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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

Date: 6th of December, 2004

PROSECUTOR	Against	SAM HINGA NORMAN MOININA FOFANA ALLIEU KONDEWA (Case No.SCSL-04-14-T)
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SEPARATE CONCURRING OPINION OF JUDGE BANKOLE THOMPSON ON DECISION
ON SECOND ACCSUED'S MOTION FOR SERVICE AND ARRAIGNMENT ON THE
CONSOLIDATED INDICTMENT

Office of the Prosecutor:

Luc Côté
James Johnson

Court Appointed Counsel for Sam Hinga
Norman

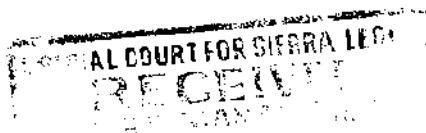
Dr. Bu-Buakei Jabbi
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Tim Owen, Q.C.

Court Appointed Counsel for Moinina Fofana:

Michiel Pestman
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Charles Margai
Yadda Williams
Ansu Lansana



NEIL GIBSON
Nigelson
9:00

I. Introduction

1. As regards the merits of the instant Motion, I wish to emphasize that I subscribe to and endorse the Conclusion and Order 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 Second Accused in his application to the Court. I have, however, in this brief Separate Opinion set out my own reasoning and reasons in support. I do adopt in their entirety the reproduction of (1) the Submissions of the Accused, (2) The Prosecution's Response, and (3) The Second Accused's Reply as set out in the Decision.

II. Non-Service of the Consolidated Indictment

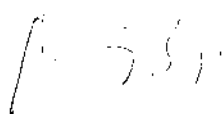
2. The first specific issue for determination here is that of the alleged failure to serve the Consolidated Indictment. The contention of the Second Accused on this issue is that he was not served the said document in the manner stipulated by law. Clearly, the law of this tribunal makes it mandatory 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 its recent Decision in this case entitled *Decision On First Accused's Motion for Service and Arraignment on the Consolidated Indictment*¹, addressing this same issue, the Trial Chamber took the view that while failure to serve the Consolidated Indictment personally on the Accused was a breach of Rule 52(B) of the Rules and of the Trial Chamber's Joinder Order, this procedural error *alone* would not, in and of itself, unfairly prejudice the Accused's right to a fair trial. In that Decision, the Trial Chamber did find that there was non-compliance with Rule 52, as a matter of fact and of law.

4. In a Separate Concurring Opinion, on the same issue, I opined that:

"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

¹ *Prosecutor Against Sam Hinga Norman, Moinina Fofana and Allieu Kondewa* (Case No. SCSL-04-14-T) dated 29 November, 2004.



departs from the acknowledged and recognized body of jurisprudence on the subject, both nationally and internationally. Under 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.”²

5. Consistent with the above reasoning, and noting in the context of this application that the records of the Court Management Office show 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, I agree that there has been a breach of Rule 52(B) 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 of the 22nd day of January, 2004.³ I agree further, and hold, that such non-compliance does not procedurally invalidate the trial proceeding in this case on two key grounds. The first is that such omission or defect does not, *without more*, prejudice the right of the Second Accused to a fair trial based on my recollection and assessment of the procedural steps so far in this case as correctly outlined in the majority Decision. The second ground upon which I base my reasoning that contravention of Rule 52(B) does not invalidate the trial proceeding and 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 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*

² See 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 at para 3.

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

*any other matter arising out of the preliminary investigation.”*⁴ The Second Accused is, therefore, in my considered view, estopped from contending that he is not properly upon his trial having pleaded “not guilty” to the indictment.

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

6. On the second issue of the alleged differences between the *Original* Indictment and the *Consolidated* Indictment after a meticulous comparison of both accusatory instruments, I find that the *Consolidated* Indictment does contain additions as to geographic locations, as detailed in the majority Decision of the Chamber. I do maintain, however, that these additions and elaborations are not *new* allegations. They are emanations from a successful challenge by the Third Accused with whom the Second Accused is herein jointly charged to the form of the *Original* Indictment following a Motion filed by the said Third Accused on Defects in the Form of the Indictment, complaining of lack of specificity and particularity in respect of certain counts where the formulations “*but not limited to these events*”, “*including but not limited to*”, and “*included but were not limited to*” had been used in the aforesaid indictment.⁵ The Chamber found that these formulations were “impermissibly broad” except in so far as they referred to ‘events’, ‘locations’ and ‘dates’ *simpliciter*. Due to the joint nature of the indictment and of the charges the Second Accused, who did not challenge the form of the indictment, has indirectly and jointly, benefited from the Chamber’s Order in response to the Kondewa Motion challenging the formal validity of his Original Indictment on grounds of lack of specificity in respect of these allegations.

7. In the light of such finding, it is legally implausible to suggest that they are new factual allegations transforming the *Consolidated* Indictment into a *New* Indictment. In essence, it was precisely in determining the issue of the extent to which, in the context of the framing of indictments within the jurisdiction of the Special Court, the required degree of specificity or particularity had been met in relation to the pleadings of the allegations in the *Original* Indictment preferred against the Third Accused, that the Trial Chamber did, in respect of the additions and elaborations now complained of, order that the Prosecution, pursuant to the Chamber’s *Decision and Order on Defence*

⁴ 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 of Procedure 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 section 133(1) and (2) of the *Sierra Leone Criminal Procedure Act 1965*.

Preliminary Motion on the Defects in the Form of the Indictment, file a *Bill of Particulars* providing further and better particulars in response to the Third Accused's objections to the form of the *Original* Indictment. In effect, these amplifications and elaborations were incorporated in the *Consolidated* Indictment during the process of consolidation.

8. Based on the reasoning and finding in paragraphs 6-7 herein, I hold that the Second Accused is clearly estopped from challenging the validity of the *Consolidated* Indictment, at this point in time, not having exercised his right to challenge the formal validity of the *Original* Indictment against him within the prescribed time frame prescribed by Rule 72. Having so held, the only question that remains to be addressed is whether the Second Accused is entitled to a re-arraignment on the *Consolidated* Indictment.

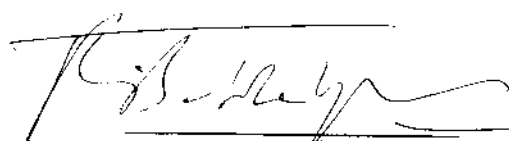
III. The Issue of Re-Arraignment

9. I make shortshrift of the issue of re-arraignment by noting that since the *Consolidated* Indictment is neither an amended nor a new Indictment, no re-arraignment is legally necessary or mandatory.

IV. Conclusion

10. I, accordingly, concur in the Conclusion as set out in the majority Decision and Order therein dismissing the Motion in its entirety.

Done in Freetown, Sierra Leone, this 6th day of December 2004



Hon. Judge Bankole Thompson



⁵ *Prosecutor v. Kondewa*, Decision and Order on Defence Preliminary Motion on Defects in the Form of the Indictment (Case No. SCSL-2003-12-PT) 27th November, 2003.

