SCSL-04-15-T.

(10551 - 10575)

SPECIAL COURT FOR SIERRA LEONE

IN THE TRIAL CHAMBER

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

Registrar: Mr. Robin Vincent

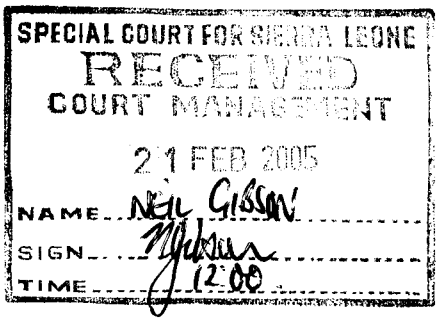
Date Filed: 21 February 2005

THE PROSECUTOR **Against** **ISSA HASSAN SESAY**
MORRIS KALLON
AUGUSTINE GBAO

Case No. SCSL – 2004 – 15 – T

KALLON: DEFENCE RESPONSE TO "FURTHER RENEWED WITNESS LIST PURSUANT TO ORDER TO THE PROSECUTION CONCERNING RENEWED WITNESS LIST"

Office of the Prosecutor
Luc Cote
Lesley Taylor
Peter Harrison



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
John Cammegh

INTRODUCTION

1. The Defence for Kallon files this Response in answer to the Prosecution's "Further Renewed Witness List Pursuant to Order To The Prosecution Concerning Renewed Witness List" filed on 10 February 2005.

PROCEDURAL BACKGROUND

2. In accordance with the Trial Chamber's Order dated 1 April 2004, the Prosecution filed on 26 April 2004, a list of the pseudonyms of each witness they intend to call at trial ("the Original Witness List"), together with a table summarizing the facts and points in the Indictment on which each witness will testify (" Witness Summaries Table"). The Witness list and Witness Summaries Table contained 266 Witnesses.

3. Pursuant to the Trial Chamber's Order dated 7 July 2004 to the Prosecution to produce a list of the "Core" witnesses they were intending to call to testify at trial and a list of the "Backup" witnesses they intend to call only if later deemed necessary at trial, the Prosecution filed on 12 July 2004a Modified Witness List of 173 witnesses they intend to rely upon as their "Core" witness to have testify at trial (" the Modified Witness List").

4. On 23 November 2004, the Prosecution submitted a Renewed Witness List consisting of 102 "Core" witnesses they intend to have testify at trial together with a "Backup" list of 170 witnesses they did not currently intend to call at trial ("the Renewed Witness List").

5. The Trial Chamber on 3 December 2004 issued its Order to the Prosecution concerning Renewed Witness List.

6. Pursuant to that Order, the Prosecution filed on 10 February 2005, a "Further Renewed Witness List" consisting of 98 "Core" witnesses in Annex 1, 25 of whom have already given evidence and 163 "Backup" witnesses in Annex 2.

7. Witness TF1-126 not hitherto identified as a "Core" witness in the Modified Witness List dated July 2004 appeared as a "Core" witness in the Renewed Witness List dated 23 November 2004and is now proffered as "Backup" witness in the Further Renewed Witness List filed 20 February 2005 without seeking leave to so do, although the Trial Chamber in its Order of 3 December 2004, ordered the Prosecution to seek leave of the Chamber to add this witness to their Renewed Witness List.[1]

8. Witness TF1-210 also not hitherto identified as a "Core" witness in the Prosecution's Modified Witness List of 12 July 2004 appeared as "Core" witness in their Renewed Witness List of 23 November 2004 and is again proffered as "Core" witness in the Prosecution's Further Renewed Witness List with the Prosecution seeking leave of the Trial Chamber in compliance with its Order of 3 December 2004 to add this witness to their Renewed Witness List.[2]

[1] *Para (2) of Order and Para 3(ii) of Further Renewed Witness List.*
[2] *Para (2) of Order and Para 3(iii) of Further Renewed Witness List*

9. Witness TF1-085 did appear as "Core" witness for the Prosecution in their Modified Witness List and again as "Core" witness in their Renewed Witness List but is now proffered as "Backup" witness in the Prosecution's Further Renewed Witness List.[3]

10. Witnesses TF1-029 and TF1-122 appeared as "Core" witnesses for the Prosecution in their Modified Witness List and as "Backup" witnesses in their Renewed Witness List but are both now proffered again as "Core" witnesses in the Prosecution's Further Renewed Witness List.[4]

11. The Prosecution further indicate an intention to call witness TF1-029 instead of witness TF1-085, and witness TF1-122 instead of witness TF1-126 and also state that the inclusion already of witnesses TF1-029, TF1-122 and TF1-210 in the "Core" list at Annex 1 of the Further Renewed List is done for ease of reference.[5]

SUBMISSIONS OF THE PROSECUTION

12. The Prosecution submit that they do not require leave of the Trial Chamber to move witnesses from "Backup" to "Core" as doing so involves no addition to the Original Witness List filed on 26 April 2004 and further that for witnesses who have not been identified as deleted or withdrawn from the Original Witness List, the Prosecution assert that they do not require leave of the Trial Chamber to move them between "Backup" and "Core".

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[3] *No. 44 of Annex 2 and Para 4(ii) of Further Renewed Witness List.*
[4] *No. 62 and 40 of Annex 1 and Para 5 of Further Renewed Witness List.*
[5] *Para 6 of the Further Renewed Witness List.*

13. The Prosecution also argue that the selection of the "Core" witnesses is sometimes displaced by the inability, unsuitability or latent unwillingness of such witnesses to give evidence and that in such circumstances, the Prosecution might seek to substitute "Core" witnesses with "Backup" witnesses.

14. The Prosecution further submit that if the Trial Chamber is however of the view that leave is so required, the Prosecution seek leave.

DEFENCE ARGUMENTS

15. The Defence Submits that the intended changes in the movements of the affected witnesses are as follows: -

i. TF1-126: from an essentially "Backup" witness in the Modified Witness List to "Core" witness in the Renewed Witness List and now proposed to be relegated back to "Backup" in the Further Renewed Witness List; and

ii. TF1-210: from an essentially "Backup" witness in the Modified Witness List, then to a "Core" witness in the Renewed Witness List and now intended to remain as "Core" witness in the Further Renewed Witness List on grounds that the initial omission as a "Core" witness was due to inadvertence attributed to some confusion with another witness bearing an identical name; and

iii. TF1-085: from "Core" in the Modified Witness List to "Core" in the Renewed Witness List and now to "Backup" in the Further Renewed Witness List; and

iv. TF1-029 and TF1-122: from "Core" in the Modified Witness List to "Backup" in the Renewed Witness List and back to "Core" in the Further Renewed Witness List; and

that the changes effected and/or proposed do evince marked inconsistency and caprice on the part of the Prosecution, which will obviously adversely impact on the Defence in the preparation of its case and therefore derogate from the accepted norms of a fair and expeditious trial enshrined in the Statute and the Rules of the Special court.

16. It is submitted that the Prosecution should not be allowed to chop and change ad libitum their Witness List of "Core" witnesses or to shuffle through backwards or forwards from "Core" to "Backup" or *vice versa* by way of amendments as the trial progresses if and when they get it wrong[6] and expect that they have an unbridled right to so do at the expense of the Defence and the Trial Chamber's obligation to ensure that the trial is fair and expeditious and that the proceedings before it are conducted in accordance with the Statute and the Rules of the Special Court.

17. It is to be noted that apart from the case put forward in respect of witness TF1-210, the Prosecution in support of their request have advanced no specific reasons based on grounds of unavailability; at best they seek to rely on a generalization in support of the proposed changes they intend to make in the witness list.

[6] *O'Connor [1997] Crim. L.R. 516*
R. V. Piggott & Litwin (1999) 2 Cr. App. R 320 - 334

18. The Defence submits that Rule 54 of the Rules of the Special Court apart, the Trial Chamber has inherent powers to control proceedings during the course of the trial to ensure that the trial is fair and expeditious and that the Defence is not prejudiced and further that the exercise of such powers in the interest of justice will not amount to an invasion of the Prosecution's independence to conduct their own case.[7]

CONCLUSION

19. The Defence accordingly disagrees with the submission made by the Prosecution that they do not require leave of the Trial Chamber in the circumstances herein adumbrated, that is to say to chop and change the list and shuffle backwards and forwards from "Core" to Backup" or vice versa by way of amendment as the trial progresses, when they get it wrong and without showing good cause in support thereof.

20. The Defence for Kallon is however not opposed to the substitution of TF1-122 for TF1-126 as they both relate to nearly similar events in the same Kenema Crime Base area, should the Trial Chamber feel so disposed to grant leave with such consequential orders as it may deem fair and just in the circumstances.

21. The Defence for Kallon is also not opposed to the retention of TF1-210 in the "Core" list as requested by the Prosecution having regard to the reasons they have advanced.

22. TF1-085 and TF1-029 do not relate to the same Crime base area and intend to testify to different incidents. The shift and substitution requested by the Prosecution lack merit. The

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[7] *See Prosecution v. Milosevic (Para.. 10, 11 and 13) of May 16, 21002: Reasons for refusal of leave to appeal from Decision to impose time limit.*

Defence for Kallon opposes the request and humbly urges the Trial Chamber to refuse leave in the circumstances.

21 February 2005

Shekou Touray

Melron Nicol-Wilson

BOOK OF AUTHORITIES

1. O'Connor [1997] Crim. L.R. 516

2. R v. Piggott & Litwin (1999) Crim. App. R 320 – 334

3. Prosecution v. Milosevic (Para 10, 11, and 13) of May 16, 2002: Reasons for refusal of leave to appeal from Decision to impose time limit.

chance of a perverse verdict; but it is an imperfect right because *Dhillon* [1997] Crim.L.R. 295 decides that he has no redress for the loss of it on appeal. [J.C.S.]

Indictment

Amendment—late amendment—whether fair

R. v. O'Connor

Court of Appeal: The Lord Chief Justice (Lord Bingham), Clarke and Mit... JJ.: February 20, 1997.

The appellant was the managing agent of a company which owned a fishing v... which foundered at sea in February or March 1991 with the loss of all six mem... of the crew. The indictment as originally preferred contained six counts all... manslaughter, each in identical form save that each related to a different mem... the crew. The particulars of each offence alleged that the appellant had caus... death of each crew member by allowing the vessel to go to sea in an unsea... condition and with no, or no adequate, life-saving equipment. As the trial proc... it became clear that if the jury were not satisfied that the appellant was crim... responsible for the sinking but only for the inadequacy of the safety equipmen... unless the Crown could establish that the criminal negligence in respect o... equipment caused the death of *all* members of the crew, the jury could not fi... appellant criminally responsible for the death of *any* individual member. T... judge was alert to this difficulty from an early stage but the prosecution d... apply to amend the indictment until the 27th day of the trial, after a submis... no case to answer by the defence. Count 7 was then added which alleged th... appellant unlawfully killed a person unknown, a member of the crew, by fa... take reasonable care for their safety. The appellant was subsequently con... manslaughter on that count alone, the jury acquitting him of counts 1... appealed against conviction on the grounds that the judge erred in allo... indictment to be amended.

Held, allowing the appeal, that the effect of the amendment was unfa... the factual basis of the Crown's case on causation changed very signific... confronted the appellant with a different and more difficult case and the a... was deprived of the opportunity to mount the defence he would have mo... the Crown case been put in this way from the beginning; that it was for th... to decide how to put its case and it could not rely on the court granting... chop and change as the trial progressed; that the defence were entitled... their attention to the case against the appellant as framed and were not ... alone obliged, to fashion their defence to meet charges which the Crown ... choose to prefer; that, the Crown having resisted the need to amend unt... end, there was nothing in the conduct of their case which could have led ... to regard amendment as their preferred cour...; and that, accordingly, ... tion was unsafe.

[*Reported by Clare Barsby, Barrister*]

Commentary. The Crown's case at the outset was that the defendant ... gross negligence ...

sinking of the vessel and (ii) gross negligence in respect of the life-saving equipment. Each was alleged to be a cause of death and so proof of either would have been sufficient. The prosecution seem to have relied principally on the second ground. In opening, counsel said:

"In any event, the Crown say, whatever the cause of the collision, it is the absence of safety equipment . . . that is the most serious aspect of this case. It really does not matter why she sank, we say."

So far as ground (ii) was concerned, the evidence of gross negligence resulting in the sinking was irrelevant ("it really does not matter why she sank") and highly prejudicial. If the prosecution had relied on ground (ii) only, it would surely have been inadmissible. Had it been admitted, it seems it would have been a ground for quashing the conviction: *R. v. Sandhu* [1997] Crim.L.R. 288. Because there was a case (though not, it seems, a very good one) to leave to the jury on ground (i), it was admissible but it was no less irrelevant, and no less prejudicial, when the jury, having rejected ground (i), came to consider ground (ii) on count 7 in the amended indictment. Should they not have been instructed (however impracticable it might be) to ignore the evidence on ground (i) when considering ground (ii)? The fact that they had the whole evidence to consider may explain what seems, on the evidence to be gleaned from the Court of Appeal's judgment, to be the remarkable conclusion that they were sure that at least one person would have survived if the safety equipment had been in order. They may well have formed the impression that the defendant had behaved very badly and was, in a general way, responsible for the catastrophe. The Court itself remarks that the defendant's case on the merits was threadbare. But "the merits" in the eyes of the jury must have included much matter which was irrelevant to the issue they had to consider. In the circumstances, it is not at all surprising that the late amendment should be found to render the conviction unsafe. [*J.C.S.*]

Jurisdiction

Trade Descriptions Act 1968, s.26—duty of local authority to enforce provisions of Act—whether jurisdiction limited to prosecuting solely for offences under the Act

R. v. Jarrett, R. v. Steward

Court of Appeal: Rose L.J., Dyson and Timothy Walker JJ.: January 30, 1997.

The appellants were convicted of conspiracy to defraud, the appellant S having earlier pleaded guilty to five counts of applying a false trade description under the Trade Descriptions Act 1968. The conspiracy was said to be between the two appellants to defraud purchasers of second-hand cars by altering the odometer readings to reduce the apparent mileage travelled by the cars. On appeal it was argued that in bringing the prosecution the local authority was acting in its capacity as weights and measures authority and as such had no power under the Trade Descriptions Act 1968 to charge conspiracy because a prosecution for such an offence was outside the powers granted by that Act and the Weights and Measures Act 1985.

Held, dismissing the appeal, that the local authority was empowered by section 222 of the Local Government Act 1972 to bring such a prosecution for conspiracy; that there was no warrant for limiting the words of the section which were very wide,

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LUKE ANTHONY PIGGOTT
JEFFREY SIMON LITWIN

COURT OF APPEAL (Lord Justice Waller, Mr Justice Timothy Walker and Judge Hyam, The Recorder of London): February 19, March 18, 1999

INDICTMENT

Amendment

Conspiracy to steal—Case for prosecution closed—Submission of no case to answer—Amendments to indictment allowed by judge—Jury discharged and fresh trial ordered—Re-arraignment on amended indictment—Whether amendments properly allowed—Whether retrial abuse of process—Indictments Act 1915 (5 & 6 Geo. 5, c. 90) s.5(5)

In May 1996 the appellant L was arrested for conspiring to steal motor vehicles. He was later charged with 14 offences of handling stolen goods and the case was adjourned in the magistrates' court for committal proceedings. In September 1996 the Crown Prosecution Service wrote to his solicitors informing them that all the charges would be withdrawn and a new charge would be laid, charging him that between May 1993 and May 1996 he conspired with the appellant P, three other named co-accused and other persons unknown, to steal motor vehicles and plant equipment. In October 1996 the appellant L was committed to the Crown Court on the charge of conspiracy. In March 1997 the appellants and their co-accused were arraigned on an indictment containing one count of conspiracy to steal. One of the co-accused pleaded guilty to assisting in the disposal of stolen goods and the charge of conspiracy was ordered to lie on the file. The Crown opened its case to the jury and over a period of ten working days the case was conducted on the basis that it was alleged that between May 1993 and May 1996 five conspirators conspired together and with other persons unknown to steal motor vehicles and plant equipment. At the close of the case for the Crown all the defendants made a submission of no case to answer. For the appellant L it was submitted that the conspiracy alleged by the Crown was bad as the evidence adduced did not show one overall conspiracy but, if anything, showed a number of different conspiracies. The Crown then applied to amend the indictment by adding nine substantive counts alleging against the appellant L the handling of stolen goods and a tenth count alleging a conspiracy between the appellants to steal motor vehicles between March 1995 and May 1996. The judge, holding that no injustice would be caused to the appellants, allowed the amendments. He then considered the evidence and concluded that there was evidence before the jury at that stage of a large amount of stolen property which would be inadmissible on the indictment as amended. Accordingly he discharged the jury and ordered a fresh trial. At the commencement of the second trial the trial judge rejected a submission that the prosecution was an abuse of the process of the Court, on the ground that he was being asked to review the exercise of discretion by the first judge, which he had no jurisdiction to do. The appellants were convicted. The appellants appealed on the ground that the first judge erred in allowing the amendments to the indictment at the stage he did, and/or that the second judge should have stayed the second trial on the ground that the proceedings were an abuse of the process of the Court.

Held, allowing the appeals, that to allow an amendment of the indictment at the close of the Crown's case which was of such a nature that the judge of his own motion had to discharge the jury, and which had the effect of allowing the Crown simply to start again on a basis previously withdrawn, offended the concept of a defendant being entitled to know the case he or she had to meet and the concept of being entitled to a fair trial. Section 5(5) of the Indictments Act 1915 contemplated amendments only being made at a very early stage of a trial when a decision might be taken to order a separate trial or to postpone a trial which had not in effect started. In the instant case, the amendments allowed included the addition of substantive counts which the Crown, on their own decision, had withdrawn prior to committal before the magistrates; in the circumstances, to allow the amendments at the stage when they were allowed caused an injustice to the appellants. Further, the judge at the second trial was in control of that trial and thus had a separate jurisdiction to consider whether the second trial was an abuse of process. The correct exercise of his jurisdiction at that stage would have been to halt the second trial, the appellants having already been subjected to a trial on the grounds chosen by the Crown over a ten day period. Accordingly, since the second trial should never have taken place, the convictions were unsafe and would be quashed.

(For the Indictments Act 1915, s.5, see *Archbold* 1999, para. 1-147; for amendments to indictments, see, *ibid*, paras 1-148 to 153; for abuse of process, see, *ibid*, paras 4-48 to 73.)

Appeal against conviction.

On March 20, 1998, in the Crown Court at Wood Green (Judge Dean Q.C.), the appellants were convicted, at a re-trial, of conspiracy to steal. Litwin was also convicted of nine counts of handling stolen goods. On the same day Piggott was sentenced to four years' imprisonment and Litwin was sentenced to six years' imprisonment on each count concurrent.

The facts and grounds of appeal appear in the judgment.

The appeal was argued on February 19, 1999, when the following additional cases were cited or referred to in skeleton arguments: *Bendell* (1933) 34 Cr.App.R. 39; *Beckford* [1996] 1 Cr.App.R. 94, CA; *Humbery* (1977) 65 Cr.App.R. 233, 237; *Hui Chi-Ming v. R.* (1991) 94 Cr.App.R. 236, [1994] 1 A.C. 34, P.C.

[1999] 2 Cr.App.R., Part 3 © Sweet & Maxwell

Keith Hotten (assigned by the Registrar of Criminal Appeals) for the appellant Piggott.

Miss Zoë Smith (assigned by the Registrar of Criminal Appeals) for the appellant Litwin.

Justin Wigoder for the Crown.

Cur. adv. vult.

March 18. The following judgment of the Court was handed down.

WALLER L.J.: On March 20, 1998 in the Crown Court at Wood Green before His Honour Judge Dean Q.C. and a jury the appellants were convicted by a majority of 10:2 of conspiracy to steal (count 12). Litwin was also convicted of nine counts of handling stolen goods (counts 3–7) again by a majority of 10:2, and counts 8–11 this time unanimously. On the same day Piggott was sentenced to 4 years' imprisonment on count 12 and Litwin was sentenced to 6 years' imprisonment on each count concurrent.

Background

The trial before Judge Dean was a second trial on an indictment amended in circumstances, to which we will turn, at a first trial which took place at Wood Green Crown Court over 10 working days in September 1997 before His Honour Judge Maher. The indictment originally contained a single count of conspiracy to steal against the two appellants and co-accused Justin Litwin (the appellant's son), Jason Boler and Nathan Nolan. During the first trial, on September 16, the indictment was amended by the addition of count 2, charging Boler alone with handling stolen goods, to which he pleaded guilty, and the conspiracy count, at that time count 1, was ordered to remain on the file in his case.

At the close of the case for the prosecution a submission was made on behalf of the appellants and the co-accused on that conspiracy count of no case to answer. That submission was in essence successful on the way the count was framed at that time, and in the result the judge directed a not guilty verdict in respect of Justin Litwin and Nolan and they were discharged; but he allowed amendments to the indictment in respect of the appellants. However, because there was evidence which had been deployed before the jury inadmissible on the way the case was now to be made by virtue of the amended indictment, he discharged the jury in respect of those appellants and ordered a retrial. It was that retrial that commenced in March 1998 at which stage, as we understand it, the appellants were re-arraigned on the amended indictment. The amendments allowed at that stage deleted the names of the appellants from the conspiracy the subject of that first trial; added counts 3–11 being substantive counts alleging handling stolen goods against the appellant Litwin; and added a count 12 alleging a conspiracy to steal against the appellants with a narrower time frame than the original conspiracy count and also alleging a conspiracy to steal motor vehicles as against the original allegation of a conspiracy to steal motor vehicles and plant equipment which had been the subject of the original conspiracy count.

The basic issue on the appeal is whether the judge should have allowed the amendments to the indictment at the stage that he did and with the consequences that the first trial had to be aborted and the appellants tried again and/or whether Judge Dean should have stayed the second trial on the grounds that the proceedings were an abuse of the process of the Court.

The history

On May 14, 1996 the appellant Litwin was arrested for conspiring to steal motor vehicles. He was later charged with 14 charges of handling stolen goods. The matter was adjourned in the Derby Magistrates Court for committal proceedings under section 6(1) of the Criminal Justice Act 1987.

In September 1996 the Crown Prosecution Service wrote to the appellant Litwin's solicitors informing them that all the charges would be withdrawn and a new charge would be laid charging him that between May 18, 1993 and May 14, 1996 he conspired with Jason Boler, Nathan Nolan, Luke Piggott and other persons unknown to steal motor vehicles and plant equipment.

On October 14, 1996 the appellant was committed under section 6(2) of the Criminal Justice Act 1987 to Derby Crown Court on the charge of conspiracy. The case was later transferred to Wood Green Crown Court.

On March 20, 1997 the appellant and his co-defendants were arraigned on an indictment containing one count of conspiracy in the same terms as the charge laid in the magistrates' court. The appellant and each of the co-defendants pleaded not guilty and the trial was then adjourned to September 1, 1997. On September 1, 1997 Boler pleaded guilty to assisting in the disposal of stolen goods, namely a skip loader, on March 13/14, 1996 and the charge of conspiracy was ordered to lie on the file subject to the usual order. It would appear that the amendment to the indictment, which on the indictment of which we have a copy is dated September 16, 1997, simply formalised Boler's position.

On September 2, 1996 the Crown opened its case to the jury. The case was opened and conducted over a period of 10 working days on the basis that there was what can be termed the wide form of conspiracy to steal that being the only count on the indictment. The period of the conspiracy was May 18, 1993 to May 14, 1996 and there were five conspirators alleged and charged with conspiring together, and with other persons unknown, to steal motor vehicles and plant equipment.

On September 25, 1997 at the close of the case for the Crown, all defendants made a submission of no case to answer. The submission made on behalf of the appellant Litwin was on the ground that the conspiracy alleged by the Crown was bad as the evidence adduced did not show one overall conspiracy but if anything showed a number of different conspiracies. The Crown sought to maintain that there was a case to go to

the jury but recognising that they were losing the argument then suggested the possibility of the amendment to the indictment.

Judge Maher ruled initially on the submission of no case in the following way:

> "So to cut a long story short, I accept the submission made that the count is as presently drafted fatally flawed in that it appears to role up in one count at least two, and possibly more agreements or conspiracies, and accordingly the trial cannot proceed on the present basis. The prosecution have substantially conceded that this analysis is probably correct and now seek to amend the indictment in a way set out in the draft which we have all just seen. The defence have not yet had the opportunity to consider this in detail with their client. Accordingly, what I'll do in a moment is to rise for half an hour before proceeding to the second part of this, namely whether the indictment could properly be amended."

The judge also ruled at that stage that there was no case to go to the jury in relation to Nathan Nolan and accordingly he said at that stage that he proposed to direct the jury to return a verdict of not guilty on Nathan Nolan.

There was then argument about whether the indictment should be amended and ultimately on September 25, 1997 the judge ruled in relation to the Crown's application to amend. At that stage the Crown proposed to add the substantive counts of handling as against the appellant Litwin and two counts of conspiracy. Count 10 alleged:

> "Jeffrey Litwin and Luke Piggott between the 25th day of March 1995 and the 12th day of May 1996 conspired together to steal motor vehicles."

Count 11 was in identical terms save that the name of Justin Simon Litwin, the appellant Litwin's son, was included. It was in this context that at the commencement of the ruling relating to amendment the judge ruled that there was no case to go before the jury in relation to Justin Litwin and that thus he would direct a not guilty verdict on the original count so far as he was concerned.

In those circumstances what the judge then did was to consider whether it was right to allow the Crown to amend the indictment by adding nine substantive counts alleging against Litwin the handling of stolen goods between February 25, 1993 and May 12, 1996, plus a tenth count asserting a conspiracy between the appellants to steal motor vehicles between March 25, 1995 and May 12, 1996. The judge approached the matter by reference to section 5(1) of the Indictments Act 1915 which is in the following terms:

> "Where before trial, or at any stage of the trial, it appears to the Court that the indictment is defective, the Court shall make such order for the amendment of the indictment that the Court thinks necessary to meet the circumstances of the case. The Court must consider whether the amendment can be made without injustice. If injustice is or may be caused to a defendant, then the indictment ought not to be amended."

The judge also referred to section 5(5) of the Act and the power in appropriate circumstances to discharge the jury from giving a verdict and to order a retrial where a proper amendment is made. At the time of his ruling on the amendment he stated in relation to the order for a retrial:

> "Clearly that step should not be taken without hearing further submissions since one can well understand there may be many cases in which the defence wish to soldier on notwithstanding that amendments have been made to which they take objection. They may, for example, wish to take advantage of whatever good points they have made in the course of the instant trial. They may not wish what one might call the flavour and atmosphere of a trial to be lost, and there may be all sorts of tactical reasons for wishing to preserve the position and possibly argue the inappropriateness of amendment on appeal, and so on . . .".

He was referred to many authorities and we will turn to those further below, but in essence he decided that there would be no injustice to the appellants if an amendment was allowed. He reminded himself of the history and of the way in which the case had been conducted by the defence so far. Thus he said in relation to the appellant Litwin's defence:

> "What Mr Litwin has to say is very easily encapsulated. He does not, I repeat, dispute the presence of the property in or upon his land. What he says is a blend of three defences; (1) I did not know it was there; (2) as to some property he received innocently and in good faith. And (3) some of the property in any event was brought onto his site by third parties to whom he rented out a part of his yard.
> The defence conducted their case on this basis and if the indictment is amended will be able to put before the jury exactly the same defences. I summarise what Mr Litwin will say. Of course, he will support it if matters continue with great detail. . . .
> Miss Smith when invited by me how she might have conducted her case differently, mentioned, as I have said the question of fingerprints. Of course it is beyond contradiction that the specific charges brought by the police last year remained specific charges for many many months and I might have expected any request for defence fingerprint examination to be made during that period."

The judge thus came to the conclusion that standing back from the matter the addition of the specific counts to the indictment would not cause injustice to the appellants and he allowed the amendments.

He then came to consider whether even on the bases of the amendments there might be arguments for withdrawing the matter from the jury. It was

in the course of that ruling that he considered what evidence was at that stage before the jury and would be admissible on the indictment as now amended and his conclusion was that there was evidence at that stage before the jury of a large amount of stolen property which would be inadmissible on the new counts. Thus he concluded:

> "I do not see how this jury, even with a proper direction, could conceivably put on one side that potentially very damaging evidence. It is quite impossible, in my view, for Mr Litwin in particular to have a fair trial at the hands of this jury now they know the full extent of the stolen items recovered from his yard.
>
> In those circumstances, if the matter is to proceed there is only one course for me to adopt and that is when the directed verdicts have been given to discharge the jury from having to continue with this trial, and revisit the question as to whether that is a fair course.
>
> As far as Mr Litwin and Mr Piggott are concerned, they will have to come back here, I hope, in the near future, if I do discharge the jury, for the trial to continue on the new basis; that is regrettable but I do not see that as an injustice to them, and, indeed, section 5(5) of the Indictments Act contemplates that in extremis a judge may have to take this course. In my view, the interests of justice require a discharge of this jury and a fresh trial before a new jury who will be untroubled and uninfluenced by the irrelevant and highly damning evidence, so when the directed verdicts have been returned I will discharge the jury."

It was in those circumstances that the second trial commenced before His Honour Judge Dean and the application was made to Judge Dean that the second trial was an abuse of the process of the Court. Judge Dean ruled on that matter on March 6. Judge Dean spelled out the history of the matter fully and he referred both to the authorities relating to abuse of process and authorities relating to the amendments to indictments. Ultimately, his conclusion was that he was being asked to review the exercise of discretion by Judge Maher and that that was something which he had no jurisdiction to do. His view was that the proper course open to the defendants who were dissatisfied with the exercise of a discretion of the trial judge, was to go to the Court of Appeal and seek to persuade the Court of Appeal that the exercise of that discretion was in some way improper or flawed. In those circumstances he recognised that there was no ability to go to the Court of Appeal prior to the trial that was then taking place before him. Thus he said:

> "I cannot of course dictate to the Court of Appeal the nature of its own jurisdiction and the matter will have to be determined by the Court of Appeal. But I am satisfied, and this is the basis of my decision, that it is not open to me to exercise the inherent jurisdiction upon the facts of this case, accordingly I do not proceed to do so."

Submissions in broad terms

It was Miss Smith's submissions, supported by Mr Hotten on behalf of the appellants, that it was unfair for the Crown to be able to conduct their case to its close on one basis, and then be allowed at such a late stage to amend their case particularly as in the result:

(a) the defendants were denied the acquittal to which they were otherwise entitled;
(b) the Crown were allowed to reinstate the counts that they had elected to withdraw; and
(c) the judge was forced to discharge the jury and order a retrial of his own motion.

That submission supported an attack on Judge Maher's rulings at the close of the first trial and an attack on Judge Dean's refusal to halt the second trial as an abuse of process.

It was Mr Wigoder's submission that the matter must be followed through chronologically. He submitted that the power to amend flowed from the Indictments Act 1915. The question was whether any injustice would be caused to the appellants by virtue of any amendments. The proper conclusion of Judge Maher was that no injustice would be caused and that thus the amendments should be allowed. It was permissible on that basis for Judge Maher to discharge the first jury and again that caused no injustice to the appellants. Mr Wigoder further submitted that the decision of Judge Dean was right since in effect the discretion had already been exercised by Judge Maher and there could be no question of abuse of process.

We have to say that our immediate reaction to the above submissions is that to allow an amendment at the close of the Crown's case which is of such a nature that the judge of his own motion has to discharge the jury which has the effect of allowing the Crown simply to start again on a basis previously withdrawn, offends the concept of a defendant being entitled to know the case he or she has to meet and the concept of being entitled to a fair trial.

Mr Wigoder however, by reference to the authorities, sought to persuade us that that reaction was unjustified.

Authorities

Mr Wigoder first referred to many authorities relating to the amendment of the indictment. A review of some of those authorities is called for. *Johal and Ram* (1972) 56 Cr.App.R. 348. In that case the appellants had been arraigned on an indictment containing two counts. Before the jury had been empanelled counsel for the appellants sought directions in relation to certain statements, and the judge having ruled that the statements were admissible the prosecution applied for leave to amend by adding four further counts. The judge granted leave and the appellants were then arraigned on the further counts and the jury was thereafter empanelled

and the trial proceeded. Ashworth J. delivering the judgment of the Court said at page 353:

> "In the judgment of this Court, there is no rule of law which precludes amendment of an indictment after arraignment, either by addition of a new count or otherwise. The words in section 5(1) of the Indictments Act 1915 'at any stage of the trial' themselves suggest that there is no such rule; if the suggested rule had been intended as a limitation of the power to amend, it would have been a simple matter to include it in a subsection.
>
> On the other hand this Court shares the view expressed in some of the earlier cases that amendment of an indictment during the course of a trial is likely to prejudice an accused person. The longer the interval between arraignment and amendment, the more likely is it that injustice will be caused, and in every case in which amendment is sought, it is essential to consider with great care whether the accused person will be prejudiced thereby."

Radley (1974) 58 Cr.App.R. 394. The facts there were that the appellants were arraigned on and pleaded not guilty to an indictment containing one count only for conspiracy. At the close of counsel for the prosecution's opening which took 1½ days, counsel for the prosecution obtained leave from the judge to add three further counts alleging conspiracies. The judge directed those fresh counts to be put to the appellants who pleaded not guilty to them. The appellants were convicted on count 2 and count 3. On appeal it was held that the original form of the indictment was defective because as it stood originally it might have excluded from the consideration of the jury any two man conspiracy as opposed to a three man conspiracy and was thus inconsistent with the evidence as shown in the depositions. It was further held having regard to the circumstances in which the amendment was made and in view of the fact that the amendment really amounted to a splitting up of the original allegation in the original count that no injustice had been caused by permitting the amendment. It was further held that there had been no irregularity in procedure as a second arraignment had been carried out.

Mr Wigoder suggested that the fact that an indictment may be amended even at the close of the Crown's case if "no injustice would have been caused" was recognised *obiter* in the case of *Jones* (1974) 59 Cr.App.R. 120 at 128. Whether or not that is so, it was so recognised in *Tirado* (1974) 59 Cr.App.R. 80 and in *Harris* (1976) 62 Cr.App.R. 28. In *Tirado* at the conclusion of the Crown's case the Crown sought leave to substitute, in relation to an allegation of obtaining a banker's draft by false pretences, the bank as opposed to the person who held the draft, as the person from whom the draft was obtained. The Court of Appeal called this "highly technical stuff" and continued at page 88 in a passage relied on by Mr Wigoder:

> "The judge justified it by saying that although it came very late, namely, at the close of the case for the prosecution, it did not really amount to more than correcting a false description and he saw no reason why it should not be done. In reaching that conclusion, he correctly instructed himself that he should not allow the amendment if injustice might result, and that is the key to the problem raised when the prosecution seek to amend an indictment. The judge does not bother so much with the technicalities of another era. He asks himself: 'can this be done without injustice?' and if the answer is 'Yes', then he is perfectly entitled to allow the amendment. One asks oneself in this case whether the amendment could be made without injustice and the answer again seems to us too clear for argument. There is no possible reason why it should have caused injustice to the appellant and the amendment was properly made."

In *Harris* (1976) 62 Cr.App.R. 28, the Court of Appeal upheld the decision of the Recorder who had allowed an amendment to a count by the amendment alleging an attempt to obtain a pecuniary advantage in contra distinction to the full offence of obtaining a pecuniary advantage which had originally been alleged. The Court held that the amendment was not a substitution of a different offence, but merely the correction of a description of the offence and that no injustice had been caused to the appellant thereby and thus the judge had properly allowed it under the power given to him by section 5(1) of the Indictments Act 1915. In giving the judgment of the Court Stocker J. said at p. 32:

> "As to the time at which the amendment was made, it may very well be that in very many circumstances an application to amend as late as the close of the case for the prosecution will be so likely to involve injustice to an accused person that such an application in many instances might be refused. In this case, we can see no injustice which will have resulted, and we feel really that Mr Hordern has not pinpointed any specific injustice. He relied simply on the general proposition that an amendment at such a late stage must involve the question of injustice. We consider that it was an amendment which involved a more accurate description of a representation by conduct and that could appropriately be made at the stage at which it was."

In *Teong Sun Chuah* [1991] Crim.L.R. 463 the appellants had been charged with obtaining mortgages by false pretences. The indictment charged them with obtaining "services". There was a submission of no case based on *Halai* [1983] Crim.L.R. 624 which suggested a mortgage was not a service. The judge allowed an amendment to exchange the word "property" for "services" and the Court of Appeal held that the amendment of the deception count 2 "property" in place of "services" though made at a late stage caused no injustice as it deprived the defence only of a technical and unmeritorious argument that concerned only a matter of form.

In *Fyffe* [1992] Crim.L.R. 442, at the close of the prosecution case the defence submitted that the indictment containing 11 counts was bad for

duplicity. The Crown offered to sub-divide the counts and a document was produced with 27 counts. The Court of Appeal held that with two immaterial exceptions the 27 counts reproduced what had appeared in the 11 counts. They added no new allegations and charged no new offences: these were not amendments of substance but only of form.

Finally we were referred to *O'Connor* [1997] Crim.L.R. 516. In that case the appellant was managing agent of a company which owned a fishing vessel which foundered at sea in February/March 1991 with the loss of all six members of the crew. The original indictment contained six counts alleging manslaughter in identical terms save that each related to a different member of the crew. The particulars of each offence alleged that the appellant had caused the death of each crew member by allowing the vessel to go to sea in an unseaworthy condition and with no adequate lifesaving equipment. On the 27th day of the trial, and after a submission of no case to answer by the defence, count 7 was added by amendment which alleged that the appellant "unlawfully killed a person unknown, a member of the crew, by failing to take reasonable care of their safety". The appellant was subsequently convicted of manslaughter on that count alone. The Court of Appeal held that the effect of the amendment was unfair because the factual basis of the Crown's case on causation changed very significantly and confronted the appellant with a different and more difficult case. The appellant was deprived of the opportunity to mount the defence he would have mounted had the Crown's case been put in this way from the beginning; that it was for the Crown to decide how to put its case and it could not rely on the Court granting it leave to chop and change as the trial progressed; that the defence were entitled to confine their attention to the case against the appellant as framed and were not entitled, let alone obliged, to fashion their defence to meet charges which the Crown might later chose to prefer and that the Crown having resisted the need to amend until the bitter end, there was nothing in the conduct of their case which could have led the defence to regard the amendment as their preferred course and accordingly the conviction was unsafe.

The review of the above authorities demonstrates that the courts have in more recent years construed the power to amend more liberally. Even however if "defective" has been given a more liberal reading, certain matters strike us in relation to the authorities. In no case where an amendment was being sought or allowed once the Crown case was completed was there any suggestion that one consequence could be the discharge of the jury and a retrial. The concentration in all the authorities has been on whether the trial itself can be continued without injustice. *O'Connor* furthermore supports the view that the Crown should not be allowed to chop and change in the way that it puts its case and hope that leave to amend will be given if it has got it wrong.

The judge placed reliance on section 5(3) of the Indictments Act 1915 which provides:

"Where an order of the Court is made under this section for a separate trial or for the postponement of a trial,

(a) if such an order is made during a trial the Court may order that the jury are to be discharged from giving a verdict on the count or counts the trial of which is postponed or on the indictment, as the case may be and

(b) the procedure on a separate trial of a count shall be the same in all respects as if the count had been found in a separate indictment, and the procedure on the postponed trial shall be the same in all respects (if a jury has been discharged) as if the trial had not commenced; and (c) the Court may make such order . . . as to grant any accused person bail, and as to the enlargement of recognisance's and otherwise as the Court thinks fit."

We would suggest that the flavour of that subsection contemplates amendments only at the very early stage at which a decision may be taken to order a separate trial or to postpone the trial which has not in effect started. Albeit a more liberal construction may have been put on the word defective by later authorities there is nothing in those authorities which would suggest that a more liberal interpretation should be put on that subsection. One can understand how postponement or discharge at a very early stage may not be unfair but we find it difficult to contemplate that postponement or discharge of a jury was something that could take place at the end of the Crown's case without producing unfairness.

It seems to us that some of the cases relating to abuse of process are relevant in considering the question of amendment of the indictment. Starting with the dictum of Lord Devlin in *Connelly v Director of Public Prosecutions* (1964) 48 Cr.App.R. 183, 274, [1964] A.C. 1254, 1359 where he said:

"The result of this will, I think, be as follows. As a general rule a judge should stay an indictment (that is, order that it remain on the file not to be proceeded with) when he is satisfied that the charges therein are founded on the same facts as the charges in a previous indictment on which the accused has been tried, or form or are a part of a series of offences of the same or a similar character as the offences charged in the previous indictment. He will do this because as a general rule it is oppressive to an accused for the prosecution not to use rule 3 where it can properly be used. But a second trial on the same or similar facts is not always and necessarily oppressive, and there may in a particular case be special circumstances which make it just and convenient in that case. The judge must then, in all the circumstances of the particular case, exercise his discretion as to whether or not he applies the general rule. Without attempting a comprehensive definition, it may be useful to indicate the sort of thing that would, I think, clearly amount to a special circumstance. Under section 5(3) of the Act a judge has a complete discretion to order separate trials of offences charged

in one indictment. It must, therefore, follow that where the case is one in which, if the offences in the second indictment had been included in the first, the judge would have ordered a separate trial of them, he will in his discretion allow the second indictment to be proceeded with. *A fortiori*, where the accused has himself obtained an order for a separate trial under section 5(3). Moreover, I do not think that it is obligatory on the prosecution, in order to be on the safe side, to put into an indictment all the charges that might conceivably come within rule 3, leaving it to the defence to apply for separation. If the prosecution considers that there ought to be two or more trials, it can make its choice plain by preferring two or more indictments. In many cases this may be to the advantage of the defence. If the defence accepts the choice without complaint and avails itself of any advantage that may flow from it, I should regard that as a special circumstance; for where the defence considers that a single trial of two indictments is desirable, it can apply to the judge for an order in the form made by Glyn-Jones J. In *Smith* (1958) 42 Cr.App.R. 35, [1958] 1 W.L.R. 312."

That *dictum* was applied by Barry J. In *Riebold* [1967] 1 W.L.R. 674. The facts in *Riebold* were that the defendants had been charged on an indictment containing two counts of conspiracy and 27 counts of larceny and, alternatively, charges of false pretences. The latter counts related to overt acts in support of the conspiracy allegation. The prosecution proceeded on the second count (conspiracy) alone, and after conviction of both defendants and successful appeals by them, the prosecution sought leave to proceed on the remaining 27 counts of the original indictment. The leave was initially given *ex parte* by Phillimore J. But when the matter was fully argued out Barry J. refused to allow the Crown to proceed on the 27 counts. He said at page 678:

"I am perfectly satisfied here that what the prosecution seek to do is to secure a re-trial of this whole case, and I am equally satisfied that if such a re-trial were to take place, it would become a complete reproduction of the trial which took place last year at some considerable length at the Stafford Assizes. The issues would be entirely the same because, indeed, all these charges of larceny, false pretences and certain cases of forgery were joint charges, and the prosecution would have to prove that the two defendants jointly took part in each of these offences. I am told, and I accept, that the subject matter of the remaining charges, that is, charges 3 to 29, did in fact constitute the whole of the overt acts of the conspiracy upon which the prosecution relied, and there were no additional factors or evidence on which the prosecution relied in order to secure a conviction on the conspiracy charge."

Riebold was approved recently in *Beedie* [1997] 2 Cr.App.R. 167. In *Beedie* the appellant had been convicted before the magistrates of offences relating to gas installations. The appellant was then indicted on an offence

of manslaughter arising out of the defective gas fires in relation to which he had pleaded guilty before the magistrates. The judge had ruled that the plea of *autrefois convict* was not applicable in relation to the second indictment and the judge had exercised his discretion in allowing the proceedings for manslaughter to continue. However the Court of Appeal held, following *Connelly* and *Riebold* amongst other authorities, that special circumstances as set out in the *dictum* of Lord Devlin were necessary to be established by the prosecution if it were to be allowed to proceed with the manslaughter trial.

Mr Wigoder stresses, quite rightly, that there is a material distinction between the situation in which a defendant has been tried and either convicted or acquitted and the situation as occurred in the instant case where the judge allowed an amendment to the indictment and discharged the jury. We accept that important distinction. However, if in the instant case the counsel for the appellants had not made a submission of no case and allowed the matter to be decided by the jury, the jury would have had to acquit the appellants on the conspiracy as it was charged. In that instance, on any view, an attempt by the Crown to resurrect substantive offences and even narrower conspiracies would have been bound to fail. No one would suggest that if the amendments had not been sought and thought necessary, and if the defence were entitled to succeed on a submission, that the Crown would be entitled to have the jury discharged as opposed to a verdict of Not guilty entered simply so that they could mount a second case. The question in one sense is whether when they have elected to put their case in one way, they should be entitled to have the jury discharged so that they can put the case in a different way. Mr Wigoder would submit that that is putting the matter pejoratively.

Mr Wigoder's submission began with the narrowing of the conspiracy allegation by the addition of count 10. He would ask rhetorically, why should not a defendant face the narrower charge since the greater included the lesser. There is force in that submission, but the difficulty with even that submission in the context of this case is that the Crown had chosen the very broad conspiracy and thus put in evidence matters which, it is now accepted, would not be admissible on the lesser conspiracy and it might easily just as well be posed rhetorically why should the Crown having pinned their colours to one mast be entitled to abort that trial in order to pin their colours to a different mast.

In any event, Mr Wigoder has to face the fact that there was not simply a narrowing of the conspiracy charge. The amendments allowed included substantive counts which the Crown, on their own decision, had withdrawn prior to committal before the magistrates. It is thus not even a case where those substantive counts being on the indictment the Crown had been put to an election as to whether they pursued the conspiracy or the substantive counts. At least in the situation in which the substantive counts had remained on the indictment those advising the appellants at the

of an application to alter the election previously made but in the situation that existed that election appeared finally to have been made.

In the circumstances we are of the view that to allow amendments at the stage where they were allowed in this case after a trial lasting some 10 days and which could only be proceeded with by ordering a re-trial which would traverse the same ground as the first trial but on counts which the appellants were entitled to think had been withdrawn, did cause an injustice to the defendants. In those circumstances we are of the view that the amendments to the indictment should not have been allowed.

It also seems to us that Judge Dean, albeit faced with a somewhat awkward situation, would have been entitled to conclude that the second trial was an abuse of process. It is true that some of the same factors were relevant in considering whether the amendments should be allowed as were relevant to considering whether the second trial was an abuse of process, but he was the judge at the second trial and he was in control of that trial. He thus had a separate jurisdiction to consider whether the second trial was an abuse of process. For the reasons we have already given in relation to the amendment, we are of a view that the correct exercise of his jurisdiction at that stage would have been to halt that second trial the appellants having already been subjected to a trial on the grounds chosen by the Crown over a 10 day period previously.

If, as we have concluded, the second trial should never have taken place, it seems to us that we must also conclude that the convictions are unsafe. We announced at the conclusion of the hearing that the convictions of these appellants should be quashed and that reasons would be given in writing later. These are those reasons and these appeals are allowed.

Appeals allowed.
Convictions quashed.

Solicitors: Crown Prosecution Service, Derby.

TONY BAKER
ALAN WARD

COURT OF APPEAL (Lord Justice Roch, Mr Justice Richards and Judge Colston Q.C.): March 19, 31, 1999

DEFENCES

Duress

Possession of firearm while committing robbery—Defence of duress—Limits.

The appellants committed a robbery at a superstore during which an imitation pistol was used. Their defence at trial was that they had acted under duress. They gave evidence that, having involved themselves in the supply of cannabis and having failed to pay for one batch which they had bought, they and their families had been subjected to threats of violence and, in the case of one of them, subjected to actual violence on one occasion; subsequently they had been instructed to rob the store and were supplied with the imitation firearm. The judge's summing up included directions on duress and the limitations on that defence. After retiring the jury submitted written questions to the judge relating to the limitations. The judge declined to answer the questions and simply repeated the directions he had given. The appellants were convicted and appealed on the grounds that by not answering the questions the judge in effect had removed the defence of duress from the jury, and had failed to give the jury the assistance to which they were entitled and which, by their questions, they showed that they needed.

Held, allowing the appeal, that a jury was entitled to assistance from the trial judge in identifying the issues of fact which, applying the law relating to the case, arose for their decision.

The following observations were made to give guidance on the assistance which could and should be before a jury when the limitations or exceptions to the defence of duress had to be considered.

There were two limitations on the defence of duress: (1) a man must not voluntarily put himself in a position where he is likely to be subjected to such compulsion; and (2) if a person can avoid the effects of duress by escaping from the threats, without damage to himself (or to a member of his immediate family), he must do so.

The defence involved both subjective and objective elements. When considering whether the compulsion to which a defendant claimed to have been subjected amounted to duress, the conduct relied on must be such that any sober person of reasonable firmness of a sort similar to the defendant would have reacted in a similar way. Equally, he could not say that he was not able to avoid the effects of duress if a reasonable person of a

10571

Case: IT-02-54-AR73

BEFORE A BENCH OF THREE JUDGES OF THE APPEALS CHAMBER

Before:
Judge Claude Jorda, Presiding
Judge David Hunt
Judge Fausto Pocar

Registrar:
Mr Hans Holthuis

Decision of:
16 May 2002

PROSECUTOR

v

Slobodan MILOSEVIC

REASONS FOR REFUSAL OF LEAVE TO APPEAL FROM DECISION TO IMPOSE TIME LIMIT

Counsel for the Prosecutor:

Ms Carla Del Ponte, Prosecutor
Mr Geoffrey Nice
Ms Hildegard Uertz-Retzlaff
Mr Dirk Reyneveld

The Accused:
Mr Slobodan Milosevic (unrepresented)

Amici Curiae
Mr Steven Kay
Mr Branislav Tapuskovic
Mr Mischa Wladimiroff

The background to the application for leave to appeal

1. During the course of the trial in this case, the prosecution filed a document in relation to the future management of the trial, in which it invited the Trial Chamber to consider "possible creative solutions" to problems which it saw as arising in relation to various "procedural/evidentiary issues". The Prosecution Paper sought no specific relief, and it had been filed by the prosecution in response to an indication by the Trial Chamber that its assistance was sought in relation to the anticipated length of the trial.

2. There was an extensive discussion of the issues raised in the Prosecution Paper. It is sufficient at this stage to refer only to a number of salient points. The prosecution made it clear that, because the unrepresented accused had become "fully engaged" in the trial, the time which its case was expected to take was now longer than originally envisaged. Reference was made to over 1000 witnesses whose "crime-base" evidence was necessary in one form or another to establish all of the incidents pleaded. It was pointed out to the prosecution that it was necessary for it to consider presenting a case which was of a smaller size than that which had been pleaded, by selecting incidents which were representative of those charged in the indictment. Counsel for the prosecution stated that he was in "complete agreement" with such an approach. The Trial Chamber recognised that, in the rather special circumstances of this case, the final issues in dispute would probably not become clear until the trial was well under way, and that they may well not become clear until the beginning of the Defence case.

3. Against that very generally stated background, the Trial Chamber stated that, as part of its management of the trial so that it could be brought to an end within a reasonable time, and in order to concentrate minds and to ensure that the matter was completed fairly to both parties, it was necessary to impose a time limit within which the prosecution was to complete its case. The Trial Chamber recognised the duty of the prosecution to put forward its case, that it must be given a reasonable opportunity to do so, and that it was not for the Trial Chamber to dictate to the prosecution in any arbitrary way how it should do so. The Trial Chamber stated that it would consider ways in which the evidence could properly be put before it expeditiously, and it noted that ways in which the scope of the prosecution case might be brought within a "proper range" would be pursued. It stated that, because the issues in dispute may not be made plain in the circumstances of this trial until the beginning of the Defence case, such a limit had to be imposed at an early stage of the trial. The Trial Chamber acknowledged its duty to ensure that the cross-examination of the prosecution witnesses was kept within reasonable limits without an unreasonable waste of time. The prosecution was directed to conclude its case within twelve months, in addition to the two months which had already been spent, the Trial Chamber expressing its view that no prosecution case should continue for longer than fourteen months. Such a limitation was subject to "the unexpected", and the Trial Chamber stated that it would be reviewed in the light of illness or other unforeseen circumstance.

Rule 73

4. Appeals from interlocutory decisions other than preliminary motions and applications for provisional release are governed by Rule 73 of the Rules of Procedure and Evidence ("Rules"), which at the relevant time provided:

(B) Subject to paragraph (C), decisions rendered during the course of the trial on motions involving evidence and procedure (including, without limiting the generality of this Rule, orders and decisions under Rule 71, Depositions, and denials under Rule 98*bis*, Motion for Judgement of Acquittal) are without interlocutory appeal. Such decisions may be assigned as grounds for appeal from the final judgement.

(C) The Trial Chamber may certify that an interlocutory appeal during trial from a decision involving evidence or procedure is appropriate for the continuation of the trial, upon a request being made within seven days of the issuing of the decision. If such certification is given, a party may appeal to the Appeals Chamber without leave, within seven days of the filing of the certification.

(D) Decisions on all other motions are without interlocutory appeal save with the leave of a bench of three Judges of the Appeals Chamber which may grant such leave

> (i) if the decision impugned would cause such prejudice to the case of the party seeking leave as could not be cured by the final disposal of the trial including post-judgement appeal;
>
> (ii) if the issue in the proposed appeal is of general importance to proceedings before the Tribunal or in international law generally.

Rule 73(E) at the relevant time provided for the time in which an application for leave to appeal had to be filed.

5. No certificate was sought in accordance with Rule 73(C). The prosecution has instead sought leave to appeal pursuant to Rule 73(D), arguing that a consequence of the limitation imposed by the Trial Chamber upon the length of its case is the infringement of its statutory rights. This situation is thus "clearly distinguishable", the prosecution says, from "the more 'ordinary' matters described in Rule 73(B) as examples of matters involving evidence and procedure". As such, the prosecution submits, its appeal rights should be governed by Rule 73(D) rather than Rule 73(B).

Was a certificate necessary?

6. The decision of the Trial Chamber to impose a time limit upon the length of the prosecution case was not given as the determination of any motion. The prosecution has nevertheless argued that the fact that the order was made *proprio motu* and not on a motion does not deny it the right to seek leave to appeal pursuant to Rule 73(D). Provided that the character of the decision given is otherwise appropriate to be dealt with under Rule 73(D), this Bench of the Appeals Chamber agrees that that is so. For the same reasons, the fact that the order was made *proprio motu* and not on a motion does not exclude the application of Rule 73(B) if the decision rendered during the course of the trial is otherwise one "involving evidence and procedure".

7. The order which was made in the present case is incontrovertibly one "rendered during the course of the trial" and one "involving evidence and procedure". The examples given in Rule 73(B) – "orders and decisions under Rule 71, Depositions, and denials under Rule 98*bis*, Motion for Judgement of Acquittal" – were intended to make it clear that they

were *included* within the concept of "evidence and procedure", and they are expressly described as *not* limiting the generality of the Rule. The allegation (or even the fact) that an impugned decision made during the course of the trial has the consequence of infringing the statutory rights of a party cannot change its character as one involving evidence and procedure. It would be extraordinary that a party could have avoided the strict provisions of Rule 73(B) by the simple expedient of

merely alleging that an impugned decision had the consequence of affecting its statutory rights or, for example, the fairness of the trial. Such an interpretation would clearly emasculate the purpose of Rule 73(B). What matters is the character of the impugned decision, not the character of its consequences. The possibility of such consequences would have been a matter for the Trial Chamber to consider in determining whether a certificate should be given, but it did not take the order made out of the scope of Rule 73(B).

8. Accordingly, the absence of a certificate from the Trial Chamber is fatal to the prosecution's attempt to appeal from the time limitation imposed by the Trial Chamber, as the impugned decision was without interlocutory appeal. It is for this reason that the Motion was dismissed.

Leave

9. In its Formal Decision dismissing the Motion, this Bench of the Appeals Chamber also stated that, even if Rule 73(D) *were* applicable, it was not satisfied that the conditions for its application had been made out. To that issue, the Bench now turns.

10. The prosecution's Motion expressly assumes that, in limiting the time within which the prosecution case was to be concluded, the Trial Chamber was exercising its power under Rule 73*bis*(E). However, every court possesses the inherent power to control the proceedings *during* the course of the trial. Rule 73*bis*(E) merely makes it clear that that power may also be exercised *before* the trial at the Pre-Trial Conference by the Trial Chamber, or by the Pre-Trial Judge. The current trial has, since its commencement, been the trial of all three indictments issued against the accused, which are now deemed to constitute one indictment, so that Rule 73*bis*(E) – which concerns the Pre-Trial Conference – could not have been the source of the power during the trial to limit the time for the prosecution case. The order made by the Trial Chamber was made in the exercise of its power to control the proceedings currently being tried before it, which is no different in its relevant aspect from the power identified in Rule 73*bis*(E).

11. The prosecution has submitted that such a power is not intended "to provide a vehicle for a Trial Chamber unduly to interfere with the presentation of the Prosecution case" which, it says, "falls under the exclusive province of the Prosecution". The exercise of that power on this occasion, the prosecution submits, was "invading the sphere of prosecutorial autonomy". It draws attention to Article 16.2 of the Tribunal's Statute, which provides:

> The Prosecutor shall act independently as a separate organ of the International Tribunal. He or she shall not seek or receive instructions from any Government or from any other source.

The prosecution argues that the impugned decision invades the independence of the Prosecutor under that Article, as well as her right to a fair and expeditious trial under Article 20. The prosecution says that its right to present the prosecution case in the manner which it "deems fit (absent a demonstration of abuse)" falls solely within its province as an independent and separate organ on the Tribunal.

12. The claim that the order made by the Trial Chamber has interfered with the independence of the Prosecutor is misconceived. The independence which the Tribunal's Statute gives to the Prosecutor is an important feature of the Statute, and it is the source of the "largely adversarial" nature of the proceedings before the Tribunal. The Statute leaves it entirely to the Prosecutor to investigate serious violations of international humanitarian law in the territory of the former Yugoslavia, and to determine against whom an indictment is to be brought. No government or other institution or person, including the judges of the Tribunal, can direct the Prosecutor as to whom he or she is to investigate or to charge. That is the true intent, and the extent, of Article 16.2 of the Statute.

13. However, once the indictment has been confirmed by a judge, and once the indictment has been filed, the Prosecutor becomes a party before the Tribunal, and thus subject to the power of a Chamber to manage the proceedings, in the same way as any other party before the Tribunal. It is erroneous to suggest that the Prosecutor has an independence in relation to the way in which her case is to be presented before a Trial Chamber which the accused person does not have. The Tribunal's Statute itself provides to the contrary. Article 21 is stated in uncompromising terms: "All persons shall be equal before the International Tribunal." That equality is fundamental to the fairness of the trials which are conducted before the Trial Chambers. It has not been infringed in the present case.

14. The prosecution concedes, correctly, that the decision by the Trial Chamber to impose a time limit within which the prosecution was to present its case was a discretionary one. The issue in an appeal from such a decision is not whether

the decision was correct, in the sense that the Appeals Chamber agrees with that decision, but rather whether the Trial Chamber has correctly exercised its discretion in reaching that decision. Provided that the Trial Chamber has properly exercised its discretion, its decision will not be disturbed on appeal, even though the Appeals Chamber itself may have exercised the discretion differently. The prosecution identifies, as the "discernible" error made by the Trial Chamber in the exercise of its discretion, its disregard of the need for the issues in the trial to become clear before any time-limit is imposed. This is said to have caused the prosecution "irremediable prejudice", and to raise an issue of general importance to proceedings before the Tribunal, thus establishing a basis upon which leave to appeal should be granted pursuant to Rule 73(D).

15. In the *Galic* Decision, upon which the prosecution relies, a Bench of the Appeals Chamber said:

> [The power to impose time limits] is a powerful tool for preventing excessive and unnecessary time being taken by the prosecution, and it is intended to ensure that the prosecution litigates only those issues which are really in dispute and which are necessary to determine for the purposes of its case. Its introduction followed serious excesses by prosecution teams in the past. S...C [It] requires the Trial Chamber to consider with care whether the issues really in dispute have been clearly identified so that a proper assessment of the time needed for the prosecution can be made.

That was said in a case in which the accused was represented by counsel, and it was still in the pre-trial stage. In the particular circumstances of this case, the Trial Chamber was entitled to regard that injunction as largely inapplicable. The case as pleaded in the indictment, and as initially pursued by the prosecution at the hearing, required proof of every serious violation of international humanitarian law which had occurred throughout Croatia, Bosnia and Kosovo for which evidence was available. The accused, although engaged in the case in the sense that he is cross-examining the prosecution witnesses, has not co-operated with the prosecution or with the Trial Chamber in any meaningful way in defining the issues in the case.

16. Having in mind the discussion which had occurred, it is clear that what the Trial Chamber was saying to the prosecution was that:

> (i) it was necessary for the anticipated length of the prosecution case to be reduced so as to make the trial manageable,
>
> (ii) this was not the case in which it was appropriate to establish every serious violation for which evidence was available,
>
> (iii) the prosecution would have fourteen months in which to present its case,
>
> (iv) as a consequence, it had to reduce the number of incidents to be proved to those which it could prove within that period, and
>
> (v) the Trial Chamber would review its decision in the light of unforeseen circumstances.

In the circumstances of this case, which were exceptional, the Trial Chamber was entitled to take such a course, and error in the exercise of its discretion has not been established.

17. This Bench of the Appeals Chamber is not satisfied that the prosecution has been prejudiced by the order made in the manner which it has alleged. It must be emphasised that a Trial Chamber may always reconsider a decision it has previously made, and not only because of unforeseen circumstances. Whether or not it exercises that power is a discretionary matter. In the present case, the accused has several times stated that, when given the opportunity to cross-examine the prosecution witnesses, he intends to avail himself of every such opportunity "to speak in the interest of truth" and "to make a comment". Such an intention is not always consistent with the proper limitations upon a cross-examination, and it will obviously be difficult for the Trial Chamber continually to ensure that his cross-examinations are kept within reasonable limits without an unreasonable waste of time. It does not need any particular degree of foresight to see that, even with the Trial Chamber exercising stringent control, the accused's cross-examinations may, deliberately or otherwise, seriously erode the time available for the prosecution case.

18. Nor is this Bench of the Appeals Chamber satisfied that, in the exceptional circumstances already described, the decision raises any issue of general importance to proceedings before the Tribunal generally which warrants further elaboration by a full Bench of the Appeals Chamber.

19. It was for these reasons that this Bench of the Appeals Chamber stated that, even if Rule 73(D) *were* applicable in the present case, it was not satisfied that the conditions for its application had been made out.

Done in French and English, the French text being authoritative.

Dated this 16th day of May 2002,
At The Hague,
The Netherlands.

_____
Judge Claude Jorda
Presiding

[Seal of the Tribunal]