment (Case No. SCSL-2003-12-PT) 27th day of November, 2003.

12. From the key perspective of the imperative of specificity in framing indictments the thrust of the distinction sought to be made by the Trial Chamber in *Sesay* and the subsequent *Decisions* referred to here is that specificity in cases of extraordinary crimes that occur within the setting of international criminality is not an absolute concept. It is a quality of necessarily variable content depending upon the peculiar facts and circumstances, as alleged, and in so far as the context for the pleading of the factual allegations of such extraordinary crimes admit. This distinction as to the régime of rules governing the framing of indictments has not hitherto been sufficiently or clearly articulated by the authorities on the subject.

13. Instructively, the foregoing principles were adapted, modified and, as it were, tailored to the needs of the Special Court for two key reasons. First, to differentiate between the rules governing the framing of indictments in the context of domestic or national criminality and the régime of rules designed to govern the framing of indictments in the sphere of international criminality. Second, to reflect the unique specificities and peculiarities of the Special Court in the fulfilment of its mandate.

14. Guided by the above restatement of the law, and having regard specifically to the proposition enunciated in *Sesay* that the degree of specificity required in framing an indictment must necessarily depend upon the variables articulated at paragraph 8 of that Decision, it follows, as the Chamber stated in *Kanu*, that it would not be realistic to expect the offences charged in an indictment, in the sphere of international criminality whether in its ***original*** or ***consolidated*** form, to be pleaded with "pin-point particularity".[11]

15. Contrastingly and significantly, the pith of the First Accused's complaint here is not that the crimes charged in the ***Consolidated*** Indictment have not been pleaded with "pin-point particularity" but that the said Indictment is, as it were, overloaded with particulars and details in relation to the First Accused that were not embodied in the ***Original*** Indictment and in respect of which, inferentially, he had not been, in the language of Article 17(4)(a) of the Court's Statute, ***"informed promptly and in detail"***, a conjunctive concept (I must add). In this context, therefore, one critical question is whether exceeding the degree of particularity required by law, albeit later, is, *ipso facto*, prejudicial to the Accused and impacts adversely on his right to a fair trial even where such specificity does not result in the charging of new offences. And so, the issue for ultimate resolution here is whether the Chamber is foreclosed from examining whether the discovered new material expanded

[11] Id., para 21.

factual allegations as to geographical locations and time frames within existing counts are consistent with the doctrine of fundamental fairness and the overall interests of justice thereby disentitling the First Accused from some appropriate remedy in law, attaching normative primacy to Article 17(4)(a) of the Statute which mandates that every person accused of crime be informed ***"promptly and in detail"*** of the charges against him/her.

IV. Issue of Re-Arraignment

16. It is in this regard, that I perceive some legal nexus between the issue of the discovery of the new material expanded factual allegations found in the ***Consolidated*** Indictment herein and the issue of the legal necessity, if any, for a re-arraignment.

17. *As to the issue of arraignment on a* ***consolidated*** *indictment authorised pursuant to a joinder decision, there is no specific governing rule of procedure directly on the point in international criminal tribunals. The only analogous situation is that of arraignment on an* ***amended*** *indictment.* On this latter aspect, the prevailing position in ICTY, ICTR and the Special Court is that where the ***amended*** indictment incorporates ***new charges*** and the accused has already appeared before a Trial Chamber consistent with the procedure for initial appearance, a further appearance shall be held as soon as practicable to afford the accused the opportunity to plead to the new charges.[12]

18. It is my considered view that there is a clear legal distinction between a ***consolidated*** indictment and an ***amended*** indictment, though, logically there may be some overlapping of the ***concept of consolidation*** and the ***concept of amendment*** in the context of an indictment, and justifiably so, given the dynamics of prosecutorial strategies and the investigatory process. In effect, they may be mutually inclusive depending on the circumstances, but not necessarily mutually exclusive. This reasoning is partly based on an appreciation of the etymology of each word. According to *The Oxford Dictionary of Word Histories* 'consolidate' means to "combine into a single whole". It derives from the latin word '*consolidare*' meaning "to make firm together"[13] The word '*amend*' which comes from the French '*emend*' however means to improve or make corrections.[14] In

[12] See Rule 50 of ICTY Rules as amended on 28 July 2004; see also Rule 50 of ICTR Rules and Rule 50 of SCSL Rules as amended on 14 March 2004.
[13] Glynnis Chantrell (ed.) Oxford: Oxford University Press, 2002, p115.
[14] Id., pp20 and 175.

Black's Law Dictionary, '*consolidate*' means "to combine or unify into one mass or body".[15] The word '*amend*' means to "correct or rectify". Guided by the foregoing definitions, I am fortified in my analysis that a ***consolidated*** indictment is not necessarily, without more, an ***amended*** indictment by reason of its consolidated nature or being the product of the merger of, at least, two separate original indictments. Legally, a ***Consolidated Indictment*** which is ***amended***, with leave of the Court or not, becomes an ***Amended Consolidated Indictment.*** Given the validity of my analysis, it would follow that there is a *lacuna* in our régime of rules as to the requirement of re-arraignment on a ***consolidated*** indictment *simpliciter* as distinct from re-arraignment on an ***amended*** indictment.

19. The law is that where the Rules of Procedure and Evidence applicable in the Special Court "do not, or adequately provide for a specific situation", the Court "may be guided, as appropriate, by the Criminal Procedure Act, 1965 of Sierra Leone"[16] In effect, the Court's Statute provides for some jurisprudential resource to which recourse may be had whenever there is a *lacuna* in our Rules. It is to the Sierra Leone legal system, specifically the *Criminal Procedure Act, 1965*. The only guidance that can be derived from the aforesaid Sierra Leone statute though not directly on the point but on a kindred and relevant procedural issue, is as to the effect of a plea of "not guilty". ***It 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 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 preliminary investigation, or any other matter arising out of the preliminary investigation."***[17] Adopting this approach it would seem, therefore, that ordinarily the First Accused is, at this stage of the proceedings, estopped from objecting that he is not properly upon his trial by reason of any defect in the ***Consolidated*** Indictment, having pleaded on the 15th, 17th and 21st of March 2003 "not guilty" to each of the eight counts charged in the ***Original*** Indictment, all of which said counts are subsumed and replicated in the ***Consolidated*** Indictment with no incorporation of new counts or offences. But should the estoppel be applied to bar the recovery by the First Accused of some appropriate remedy considering the material nature of the expanded factual allegations and having been granted leave of the Court to object? I now address this issue.

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[15] Bryan A, Garner (ed.), St. Paul: West Publishing Inc. 1990 at p303.
[16] Article 14(2) of the Statute of the Special Court for Sierra Leone.
[17] Sections 133(1) and (2)

20. My first observation on this issue is that the First Accused is not, by way of a procedural due process right, entitled to a re-arraignment on the ***Consolidated*** Indictment by reason simply of its being consolidated. What I understand the Defence to be saying is that the ***Consolidated*** Indictment has confronted the First Accused with "*a considerably extended indictment period of an additional 20 months, until December 1999 and additional geographic locations.*" (my emphasis)[18] ***Also, the Defence complaint is not that the Consolidated Indictment confronts the First Accused with new offences or crimes.*** But does this first observation dispose of the issue in the face of the findings that the ***Consolidated*** Indictment, though not a ***New*** Indictment, *per* se, does incorporate new material factual allegations of an expanded nature within existing counts? I think not. In the circumstances, as I noted earlier, there is nothing which precludes the tribunal from examining whether such material additions and elaborations are consistent with the doctrine of fundamental fairness and the overall interests of justice according primacy to Article 17(4)(a) of the Court's Statute entitling the First Accused to some appropriate remedy.

21. My second observation is that what we are confronted with here, as a ***Consolidated*** Indictment, is an accusatory instrument whose complexion and character has been transformed in some material respects (though not out of recognition) during the process of consolidation from the complexion and character of the separate, individual, ***Original*** Indictment to that of an ***Amended*** Indictment incorporating new and expanded factual allegations within existing counts for which there exists no Order of this Court authorising incorporation of the same, but falling short of a ***New*** Indictment (***which phraseology I apply only and restrictively to an accusatory instrument charging new offences or new crimes using the terms "offences", "crimes" and "charges" synonymously in this context).***[19] It goes against both legal orthodoxy and the preponderant weight of the jurisprudence, national and international, to characterise the Consolidated Indictment as new.

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[18] Motion, para 8.

[19] In the context of legal requirements for indictments in both municipal law systems, and for the purposes of international criminal trials, the "nature" of the charge is a full description of the legal characterization of the charge, that is the specific provision of the Statute alleged to have been violated. For this proposition, see an instructive article by Michael J. Keegan and Daryl A. Mundis reflecting the complexities of the legal requirements of indictments in the international criminal law sphere, entitled "Legal Requirements for Indictments" in *Essays on ICTY Procedure and Evidence in Honour of Gabrielle Kirk Macdonald* edited by Richard May et al., published by Kluwer International Law, The Hague 2001 page 125 note 1. I am indeed grateful to Judge Boutet for making this article available to me.

22. Based on these two observations, I opine from all the circumstances of the case and according primacy to Article 17(4)(a) of the Court's Statute, that the doctrine of fundamental fairness and the overall interests of justice demand granting the First Accused some remedy in respect of the objectionable portions of the ***Consolidated*** Indictment by requiring the Prosecution to elect either to expunge them completely from the aforesaid ***Consolidated*** Indictment or seek an amendment in respect thereof.

V. Issue of Double Jeopardy

23. I need not dwell on the issue of double jeopardy raised by the First Accused since it does not arise for determination based on my finding that the ***Consolidated*** Indictment is not a ***New*** Indictment and, that it consolidated and superseded the ***Original*** individual separate indictments including that of the First Accused thus, as it were, extinguishing and relegating them into a state of legal oblivion. There is only one Indictment legally in existence at this point in time. It is the Consolidated Indictment.

VI. Conclusion

24. In conclusion, I concur in the Conclusion and the Order as set out in the majority Decision.

Done in Freetown, Sierra Leone, this 29th day of November 2004

Hon. Judge Bankole Thompson

[Seal of the Special Court for Sierra Leone]