THE SPECIAL COURT FOR SIERRA LEONE

Case No. SCSL-04-14-T

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

Registrar: Robin Vincent

Date: 18 February 2005

PROSECUTOR

V

CHIEF SAM HINGA NORMAN

RESPONSE OF FIRST ACCUSED TO PROSECUTION'S "URGENT PROSECUTION MOTION FOR RULING ON ADMISSIBILITY OF EVIDENCE" AND OBJECTION TO OTHER CRIMES EVIDENCE

Office of the Prosecutor

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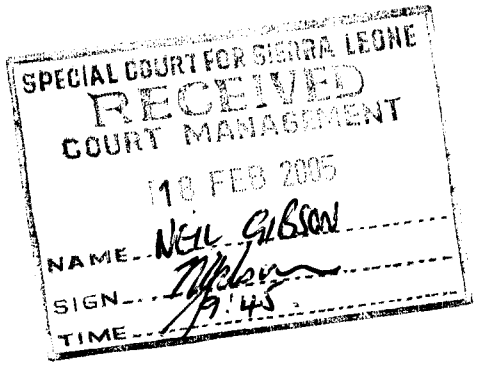

A. The Prosecution's Motion

1. On 16 February 2005, Doc. No. 341, the Prosecution filed its "Urgent Prosecution Motion For Ruling On Admissibility Of Evidence." This Motion seeks admission of various categories of sex crimes against the three accused persons in this case.

2. The First Accused objects to the admission of this evidence as:

   a. being outside the indictment, and too vague to now be included within the scope of the indictment;

   b. an attempt to back door the Trial Chamber's prior ruling that the indictment could not be amended to include sex crimes,[1] thereby opening the phrases "other inhumane acts" and "mental suffering" to include anything that the Prosecution can gather in this investigation, no matter how remote to the specific indictment, virtually amending the Indictment mid-trial in violation of the SCSL Statute Art. 17(2) and principles of fundamental fairness, due process of law, and the right to a fair trial and the right to a specific indictment;

   c. more prejudicial than probative or relevant.

B. Objections of First Accused

a. This is evidence outside the indictment

3. This proffered evidence is far outside the scope of the current indictment, even as the Prosecution has attempted to amend it (*see* footnote 1). Therefore, it is not relevant under SCSL Rule 89(B-C):

> (B) In cases not otherwise provided for in this Section, a Chamber shall apply rules of evidence which will best favour a fair determination of the matter before it and are consonant with the spirit of the Statute and the general principles of law.
>
> (C) A Chamber may admit any relevant evidence.

4. Evidence outside the scope of the indictment is not relevant, as the Trial Chamber has already ruled.

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[1] *Prosecutor v. Norman, Fofana, and Kondewa,* Trial Chamber, SCSL-04-14.PT, "Decision on Prosecution Request for Leave to Amend the Indictment," 20 May 2004 (filed of record 1 June 2004, RP 7001).

5. This is the general rule. RICHARD MAY & MARIEKE WIERDA, INTERNATIONAL CRIMINAL EVIDENCE § 4.32 (2002), citing *Prosecutor v. Kvočka, et al.,* ICTY, Judgement 2 Nov. 2001, ¶s 556 & 653[2]; JOHN R.W.D. JONES & STEVEN POWLES, INTERNATIONAL CRIMINAL PRACTICE §§ 8.5.666-.667, citing *Prosecutor v. Furundžija,* ICTY Trial Chamber, IT-95-17/1-T, Decision of 12 June 1998 (in § 8.5.666) & *Prosecutor v. Kupreškič,* ICTY Appeals Judgement, IT-95-16-T, Decision of 23 October 2001 in § 8.5.667).[3]
6. *Kvočka* does permit, however, such evidence to be admitted as evidence of a pattern of conduct. The Prosecution, however, does not even attempt to offer it for this purpose to attempt to shore up another count in the Indictment.
7. To the contrary, the Prosecution expressly relies upon this evidence as proof of another crime under virtual "catch all" language in the indictment without having to specify in the indictment the conduct they are relying upon to make out yet a new war crime in the middle of the trial.
8. The First Accused submits that this violates SCSL Statute Art. 17(2) that "[t]he accused shall be entitled to a fair . . . hearing . . . ." A virtual mid-trial amendment of the Indictment in this manner simply denies a fair trial, fundamental fairness, and due process of law to the Accused persons.

b. Back dooring the Trial Chamber's prior ruling

9. This effort by the Prosecution is really a back door way of avoiding the Trial Chamber's prior ruling excluding the evidence, and, while the Prosecutor may be credited with their creativity in attempting to do so, it is would deny the Accused a fair trial guaranteed by SCSL Statute Art. 17(2) and fundamental fairness and due process of law by granting the Prosecution an alternative route to attempt to prove another substantive offence completely outside the scope of the indictment.
10. Thus, the vice of their effort is to create a free amendment of the indictment by coming up with virtually anything they can to put in evidence under the rubric of "other inhumane acts." If they can do it here with this proffered evi-

[2] http://www.un.org/icty/kvocka/trialc/judgement/index.htm.
[3] http://www.un.org/icty/kupreskic/appeal/judgement/index.htm.

dence, where will it stop? Where can it stop? Cannot anything be labelled "other inhumane acts" when it is alleged to be a war crime? Will they then seek to bring in yet other evidence as an alleged war crime because it somehow qualifies as an "inhumane act"? If the Trial Chamber grants it here, where will it stop? A line has to be drawn somewhere, and, we submit, it was drawn when amendment of the indictment was originally denied and then when the trial started on the original indictment.

11. The purpose of an indictment is to put the persons accused on notice of what they are to defend against. SCSL Rule 47(C):

> 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. (emphasis added)

12. Allowing this evidence in now as proof of "other inhumane acts" would be a virtual free amendment of the indictment without any specifics in the indictment whatsoever (other than a limitation as to date already in the Indictment) in violation of Rule 47(C) denying the Accused "a statement of each specific offence of which the named suspect is charged" along with the particulars.[4]

13. Such a procedure simply cannot be considered fair, and, if granted, it would violate fundamental fairness to the Accused. It would deny the persons accused a fair trial on the charge because it would permit trial on a vague indictment making it impossible to fairly defend. It is also tantamount to an amendment of the indictment more than half way through the Prosecution's case to allege new crimes without having specified them at all, other than by saying "we gave it to you in discovery." That simply does not satisfy the requirements of reasonable notice and a fair trial. In no jurisdiction in the world that we can think of can an indictment be amended mid-trial to add what

[4] The First Accused grants to the Prosecution that sexual offences may qualify as other "inhumane acts," if, and this is a big IF, it is already included in the original indictment. Here, it is not, so the Prosecution's authorities are inapposite.

amounts to new charges against the accused,[5] that has to be separately investigated to prepare a defence to these new allegations.

c. More Prejudicial Than Probative or Relevant

14. The customary analysis of this issue is as follows:

    i. Is the proffered evidence relevant to any issue in the case? (If not, the inquiry ends. (Relevance is already discussed.))

    ii. If so, is the probative value of the evidence outweighed by its prejudicial effect on the Accused?

    The First Accused submits that this analysis applies under SCSL Rule 89(B), quoted in ¶ 3, *supra,* that the Trial Chamber "shall apply rules of evidence which will best favour a fair determination of the matter before it and are consonant with the spirit of the Statute and the general principles of law."

15. This evidence is also inflammatory and prejudicial to the First Accused since the Prosecution's proffer only attempts to show, essentially, that Norman was present when things were happening at Base Zero.[6]

16. This evidence is more prejudicial than probative or relevant to the existing charges, and it cannot be offered at all. MAY & WIERDA, *supra,* § 4.29, citing *Prosecutor v. Kupreškić,* Decision on Evidence of Good Character of the Accused and the Defence of *Tu Quoque*, 17 Feb. 1999[7]; JONES & POWLES, *supra,* § 8.5.668, citing *Prosecutor v. Kordič*, Decision on Prosecutor's Submissions Concerning "Zabreb Exhibits" and Presidential Transcripts," 1 Dec. 2000.[8]

17. The U.S. rule is the same in both the federal and state courts:

> Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the

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[5] The U.S. Supreme Court has held many times that "Conviction upon a charge not made would be a sheer denial of due process." *See, e.g., De Jonge v. Oregon,* 399 U.S. 353, 362 (1937), *Jackson v. Virginia,* 443 U.S. 307, 313 (1979).

[6] We assume that the Prosecution seeks to hold all three Accused responsible under the theory of joint responsibility which is specified in the Indictment since the Prosecution's submission does not state that this proffered evidence is limited to any particular Accused.

[7] http://www.un.org/icty/kupreskic/trialc2/decision-e/90217MS25407.htm.

[8] http://www.un.org/icty/kordic/trialc/decision-e/01201AE514292.htm.

> issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

FED. R. EVID. 403; UNIF. R. EVID. 403.[9]

18. Evidence of a sex offence simply has to be more prejudicial than relevant. We anticipate, however, that the Prosecution will argue that relevance and probative value is satisfied because the evidence is offered to prove another crime. This, however, assumes that it gets to present the evidence at all, considering our objection that this subverts the fundamental due process and fair trial requirement that the accused be presented with an indictment which specifies the acts which he is charge with as to time and place so he can adequately defend.
19. In addition, an alternative argument against its admission as evidence is that it is objectionable as inadmissible character evidence. JONES & POWLES § 8.5.663. Again, the U.S. rule is the same under FED. R. EVID. 404(a); UNIF. R. EVID. 404(a) ("Evidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion [with exceptions not applicable]"). This argument presupposes that the Prosecution can even get over the first hurdle of showing relevance in the first place, something the First Accused does not concede.

C. Conclusion

20. For all the reasons stated, the First Accused respectfully requests that the Prosecution's motion to admit these other crimes be DENIED and OVERRULED.

Done at Freetown, this 18th day of February, 2005.

John Wesley Hall
Dr. Bu-Buakei Jabbi
Court Appointed Counsel for Norman

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[9] A version of Rule 403 has been adopted in every U.S. jurisdiction, state, federal, and military. Courts Martial in the United States are governed by the same rule. MIL. R. EVID. 403; *United States v. McDonald,* 59 M.J. 426 (C.A. A.F. 2004) (most recent Court of Appeals of Armed Forces case recognizing that Rule 403 of Military Rules of Evidence is the same in text and application as civilian rule 403).

ANNEX A

(Table of Authorities)

STATUTES AND RULES:

SCSL Rule 47(C)

SCSL Rule 89(B, C)

SCSL Statute Art. 17(2)

FED. R. EVID. 403

FED. R. EVID. 404(a)

MIL. R. EVID. 403

UNIF. R. EVID. 403

UNIF. R. EVID. 404(a)

CASES:

De Jonge v. Oregon, 399 U.S. 353, 362 (1937)

Jackson v. Virginia, 443 U.S. 307, 313 (1979)

Prosecutor v. Furundžija, ICTY Trial Chamber, IT-95-17/1-T, Decision of 12 June 1998

Prosecutor v. Kordič, Decision on Prosecutor's Submissions Concerning "Zabreb Exhibits" and Presidential Transcripts," 1 Dec. 2000, http://www.un.org/icty/kordic/trialc/decision-e/01201AE514292.htm

Prosecutor v. Kvočka, et al., ICTY, Judgement 2 Nov. 2001, ¶s 556 & 653, http://www.un.org/icty/kvocka/trialc/judgement/index.htm

Prosecutor v. Kupreškić, ICTY, Decision on Evidence of Good Character of the Accused and the Defence of *Tu Quoque*, 17 Feb. 1999, http://www.un.org/icty/kupreskic/trialc2/decision-e/90217MS25407.htm

Prosecutor v. Kupreškič, ICTY Appeals Judgement, IT-95-16-T, Decision of 23 October 2001, http://www.un.org/icty/kupreskic/appeal/judgement/index.htm

Prosecutor v. Norman, Fofana, and Kondewa, Trial Chamber, SCSL-04-14.PT, "Decision on Prosecution Request for Leave to Amend the Indictment," 20 May 2004

United States v. McDonald, 59 M.J. 426 (C.A. A.F. 2004)

OTHER AUTHORITIES:

JOHN R.W.D. JONES & STEVEN POWLES, INTERNATIONAL CRIMINAL PRACTICE §§ 8.5.663, -.666, -.667, -668

RICHARD MAY & MARIEKE WIERDA, INTERNATIONAL CRIMINAL EVIDENCE §§ 4.32 & 4.29 (2002)