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(14197-14206)

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SPECIAL COURT FOR SIERRA LEONE
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TRIAL CHAMBER II

Before: Justice Teresa Doherty, Presiding Judge
Justice Richard Lussick
Justice Julia Sebutinde

Registrar: Robin Vincent

Date: 28 July 2005

PROSECUTOR Against Alex Tamba Brima
Brima Bazy Kamara
Santigie Borbor Kanu
(Case No.SCSL04-16-T)

DECISION ON JOINT DEFENCE MOTION FOR GENERAL ORDERS PURSUANT TO
RULE 54

Office of the Prosecutor:
Luc Côté
Lesley Taylor
James Hodes

Defence Counsel for Alex Tamba Brima:
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Defence Counsel for Brima Bazy Kamara:
Andrew Daniels
Mohamed Pa-Momo Fofanah

Defence Counsel for Santigie Borbor Kanu:
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SPECIAL COURT FOR SIERRA LEONE
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TRIAL CHAMBER II ("Trial Chamber") of the Special Court for Sierra Leone ("Special Court"), composed of Justice Teresa Doherty, presiding Judge, Justice Richard Lussick and Justice Julia Sebutinde;

SEISED of the Joint Defence Motion for General Orders Pursuant to Rule 54 filed on 5 May 2005 on behalf of the Accused Brima, Kamara and Kanu ("Motion");

CONSIDERING the Prosecution Response to the Joint Defence Motion for General Orders Pursuant to Rule 54 filed on 12 May 2005;

CONSIDERING the Joint Defence Reply to Prosecution Response to Joint Defence Motion for General Orders Pursuant to Rule 54 filed on 18 May 2005;

CONSIDERING ALSO the oral submissions of Counsel made in open Court on 26 April 2005;

DECIDES AS FOLLOWS.

I. INTRODUCTION

1. This Motion has been filed as a consequence of certain allegations made in Court by the Defence on 26 April 2005.
2. The allegations raised serious claims that a potential witness for the Defence had been interfered with in a way likely to bring the administration of justice into disrepute, that the right of the Accused to a fair trial had been violated, and that other potential witnesses had been discouraged from coming forward.
3. The allegations were all the more serious because it was claimed that the persons responsible for the transgressions were none other than agents of the Government of Sierra Leone and personnel of the Special Court.
4. At the sittings of the Trial Chamber on 26 April 2005, Mr. Metzger, counsel for Brima, informed the Court that the Accused were "very concerned about events which have occurred over the weekend". He recounted that on Saturday 23 April 2005 someone whose name he was not prepared to give in open court and who had attended the premises of the Special Court and may have been one of a number of persons who had visited the detainees, was arrested by military police at 5.00 in the morning and taken to Wilberforce Barracks, where he was detained for some five hours. The premises of this person were also searched. Mr. Metzger went on to state that the Defence had information that the military police went to this person's address after having been informed by State House that they should do so. It appeared that the military police were looking for ammunition and military uniforms.
5. Mr. Metzger then related another incident in which the premises of the clerk to Mr. Manly-Spaine, co-counsel for Kanu, were searched by the military police. He added that the Defence had

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been unable to contact Mr. Manly-Spaine and were very concerned that he was not in Court that morning. Mr. Metzger told the Court that the Accused fear that they are not receiving a fair trial and that "there appear to be outside agencies that are involved - and I use that term advisedly - with the collection of evidence for the Defence in this case".¹

6. Mr. Metzger also told the Court that on 15 March last year, Defence Counsel went to Makeni Barracks to interview military personnel, resulting in a number of people coming forward to give witness statements, but that "someone, somewhere, or a body of people, for whatever reasons, are trying to rattle persons who may want to offer themselves as witnesses in this case".²

7. Based on the matters put to the Court, the Defence asked that the issue be stood down to enable it to file a formal Motion pursuant to Rule 54.

II. SUBMISSIONS OF THE PARTIES

The Motion

8. The Defence makes reference to the matters raised by it in Court on April 26, 2005.

9. The Defence also refer to their "reasonable suspicion and belief of a nexus between the visit of the potential witness to the Special Court and his ensuing arrest." (We note from the redacted statement of the potential witness annexed to the Motion (Annex A) that he claims to have visited the Special Court "sometime in early April, 2005.")

10. The Defence makes mention of informing the Trial Chamber of a visit by the Defence team to barracks at Makeni "sometime in March 2005" (this is an error; the date was actually 15 March 2004³) to ascertain if there might be potential witnesses among military personnel. Flowing from that visit, according to the Defence, about 5 persons, a combination of serving and ex-soldiers, visited the Special Court to see the detainees and discuss their willingness to testify on behalf of the Defence. (It is clear from Annex C to the Motion that this visit took place on 6 April 2005).

11. The Defence submits that the events involving the arrest and search of the premises of a potential Defence witness amount to interference with that potential Defence witness and are therefore likely to bring the administration of justice into disrepute, necessitating the intervention of the Trial Chamber to protect such potential witnesses. Furthermore, the Defence argues that this interference, which can be attributable to the local authorities, amounts to an invasion of the right to a fair trial and of Defence rights in general pursuant to Article 17 of the Statute of the Special Court for Sierra Leone ("the Statute").

12. The Defence argues that the Trial Chamber has the power to issue binding orders on the State of Sierra Leone to ensure a cessation of the interference with potential Defence witnesses. Further, it submits that the action of the Military Police in conducting searches at the premises of the clerk to Defence Counsel amounts to a breach of Article 14 of the Agreement Between the United Nations

¹ See transcript 26 April 2005, pages 2, 3, 4.

² *Ibid.*, pages 5,6.

³ *Ibid.*, page 5, line 25.

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and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone ("the Special Court Agreement") (Article 14 provides certain protections for Defence counsel). The Defence goes further to submit that this action can be attributed to the national authorities of Sierra Leone themselves.

13. The Defence further submits that the hostile conduct of the Special Court security personnel towards the visit of the serving and ex-soldiers had an adverse effect on their willingness to come forward as potential Defence witnesses.

14. The Defence also submits that under Article 17 of the Special Court Agreement, the Government of Sierra Leone is obliged to cooperate with all organs of the Special Court ostensibly to ensure a fair and expeditious trial for all accused persons and to comply without delay with any requests for assistance by the Special Court.

15. The Motion seeks the following relief:

- a. An order that the Registrar is to ensure that no witnesses, especially potential Defence witnesses, are interfered with or intimidated by security officers of the Special Court or by operatives and personnel of the Sierra Leone Military Police or security services, or by any other State functionary.
- b. An order that security personnel of the Special Court provide the Court, Defence and Prosecution with information as to the use made of biographic data collected from visitors, "particularly in the light of developments which have created reasonable suspicion that biographic information collected by the Special Court security personnel are channelled to State security functionaries for purposes that appear not be (sic) in the interests of the respective Defence teams".
- c. An order for interim protective measures for potential Defence witnesses.
- d. An order to restrain State security services and their functionaries from interfering with potential Defence witnesses.
- e. An order directing the Registry to seek the cooperation of the State of Sierra Leone pursuant to Article 17 of the Special Court Agreement in complying with the foregoing orders sought in this Motion.
- f. Any other relief the Trial Chamber may deem fit and proper in the circumstances.

Prosecution Response

16. In its Response, the Prosecution submits that there is an insufficient factual basis to support the allegations made by the Defence, that the relief sought is inappropriate, and that the Motion should be dismissed in its entirety.

17. The Prosecution further submits:

- a. That the soldiers and ex-soldiers who visited the Special Court were denied access only because they had been asked to fill out an application to visit the detention facility and wait for approval. This procedure does not amount to an outright denial of access, nor does it amount to interference with the rights of the Accused to a fair trial.
- a. That the reasons why records are kept of the identity of visitors to persons held in detention are so obvious as to need no elaboration.
- b. With regard to the Defence allegation of the existence of a nexus between the visit of a potential witness to the Special Court and the subsequent searching of his home and arrest, that the only evidence of any connection is a statement by the potential witness that the Provost Marshall asked the question: "I have been informed by State House that you have been visiting the Special Court premises, what is your purpose of going there?" It

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- is to be noted that the alleged search of the home of the clerk to Defence counsel was conducted on suspicion that arms and ammunition were stored on those premises. Further, both searches were virtually simultaneous.
- c. That there is no evidence that would enable the Trial Chamber to conclude that the two searches and the arrest of the potential Defence witness were connected to the visit of that potential witness to the Special Court. Accordingly, there is no factual nexus between the incidents asserted and alleged interference by "Sierra Leone state security services and/or their operatives" in the preparation of the Defence for trial. No breach of the Article 17 rights of the Accused has been established.
 - d. That no breach by the Government of Sierra Leone of Articles 14 or 17 of the Special Court Agreement can be substantiated; "reasonable suspicion and belief of a nexus", the belief of the Accused that there has been State interference, or a "high level of coincidence" are not sufficient.
 - e. That the test of "as may be necessary" in Rule 54 has not been made out because of the lack of factual foundation in the Motion.
 - f. That, as regards the first order sought, the Registrar cannot be asked to control the behaviour of the Sierra Leone Military Police or other State functionaries. Further, the first and fourth orders sought ignore the sovereignty of the State of Sierra Leone.
 - g. That the fifth order sought, that the Registrar be directed to seek the cooperation of the Government of Sierra Leone in complying with the other orders, borders on the offensive.
 - h. With respect to the third order sought, that any application for protective measures should be made pursuant to Rule 75 and upon appropriate evidence. The court should not be asked to order protective measures for witnesses who have not been identified.

Defence Reply

18. In its Reply to the Prosecution Response, the Defence submits as follows:
 - a. That they are not seeking special treatment for their potential witnesses. Even though the process of approvals may not amount to a denial of access and visitation rights, delays in approving requests for visits continue to create an unwillingness on the part of potential Defence witnesses to revisit the Special Court. Also, such delays may amount to a denial of visitation rights as well as an interference with the rights of the accused to a fair trial insofar as Defence Counsel need information from some of these potential witnesses for purposes of preparation and cross-examination.
 - b. That the Military Police and the Provost Marshall are agents of the State of Sierra Leone, and that under international law, the State may be held responsible for the direct and indirect actions of its agents.
 - c. That the question asked by the Provost Marshall establishes an additional fact or reason for the arrest of the potential witness, and that is to inquire about his visits to the Special Court on the instructions of State House.
 - d. That they are not objecting to the collection of biographic information from potential witnesses, but rather they are requesting the Trial Chamber to make the necessary orders to prevent the use of such information in a wrongful manner.
 - e. That what they are seeking from the Registrar is for him to solicit the cooperation of the State of Sierra Leone to ensure that its agents do not interfere with potential witnesses or witnesses for the Defence.
 - f. That Rule 75 was not designed for the protection of potential witnesses, hence the need for the Chamber to make an order under Rule 54 to protect them.

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III. DELIBERATIONS

19. Rule 54 states:

“At the request of either party or of its own motion, a Judge or a Trial Chamber may issue such orders, summonses, subpoenas, warrants and transfer orders as may be necessary for the purposes of an investigation or for the preparation or conduct of the trial”.

20. The Rule is a general rule in unambiguous language. Clearly, the test for whether the Trial Chamber ought to issue the orders sought by the Defence, is whether to do so is necessary (not simply useful or helpful) for the purposes of an investigation or for the preparation or conduct of the trial.⁴

21. The relief sought by the Motion is based on events alleged to have occurred on two dates, 6 April, 2005, when a group of 5 soldiers and ex-soldiers visited the Special Court, and 23 April 2005, when Military Police searched the houses of a potential witness and a clerk to one of the Defence Counsel. From what Defence Counsel told the Court on 26 April 2005, it is probable that the potential witness involved in the latter incident was one of the group of 5 involved in the earlier incident.⁵

Incident on 6 April, 2005.

22. According to the Defence, the group of 5 soldiers and ex-soldiers were denied access to the detainees and have since refused to visit again because of the way they were treated by Special Court security.

23. Considering all the facts available, we were unable to find anything to justify the claim that they were refused access to the detainees. In fact, they were permitted to visit the Special Court⁶, but when they asked to see the detainees they were asked to fill out an application and wait for approval⁷. That requirement is not unreasonable and is well within the powers of the Chief of Detention. In fact, it would be unreasonable for any visitor to expect to be shown a red carpet straight through to the Detention Facility without having to undergo any formalities.

24. Under Rule 41 of the Rules of Detention, the Chief of Detention, in consultation with the Registrar, has the power to impose such restrictions and supervision on visits to detainees as he may deem necessary in the interests of the administration of justice or the security and good order of the Detention Facility. All visitors are obliged to comply with the separate requirements of the visiting regime of the Detention Facility, which may include personal searches, and any person who refuses to comply with such requirements shall be refused access.

⁴ See *Prosecutor v. Delalic et al.*, Case No. No. IT-96-21-T, Decision of the President on the Prosecutor’s Motion for the Production of Notes Exchanged between Zejnir Delalic and Zdravko Mucic, 11 November 1996; see also Jones & Powles, *International Criminal Practice* 3rd. Edition, at para. 8.4.3.

⁵ See transcript 26 April 2005, page3 lines 16 - 19.

⁶ See statement of Claire Carlton-Hanciles, Annex C, and copy of email from Acting Chief of Security, Annex D to Motion.

⁷ See copy of email from Acting Chief of Security, Annex D to Motion.

25. One such requirement is the completion of a Visitors Declaration and Application Form, wherein the visitor provides personal information such as his or her name, address, date and place of birth, the name of the Detainee to be visited, his or her relationship to the Detainee, as well as proof of identity and a declaration as to criminal antecedents. By signing the Form, the visitor authorizes the Special Court to check the information given by the visitor. The visitor also certifies that all information is true and that any omission or false information will result in the immediate denial of the visiting application.

26. The Defence has expressed a "reasonable suspicion" that such information collected from visitors is sent to State security functionaries for purposes contrary to the interests of the Defence. This suspicion is apparently based on the allegation by the potential witness in his statement (Annex A) that, after the search by the Military Police on 23 April 2005, he was asked by the Provost Marshall: "I have been informed by State House that you have been visiting the Special Court premises, what is your purpose for going there?" We do not find that such a suspicion is reasonable, based solely as it is on that allegation. If what the potential witness says is true, there are many possibilities as to how State House could have known of his visit to the Special Court. It is not logical to conclude that the information could only have come from the Special Court security personnel.

27. In any event, the 5 visitors decided not to follow up their application and were content to speak to the detainees by phone, which they were allowed to do⁸.

28. The Defence claims that the Special Court security personnel were hostile to the visitors, but that is not borne out by the information available. There is no evidence that a threat or any other kind of intimidation was directed towards the visitors. Going by the following passage from the statement of Claire Carlton-Hanciles, it seems that the visitors were dissatisfied merely because the security personnel appeared to be curious about them, which of course is not unusual for security personnel.

".....they informed me that they were content to speak to the Detainees on the phone and not have any thing done by me because they were now uncomfortable with the curiosity that their presence had gathered which was visible from the faces of the Special Court Security."

29. The visitors may not have liked the formalities with which they had to comply, but there is no support for the Defence submission that the rights of the Accused to a fair trial were interfered with.

30. Further, the given facts do not entitle us to find that any potential Defence witness was interfered with or intimidated, or that any security officer of the Special Court misused information given by the visitors or exceeded his or her authority in any way.

31. We note that the Defence did not avail itself of the complaints procedure provided by the Rules of Detention. Under Rule 59, each Detainee or his Counsel may make a complaint to the Chief of Detention or his representative at any time. If not satisfied with the response, the Detainee has the right to make a written complaint, without censorship, to the Registrar, who is obliged to deal with the complaint promptly and to reply without undue delay.

Incidents on 23 April 2005

⁸ See statement of Claire Carlton-Hanciles, Annex C to Motion.

32. In a chronological sense, the latter incidents cannot be said to have been a consequence of the earlier incident. As has already been pointed out, there is a considerable gap in time between the visit of the potential Defence witness to the Special Court ("early April 2005") and the searches by the Military Police (23 April 2005).

33. According to the statement of the potential witness (Annex A), the Provost Marshall said to him: "I have been informed by State House that you may have been visiting the Special Court premises, what is your purpose of going there?" and the potential witness replied (untruthfully): "I have never visited the Special Court premises and besides I have nothing to do". That one question asked by the Provost Marshall is the slender thread which, the Defence argues, connects the searches by the Military Police with the potential witness's earlier visit to the Special Court. There were no further questions by the Military Police along those lines. No mention was made by the Military Police about the potential witness giving evidence in Court, nor was anything said to discourage him from doing so. There is no evidence that the Military Police even knew that the potential witness was in fact a potential witness for the Defence.

34. The reason given by the Military Police for the search, that is, that they were searching for uniforms and military items, is quite consistent with the reason they gave to the law clerk for searching his premises. According to the potential witness's statement (Annex A), the Provost Marshall told him he was being closely watched because he was once a soldier. Having found nothing, the Provost Marshall, according to the potential witness, told him that he was going to get back to the informant to tell him that what was alleged against the potential witness was not true. There is nothing to say that the Military Police had any ulterior motive for conducting the search. In fact, they carried out an almost simultaneous search at the home of the law clerk and gave a similar reason for the search (i.e. searching for arms and ammunition).

35. The situation at face value was that the Military Police had received information regarding the location of arms, ammunition, uniforms and other military items and were acting on that information to conduct searches. No credible arguments have been put forward to cause us to look behind that situation. The alleged factual nexus between the incidents is not sufficient to justify the inferences which the Defence urges us to draw. There is no inescapable conclusion that the potential witness's visit to the Special Court had led to attempts by the Military Police to intimidate him into not giving evidence for the Defence. Such a conclusion is, in fact, highly speculative.

36. As regards the search of the house of the clerk to Mr. Manly-Spain of Counsel, the Military Police explained to the clerk that the purpose of their search was for arms and ammunition. When none were found the matter apparently ended there. No threats were made, nor was any reference made to the trial, nor to his employer, nor was any approach made to Counsel himself. There is certainly no evidence at all that the Military Police were attempting to interfere with Counsel in the free and independent exercise of his functions in relation to the trial.

37. When the subject allegations were first raised in Court by the Defence on 26 April 2005, we indicated that we were not convinced that such allegations had any connection to the case we were hearing.

38. The Presiding Judge asked Mr. Metzger, Counsel for the Accused Brima, to clarify two matters: firstly, whether he had any knowledge that the actions of the military police were related to the trial and secondly, in what way did the Accused feel that they were not having a fair trial?

39. In answer to the Presiding Judge's second question, Mr. Metzger replied that the Accused believed that in amassing evidence on their behalf "there is interference, and interference from the

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State, which I accept at this point in time is really in terms of a general allegation based on the rather serious circumstances that we have sought to put before you”.

40. As to the first matter raised by the Presiding Judge, Mr. Metzger stated that: “We cannot say clearly for certain that these matters are connected. But the level of coincidence in our collective experience is so high as to raise more than mere suspicion that someone, somewhere or a body of people, for whatever reasons, are trying to rattle persons who may want to offer themselves as witnesses in this case.”⁹

41. Justice Sebutinde endeavoured to obtain further clarification from Mr. Harris, Counsel for the Accused Kamara:

*JUDGE SEBUTINDE: Mr. Harris, I've listened to both Defence counsel carefully, and I've tried to see if there is a nexus between the events that Mr. Metzger described having transpired yesterday and the day before and the proceedings and conduct of this trial. I still haven't seen it, and I'm hoping that between yourselves you will help this Trial Chamber to establish such a nexus, if indeed there is one.*¹⁰

Mr. Harris replied as follows:

MR. HARRIS: [...]The potential witness who, in fact, has made a statement to us was a soldier, no longer soldier some time now. He was approached to make a statement. He visited the facility. Thereafter...

JUDGE SEBUTINDE: What facility?

*MR. HARRIS: He visited the Special Court in that he went to the prison to see and intended to see the detainees or defendants in the case. Thereafter, he was visited by the Military Police at 5.00 a.m. in the morning. It beggars belief that there is no nexus between his presence here and our contact with them and their visit. It is right to say that the substance of his statement amounts to, and I only refer to one part of it, there was reference to him and his contact with the defendants and the reasons why that was necessary in his case. As I understand it, he declined to give any information as to the reasons why. But his detention of up to five hours and then his release, there could be no other safe conclusion than it is linked with the trial...this trial.*¹¹

Needless to say, the vagueness of the replies from Defence Counsel did nothing to persuade us. Having now considered the present Motion, it does not, in our judgment, advance the oral arguments they put to the Court on 26 April 2005. It is clear that the prayer for relief is based on allegations which have not been substantiated and are, at best, speculative.

42. We find that the test for the application of Rule 54 mentioned earlier has not been met in this case. The relief sought by the Defence is in respect of situations which have not been conclusively proved to exist, and hence cannot be regarded as being necessary for the purposes prescribed in Rule 54. Accordingly, we find that no grounds have been established for orders under Rule 54.

⁹ See transcript 26 April 2005 pages 5 and 6.

¹⁰ See transcript 26 April 2005 page 11, lines 20 – 26.

¹¹ See transcript 26 April 2005 page 12, lines 13 – 29 and page 13, line 1.

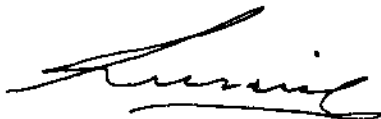
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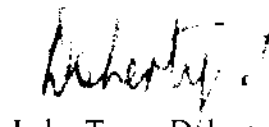
43. We note the submissions of the parties in respect of the appropriateness of the relief sought. However, in view of what we have said, any consideration of that issue in this decision would be merely an unnecessary academic exercise.

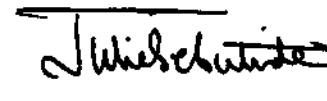
FOR THE ABOVE REASONS,

THE TRIAL CHAMBER dismisses the Motion.

Done at Freetown, Sierra Leone, this 28th day of July 2005.


Judge Richard Lussick


Judge Teresa Doherty
Presiding Judge


Judge Julia Seburinde

