488

SCSL-04-15-T
(18026 - 18085)

18026

SPECIAL COURT FOR SIERRA LEONE
OFFICE OF THE PROSECUTOR
Freetown – Sierra Leone

Before: Justice Pierre Boutet, Presiding
Justice Bankole Thompson
Justice Benjamin Itoe

Interim Registrar: Mr. Lovemore G. Munlo

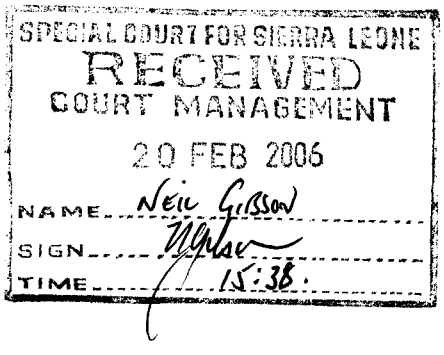
Date filed: 20 February 2006

THE PROSECUTOR **Against** **Issa Hassan Sesay**
Morris Kallon
Augustine Gbao

Case No. SCSL-04-15-T

PUBLIC
PROSECUTION APPLICATION FOR LEAVE TO AMEND INDICTMENT

Office of the Prosecutor:
Christopher Staker
James C. Johnson
Peter Harrison
Mohamed A. Bangura



Defence Counsel for Issa Hassan Sesay
Wayne Jordash
Sareta Ashraph

Defence Counsel for Morris Kallon
Shekou Touray
Charles Taku
Melron Nicol-Wilson

Defence Counsel for Augustine Gbao
Andreas O'Shea
John Cammegh

I. INTRODUCTION

1. The Prosecution applies for leave, pursuant to Rules 50 and 73(A) of the Rules of Procedure and Evidence ("Rules"), to amend the Amended Consolidated Indictment ("Indictment") against Issa Hassan Sesay, Morris Kallon and Augustine Gbao ("Accused").[1]
2. The Prosecution seeks the following amendments, paragraph (a) of which relates exclusively to Kono District:

   (a) paragraphs **48** (unlawful killings, Counts 3-5), **62** (physical violence, Counts 10-11) and **80** (looting and burning, Count 14) be amended so that the words "Between about 14 February 1998 and 30 June 1998 ..." read "Between about 14 February 1998 and 31 January 2000 ...";

   (b) paragraph **31** be amended so that the word "from" is deleted from the last sentence and replaced with "between" so that the sentence reads: "In this position, between about April 1997 and about mid 1998, AUGUSTINE GBAO was subordinate...."

II. LEGAL ARGUMENTS

3. Rule 50(A) provides in relevant part: "At or after [the] initial appearance, an amendment of an indictment may only be made by leave granted by a Trial Chamber pursuant to Rule 73. If leave to amend is granted, Rule 47(G) and Rule 52 apply to the amended indictment." Rule 73(A) states in relevant part: "Subject to Rule 72, either party may move before the Designated Judge or a Trial Chamber for appropriate ruling or relief after the initial appearance of the accused." Rule 50(A) of the Special Court's Rules is similar to Rule 50(A) of the ICTR Rules and to Rule 50(A)(i) of the ICTY Rules concerning the amendment of an indictment.
4. The proposed amendments to paragraphs 48, 62 and 80 of the Indictment relate exclusively to the time frames pleaded as particulars of the unlawful killings, physical violence, and looting and burning alleged to have occurred in the Kono District. Some of the witnesses who have testified before the Trial Chamber in relation to these crimes in the Kono District have given evidence that indicates or suggests that some of the crimes

[1] *Prosecutor v Sesay, Kallon and Gbao*, SCSL-15-PT-122, "Amended Consolidated Indictment", 13 May 2004.

may have fallen outside the specific time period stated in paragraphs 48, 62 and 80 of the Indictment. Examples are given in Annex A to this Motion.

5. For the reasons given below, the Prosecution does not concede that any amendment of the Indictment is necessary in order for all the evidence relating to the Kono crime base that has been heard in this case to be taken into account by the Trial Chamber in relation to Counts 3-5, 10-11 and 14. In other words, the Prosecution submits that if the Trial Chamber is ultimately satisfied beyond a reasonable doubt that an Accused is criminally responsible for a particular crime to which paragraph 48, 62 or 80 of the Indictment relates, the Accused might be convicted of that crime even if the evidence does not establish that the crime necessarily occurred within the specific time period stated in those paragraphs of the Indictment, or even if the evidence establishes that the crime occurred outside that specific time period. Nevertheless, for the reasons given below, the Prosecution submits that it would be good practice in the circumstances to seek an amendment to the Indictment, to make the stated time periods consistent with the evidence before the Trial Chamber.

6. The common law rule concerning dates specified in an indictment, which was said in *Dossi* to be a rule that has existed "since time immemorial",[2] is expressed in *Archbold* as follows:

> ... a date specified in an indictment is not a material matter unless it is an essential part of the alleged offence; the defendant may be convicted although the jury finds that the offence was committed on a date other than that specified in the indictment. *Amendment of the indictment is unnecessary, although it will be good practice to do so* (provided there is no prejudice ...) ...
>
> The prosecution should not be allowed to depart from an allegation that an offence was committed on a particular day in reliance on the principle in *Dossi* if there is a risk that the defendant has been misled as to the allegation he has to answer or that he would be prejudiced in having to answer a less specific allegation....[3]

7. The rule in *Dossi* was applied by the Appeals Chamber of the ICTR in the *Rutaganda* case.[4] The *Dossi* principle has also been recognised by the Appeals Chamber of the ICTY

---

[2] *R .v. Dossi*, 13 CR.App.R. 158 (CCA), at pp. 159-160 (***"Dossi"***): "From time immemorial a date specified in an indictment has never been a material matter unless it is actually an essential part of the alleged offence.... Thus, though the date of the offence should be alleged in the indictment it has never been necessary that it should be laid according to truth unless time is of the essence of the offence."

[3] *Archbold Criminal Pleading, Evidence and Practice*, 2002 Edition, paras. 1-127 to 128, emphasis added.

[4] *Prosecutor v. Rutaganda*, ICTR-96-3-A, "Judgement", Appeals Chamber, 26 May 2003, paras 296-306, especially para. 306: "It is the opinion of the Appeals Chamber that the alleged variance between the evidence presented at

in the *Kunarac* case.[5] *Dossi* was further cited with approval by the ICTY Trial Chamber in the *Tadic* case, which affirmed that the date of the crime is not of the essence.[6] The ICTR Trial Chamber in the *Kayishema and Ruzindana* case expressly approved the relevant passage in the *Tadic* case and the authorities cited therein (including *Dossi*), and similarly affirmed that the Prosecution need not prove an exact date of an offence where the date or time is not a material element of the offence.[7] In that case the Trial Chamber stated:

> It is unnecessary, however, for the Prosecution to prove an exact date of an offence where the date or time is not also a material element of the offence. Whilst it would be preferable to allege and prove an exact date of each offence, this can clearly not be demanded as a prerequisite for conviction where the time is not an essential element of that offence. Furthermore, even where the date of the offence is an essential element, it is necessary to consider with what precision the timing of the offence must be detailed. It is not always possible to be precise as to exact events; this is especially true in light of the events that occurred in Rwanda in 1994 and in light of the evidence we have heard from witnesses. Consequently, the Chamber recognises that it has balanced the necessary practical considerations to enable

---

trial and the Indictment in relation to the date of the commission of the offence cannot lead to invalidation of the Trial Chamber's findings unless the said date is actually an essential part of the Appellant's alleged offence. However, such is not the case in this instance. The Appeals Chamber notes, moreover, that according to the evidence presented at trial, the weapons distributions occurred during a period that was reasonably close to the date referred to in the Indictment and that, therefore, the Appellant was not misled as to the charges brought against him. For these reasons, the Appeals Chamber dismisses this sub-ground of appeal and finds that the Trial Chamber did not commit the alleged error of law in this instance." The Appeals Chamber in this judgement affirmed the judgement of the Trial Chamber in this respect: see *Prosecutor v. Rutaganda*, ICTR-96-3-T, "Judgement", Trial Chamber, 6 December 1999, para 201: "The Chamber notes that the dates of the three incidents - 8 April, 15 April, and 24 April - vary from the date on or about 6 April, which is set forth in paragraph 10 of the Indictment. The phrase 'on or about' indicates an approximate time frame, and the testimonies of the witnesses date the events within the month of April. The Chamber does not consider these variances to be material or to have prejudiced the Accused. The Accused had ample opportunity to cross-examine the witnesses. In reviewing the allegation set forth in this paragraph of the Indictment, the Chamber finds that the date is not of the essence. The essence of the allegation is that the Accused distributed weapons in this general time period." (Footnote omitted)

[5] *Prosecutor v. Kunarac et al.*, IT-96-23&23/1-A, "Judgement", Appeals Chamber, 12 June 2002, para. 217: "in the view of the Appeals Chamber, minor discrepancies between the dates in the Trial Judgement and those in the Indictment in this case go to prove the difficulty, in the absence of documentary evidence, of reconstructing events several years after they occurred and not, as implied by the Appellant, that the events charged in Indictment IT-96-23 did not occur."

[6] *Prosecutor v. Tadic*, IT-94-1-T, "Opinion and Judgement", Trial Chamber, 7 May 1997, para. 534: "Whereas the Prosecution is bound to prove each of the elements of the offence charged, to specify and prove the exact date of an offence is not required when the date or time is not also an element of the offence. The date may be of the essence of an offence if an act is criminal only if done, or only if the consequences of the act manifest themselves, within a certain period of time, or if the date is an essential ingredient of the offence, or if a statute of limitations or its equivalent applies. However, in none of the offences here alleged was the date or time of the essence. For the foregoing reasons the events charged and the evidence adduced by the Prosecution was sufficiently precise and lack of specificity did not result in any denial of the accused's right to a fair trial."

[7] *Prosecutor v. Kayishema and Ruzindana*, ICTR-95-1-T, "Judgement and Sentence", Trial Chamber, 21 May 1999, paras. 81-86.

> the Prosecution to present its case, with the need to ensure sufficient specificity of location and matter of offence in order to allow a comprehensive defence to be raised.[8]

The principle is applied in the national courts of a variety of jurisdictions,[9] including for instance England and Wales,[10] Australia,[11] Canada,[12] Trinidad and Tobago[13] and Papua New Guinea.[14]

8. The Indictment generally charges the Accused with criminal responsibility for various crimes committed over a broad period of time. For instance, in relation to Counts 1 and 2, which refers to Counts 3 to 14 of the Indictment,[15] the relevant time period is specified as "At all times relevant to this Indictment".[16] In particular, the Indictment specifically alleges crimes in the Kono District up until about January 2000.[17] The Prosecution submits that the inclusion of the more specific time frame mentioned in paragraphs 48, 62 and 80 of the Indictment is not intended to have the effect, and indeed, cannot have the effect, of making the dates specified in these paragraphs a material matter that must be proved beyond a reasonable doubt in order for an Accused to be convicted. The purpose of stating a more specific time period in these particular paragraphs is to give the Defence better notice and particulars of the case that the Accused has to meet. Indeed, paragraphs 48, 62 and 80 do not even purport to be specific, but are merely indicative of a general time frame, given that they specify a time frame "Between ***about*** 14 February 1998 and 30 June 1998". In accordance with the *Dossi* principle, if the evidence of witnesses, once

---

[8] Ibid, para. 85.
[9] The rule is not applicable where the defence has provided an alibi defence or where the age of the complainant is an essential element of the offence, neither of which applies here. See *R. v. Radcliffe* [1990] Crim LR 524 (CA).
[10] *R. v. JW* [1999] EWCA Crim 1088 (21 April 1999) (CCA); *R. v. Lowe* [1998] EWCA Crim 1204 (CCA).
[11] *R. v. Kenny Matter,* No. CCA 60111/97 (29 August 1997) (NSW CCA), where the indictment alleged offences in 1986 and the court convicted on evidence indicating that the offence happened in the last week of 1985; *R. v. Liddy* [2002] SASC 19 (31 January 2002) (SA CCA), esp. paras. 256ff; *R. v. Frederick* [2004] SASC 404 (7 December 2004) (SA CCA), esp. paras. 38-41.
[12] *R. v. B. (G.)*, [1990] 2 S.C.R. 30, 1990 CanLII 114 (S.C.C.); *R. v. B. (G.)*, [1990] 2 S.C.R. 57, 1990 CanLII 115 (S.C.C.).
[13] *Bowen v. State*, Cr. App. No. 26 of 2004, Trinidad and Tobago Court of Appeal, 12 January 2005
[14] *State v. Fineko* [1978] PNGLR 262 (25th July, 1978).
[15] This is made clear in paragraph 44 of the Indictment.
[16] The time period relevant to Counts 1 and 2 is specified by paragraph 41, which begins with the words "At all times relevant to this Indictment". In an earlier decision this Trial Chamber held that this phrase gave adequate notice to the Accused to prepare his defence and was not vague: *Prosecutor v Sesay*, SCSL-2003-05-PT-080, "Decision and Order on Defence Preliminary Motion for Defects in the Form of the Indictment", Trial Chamber, 13 October 2003, para. 21.
[17] Indictment, para. 71.

they testify, suggests that the time frame in those paragraphs may have been stated too narrowly, that does not prevent the Accused from being convicted of crimes falling outside that time frame, unless this would cause prejudice to the Accused. The Prosecution submits that there is no such prejudice in this case (for reasons which are given below). As a matter of good practice, the Prosecution therefore seeks to amend the Indictment to amend the time frames indicated in order to provide better notice and specificity.

9. The Appeals Chamber of the Special Court has said that amendments to an indictment, "broadly speaking", fall into three categories:

> a) Formal or semantic changes, which should not be opposed;
> b) Changes which give greater precision to the charges or its particulars, either by narrowing the allegation or identifying times, dates or places with greater particularity or detail. Such amendments will normally be allowed, even during trial; and
> c) Substantive changes, which seek to add fresh allegations amounting either to separate charges or to new allegation in respect of an existing charge.[18]

10. Even an amendment falling in the third, most significant, category, can be made during trial. For instance, in the *Akayesu* case, the ICTR permitted the Prosecution to amend the Indictment *more than five months into the trial* to add three new counts after evidence of rape had been heard, in order to reflect the evidence that emerged at trial and the actual responsibility of the accused.[19] However, the Prosecution submits that the proposed amendments to paragraphs 48, 62 and 80 of the Indictment do *not* fall into this third category. The proposed amendment in this case is far more modest. It is not proposed to add any new charges, but merely to correct the particulars of the time frame of existing charges. The Prosecution is not seeking to add new allegations to the existing charges, but merely to state with greater accuracy the time frame within which the existing charges were committed (see the second category of amendments referred to above, which are "normally ... allowed, even during trial").

11. As has been recognised by both the Appeals Chamber of the ICTY and ICTR, "There are,

---

[18] *Prosecutor v Norman , Fofana and Kondewa*, SCSL-04-14-397, "Decision on Amendment of Consolidated Indictment", Appeals Chamber, 16 May 2005, Para 79. See also *Prosecutor v Muvunyi*, ICTR-2000-55A-PT, "Decision on the Prosecutor's Motion for Leave to file an Amended Indictment", Trial Chamber II, 23 February 2005, para. 35.

[19] *Prosecutor v. Akayesu* ,ICTR-96-1-A, "Judgement", Appeals Chamber, 1 June 2001, paras. 115-123.

of course, instances in criminal trials where the evidence turns out differently than expected. Such a situation may require the indictment to be amended, an adjournment to be granted, or certain evidence to be excluded as not being within the scope of the indictment."[20] This has also been recognized by this Trial Chamber.[21] National authorities are readily found in support of the proposition that an indictment may be amended at trial to bring the charge in conformity with evidence already adduced before the court.[22] The present motion is concerned with the time frame in which the relevant crimes were committed in the Kono District. As argued above, the time frame specified in paragraphs 48, 62 and 80 of the Indictment are not a material matter. In the circumstances, the appropriate course would be to amend the Indictment.

12. The difficulty faced by witnesses in being precise about dates is understandable. As the ICTR and ICTY have recognised, it is not always possible to be precise as to exact dates of events in cases of the type that come before international criminal tribunals.[23] It must be remembered that some witnesses before the court are illiterate. They are asked to recall traumatic events that took place five or more years ago. At times they are able to recall other events that assist the Court in understanding the time frame they are talking about, at other times they are able to describe events in relation to the dry season or the rainy season.

13. The proposed amendment would not cause any prejudice to the Accused.[24] As a Trial Chamber of the ICTR has observed: "The fundamental issue in relation to granting leave to amend an indictment is whether the amendment will prejudice the accused unfairly".[25]

---

[20] *Prosecutor* v. *Kupreškić et al.*, "Appeal Judgement", IT-95-16-A, Appeals Chamber, 23 October 2001, para. 92; see also *Prosecutor* v. *Niyitegeka*, "Appeal Judgement", ICTR-96-14-A, Appeals Chamber, 9 July 2004, para. 194, 196.

[21] *Prosecutor* v. *Norman, Fofana and Kondewa*, SCSL-04-14-282, "Decision on the First Accused's Motion for Service and Arraignment on the Consolidated Indictment", Trial Chamber, 29 November 2004, para. 26.

[22] *Archbold's Criminal Pleading, Evidence and Practice*, 2002 Edition, para. 1-150, 1-151. Section 601 of the *Criminal Code* of Canada, RSC 1985, chapt. C-46, states that a court may amend the indictment "where there is a variance between the evidence and (a) a count in the indictment...". Such motions may be *ex mero motu* to amend the information to conform with the evidence: *R. v. Powell*, [1965] 4 CCC 349 (BCCA).

[23] See the quotations in footnotes 6 and 7 above. Compare also, for instance, *Prosecutor v. Delalic et al. (Celebici case)*, Judgement, IT-96-21-T, Trial Chamber, 16 November 1998, paras. 596-597.

[24] Compare *Prosecutor v Norman, Fofana and Kondewa*, SCSL-04-14-397, "Decision on the Amendment of the Consolidated Indictment", Appeals Chamber,16 May 2005, para 78; *Prosecutor v. Bizimungu, Mugenzi, Bicamumpaka & Mugiraneza*, ICTR-99-50-I, "Decision on the Prosecutor's Request for Leave to file an Amended Indictment", Trial Chamber II, 6 October 2003, paras. 34-35.

[25] *Prosecutor v. Muhimana*, ICTR-1995-1B-I, "Decision on Motion to Amend Indictment", Trial Chamber, 21 January 2004, para. 4 (emphasis added).

The Trial Chamber in that case went on to explain that "The word 'unfairly' is used in order to emphasize that an amendment will not be refused merely because it assists the prosecution quite fairly to obtain a conviction. To be relevant, the prejudice caused to an accused would ordinarily need to relate to the fairness of the trial".[26] In the present case, all the witnesses were extensively cross-examined on the facts precisely because the evidence in question was in any case relevant to Counts 1 and 2, which incorporate all of the acts alleged in relation to all of the other counts,[27] and which therefore include relevant events in the Kono District spanning the broader time period until January 2000.[28] There should therefore be no need to recall any witness. (Notably, in *Akayesu*, the Appeals Chamber held that the amendments were properly allowed even though defence counsel did not know of the allegations of rape at the time of the cross-examination and did not cross-examine on the topic, having failed subsequently to ask for permission to recall the relevant witnesses.[29]) The Prosecution is not seeking any improper tactical advantage, and the proposed amendment would be consistent with the duty of the Prosecutor to prosecute the Accused to the full extent of the law.[30]

14. This application is being made at this stage of the proceedings as the evidence regarding Kono District is still being heard and it was not possible to know previously to what extent the testimony would diverge from the facts known to the Prosecution at the time the Indictment was filed. Evidence related to Kono District was heard during the first four trial sessions. Further significant evidence relevant to Kono District was heard in the fifth trial session (witnesses TF1-272, TF1-361, TF1-360 and TF1-036), and in the sixth trial session (witness TF1-366). Witness TF1-041, whom the prosecution intends to call in the upcoming seventh trial session is expected to testify about events in Kono District. The Prosecution has therefore not delayed in bringing this application; there would have been little purpose in bringing it immediately after the evidence of the first

---

[26] *Ibid.*

[27] Paragraph 44 of the Indictment, dealing with Counts 1 and 2, expressly incorporates "the crimes set forth below in paragraphs 45 through 82 and charged in Courts 3 through 14".

[28] See Indictment, para. 71.

[29] *Akayesu*, Appeals Judgement, para. 121.

[30] See, for instance *Prosecutor v. Ndayambaje*, ICTR-96-8, "Decision on the Prosecutor's Request for Leave to File an Amended Indictment", Trial Chamber, 2 September 1999, para. 7; *Prosecutor v. Naletilic and Martinovic*, IT-98-34, "Decision on Vinko Martinovic's Objection to the amended Indictment and Mladen Naletilic's preliminary Motion to the amended Indictment", Trial Chamber, 14 February 2001 (see the final paragraph in that decision before the heading "B. Cumulative Charging").

witness to events in Kono District differed from the Indictment in terms of the timing of these events.

III. CONCLUSION

15. For the reasons given above, the Prosecution submits that the proposed amendments to paragraphs 48, 62 and 80 of the Indictment should be made as a matter of good practice, there being no prejudice to the accused.
16. The proposed amendment to paragraph 31 is a formal or semantic change only, which should be uncontroversial.
17. The Prosecution attaches at ANNEX B a draft copy of the FURTHER AMENDED CONSOLIDATED INDICTMENT.

Filed in Freetown,
20 February 2006
For the Prosecution,

James C. Johnson

Peter Harrison

List of Authorities

Texts

Archbold Criminal Pleading, Evidence and Practice, London, Sweet & Maxwell, 2002 Edition, paragraphs 1-127 – 1-128, page 59; paragraphs 1-150 – 1-151, pages 68-69.

Cases

R. v. B. (G.), [1990] 2 S.C.R. 30, 1990 CanLII 114 (S.C.C.), (http://www.canlii.org/ca/cas/scc/1990/1990scc59.html)

R. v. B. (G.), [1990] 2 S.C.R. 57, 1990 CanLII 115 (S.C.C.), (http://www.canlii.org/ca/cas/scc/1990/1990scc60.html)

Bowen v. State, Cr. App. No. 26 of 2004, Trinidad and Tobago Court of Appeal, 12 January 2005, (http://64.233.179.104/search?q=cache:LAekyq0Fx_wJ:www.ttlawcourts.org/Judgments/coa/2005/john/Cra26_2004.rtf+dossi+indictment&hl=en&gl=uk&ct=clnk&cd=5)

Prosecutor v Muvunyi, ICTR-2000-55A-PT, "Decision on the Prosecutor's Motion for Leave to file an Amended Indictment", Trial Chamber II, 23 February 2005, (http://65.18.216.88/ENGLISH/cases/Muvunyi/decisions/230205.htm)

Prosecutor v. *Norman, Fofana and Kondewa*, SCSL-04-14-282, "Decision on the First Accused's Motion for Service and Arraignment on the Consolidated Indictment", Trial Chamber, 29 November 2004

Prosecutor v Norman, Fofana and Kondewa, SCSL-04-14-397, "Decision on the Amendment of the Consolidated Indictment", Appeals Chamber, 16 May 2005

Prosecutor v Sesay, SCSL-03-05-PT-080, "Decision and Order on Defence Preliminary Motion for Defects in the Form of the Indictment", Trial Chamber, 13 October 2003

Prosecutor v Sesay, Kallon and Gbao, SCSL-04-15-122, "Amended Consolidated Indictment", 13 May 2004

Prosecutor v. Akayesu, ICTR-96-1-A, "Judgement", Appeals Chamber, 1 June 2001, (http://65.18.216.88/ENGLISH/cases/Akayesu/judgement/Arret/index.htm)

Prosecutor v Bizimungu, Mugenzi, Bicamumpaka and Mugiraneza, ICTR-99-50-I, "Decision on the Prosecutor's Request for Leave to file an Amended Indictment", Trial Chamber II, 6 October 2003, (http://65.18.216.88/ENGLISH/cases/Bizimungu/decisions/061003.htm)

Prosecutor v Delalic et al (*Celebici* case), "Judgement", IT-96-21-T, Trial Chamber, 16 November 1998, (http://www.un.org/icty/celebici/trialc2/judgement/cel-tj981116e.pdf)

Prosecutor v Kayishema and Ruzindana, ICTR-95-1-T, "Judgement and Sentence", 21 May 1999, (http://65.18.216.88/ENGLISH/cases/KayRuz/judgement/index.htm)

Prosecutor v Kunarac et al, IT-96-23&23/1-A, "Judgement", Appeals Chamber, 12 June 2002, (http://www.un.org/icty/kunarac/appeal/judgement/kun-aj020612e.pdf)

Prosecutor v. Kupreškić et al, "Appeal Judgement", IT-95-16-A, Appeals Chamber, 23 October 2001, (http://www.un.org/icty/kupreskic/appeal/judgement/kup-aj011023e.pdf)

Prosecutor v Muhimana, ICTR-1995-1B-I, "Decision on Motion to Amend Indictment", Trial Chamber I, 21 January 2004, (http://65.18.216.88/ENGLISH/cases/Muhimana/decisions/210104.html)

Prosecutor v Naletilic and Martinovic, Case No. IT-98-34-T, "Decision on Vinko Martinovic's Objection to the amended Indictement and Mladen Naletilic's preliminary Motion to the amended Indictment",Trial Chamber, 14 February 2001, (http://www.un.org/icty/naletilic/trialc/decision-e/10214AI114803.htm)

Prosecutor v Ndayambaje, ICTR-96-8-T, "Decision on the Prosecutor's Request for Leave to File an Amended Indictment", Trial Chamber, 2 September 1999

Prosecutor v Niyitegeka, ICTR-96-14-A, "Judgement", Appeals Chamber, 9 July 2004, (http://65.18.216.88/ENGLISH/cases/Niyitegeka/judgement/NIYITEGEKA%20APPEAL%20JUDGEMENT.doc)

Prosecutor v Rutaganda, ICTR-96-3-A, "Judgement", Appeals Chamber, 26 May 2003, (http://65.18.216.88/ENGLISH/cases/Rutaganda/decisions/030526%20Index.htm)

Prosecutor v Rutaganda, ICTR-96-3-T, "Judgement and Sentence ", Trial Chamber, 6 December 1999, (http://65.18.216.88/ENGLISH/cases/Rutaganda/judgement/index.htm)

Prosecutor v. Tadic, IT-94-1-T, "Opinion and Judgement", 7 May 1997, (http://www.un.org/icty/tadic/trialc2/judgement/tad-tsj70507JT2-e.pdf)

R .v. Dossi, 13 CR.App.R. 158 (CCA)

R v Frederick, [2004] SASC 404 (7 December 2004) (SA CCA), (http://www.austlii.edu.au/cgi-bin/disp.pl/au/cases/sa/SASC/2004/404.html?query=+%28%28frederick%29+and+%28on%29%29)

R v JW, [1999] EWCA Crim 1088 (21 April 1999) (CCA), (http://www.bailii.org/cgi-bin/markup.cgi?doc=/ew/cases/EWCA/Crim/1999/1088.html&query=jw&method=all)

R v Kenny Matter, No. CCA 60111/97 (29 August 1997) (NSW CCA), (http://www.austlii.edu.au/cgi-bin/disp.pl/au/cases/nsw/supreme%5fct/unrep602.html?query=kenny+matter)

R v Liddy, [2002] SASC 19 (31 January 2002) (SA CCA), (http://www.austlii.edu.au/cgi-bin/disp.pl/au/cases/sa/SASC/2002/19.html?query=+%28%28liddy+%29+and+%28on%29%29)

Prosecutor v Sesay, Kallon and Gbao, SCSL-04-15-T

R v Lowe, [1998] EWCA Crim 1204 (CCA), (http://www.bailii.org/cgi-bin/markup.cgi?doc=/ew/cases/EWCA/Crim/1998/1204.html&query=1204&method=all)

R v Powell, [1965] 4 CCC 349 (BCCA)

R v Radcliffe, [1990] Crim LR 524 (CA), (http://web2.westlaw.com/search/default.wl?rs=WLW6.02&tempinfo=%7cMethodTNC%7cdbUK-CASELOC%7ctiduk_u%7cSearchByPartyNamesFNR+v+Radcliffe&eq=welcome%2fWestlawUK&db=UK-CASELOC&query=TI(R+%26+Radcliffe)&fn=_top&action=Search&mt=WestlawUK&vr=2.0&method=TNC&sv=Split&rp=%2fsearch%2fdefault.wl)

State v Fineko, [1978] PNGLR 262 (25th July, 1978), (http://www.worldlii.org/pg/cases/PNGLR/1978/262.html).

Legislation

Canadian *Criminal Code*, [R.S., 1985, c. C-46] Section 601, (http://www.canlii.org/ca/sta/c-46/sec601.html)

ANNEX A

1. The Trial Chamber has heard evidence of events that fall within the time period specified in the relevant counts, and events that may be outside this time period. Witnesses who gave evidence, some of which may fall outside the time period of the relevant counts as outlined below, include TF1-304, TF1-012, TF1-263, TF1-362, and TF1-141.
2. TF1-304 testified that on 19 February 1999 he saw many decapitated human heads at Savage Pit and that only 21 of the 360 houses in Tombodu were undamaged.
3. TF1-012 testified that he was in Tombodu when ECOMOG pushed the AFRC and RUF from Freetown and they came to Tombodu. He stated that towards the end of the dry season a house full of people was set on fire.[1] He testified that Pa Sankoh came to Koidu at the time of the Lomé Peace Accord and said they should start mining diamonds and civilians started mining.[2] In 1999 the town chief was flogged by the rebels.[3]
4. TF1-263 testified that he was captured in February 1998 by rebels. He saw five people shot and killed during the time mangos were ripe in Kono, at which time Kallon shot a boy.[4] After the attack on Kono towards the end of the rainy season, the witness went to Tombodu and then to Krubola with Superman. On the way from Tombodu civilians were killed and others were forced to carry loads.[5]
5. TF1-362 testified that around the time Sam Bockarie fled Sierra Leone for Liberia, Issa Sesay ordered the killing of six recruits who attempted to escape from the Yengema training base, and that 5 of the 6 were executed.[6] Yengema training base was established after Koidu was recaptured in late 1998.[7]
6. TF1-141 testified that he went on a mission to Koidu called Operation No Living Thing. Based on other evidence the Prosecution argues that this would be on or about December 1998. The witness state that it was a mission to capture Koidu led by Issa Sesay and that the remaining houses were burned, unless they were occupied by commanders.[8] The

[1] Transcript 2 February 2005, pp. 17-22.
[2] Transcript 2 February 2005, pp. 26-35.
[3] Transcript 4 February 2005, pp. 9-10.
[4] Transcript 6 April 2005, pp. 19-24.
[5] Transcript 6 April 2005, pp. 44-51.
[6] Transcript 21 April 2005, pp. 21-23.
[7] Transcript 25 April 2005, pp. 102-106.
[8] Transcript 13 April 2005, pp. 14-17.

witness then went to Tombodu on a food finding patrol. He stated that there, many civilians were captured and killed and Morris Kallon was in command.[9] The witness testified that Issa Sesay gave commands for the attack on Koidu and that houses were burned and civilians were killed at Kwiyor.[10]

---

[9] Transcript 13 April 2005, pp. 22-30.
[10] Transcript 15 April 2005, pp. 108-111.

ANNEX B

AUSTRALIA
LBC Information Services
Sydney

CANADA AND USA
Carswell
Toronto

NEW ZEALAND
Brooker's
Auckland

SINGAPORE AND MALAYSIA
Sweet and Maxwell
Singapore and Kuala Lumpur

A CIP catalogue record for this book is available from the British Library

ISBN 2001 0421 753706

No natural forests were destroyed to make this product; only farmed timber was used and replanted

ARCHBOLD

CRIMINAL PLEADING, EVIDENCE AND PRACTICE

2002

LONDON
SWEET & MAXWELL

cases, it may be appropriate for the judge to direct the giving of such further particulars even though no application is made: *R. v. Warburton-Pitt*, 92 Cr.App.R. 136, CA. Further particulars should be reduced to writing: *ibid.* (where an offence charged depends on allegations which could be put on several different footings it is incumbent on the prosecution to particularise the facts on which it relies in support of its allegations).

In *R. v. Litanzios* [1999] Crim.L.R. 667, CA, it was said that a count for cheating the public revenue should be drafted with sufficient detail to inform the court and the defence as to the exact nature of the factual allegation, and so as to eliminate the possibility of a conviction on either of two alternative bases. In this regard, see also *R. v. Carr* [2000] 2 Cr.App.R. 149, CA (unfortunate that judge had not ordered particulars to be given in such a situation when pre-trial request for same had not been met) and *post*, §§ 4–391 *et seq.* See also *post*, §§ 1–131 *et seq.*, as to the need for particularity where specimen charges are laid; and *cf.* the principles discussed in *Pelissier v. France* (2000) 30 E.H.R.R. 715, ECHR, *post*, § 4–378.

The particularity required of a count alleging conspiracy has frequently given rise to difficulty: see generally, *post*, §§ 33–41 *et seq.*, but see also *R. v. Bolton*, 94 Cr.App.R. 74, CA (need to allege course of conduct agreed upon) (*post*, § 33–4); and *R. v. Patel and others, The Independent*, September 2, 1991, CA (89 04351 S1) (conspiracy relating to controlled drugs) (*post*, §§ 33–16, 33–17).

1–118 Where the prosecution case is that the defendant committed an offence either as a principal or as a secondary party, but cannot say which, one count may be laid to cover the alternative modes of participation, and if particulars are sought the prosecution are entitled to allege the two modes of participation in the alternative. See further *ante*, § 1–113b and *post*, § 18–32.

Indictment Rules 1971, Sched. 1

1–118a Rule 4(1)

SCHEDULE 1

[INDICTMENT]

COURT OF TRIAL.....

THE QUEEN *v.* .....

charged as follows:—

STATEMENT OF OFFENCE

[*e.g. Theft, contrary to section 1(1) of the* Theft Act *1968*]

PARTICULARS OF OFFENCE

[*e.g. A B on the 1st day of February 2001 stole a bag belonging to J N*]

Date..... .....

Appropriate officer of the court

NOTE: the example given in the square brackets is not given in the Schedule.

D. STATUTORY OFFENCES

Indictment Rules 1971, r. 6

1–119 6. Where the specific offence with which an accused person is charged in an indictment is one created by or under an enactment, then (without prejudice to the generality of rule 5 of these Rules)—

(a) the statement of offence shall contain a reference to—

(i) the section of, or the paragraph of the Schedule to, the Act creating the offence in the case of an offence created by a provision of an Act;

(ii) the provision creating the offence in the case of an offence created by a provision of a subordinate instrument;

(b) the particulars shall disclose the essential elements of the offence:

Provided that an essential element need not be disclosed if the accused person is not prejudiced or embarrassed in his defence by the failure to disclose it;

(c) it shall not be necessary to specify or negative an exception, proviso, excuse or qualification.

See *post*, §§ 1–195 *et seq.*, as to the effect of a breach of rule 6; and see *R. v. Mandair* [1995] 1 A.C. 208, HL, as to the importance of compliance with paragraph (a)(i).

Indictment Rules 1971, r. 7

1–120 7. Where an offence created by or under an enactment states the offence to be the doing or the omission to do any one of any different acts in the alternative, or the doing or the omission to do any act in any one of any different capacities, or with any one of any different intentions, or states any part of the offence in the alternative, the acts, omissions, capacities or intentions, or other matters stated in the alternative in the enactment or subordinate instrument may be stated in the alternative in an indictment charging the offence.

As to duplicity and rule 7, see *post*, §§ 1–141 *et seq.*

E. SPECIFIC AVERMENTS

1–121 The following paragraphs refer to certain authorities in which the courts have considered particular averments. Some of these authorities are of considerable antiquity and, when drafting an indictment, it should be borne in mind that the extent to which the dicta in any of the authorities referred to is relevant may well depend upon the particular facts of the case under consideration. Above all else, the requirements of section 3(1) of the *Indictments Act* 1915 (*ante*, § 1–114) and rules 5 and 6 of the *Indictment Rules* 1971 (*ante*, §§ 1–116, 1–119) should be complied with.

(1) Property

Ownership or occupation of property

1–122 Where it is common knowledge that the property named in an indictment belongs to some person or institution (*e.g.* in the case of an outstanding work of art), it may be unnecessary to particularise the ownership of the property; but where the property is of a common or undistinctive type, for the sake of clarity, and in order that the defendant may know exactly with what he is charged, the name of the owner should be stated in the particulars of offence: *R. v. Gregory*, 56 Cr.App.R. 441, CA. Where, however, the ownership of property is unknown, it is common practice and unobjectionable to aver the theft of property "belonging to a person unknown": see also the *Indictment Rules* 1971, r. 8, *post*, § 1–124.

Description of property

1–122a As to the degree of particularity required in a count of theft when describing the property alleged to have been stolen, see *post*, §§ 21–7, 21–56.

(2) Trading companies

1–123 Trading companies may be described by their corporate name, whether incorporated under the *Companies Act* 1985 or not. The existence of a company under its corporate name is sufficiently proved by parol evidence that it has carried on business under that name: *R. v. Langton* (1876) 2 Q.B.D. 296. But it is preferable to prove the existence and name of a company incorporated under the Act by the certificate of incorporation given under the Act: *R. v. May*, 64 J.P. 570.

(3) Description of persons

1–124 The accused should be described in the indictment by his forename and surname: see 2 Hale 175. But these need not necessarily be stated correctly, provided that he is described in a manner which is reasonably sufficient to identify him.

The surname may be such as the accused has usually been known by or acknowledged; and if there be a doubt as to which one of two names is his real surname, the second may be added in the indictment, thus: "Richard Wilson, otherwise called Richard Layer".

In indictments for offences against the person or property of individuals, the forename and surname of the person injured should be stated, if known: 2 Hawk. c. 25, ss.71, 72. A new-born child may be sufficiently described as "... a child then recently born to A.B. and not named".

Where the person injured has a name of dignity as a peer, baronet, or knight, he should be described by it. "His Royal Highness the Duke of Cambridge" has been considered sufficient without setting forth any of his forenames: *R. v. Frost* (1855) Dears. 474.

Indictment Rules 1971, r. 8

1–124a 8. It shall be sufficient to describe a person whose name is not known as a person unknown.

(4) Certainty as to age of person injured

1–124b Where it is essential to constitute the offence that the person injured should have been under a certain age, the person should be stated in *every* relevant count of the indictment to be under that age: *R. v. Martin* (1843) 9 C. & P. 213, and *R. v. Sarah Waters* (1848) 1 Den. 356.

(5) Statement as to date and place

1–125 In the *Indictment Rules* 1971 there is no specific requirement for the place where an offence is said to have occurred to be identified. Nor is there any specific requirement therein to state the date of the offence.

In *R. v. Wallwork*, 42 Cr.App.R. 153, CCA, it was held that there is no necessity to identify in the indictment the place where an offence is alleged to have taken place unless it is material to the charge. As to date, there is old authority for the proposition that the proper practice is to state in the indictment the date on which the offence is alleged to have been committed: *R. v. Hollond* (1841) 5 T.R. 607; *R. v. Aylett* (1785) 1 T.R. 63 at 69; *R. v. Haynes* (1815) 4 M. & Sel. 214. Quite apart from these authorities, however, it will usually be necessary to identify in the indictment the date when the offence charged is said to have occurred in order to satisfy at least the spirit of rules 5 and 6 of the 1971 Rules (*ante*, §§ 1–116, 1–119) and, for the same reason, it will sometimes be necessary to particularise the place where the offence is alleged to have taken place. It is in fact the invariable practice to have some reference to the date in an indictment.

1–126 The date specified should be the day of the month, the month and year when the offence is alleged to have been committed.

When an offence of unlawful killing is charged in a case where the fatal injury was caused on a date earlier than the death, it is the date of the death that should be shown on the indictment because the offence is not complete until the death occurs.

Where a time is limited for preferring an indictment, the time laid should appear to be within the time so limited (see *R. v. Brown* (1828) M. & M. 163) and in such a case, despite the general rule in *R. v. Dossi*, 13 Cr.App.R. 158, CCA (*post*,

§ 1–127), the prosecution should not be entitled to rely on any earlier date that may appear from the evidence if that date is not within the relevant time limit.

Where the exact date of the offence is not known the date should be stated as being on or about a particular date, or on a day unknown between two stated dates, so as to isolate the date of the offence alleged as accurately as possible. Unless the offence is a "continuous" one (*post*, § 1–133), the date of the offence should not be given merely as between two stated dates because this may give rise to problems of duplicity, *post*, §§ 1–135 *et seq.*

See also the *Children and Young Persons Act* 1933, s.14(4), *post*, § 19–323 (continuous offences against children).

Materiality of averment as to date and place

1–127 In *R. v. Wallwork*, *ante*, it was held that the lack of precision as to place in the particulars did not invalidate the indictment because the place of commission of the offence was not material to the charge.

Despite the old authorities to the effect that the date of the offence must be shown in the indictment it never seems to have been necessary for the date shown to be proved by the evidence unless time is of the essence of the offence.

In other cases, if the time stated were prior to the finding of the indictment, a variance between the indictment and evidence of the time when the offence was committed was not material: 2 Co. Inst. 318; 3 Co. Inst. 230; *Sir H. Vane's Case* (1662) Kel.(J.) 16; *R. v. Aylett*, *ante*; *R. v. Dossi*, *ante*. In *Dossi* it was held that a date specified in an indictment is not a material matter unless it is an essential part of the alleged offence; the defendant may be convicted although the jury finds that the offence was committed on a date other than that specified in the indictment. Amendment of the indictment is unnecessary, although it will be good practice to do so (provided there is no prejudice, *post*) where it is clear on the evidence that if the offence was committed at all it was committed on a day other than that specified.

1–128 The prosecution should not be allowed to depart from an allegation that an offence was committed on a particular day in reliance on the principle in *Dossi* if there is a risk that the defendant has been misled as to the allegation he has to answer or that he would be prejudiced in having to answer a less specific allegation: see *Wright v. Nicholson*, 54 Cr.App.R. 38, DC; *R. v. Robson* [1992] Crim.L.R. 655, CA.

1–129 In *R. v. Hartley* [1972] 2 Q.B. 1, 56 Cr.App.R. 189, CA, the court observed that where the words "on or about [the date]" are used, the offence must be shown to have been committed "within some period which has reasonable approximation to the date mentioned in the indictment". However this dictum was *obiter* and should not be taken as more than an indication of the desirability of identifying the relevant date as accurately as possible so that the defendant is not misled as to the case which he has to meet.

1–130 For further examples of circumstances in which it has been held that a variance between the evidence and the particulars was immaterial, see *R. v. Bonner* [1974] Crim.L.R. 479, CA; *R. v. Browning* [1974] Crim.L.R. 714, CA; *R. v. Fernandes* [1996] 1 Cr.App.R. 175, CA; and *Kay v. Biggs and another, The Independent (C.S.)*, November 23, 1998, DC. For examples of allegations as to time, or time and place, being held to be material, see *R. v. Radcliffe* [1990] Crim.L.R. 524, CA (allegation of indecency with child contrary to s.1 of the *Indecency with Children Act* 1960, *post*, § 20–272, an essential ingredient of which is that the child is under 14 at the time of the act of indecency); *R. v. Allamby and Medford*, 59 Cr.App.R. 189, CA (having an offensive weapon in a public place, *post*, § 24–107); *R. v. Pickford* [1995] 1 Cr.App.R. 420, CA (inciting incest where boy incited was under age of capacity for part of period particularised); and *R. v. Macer, The Times*, February 17, 1995, CA (convictions quashed where based on general allegations rather than on specific evidence relating to the particular occasions charged).

Specimen charges; identifying the incident charged

1–131 A further problem can arise if evidence is put before the jury of a number of incidents occurring within the date span specified in the indictment (or relied upon by the prosecution) where any one of those incidents, if proved, could amount to the offence charged. Quite apart from the difficulties that a defendant may have in such a case in knowing precisely which incident to concentrate his defence upon, there is the risk that some members of the jury will found a conviction on one incident while other members of the jury will found a conviction on a different incident. (See *post*, §§ 4–391 *et seq.* for a discussion of a similar problem in other contexts, and see *ante*, §§ 1–116, 1–117 generally, and as to the practice of seeking further particulars.) Furthermore, the judge who passes sentence will not know which incident the jury have found proved. This problem can arise where specimen charges only are laid. The facts of *R. v. Shore* 89 Cr.App.R. 32, CA, illustrate these difficulties. The defendant was charged with four counts of indecent assault against four different girls, the date span in each count being one of several years. The defendant was a school teacher and evidence was adduced of indecent acts by him against the four girls in three particular situations, namely during P.E. lessons, on a bus during school trips and at swimming lessons. No attempt was made to tie any count to any particular allegation. The Court of Appeal appears to have regarded this as unobjectionable, but it is submitted that such an approach is objectionable in that the allegations and the resulting convictions were too vague. The judge could not have known whether the jury were satisfied about one particular incident or about a course of conduct, or, indeed, about which type of incident.

1–132 In such circumstances, there is no reason why there should not be one count for each situation in which any particular child was alleged to have been assaulted. Where a child's statement refers not to situations but to particular occasions (a birthday, a holiday, a time when his or her mother was in hospital) the counts can be drafted to make clear what offences are being alleged. Where the prosecution does relate particular counts to particular incidents, it is incumbent on the judge in summing up to relate the evidence to the particular counts: see *R. v. Farrugia, The Times*, January 18, 1988, CA. This approach was followed by the Court of Appeal in *R. v. Rackham* [1997] 2 Cr.App.R. 222, where convictions in respect of alleged sexual assaults on children over a lengthy period of time were quashed on the ground that the trial judge should have acceded to a request for better identification of the specific incidents to which the various counts related. The court concluded that in such a case the indictment should be drawn or exemplified with as much particularity as the circumstances of the case will admit and that a difficulty in being precise in every respect is not a reason for not being precise when it is possible to be so. The decision in *R. v. Shore*, *ante*, was said, reflected no more than that if a defendant chooses to meet general charges without objection he cannot easily raise lack of particularity in the Court of Appeal.

Where a child speaks of a number of incidents with no distinguishing features a convenient course, in order to establish the systematic conduct of the accused, is to have a number of counts, each, apart from the first, alleging "on an occasion other than that alleged in [the previous counts]". The overriding principle is that the number of counts in the indictment should fairly reflect the alleged criminality (*R. v. Canavan*; *R. v. Kidd*; *R. v. Shaw* [1998] 1 Cr.App.R. 79, CA); otherwise sentencing problems may arise: *post*, § 5–14. It should not be too difficult in most cases to settle an indictment which steers a safe course between prejudicial uncertainty and overloading: *R. v. Rackham*, *ante*.

Further examples of the problems that can arise are to be found in *R. v. Evans* [1995] Crim.L.R. 245, CA, and *R. v. Macer, The Times*, February 17, 1995, CA; *ante*, § 1–130. See also *R. v. Litanzios* [1999] Crim.L.R. 667, CA, *ante*, § 1–117.

Continuous offence

1–133 It is not an essential characteristic of a single criminal offence that the prohibited act or omission took place once and for all on a single day, since it can take place continuously or intermittently over a period of time and still remain a single offence: *Chiltern D.C. v. Hodgetts* [1983] A.C. 120, HL. Upholding a conviction for failure to comply with an enforcement notice, the House said that the offence should be alleged to have been committed between the date when compliance with the notice was first required and the date when the information was laid or the notice complied with, whichever was the earlier. See also *post*, §§ 1–143a *et seq.*

(6) Value

1–134 It is unnecessary to state value, except where it is of the essence of the offence such as an offence against the *Insolvency Act* 1986, s.360(1)(a) (*post*, § 30–185).

(7) Immaterial averments—surplusage

1–134a Allegations which are not essential to constitute the offence and which may be omitted without affecting the charge, or vitiating the indictment, do not require proof and may be rejected as surplusage: *R. v. Barraclough* [1906] 1 K.B. 201 at 210. Similarly, the Crown need only prove sufficient of the particulars to constitute the offence charged, *e.g.* the theft of one of the several articles charged in the count or the theft of part of a sum of money (see also *R. v. Hancock and others* [1996] 2 Cr.App.R. 554, CA, *post*, § 33–43), but the problem identified at §§ 4–391 *et seq.*, *post*, should be borne in mind.

F. DUPLICITY

(1) The rule

1–135 The indictment must not be double; that is to say, no one count of the indictment should charge the defendant with having committed two or more separate offences: see rule 4(2) of the *Indictment Rules* 1971, *ante*, § 1–115, and rule 12 of the *Magistrates' Courts Rules* 1981. This rule though simple to state is sometimes difficult to apply. Duplicity in a count is a matter of form, not evidence: *R. v. Greenfield*, 57 Cr.App.R. 849, CA; *R. v. West* [1948] 1 K.B. 709, 32 Cr.App.R. 152, CCA; *R. v. Davey and Davey*, 45 Cr.App.R. 11, CCA; and *cf. R. v. Griffiths* [1966] 1 Q.B. 589, 49 Cr.App.R. 279, CCA. The general principle is well illustrated by the decision of the Court of Appeal in *R. v. Asif*, 82 Cr.App.R. 123 (*post*, § 25–517). In *R. v. Browning* [1974] Crim.L.R. 714, the Court of Appeal remarked that "the question which arises when an issue of duplicity is raised is one of substance and not of form." No authority is cited in support of this proposition, which is clearly inconsistent with *Greenfield*. Perusal of the transcript of the judgment in *Browning* shows that in truth no question of duplicity arose there. It is submitted that the remark was made *per incuriam* and should be disregarded.

In *Greenfield*, the Court of Appeal held that on this issue it is ordinarily unnecessary to look further than the count itself. If particulars have been requested and given these too should be considered. If particulars have been requested but refused, the judge may look at the committal evidence to discover the nature of the count, *semble* because such refusal is usually justified by the assertion that the particulars of the allegation sufficiently appear from a perusal of that evidence.

If the particulars allege one offence, the fact that the evidence at the trial may reveal two offences does not invalidate the count if it is otherwise within the rules.

"I agree that in the ordinary case, where it is possible to trace the individual items a to prove a conversion of individual property and money, it is undesirable that o should include them all in a count alleging a general deficiency. Such a count may b bad for uncertainty, but in a case like this, where individual items cannot be traced detail, but where the evidence makes it clear that there has been a fraudule conversion, the prosecution are entitled to frame their counts in the way in which th have been framed here" (at pp. 37–38).

Lawson was approved and followed in *R. v. Tomlin* [1954] 2 Q.B. 274, Cr.App.R. 82, CCA. What appears to have been a special stock-taking at the sh which the defendant managed revealed a cash deficiency since the previo stock-taking. His conviction for embezzlement of the aggregate amount on a da between the two stock-takings was upheld. The court said:

"We desire to make it plain . . . that in the ordinary case, where it is possible to trace th individual items and to prove a conversion of individual property or money, it undesirable to include them all in a count alleging a general deficiency. What we a not willing to do is to elevate a rule of practice, applicable to circumstances where may be required to avoid injustice, into a rule of law applicable to circumstances whe it may defeat justice" (at pp. 282, 89–90).

1–145 If this principle is properly to be limited by reference to an "accounting date" may be that the defendant being called upon to account, whether by an employe the police, the Official Receiver, or the like, will be sufficient.

(7) Taking the objection

1–146 See *post*, §§ 1–190 *et seq.*

(8) Can amendment cure duplicity?

1–146a In view of the clear provisions of section 5 of the 1915 Act, *post*, § 1–147, whe at any stage of a trial an application is made to quash a count on the ground duplicity the court has power to cure such a defect, if it exists, by making necessary amendment: see *R. v. Jones (J.) and others*, *ante*, § 1–140. Any su amendment must fall within the framework of principles set out *post*, §§ 1–14 *seq.*

G. AMENDMENT

Indictments Act 1915, s.5

1–147 5.—(1) Where, before trial, or at any stage of a trial, it appears to the court that t indictment is defective, the court shall make such order for the amendment of t indictment as the court thinks necessary to meet the circumstances of the case, unle having regard to the merits of the case, the required amendments cannot be ma without injustice . . .

(2) Where an indictment is so amended, a note of the order for amendment shal endorsed on the indictment, and the indictment shall be treated for the purposes of t trial and for the purposes of all proceedings in connection therewith as having be signed by the proper officer in the amended form.

(3) Where, before trial, or at any stage of a trial, the court is of opinion that a per accused may be prejudiced or embarrassed in his defence by reason of being charg with more than one offence in the same indictment, or that for any other reason desirable to direct that the person should be tried separately for any one or m offences charged in an indictment, the court may order a separate trial of any coun counts of such indictment.

(4) Where, before trial, or at any stage of a trial, the court is of opinion that postponement of the trial of a person accused is expedient as a consequence of exercise of any power of the court under this Act to amend an indictment or to ord separate trial of a count, the court shall make such order as to the postponement o trial as appears necessary.

(5) 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 the 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 the jury has been discharged) as if the trial had not commenced; and

(c) the court may make such order . . . as to granting the accused person bail, and as to the enlargement of recognizances and otherwise as the court thinks fit.

(6) Any power of the court under this section shall be in addition to and not in derogation of any other power of the court for the same or similar purposes.

[This section is printed as amended by the *Administration of Justice (Miscellaneous Provisions) Act* 1933, ss.1, 2 and Sched. 2; and the *Bail Act* 1976, s.12(1) and Sched. 2; and as repealed in part by the *Prosecution of Offences Act* 1985, s.31(6) and Sched. 2.]

As to the application of section 5(3), see *post*, §§ 1–166 *et seq.*

Incidental points

1–148 Where no application to amend the indictment has been made by either side, the judge, in exercising his discretion whether to direct an amendment or not, should invite the parties, and in particular the defence, to express their views on the matter before deciding to do so: *R. v. West and others* [1948] 1 K.B. 709, 32 Cr.App.R. 152, CCA, and see also *R. v. Gregory*, 56 Cr.App.R. 441, CA.

Where an amendment of a substantial nature is made after arraignment, it is desirable that the arraignment should be repeated on the indictment as amended. No harm can be done if a judge unnecessarily directs a second arraignment: *R. v. Radley*, 58 Cr.App.R. 394, CA. Re-arraignment is unnecessary where the amended indictment merely reproduces the original allegations in a different form, albeit including a number of new counts: *R. v. Fyffe* [1992] Crim.L.R. 442, CA.

For the purpose of exercising the powers of amendment in section 5 of the 1915 Act there is no distinction to be drawn between an indictment preferred as a result of a committal for trial and an indictment preferred as a result of leave being given by a High Court judge under the provisions of the *Administration of Justice (Miscellaneous Provisions) Act* 1933: *R. v. Walters and others*, 69 Cr.App.R. 115, CA; *R. v. Ismail and others*, 92 Cr.App.R. 92, CA (as to which see further, *post*, § 1–215); *R. v. Wells* [1995] 2 Cr.App.R. 417, CA; and *R. v. Allcock* [1999] 1 Cr.App.R. 227, CA.

The failure to endorse a note of an amendment on the indictment, as required by section 5(2), is not something which, in itself, invalidates the amendment: *R. v. Ismail*, *ante*.

When an amendment may be made

1–149 The appellate courts have shown an increasing willingness to allow amendments of substance to be made, and the more recent decisions cannot be reconciled with certain of the earlier ones. In *R. v. Radley*, *ante*, the court observed that, as no amendment should be made if it could not be made without injustice, the trial court ought to give a fairly liberal meaning to the language of section 5(1) of the 1915 Act.

In *R. v. Osieh* [1996] 2 Cr.App.R. 145, CA, it was said, *obiter*, that, notwithstanding the restrictions imposed by section 2(2) of the *Administration of Justice (Miscellaneous Provisions) Act* 1933 (*post*, § 1–204), the power to amend an indictment, once it has been preferred, extends to the addition of a count or counts charging offences that are not disclosed in the committal evidence but which are disclosed by evidence subsequently served. In *R. v. Swaine* [2001]

Crim.L.R. 166, CA, it was held that an indictment may be amended after a jury have disagreed and before retrial so as to add a count based on a committal for trial which occurred after the first trial. It is submitted that a more principled approach would have been to prefer a fresh indictment to combine the charges from the two committals, or to obtain a voluntary bill.

In *R. v. Hemmings and others* [2000] 1 Cr.App.R. 360, CA, it was held that where an appeal is allowed by the Court of Appeal and a retrial ordered by that court pursuant to section 7 of the *Criminal Appeal Act* 1968 (*post*, § 7–112), the indictment upon which the retrial takes place pursuant to that order, and which is preferred pursuant to section 8 of the 1968 Act (*post*, § 7–113), may be amended to include counts charging offences in respect of which the retrial could not, by reason of the prohibition in section 7(2) of the 1968 Act, have been ordered by the Court of Appeal and which could not have been included on the indictment when it was preferred. In reaching its conclusion, the court sought to draw a distinction between the power to prefer, or direct the preferment of, an indictment, and the power to amend the indictment after it has been preferred. It held that section 7(2) of the 1968 Act neither explicitly, nor implicitly, proscribes the making of such an amendment. That left the question of whether the indictment could be said to be "defective", within the meaning of section 5 of the *Indictments Act* 1915, so as to provide the jurisdictional basis for amendment. The court took the view that if an indictment preferred pursuant to the direction of a High Court judge under the "voluntary bill" procedure could be defective (as to which, see *R. v. Wells*, *post*, § 1–150), there was no reason why the position should be different in the situation under consideration, although it also accepted that a distinction exists in respect of the voluntary bill procedure in that there is no statutory limitation on the offences that may be included in the original bill of indictment that is preferred pursuant to the leave given by the High Court judge.

In the 2000 edition of this work the correctness of the above-mentioned dictum in *R. v. Osieh* was doubted and it was submitted that it was inconsistent with decisions in certain other authorities that were there identified. The question was posed as to how an indictment can be properly described as "defective", so as to give jurisdiction for the court to allow an amendment, where the alleged defect is that the indictment does not include certain charges that could not lawfully have been included in it at the time when it was originally preferred. In *Hemmings* the court rejected this criticism, saying of the question posed in that criticism (which also arose on the facts under consideration in *Hemmings* itself) simply that "the interests of justice and fairness (and in particular the interests of the defendants) required that [the indictment] should be amended".

In any event, as was acknowledged in *Osieh*, an amendment will only be permitted if it can be made without injustice and the fact that a proposed amendment raises, for the first time, a charge not foreshadowed in the committal evidence may provide a basis for refusing to permit it, or for permitting it only subject to the grant of an adjournment. Likewise, it was emphasised in *Hemmings* that the power to permit an amendment in the situation there under consideration must be exercised in accordance with the underlying purpose of section 7 of the 1968 Act, namely to permit the court to order a retrial to ensure that justice is done, while at the same time protecting the defendant by ensuring that he is not put in a worse position than at the original trial (thus, indictment lawfully amended where original conspiracy charge replaced, at the suggestion of defence counsel, by charges of substantive offences founded on the conduct on which the original conspiracy charge had been based).

1–150 The present position as to the exercise of the power to permit amendments is largely set out in the judgment of the Court of Appeal in *R. v. Johal and Ram*, 2 Cr.App.R. 348, where reference is made to several of the earlier authorities. It is submitted that the present position as to the effect of section 5(1), is as follows (the word "indictment" includes "count" where there is more than one count):

(1) An indictment is defective not only when it is bad on its face (e.g.

because of duplicity, *ante*, §§ 1–135 *et seq.*, or because of misjoinder, *post*, §§ 1–154 *et seq.*), but also, for example:

(a) when it does not accord with the evidence before the magistrates either because of inaccuracies or deficiencies in the indictment or because the indictment charges offences not disclosed in that evidence or fails to charge an offence which is disclosed therein: *R. v. Martin* [1962] 1 Q.B. 221, 45 Cr.App.R. 199, CCA;

(b) when for such reasons it does not accord with the evidence given at the trial: *R. v. Hall* [1968] 2 Q.B. 787, 52 Cr.App.R. 528, CA; *R. v. Johal and Ram*, *ante*;

(c) when the evidence led in support of the indictment discloses more than one offence: *R. v. Jones (J.) and others*, 59 Cr.App.R. 120, CA (see *ante*, § 1–140); and *R. v. Stanley, The Independent*, November 27, 1998, CA (allegation of fraudulent evasion of VAT based on allegations of provision of two distinct and separate pieces of false information; desirable that issue of whether defendant guilty, if at all, of one or both of distinct allegations should be resolved by a jury rather than judge—*cf.* the situation discussed *post*, § 21–11);

(d) when it has been preferred in accordance with the voluntary bill procedure and does not name as a defendant a person committed for trial on the same charge as that set out in the indictment: *R. v. Ismail and others*, 92 Cr.App.R. 92, CA (see further *post*, § 1–215); or does not include a charge in respect of an offence disclosed on the material before the judge who granted leave to prefer the voluntary bill: *R. v. Wells*, *ante*, and *R. v. Allcock*, *ante*.

(2) The court has power to order an amendment which involves the substitution of a different offence for that originally charged in the indictment, or even the inclusion of an additional count for an offence not previously charged: *R. v. Johal and Ram*, *ante*.

(3) An amendment of any kind, including the addition or substitution of a count, may be made at any stage of the trial *provided* that, having regard to the circumstances of the case and the power of the court to direct a separate trial of any accused or to postpone the trial, the amendment can be made without injustice: *R. v. Smith and others*, 34 Cr.App.R. 168, CCA; *R. v. Johal and Ram*, *ante*; *R. v. Harris*, 62 Cr.App.R. 28, CA. In *R. v. Sheffield Stipendiary Magistrate, ex p. DPP, The Independent (C.S.)*, November 27, 2000, DC, it was held that in adjudicating on an application to amend an information which, if granted, may necessitate an adjournment, it is appropriate for a magistrates' court to have regard to the spirit of the new civil procedure rules, and, in particular, to the consideration that inefficiency in the conduct of litigation may prejudice litigants in other cases by leading to a risk that their cases will be delayed. The facts of the case were fairly extreme and it remains to be seen what, if any, impact the case has in respect of applications to amend indictments. 1–151

(4) An application for an amendment to meet the evidence before the magistrates should be made before arraignment, after notice given to the defence, but can be made later: *R. v. Johal and Ram*, *ante*, and cases cited therein.

(5) The longer the interval between arraignment and amendment, the less likely it is that the amendment can be made without injustice: *R. v. Johal and Ram*, *ante*.

(6) In the case of an immaterial averment an amendment can be made after verdict, though this is not necessary: see *R. v. Dossi*, 13 Cr.App.R. 158, CCA, *ante*, § 1–127).

(7) The power of amendment may be used to cure misjoinder, but any proceedings on the indictment prior to such an amendment *may* be a nullity—see further *post*, §§ 1–161 *et seq.*

1-152 Although each case will depend very much on its own facts, the following summary of certain cases where the appellate court has considered the propriety of an amendment may assist on the question of whether an amendment can be made without injustice.

(1) *R. v. Teong Sun Chuah and Teong Tatt Chuah* [1991] Crim.L.R. 463, CA (appropriate charges substituted for inappropriate charges at the end of prosecution case; no injustice as substance of allegation unchanged; defence merely deprived of technical acquittal). See also *R. v. Tirado*, 59 Cr.App.R. 80, CA.

(2) *R. v. Radley*, 58 Cr.App.R. 394, CA (single count indictment alleging conspiracy to defraud amended after prosecution opening by addition of counts to cater for the possibility that more than one conspiracy had existed; the case was made easier for the jury and no injustice resulted from the amendment at the stage at which it occurred).

(3) *R. v. Bonner* [1974] Crim.L.R. 479, CA (amendment to date after start of summing up; such late amendments should be made only after particular care has been taken to ensure that defence has had ample opportunity to consider whether witnesses should be recalled or further evidence called).

(4) *R. v. Nelson*, 65 Cr.App.R. 119, CA (statement of offence defective in that it omitted to refer to statute alleged to have been contravened; amendment even after verdict would have been permissible).

1-153 (5) *R. v. Collison*, 71 Cr.App.R. 249, CA (amendment by adding a count after the jury's initial retirement upheld; for the circumstances, see *post*, § 4-455).

(6) *R. v. O'Connor* [1997] Crim.L.R. 516, CA (wrong to permit addition of further count in order to put prosecution case on different basis, after submission of no case; defendant deprived of putting his case in way that he would have done if prosecution put in that way from outset).

(7) *R. v. Newington*, 91 Cr.App.R. 247, CA (the court questioned whether it is ever wise to exercise the power to amend during a summing up, especially in a long and complex case; when such a course is pursued it must inevitably deprive defence counsel of the opportunity to address the jury on the implications of the amendment; furthermore, there is a risk of the judge being unequal to the task of properly adjusting his summing up to accommodate the change brought about by amendment).

(8) *R. v. Piggott and Litwin* [1999] 2 Cr.App.R. 320, CA (where successful submission of no case made at close of prosecution evidence, wrong to permit amendment of indictment to allege different offence in respect of which prima facie case did exist but which necessitated discharge of jury and new trial because some evidence on original charge inadmissible on new charge; prosecution of second trial an abuse of process).

H. JOINDER

(1) Joinder of counts in one indictment

Indictments Act 1915, s.4

1-154 **4.** Subject to the provisions of the rules under this Act charges ... for more than one misdemeanour ... may be joined in the same indictment.

[This section is printed as repealed in part by the *CJA* 1948, s.83(3), Sched. 10, Pt I; and the *CLA* 1967, s.10(2), Sched. 3, Pt III.]

By virtue of the *Criminal Law Act* 1967, s.1(2) (*ante*, § 1-74), this applies to all indictable offences.

Indictment Rules 1971, r. 9

1-154a **9.** Charges for any offences may be joined in the same indictment if those charges are

founded on the same facts, or form or are a part of a series of offences of the same or a similiar character.

Rule 9 of the 1971 Rules repeats in substance rule 3 of the former rules.

In many of the authorities no clear distinction is drawn between the topics of joinder and severance, but in view of the decision in *R. v. Newland* [1988] Q.B. 402, 87 Cr.App.R. 118, CA (*post*, § 1-161) as to the effect of misjoinder, it is important to consider these two matters in separate stages. See *post*, §§ 1-166 *et seq.* as to the severance of properly joined counts.

The appellate courts have repeatedly drawn attention to rule 9 and its predecessor and to the necessity of observing them. See, *e.g.*, *R. v. Taylor*, 18 Cr.App.R. 25, CCA; *R. v. Clarke*, *ibid.*, 166, CCA; *R. v. Tyreman*, 19 Cr.App.R. 4, CCA; *R. v. Newland*, *ante*.

Different defendants in separate counts

1-155 It has been said, *obiter*, in respect of the predecessor of rule 9, that the rule was concerned with the joinder of charges against one accused and not with the joinder of counts against two or more accused charged with separate offences: see *R. v. Tizzard and Ruxton* [1962] 2 Q.B. 608, 46 Cr.App.R. 82, CCA, and *R. v. Assim* [1966] 2 Q.B. 249, 50 Cr.App.R. 224, CCA. However, no reasoned explanation was given in this regard. It is submitted that, as a matter of construction, rule 9 plainly applies to the joinder of all charges in one indictment, whether against the same or different accused. Even if rule 9 has no direct application, there would appear to be no reason why the principles set out in that rule should not be applied when deciding whether counts against different accused may be properly joined in one indictment. Indeed, the guidance given in *R. v. Assim*, *ante*, amounts to much the same as rule 9.

As to the joinder of two or more defendants in one count, see *post*, § 1-164.

See *post*, § 1-165 as to specific considerations relating to the joinder of persons who have been separately committed for trial.

Handling stolen goods

1-156 For specific statutory provision relating to the joinder of charges and persons in respect of handling items that have been stolen in one theft, see section 27(1) of the *Theft Act* 1968, *post*, § 21-277.

"founded on the same facts"

1-157 The question whether the charges are "founded on the same facts", such as to justify joinder pursuant to rule 9 of the 1971 Rules, should be tested by asking whether the charges have a common factual origin; if the "subsidiary" charge could not be alleged but for the facts which give rise to the "primary" charge, the charges are founded on the same facts for the purpose of the rule and may legitimately be joined in the same indictment: *R. v. Barrell and Wilson*, 69 Cr.App.R. 250, CA (count charging attempt to pervert the course of justice held to be properly joined with counts of affray and assault occasioning actual bodily harm where first of those charges based on allegation of trying to bribe witness for the prosecution in respect of other two charges). In one sense, it is perhaps difficult to see how the offences in *R. v. Barrell and Wilson* can truly be said to have had a common factual origin, and in *R. v. Barnes*, 83 Cr.App.R. 38, CA, the court, having considered that decision, seems to have doubted the propriety of joinder of counts of wounding and perjury where the allegation of wounding was based on the confession of the appellant to that offence when giving evidence on behalf of his brother, who had originally been charged with it, and where the allegation of perjury was based on an alternative allegation that the confession was untrue.

Other examples of the application of the principles relating to joinder of offences founded on the same facts are:

1918
June 17.

SEVERO DOSSI.

On an indictment alleging an offence on a specific date the jury is entitled to find Not Guilty on that date, and "if the indictment covers other dates Guilty," and the Court is thereupon entitled to amend the date in the indictment to "some day in" the month in question. The Court does not take the view that it is "safer to accept the uncorroborated evidence of a young child than that of an adult."

Appeal against conviction on law.

The appellant was convicted, on May 9th, 1918, before the Deputy-Chairman, at the London Sessions, of indecent assault, and was sentenced on May 10th to nine months' imprisonment with hard labour, and was recommended for deportation.

Sir Ernest Wild, K.C. (*J. A. C. Keeves* with him), for the appellant, who was present. The indictment on which the appellant was convicted charged him with indecently assaulting a child, Nora Elizabeth White, aged 11, "on March 19th, 1918," and with indecently assaulting another child, Rebecca Barnett, aged 14, between September 12th and 30th, 1917. White gave evidence of no specific date, but referred to constant acts of indecency over a considerable period ending at some date in March, 1918. A witness called for the defence swore that he was with the appellant on March 19th during the material time and that no indecency with a child took place. At the conclusion of the Deputy-Chairman's summing up the jury retired, and on their return said that they found the appellant "with regard to the date March 19th, *Not Guilty*. If the indictment covers other dates, *Guilty*." They also found him *Not Guilty* of indecently assaulting Rebecca Barnett. On the application of the prosecution the Deputy-Chairman amended the indictment by substituting "on some day in March" for the words "on March 19th, 1918," and the jury then found the appellant *Guilty* on the amended indictment.

It is submitted that if a man is put on his trial on an indictment which charges him with committing an offence on a specific date and no amendment is made before or during the trial and the jury find that he has not committed the offence on that day they have returned a verdict of Not Guilty, which must be allowed

1918
June 17.

SEVERO DOSSI.

Darling J.
Atkin J.
Shearman J.

to stand. This is especially so where the defence is an *alibi* or, as in this case, a kindred plea. The time at which the amendment was allowed in this case was not "before trial, or at any stage of the trial," as is permitted by s. 5 (1) of the Indictments Act, 1915. A trial is at an end when a verdict of Not Guilty is given (Archbold, 5th ed., p. 220). It is further submitted that the Deputy-Chairman misdirected the jury with regard to the corroboration of the evidence of the child White. That evidence was entirely uncorroborated, and the Deputy-Chairman perfectly properly warned the jury that they must act on it only with the greatest caution. He went on, however, to tell them that it was safer to accept the uncorroborated evidence of a young child than that of an adult. It is submitted that that negatived the whole value of the warning that he had previously given and was a very improper direction.

Percival Clarke for the respondents (upon want of corroboration only). The evidence of Nora White required, in law, no corroboration. The jury were entitled to act upon it if they thought fit, after the warning of the learned Deputy-Chairman—but it was in fact corroborated by the evidence of the defendant himself, and the evidence of Rebecca Barnett tended to shew that the assault was not accidentally but intentionally indecent. The statement on the value of the evidence of a young child was one which the learned Deputy-Chairman in his experience was entitled to make, and in no sense detracted from the warning he had given to the jury.

ATKIN J.: The first point taken on behalf of the appellant is that there was no power to amend the indictment, and that when the jury found that the appellant had not committed the acts charged against him on the day specified in the indictment but on some other day or days they found him *Not Guilty* and that that verdict must stand. It appears to us that that is not a correct contention in law. From time immemorial a date specified in an indictment has never been a material matter unless it is actually an essential part of the alleged offence. "And although the day be alleged, yet if the jury finds him guilty on another day the verdict is good, but then in the verdict it is good to set down on what day it was done in respect of the relation of the felony; and the

1918 June 17. — Sykes Dom. — Atkin J.

same law is in the case of an indictment," 1 *Inst.* 318. "*Syer* was indicted of burglary 1 *Augusti*, 31 Eliz. . . . it fell out in evidence that the burglary was done 1 *die Septembris* . . . so as *primo Augusti* there was no burglary done, and thereupon he was found *Not Guilty*, and afterwards he was indicted againe 1 *Septembris*, &c., and it was resolved by Wray and Periam, justices of assise, and by the greatest part of the judges that he ought not to be tried again, for he mought have been found *Guilty* upon the first indictment, for the day is not materiall; but it is necessary for the jury in that case to set down the day." *Ib.*, and 3 *Inst.* 230: Syer was discharged. Thus, though the date of the offence should be alleged in the indictment, it has never been necessary that it should be laid according to truth unless time is of the essence of the offence. It follows, therefore, that the jury were entitled, if there was evidence on which they could come to that conclusion, to find the appellant guilty of the offence charged against him, even though they found that it had not been committed on the actual date specified in the indictment. It is, therefore, unnecessary to consider whether there was power to amend the indictment, but we must not be taken to express any doubt that the wide words in s. 5 (1) of the Indictments Act, 1915, which give the Court power to amend an indictment "at any stage of a trial" might, in a proper case, permit of an amendment in circumstances similar to those which exist here.

The substantial point made by Sir Ernest Wild was with regard to the direction by the Chairman to the jury on the question of corroboration. There can be no doubt that in cases of this kind the jury are entitled to act on the uncorroborated evidence of a child who is able to give evidence on oath, but judges must warn juries not to convict a prisoner on the uncorroborated evidence of a child except after weighing it with extreme care. (See *R.* v. *Graham*, 4 Cr. App. R. 218, 1910; *R.* v. *Pitts*, 8 Cr. App. R. 126, 1912; and *R.* v. *Cratchley*, 9 Cr. App. R. 232, 1913.) Those cases sufficiently shew what kind of direction should be given to the jury in cases of this kind, and the question arises whether or not the summing up of the Deputy-Chairman offended against the rules which are there laid down. He told the jury that "The law does not require corroboration. . . . What the law does require is that it must be most carefully pointed out to a jury that they ought to act with great caution and with the greatest deliberation, if there

1918 June 17. — Sykes Dom. — Atkin J.

is no corroboration of the story in such a case as this. . . . . It is for you to say whether or not you are satisfied that that little girl was trying to tell you the truth. I say that you must be very careful before you act without corroboration, but that you are entitled, if you are convinced beyond all reasonable doubt that the little girl is telling the truth, to act on her story even without corroboration." If the summing up had stopped there it could not have been contended that it was open to any objection. The law is stated as the authorities which I have cited laid it down, and the caution to the jury is framed in careful words. But the Deputy-Chairman went on to say in reference to the question of corroboration: "It does seem to me that it is infinitely less dangerous to act on the uncorroborated testimony of little children who allege that they have been indecently assaulted than to act on the uncorroborated testimony of older people who allege that they have been assaulted, and I will tell you why. I should always practically tell a jury that they must not convict on the uncorroborated testimony of a woman of full years, because it is so easy to make a charge, for purposes that you can well imagine, either against the wrong man when there is a right man, or against a person who has had no dealings with her at all, or for the purposes of blackmail. But with regard to small children there is less incentive for them to make up a false story about a particular man in a matter of this sort than there often is in the case of an older woman. Children are less likely to suggest a wrong man when there is a right man, and they are less likely to be open to the purposes of blackmail than older people." We think that those were dangerous remarks to make to the jury. No doubt, the considerations which the Deputy-Chairman had in his mind were perfectly sensible. But, on the other hand, small children are possibly more under the influence of third persons—sometimes their parents—than are adults, and they are apt to allow their imaginations to run away with them and to invent untrue stories. There seems to us no reason to distinguish between the amount of corroboration required in the one case and that required in the other. But doubtless the jury looked on this summing up as advice on a matter on which they were quite able to form an opinion. They had heard the beginning of the summing up where they were directed quite accurately, and immediately after the passage I last read the Deputy-

1918
June 17.

Sessions Court

Atkin J.

Chairman said: "You must act with great care in the case of the little girl White. You must act with great care also in the case of Rebecca Barnett." In our view, the repetition of that caution prevented the other parts of the summing up from having the serious effect on the jury they might have had. White's story had very slight corroboration and, indeed, it might be said that, at the end of the case for the prosecution, there was none. But the question of corroboration often assumes an entirely different aspect after the accused person has gone into the witness-box and has been cross-examined. The appellant in this case stated in evidence that he was in the habit of fondling the little girls and described how he took them up, and the jury might well have refused to accept his story that these things were done innocently. There was evidence to support the verdict, there was no substantial misdirection on the facts or on the law, and the appeal must, therefore, be dismissed. The Court does not see its way to interfere with the sentence which was passed on the appellant.

Appeal dismissed.

Solicitors: *S. Fraulo* for the Appellant; *Wontner & Sons* for the Respondents.

G. B.

BEFORE

MR. JUSTICE DARLING, MR. JUSTICE BRAY, AND MR. JUSTICE COLERIDGE.

AUGUSTUS STANLEY WYMAN AND JOHN WYMAN.

1918
June 24.

Substantial particulars of misdirection or of other objections to the summing up must always be set out in, or sent to the Registrar of the Court of Criminal Appeal with, the notice of Appeal. If required, the Registrar will ask for further and better particulars.

Appeals against conviction on law and sentence.

The appellants were convicted, on May 30th, 1918, before the Deputy-Chairman, at the County of London Sessions, of receiving stolen property, and were sentenced to twelve months' and six months' imprisonment respectively.

The case does not call for report except on the point dealt with as follows.

The notices of appeal which were filed on behalf of the appellants contained under the heading "Grounds of Appeal or Application" the following statement:—"That the learned Deputy-Chairman misdirected the jury on a point of law, namely, that he misdirected the jury on what corroboration of an accomplice was necessary (the particulars of such misdirection to be given later)." On Saturday, June 22nd, forty-eight hours before the hearing of the appeal, detailed "Particulars of Misdirection" were delivered by the appellants' solicitor.

Holman Gregory, K.C. (*Huntly Jenkins* with him), for the appellants, who were present, argued that there had been misdirection by the Deputy-Chairman, and dealt *seriatim* with the particulars of misdirection referred to.

[DARLING J.: We have often said that it was never intended that any person should take a summing up and pick out small

Case No. : ICR-98-8-T

UNITED NATIONS
NATIONS UNIES

International Criminal Tribunal for Rwanda
Tribunal Pénal International pour le Rwanda

Office of the President
Bureau du Président

Arusha International Conference Centre
P.O.Box 6016, Arusha, Tanzania - B.P. 6016, Arusha, Tanzanie
Tel: 255 57 4207-11/4367-72 or 1 212 963 2850 Fax: 255 57 4000/4373 or 1 212 963 7365

Trial Chamber II

Before: Judge William Sekule, Presiding
Judge Mehmet Güney
Judge Navanethem Pillay

Original : English

Registry: Mr. John Kiyeyeu.

Decision of: 2 September 1999

THE PROSECUTOR
versus
ELIE NDAYAMBAJE

Case N°: ICR-96-8-T

DECISION ON THE PROSECUTOR'S REQUEST FOR LEAVE TO FILE AN AMENDED INDICTMENT

Office of the Prosecutor:

Mr. Japhet Mono
Ms. Celine Tonye
Mr. Ibukunolu Aloa Babajide
Mr. Robert Petit

Counsel for the Defence:

Ms. Veronique Laurent.

Case No. : ICR-98-8-T

THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA (the "Tribunal)

SITTING AS Trial Chamber II composed of Judge William H. Sekule presiding, Judge Mehmet Güney and Judge Navanethem Pillay ;

CONSIDERING a motion filed by the Prosecutor for leave to amend the indictment against the accused, Elie Ndayambaje (the "accused"), pursuant to Rule 50 of the Rules of Procedure and Evidence (the "Rules");

NOTING that the indictment against the accused, dated 17 June 1996 was confirmed by Judge T.H.Khan on 20 June 1996;

HAVING HEARD the parties at a hearing on 9 August 1999.

The Prosecutor's Submissions

1. The Prosecutor's motion was supported by a brief containing her submissions and two Annexures marked "A" and "B" respectively. According to the Prosecutor, Annexure "B" contains materials and documentary evidence in support of the new counts proposed as amendments to the indictment against the accused.

2. The Prosecutor submitted *inter alia*, that:

2.1 the amendment of the indictment is justified in law. Rule 50 of the Rules and the jurisprudence established by the Tribunal allow for the amendment of the indictment after the initial appearance of the accused;

2.2 the amendment to the indictment is justified on the available evidence against the accused. These additional counts proposed as amendments to the existing indictment accurately reflect the alleged criminal conduct of the accused. The amendments sought are based on evidence presently available to the Prosecutor, which was not available in June 1996 when the indictment against the accused was confirmed. The Prosecutor's on-going investigation have uncovered evidence of a plan of certain individuals in Rwanda, including the accused, to gain political control over the country. Evidence of how this alleged plan was carried out in Butare and the accused's alleged involvement in its execution was also uncovered.

2.3 the accused has a fundamental right to an expeditious hearing but this right must be weighed against the Prosecutor's need to present the full scope of the available evidence, at the trial of the accused. This would entail amending the indictment against the accused, so that all available evidence could be presented at the trial of the accused.

The Defence Submissions

3. The Defence submitted *inter alia* that:

3.1. there is a need for clarification as to whether the applicable version of Rule 50 is the rule as it read prior to its amendment in June 1999 or the rule as it presently reads;

3.2 both the previous and present versions of Rule 50 refer to Rules 47(g) and 53 *bis*. The text of the rules as it read prior to its amendment in June 1999 did not have a Rule 53 *bis*;

3.3 an amendment to the Rules could have retrospective effect provided it does not infringe on the rights of the accused. Rule 53 *bis* is not just an amendment to a Rule but an adoption of an entirely new rule and therefore the provisions of Rule 53 *bis* cannot be applicable to this motion;

3.4 the Prosecutor is relying on the same set of allegations for the counts she intends to add to the existing indictment. In the recent case of the Prosecutor v. Kayishema and Ruzindana (ICR-95-1-T), Trial Chamber II found that the same set of facts cannot qualify for cumulative charges;

3.5 the Prosecutor's submission that she is relying on evidence gathered in the course of Operation NAKI must be rejected, since this operation was not organised to gather evidence against the accused. Further, evidence of the accused's alleged conduct existed in the Belgian files and the statements of witnesses taken, following Operation NAKI do not provide new evidence to support the charges against the accused;

3.6 if the amendment to the indictment is granted, this could result in an undue delay in the commencement of the trial against the accused, thus causing severe prejudice to the accused. Further, the case against the accused is not legally or factually complex to justify a delay of this nature and therefore any delay in the commencement of the accused's trial is unreasonable;

3.7 the Prosecutor has not made disclosure of Annexure "B". This annexure is essential because it contains the material on which the Prosecutor relies, in support of her motion for leave to amend the indictment against the accused. The accused has the right to have disclosed to him the materials as contained in Annexure "B" and to utilize such materials in response to this motion;

AFTER HAVING DELIBERATED,

4. The Trial Chamber notes that Rule 50 has been subject *inter alia* to the following amendments:

(i) Rules 47(G) and 53 *bis* now apply *mutatis mutandis* to Rule 50 (A). This amendment was adopted in at the Plenary held in June 1998 and is applicable to the accused. Rule 53 *bis* which was also adopted at the Plenary in June 1998, makes provision for the service of an indictment on an accused. Where an indictment has been amended, such an indictment will be served on an accused pursuant to the provisions of Rules 47(G) and 53 *bis*;

(ii) the word "that" in the phrase "granted by that Trial Chamber", in Rule 50(A) was replaced by the word "a". This amendment was adopted at the Plenary in June 1999 and came into force immediately thereafter. It is accordingly not retroactively applicable to the accused.

5. The Trial Chamber applies the rulings made by the Appeals Chamber in the case of Anatole Nsengiyumva versus the Prosecutor (ICR-96-12-A) and Joseph Kanyabashi versus the Prosecutor (ICR-96-15-A), to the effect that a motion for leave to amend an indictment must be heard by the Trial Chamber, as constituted for the initial appearance of the accused. In this case the Chamber that conducted the initial appearance of the accused was composed of Judges W.H.Sekule, Y. Ostrovsky and N. Pillay. An exceptional circumstance arose as a consequence of the unavailability of Judge Ostrovsky for medical reasons. The President, by the authority vested in her, pursuant to the Statute of the Tribunal and the Rules, in particular Rules 15(E), 27(A), (B) and (C), assigned Judge M. Güney. to the Chamber to replace Judge Ostrovsky. The President's authority in this regard is recognised in the aforementioned decisions of the Appeals Chamber.

6. Rule 50 does not explicitly prescribe a time limit within which the Prosecutor may move to amend the indictment against the accused, thus the Trial Chamber has the discretion to assess each individual case on its own merits and circumstances. In Prosecutor versus Alfred Musema (ICR-96-13-T) the Trial Chamber held that:

"A key consideration would be whether, and to what extent, the dilatory filing of the motion impacts on the rights of the accused to a fair trial."[1]

7. The Prosecutor is entitled to conduct on-going investigations against the accused and where new evidence has come to light she is obliged to present this evidence at trial. The Prosecutor is also obliged to present the full scope of available evidence at the trial of the accused that accurately reflects the totality of the alleged criminal conduct of the accused, as uncovered by her investigations. In the case of the Prosecutor versus Alfred Musema, it was also held that:

"In order that justice may take its proper course, due consideration must also be given to the Prosecutor's unfettered responsibility to prosecute the accused to the full extent

[1]Prosecutor versus Alfred Musema, ICR-96-13-T, P4, Para.17

of the law and to present all relevant evidence before the Trial Chamber."[2]

On whether any amendment to the indictment will cause undue delay in the proceedings against the accused.

8. The Trial Chamber has an obligation pursuant to Article 19 of the Statute, to ensure that the accused is tried in a fair and expeditious manner and with full respect for the rights of the accused. Article 20 of the Statute guarantees the accused the right to be tried without "undue" delay. The issue is whether the proposed amendments to the indictment, if granted, will cause an "undue" delay in the commencement of the trial of the accused, to the prejudice of the accused.

9. In ascertaining whether a delay in the criminal proceedings against the accused is "undue", it is essential to take into consideration the length of the delay, the gravity, nature and complexity of the case against the accused and the prejudice that may be suffered by the accused. The Defence submission that the accused has been in custody for one thousand five hundred and three days, has little bearing on any possible future delay in the criminal proceedings against the accused, that may arise following an amendment to the indictment. The Trial Chamber has not been persuaded by the Defence submission that an amendment to the indictment would result in an "undue" delay in the commencement of the trial against the accused.

On the cumulative charges.

10. On the issue of cumulative charges, as raised by the Defence, the Trial Chamber notes that the principle of cumulative charges was applied by Trial Chamber I[3] in the case of Prosecutor versus Jean Paul Akayesu (ICR-96-4-T) .and the accused was convicted on more than one offence based on the same set of facts, whilst in the case of the Prosecutor versus Kayishema and Ruzindana (ICR-95-1-T), before Trial Chamber II[4], the majority held that the accused could not be convicted for more than one offence on the same set of facts. Both these cases are now being taken on appeal. The Trial Chamber is of the view that the appropriate stage to assess the applicability of cumulative charges is at the close of the Prosecution case, once the evidence has been led, rather than at the stage of confirmation or amendment of the indictment.

On the non-disclosure of Annexure "B"

11. The Trial Chamber notes that in support of her motion the Prosecutor submitted under Annexure "B", supporting material to the proposed new counts in the indictment. This

---

[2]ibid

[3]Trial Chamber I comprised Judges L. Kama, L Aspegren and N. Pillay.

[4]Trial Chamber II comprised Judges W. H. Sekule, T. H. Khan and Y. Ostrovsky..

supporting material was not disclosed to the Defence.

12. The Trial Chamber notes that where the Prosecutor's request to add new counts to the indictment is granted, the accused must make an "initial appearance" in accordance with Rules 50(B) and 62 to enter a plea on these new counts. The Prosecutor is thereafter obliged to disclose to the Defence all supporting material in respect of these new counts within thirty days of this "initial appearance", as envisaged in Rule 66 (A)(i) of the Rules. Therefore, disclosure of any material in support of the proposed new counts at this stage of the proceedings may be construed as pre-mature.

13. The Trial Chamber notes that the provisions of Rule 66 must be applied subject to the provisions of Rules 53 and 69. Rule 69 makes provision for the protection of victims and witnesses. Parties generally file motions requesting the implementation of certain protective measures for witnesses and victims after the initial appearance of the accused. Where such measures are granted, this has a direct bearing on the timing, nature and extent of disclosure made to the Defence. It is essential for the proper administration of justice to balance the interests of the victims and witnesses against the right of the accused to disclosure.

14. The Trial Chamber notes that pursuant to Rule 72, the Defence has the opportunity to raise any objections on defects in the form of the indictment. This Rule further provides that such objections may be raised within sixty days following disclosure of the supporting material. The accused therefore suffers no prejudice if disclosure of the supporting material is not made at this stage of the proceedings.

15. The Trial Chamber distinguishes between the procedural requirements of Rules 47 and 50. Pursuant to Rule 47, a single judge reviewing an indictment presented for confirmation, is required to establish from the supporting material that a *prima facie* case exists against the suspect. A Trial Chamber seized with a motion, requesting leave to amend an indictment pursuant to Rule 50, against an accused who has already been indicted, has no cause to inquire into a *prima facie* basis for proposed amendments to the indictment. Since such a finding has already been made in respect of the accused, it is not necessary for the Trial Chamber to consider the supporting material tendered as Annexure "B".

16. The Trial Chamber finds that in considering the Prosecutor's motion for leave to amend the indictment, pursuant to Rule 50, the onus is on the Prosecutor to set out the factual basis and legal motivation in support of her motion.

17. The Trial Chamber is not satisfied that amendments to the indictment, if granted will cause an an undue delay in the commencement of the trial against the accused, and consequent prejudice to the accused.

18. The Trial Chamber is satisfied that sufficient grounds exist, both in fact and in law, to justify the amendments to the indictment, as requested by the Prosecutor.

FOR THESE REASONS THE TRIBUNAL,

GRANTS the Prosecutor's motion for the amendment of the indictment against the accused;

ORDERS the amendment of the indictment by adding:

(I) the count of CONSPIRACY TO COMMIT GENOCIDE, pursuant to Articles 2(3)(b), 6(1) and 6(3) of the Statute;

(ii) the count of DIRECT AND PUBLIC INCITEMENT TO COMMIT GENOCIDE, pursuant to Articles 2(3)(c), 6(1) and 6(3) of the Statute;

(iii) the count of CRIMES AGAINST HUMANITY (PERSECUTION), pursuant to Articles 3(h), 6(1) and 6(3) of the Statute;

(iv) the count of COMPLICITY TO COMMIT GENOCIDE as a separate and individual count, pursuant to Articles 2(3)(e), 6(1) and 6(3) of the Statute;

(v) individual criminal responsibility, pursuant to Article 6(3) of the Statute, to all existing counts;

FURTHER ORDERS that the indictment reflecting the amendments as ordered above, is filed with the registry and served on the accused immediately.

Arusha, 2 September 1999

William H. Sekule
Presiding Judge

Navanethem Pillay
Judge

Mehmet Güney
Judge

(Seal of the Tribunal)

*[1965] 4 C.C.C. 349, *; 1965 C.C.C. LEXIS 1501, ***

REGINA v. POWELL

[1965] 4 C.C.C. 349; 1965 C.C.C. LEXIS 1501

British Columbia Court of Appeal

JUDGES: Sheppard, Norris and Bull, JJ.A.

February 22, 1965

KEYWORDS-1: [1]** False pretences -- Elements of offence -- Conviction for obtaining cheque by false pretences -- False statements made by accused Crown must also prove fraudulent intent -- Cr. Code, s. 304.

KEYWORDS-2: Indictment -- Amendment -- False pretences -- Charge of obtaining sum of money by false pretences -- Magistrate amending to insert "cheque" instead of cash to conform with evidence -- Amendment made after motion for dismissal by accused and before latter giving evidence -- Amendment within power of Magistrate and no prejudice to accused -- Cr. Code. s. 510(2).

SUMMARY-2: [R. v. Haurany (1962), 132 C.C.C. 372; R. v. Fiore (1962), 132 C.C.C. 213; 37 C.R. 31; R. v. Rycer, 86 C.C.C. 336, [1947] 2 D.L.R. 350, 2 C.R. 388, 63 B.C.R. 44, sub nom R. v. Gordon and Rycer, [1946] 3 W.W.R. 81, refd to]

APPEAL from conviction by B.M. Isman, Magistrate, for false pretences.

H.A.D. Oliver, for accused appellant.

A.A. Mackoff, for the Crown, respondent.

JUDGMENT-BY: SHEPPARD, J.A. (dissenting)

NORRIS, J.A.

BULL, J.A.

JUDGMENT: SHEPPARD, J.A. (dissenting):--This appeal is by the accused from his conviction of false pretences before B.M. Isman, Magistrate. The evidence is that the accused agreed to sell to M. & C. Enterprises Limited, a Lincoln **[**2]** Welder complete with leads and stringer, and in the payment therefor he obtained from the buyer an order on its broker, West Coast Log Exchange Limited, in order to pay the purchase price upon acceptance of the bill of sale. Pursuant thereto the broker issued to the accused a cheque (ex. 3) for $ 438.38 against bill of sale signed by the accused for "1 only Lincoln Welder ... complete with **[*350]**

leads -- stinger ... free and clear of all liens and encumbrances" (ex. 2). Later the accused arranged to purchase the welder which was without leads or stringer and paid a deposit of $ 50 thereon but did not complete, and eventually the owner, Ingham, sold to a third person.

The grounds of appeal are as follows:

(1) The accused contends that he was charged with receiving a sum of money, $ 438.38, whereas he received a cheque in that amount. At the conclusion of the Crown's case objection was taken and counsel for the accused moved to dismiss under R. v. Haurany (1962), 132 C.C.C. 372. Thereupon the Magistrate amended the charge by inserting the word "cheque", whereby the accused was charged with obtaining a cheque in the amount named. Counsel for the accused contends that the Magistrate **[**3]** should not have amended before ruling on the motion nor have amended at all on his own motion.

Those objections are not well taken. The Magistrate had power to amend under Code s. 510(2) "to make the indictment, count ... conform to the evidence", there being a variance between the charge and the evidence. The amendment was made before the accused gave evidence and before the Magistrate delivered his judgment and it was therefore made while the Magistrate was seised with jurisdiction. There is no requirement under s. 510 that he must amend before motion to dismiss, and as the amendment was made before the accused gave evidence, there was no prejudice to him and the amendment was therefore within R. v. Fiore (1962), 132 C.C.C. 213, 37 C.R. 31 (Ont. C.A.), and R. v. Rycer, 86 C.C.C. 336, [1947] 2 D.L.R. 350, 2 C.R. 388 sub nom. R. v. Gordon and Rycer (B.C.C.A.).

(2) The accused contends that if there was a false pretence there was no fraudulent intent. The Magistrate has found the accused guilty as charged and there is evidence to support that finding. The accused purported to give title to the welder and warranted it free and clear of liens and encumbrances. Neither he nor his company, **[**4]** Pacific Powell Equipment Ltd., the possible seller, had any title to the welder at that time within Rowland v. Devall (1923), 2 K.B. 500. After the deposit of $ 50 was paid there remained at least a lien for the balance of the purchase price which was never paid. Notwithstanding these false statements in the warranty of title (ex. 2) the accused received the cheque for the full purchase price. The evidence supports the finding that the representations were fraudulently made in that: **[*351]** (a) the accused knew that the warranties were false;

(b) nevertheless the accused obtained a cheque for the purchase price to himself;

(c) when he found the buyer's broker was examining the machine he obtained an option to purchase on which he paid $ 50 but did not complete.

The conviction is therefore supported by the evidence and the appeal should be dismissed.

NORRIS, J.A.:--I would allow this appeal for the reasons given by my brother Bull, which I have had the opportunity of reading.

BULL, J.A.:--This is an appeal from conviction on a charge under s. 304 of the Criminal Code of obtaining a cheque for $ 438.38 by a false pretence. The appellant was originally charged with obtaining $ **[**5]** 417.50 but at the end of the Crown's case, and after rejecting a motion by the appellant to dismiss on the grounds that no evidence had been adduced to support the obtaining of the funds, the learned Magistrate, ex mero motu, amended the charge pursuant to Cr. Code, s. 510(2) changing the property allegedly obtained from "$ 417.50" to a "cheque for $ 438.38"

in conformity with the evidence. The appellant then elected to move for dismissal on the grounds that the charge had not been sufficiently proven beyond a reasonable doubt and accordingly called no evidence in defence. The learned Magistrate found the appellant guilty on the amended charge.

Counsel for the appellant argued vigorously in the Court below, and before us, that the procedure by way of amendment followed by the learned Magistrate below was improper and prejudicial to the accused. Although some confusion and error undoubtedly arose, I consider that the learned Magistrate was entitled to make the amendment he did when he did, under the provisions of said s. 510(2), and that the appellant's objection thereto is not well founded. But it is possible that the very protracted argument and discussion before the learned Magistrate **[**6]** as to the procedural course being followed may well have overshadowed the vital question as to the proof of the offence charged.

In order to support a conviction of obtaining property on a false pretence, it is necessary that the Crown prove fraudulent intent. There is evidence upon which it could be found that the appellant misrepresented to Mr. Harrison that he owned the **[*352]**

welder in question at the time of taking the cheque, but it is equally clear that the terms of the transaction were arranged between the appellant and the proposed buyer, M. & C. Enterprises Ltd., and that Harrison's participation consisted in an obligation under instruction to deliver the cheque to the appellant. In my opinion, the little evidence there was as to the status and function of the appellant in the deal was as consistent with him acting as a commission agent for M. & C. Enterprises Ltd., to provide the welder for it as with him being a vendor of the machine. If the appellant was merely an agent to provide good title from the owner for M. & C. Enterprises Ltd., the evidence before the learned Magistrate would lend little support to a finding of fraudulent intent and a reasonable doubt in **[**7]** this regard should have been resolved in favour of the appellant.

Again, even if the appellant was pretending to be an owner-vendor, fraud would be negated if he honestly intended to forthwith acquire and give good title. In this regard the learned Magistrate in his reasons stated that the appellant "may have had the best of intentions in acquiring it" (the welder) at the time of taking the cheque. This doubt which the learned Magistrate had as to the fraudulent intent of the appellant should have been reflected, in my respectful opinion, in the dismissal of the charge on the ground that an essential element of the charge had not been proved beyond a reasonable doubt.

I would quash the conviction and direct that a verdict of acquittal be entered.

Appeal allowed; acquittal ordered. **[*353]**

ANNEX A

1. The Trial Chamber has heard evidence of events that fall within the time period specified in the relevant counts, and events that may be outside this time period. Witnesses who gave evidence, some of which may fall outside the time period of the relevant counts as outlined below, include TF1-304, TF1-012, TF1-263, TF1-362, and TF1-141.
2. TF1-304 testified that on 19 February 1999 he saw many decapitated human heads at Savage Pit and that only 21 of the 360 houses in Tombodu were undamaged.
3. TF1-012 testified that he was in Tombodu when ECOMOG pushed the AFRC and RUF from Freetown and they came to Tombodu. He stated that towards the end of the dry season a house full of people was set on fire.[1] He testified that Pa Sankoh came to Koidu at the time of the Lomé Peace Accord and said they should start mining diamonds and civilians started mining.[2] In 1999 the town chief was flogged by the rebels.[3]
4. TF1-263 testified that he was captured in February 1998 by rebels. He saw five people shot and killed during the time mangos were ripe in Kono, at which time Kallon shot a boy.[4] After the attack on Kono towards the end of the rainy season, the witness went to Tombodu and then to Krubola with Superman. On the way from Tombodu civilians were killed and others were forced to carry loads.[5]
5. TF1-362 testified that around the time Sam Bockarie fled Sierra Leone for Liberia, Issa Sesay ordered the killing of six recruits who attempted to escape from the Yengema training base, and that 5 of the 6 were executed.[6] Yengema training base was established after Koidu was recaptured in late 1998.[7]
6. TF1-141 testified that he went on a mission to Koidu called Operation No Living Thing. Based on other evidence the Prosecution argues that this would be on or about December 1998. The witness state that it was a mission to capture Koidu led by Issa Sesay and that the remaining houses were burned, unless they were occupied by commanders.[8] The witness

[1] Transcript 2 February 2005, pp. 17-22.
[2] Transcript 2 February 2005, pp. 26-35.
[3] Transcript 4 February 2005, pp. 9-10.
[4] Transcript 6 April 2005, pp. 19-24.
[5] Transcript 6 April 2005, pp. 44-51.
[6] Transcript 21 April 2005, pp. 21-23.
[7] Transcript 25 April 2005, pp. 102-106.
[8] Transcript 13 April 2005, pp. 14-17.

then went to Tombodu on a food finding patrol. He stated that there, many civilians were captured and killed and Morris Kallon was in command.[9] The witness testified that Issa Sesay gave commands for the attack on Koidu and that houses were burned and civilians were killed at Kwiyor.[10]

---

[9] Transcript 13 April 2005, pp. 22-30.
[10] Transcript 15 April 2005, pp. 108-111.

ANNEX B

THE SPECIAL COURT FOR SIERRA LEONE

CASE NO. SCSL – 2004-15-PT

THE PROSECUTOR

Against

ISSA HASSAN SESAY also known as ISSA SESAY

MORRIS KALLON also known as BILAI KARIM

And

AUGUSTINE GBAO also known as AUGUSTINE BAO

FURTHER AMENDED CONSOLIDATED INDICTMENT

The Prosecutor, Special Court for Sierra Leone, under Article 15 of the Statute of the Special Court for Sierra Leone (the Statute) charges:

ISSA HASSAN SESAY also known as (aka) ISSA SESAY

MORRIS KALLON aka BILAI KARIM

and

AUGUSTINE GBAO aka AUGUSTINE BAO

with **CRIMES AGAINST HUMANITY, VIOLATIONS OF ARTICLE 3 COMMON TO THE GENEVA CONVENTIONS AND OF ADDITIONAL PROTOCOL II and OTHER SERIOUS VIOLATIONS OF INTERNATIONAL HUMANITARIAN LAW, in violation of Articles 2, 3 and 4 of the Statute** as set forth below:

THE ACCUSED

1. **ISSA HASSAN SESAY aka ISSA SESAY** was born 27 June 1970 at Freetown, Western Area, Republic of Sierra Leone.

2. **MORRIS KALLON aka BILAI KARIM** was born 1 January 1964 at Bo, Bo District, Republic of Sierra Leone.

3. **AUGUSTINE GBAO aka AUGUSTINE BAO** was born 13 August 1948, at Blama, Kenema District, Republic of Sierra Leone.

4. He was a member of the Sierra Leone Police force from 1981 until 1986.

GENERAL ALLEGATIONS

5. At all times relevant to this Indictment, a state of armed conflict existed within Sierra Leone. For the purposes of this Indictment, organized armed factions involved in this conflict included the Revolutionary United Front (RUF), the Civil Defence Forces (CDF) and the Armed Forces Revolutionary Council (AFRC).

6. A nexus existed between the armed conflict and all acts or omissions charged herein as Violations of Article 3 common to the Geneva Conventions and of Additional Protocol II and as Other Serious Violations of International Humanitarian Law.

7. The organized armed group that became known as the RUF, led by FODAY SAYBANA SANKOH aka POPAY aka PAPA aka PA, was founded about 1988 or 1989 in Libya. The RUF, under the leadership of FODAY SAYBANA SANKOH, began organized armed operations in Sierra Leone in March 1991. During the ensuing armed conflict, the RUF forces were also referred to as "RUF", "rebels" and "People's Army".

8. The CDF was comprised of Sierra Leonean traditional hunters, including the Kamajors, Gbethis, Kapras, Tamaboros and Donsos. The CDF fought against the RUF and AFRC.

9. On 30 November 1996, in Abidjan, Ivory Coast, FODAY SAYBANA SANKOH and Ahmed Tejan Kabbah, President of the Republic of Sierra Leone, signed a peace agreement which brought a temporary cessation to active hostilities. Thereafter, the active hostilities recommenced.

10. The AFRC was founded by members of the Armed Forces of Sierra Leone who seized power from the elected government of the Republic of Sierra Leone via a coup d'état on 25 May 1997. Soldiers of the Sierra Leone Army (SLA) comprised the majority of the AFRC membership. On that date JOHNNY PAUL KOROMA aka JPK became the leader and Chairman of the AFRC. The AFRC forces were also referred to as "Junta", "soldiers", "SLA", and "ex-SLA".

11. Shortly after the AFRC seized power, at the invitation of JOHNNY PAUL KOROMA, and upon the order of FODAY SAYBANA SANKOH, leader of the RUF, the RUF joined with the AFRC. The AFRC and RUF acted jointly thereafter. The AFRC/RUF Junta forces (Junta) were also referred to as "Junta", "rebels", "soldiers", "SLA", "ex-SLA" and "People's Army".

12. After the 25 May 1997 coup d'état, a governing body, the Supreme Council, was created within the Junta. The Supreme Council was the sole executive and legislative authority within Sierra Leone during the junta. The governing body included leaders of both the AFRC and RUF.

13. The Junta was forced from power by forces acting on behalf of the ousted government of President Kabbah about 14 February 1998. President Kabbah's government returned in March 1998. After the Junta was removed from power the AFRC/RUF alliance continued.

14. On 7 July 1999, in Lomé, Togo, FODAY SAYBANA SANKOH and Ahmed Tejan Kabbah, President of the Republic of Sierra Leone, signed a peace agreement. However, active hostilities continued.

15. **ISSA HASSAN SESAY, MORRIS KALLON, AUGUSTINE GBAO** and all members of the organized armed factions engaged in fighting within Sierra Leone were required to abide by International Humanitarian Law and the laws and customs governing the conduct of armed conflicts, including the Geneva Conventions of 12 August 1949, and Additional Protocol II to the Geneva Conventions, to which the Republic of Sierra Leone acceded on 21 October 1986.

16. All offences alleged herein were committed within the territory of Sierra Leone after 30 November 1996.

17. All acts and omissions charged herein as Crimes Against Humanity were committed as part of a widespread or systematic attack directed against the civilian population of Sierra Leone.

18. The words civilian or civilian population used in this Indictment refer to persons who took no active part in the hostilities, or who were no longer taking an active part in the hostilities.

INDIVIDUAL CRIMINAL RESPONSIBILITY

19. Paragraphs 1 through 18 are incorporated by reference.

20. At all times relevant to this Indictment, **ISSA HASSAN SESAY** was a senior officer and commander in the RUF, Junta and AFRC/RUF forces.

21. Between early 1993 and early 1997, **ISSA HASSAN SESAY** occupied the position of RUF Area Commander. Between about April 1997 and December 1999, **ISSA HASSAN SESAY** held the position of the Battle Group Commander of the RUF, subordinate only to the RUF Battle Field Commander, SAM

BOCKARIE aka MOSQUITO aka MASKITA, the leader of the RUF, FODAY SAYBANA SANKOH and the leader of the AFRC, JOHNNY PAUL KOROMA.

22. During the Junta regime, **ISSA HASSAN SESAY** was a member of the Junta governing body. From early 2000 to about August 2000, **ISSA HASSAN SESAY** served as the Battle Field Commander of the RUF, subordinate only to the leader of the RUF, FODAY SAYBANA SANKOH, and the leader of the AFRC, JOHNNY PAUL KOROMA.

23. FODAY SAYBANA SANKOH has been incarcerated in the Republic of Sierra Leone from about May 2000 until about 29 July 2003. From about May 2000 until about 10 March 2003, by order of FODAY SAYBANA SANKOH, **ISSA HASSAN SESAY** directed all RUF activities in the Republic of Sierra Leone.

24. At all times relevant to this Indictment, **MORRIS KALLON** was a senior officer and commander in the RUF, Junta and AFRC/RUF forces.

25. Between about May 1996 and about April 1998, **MORRIS KALLON** was a Deputy Area Commander. Between about April 1998 and about December 1999, **MORRIS KALLON** was Battle Field Inspector within the RUF, in which position he was subordinate only to the RUF Battle Group Commander, the RUF Battlefield Commander, the leader of the RUF, FODAY SAYBANA SANKOH, and the leader of the AFRC, JOHNNY PAUL KOROMA.

26. During the Junta regime, **MORRIS KALLON** was a member of the Junta governing body.

27. In early 2000, **MORRIS KALLON** became the Battle Group Commander in the RUF, subordinate only to the RUF Battle Field Commander, ISSA HASSAN SESAY, the leader of the RUF, FODAY SAYBANA SANKOH, and the leader of the AFRC, JOHNNY PAUL KOROMA.

28. About June 2001, **MORRIS KALLON** became RUF Battle Field Commander, subordinate only to the leader of the RUF, FODAY SAYBANA SANKOH, ISSA

HASSAN SESAY, to whom FODAY SAYBANA SANKOH had given direct control over all RUF operations, and to the leader of the AFRC, JOHNNY PAUL KOROMA.

29. At all times relevant to this Indictment, **AUGUSTINE GBAO** was a senior officer and commander in the RUF and AFRC/RUF forces.

30. **AUGUSTINE GBAO** joined the RUF in 1991 in Liberia. Prior to the coup, **AUGUSTINE GBAO** was Commander of the RUF Internal Defence Unit, in which position he was in command of all RUF Security units.

31. Between about November 1996 until about mid 1998, **AUGUSTINE GBAO** was a senior RUF Commander in control of the area of Kailahun Town, Kailahun District. In this position, between about November 1996 and about April 1997, **AUGUSTINE GBAO** was subordinate only to the RUF Battle Group Commander, the RUF Battle Field Commander and the leader of the RUF, FODAY SAYBANA SANKOH. In this position, ~~from~~ between about April 1997 and about mid 1998, **AUGUSTINE GBAO** was subordinate only to the RUF Battle Field Commander, the leader of the RUF, FODAY SAYBANA SANKOH, and the leader of the AFRC, JOHNNY PAUL KOROMA.

32. Between about mid 1998 and about January 2002, **AUGUSTINE GBAO** was Overall Security Commander in the AFRC/RUF forces, in which position he was in command of all Intelligence and Security units within the AFRC/RUF forces. In this position, **AUGUSTINE GBAO** was subordinate only to the leader of the RUF, FODAY SAYBANA SANKOH, and the leader of the AFRC, JOHNNY PAUL KOROMA.

33. Between about March 1999 until about January 2002, **AUGUSTINE GBAO** was also the joint Commander of AFRC/RUF forces in the Makeni area, Bombali District. As commander of AFRC/RUF forces in the Makeni area, **AUGUSTINE GBAO** was subordinate only to the RUF Battle Field Commander, the leader of

the RUF, FODAY SAYBANA SANKOH, and the leader of the AFRC, JOHNNY PAUL KOROMA.

34. In their respective positions referred to above, **ISSA HASSAN SESAY, MORRIS KALLON and AUGUSTINE GBAO,** individually, or in concert with each other, JOHNNY PAUL KOROMA aka JPK, FODAY SAYBANA SANKOH, SAM BOCKARIE aka MOSQUITO aka MASKITA, ALEX TAMBA BRIMA aka TAMBA ALEX BRIMA aka GULLIT, BRIMA BAZZY KAMARA aka IBRAHIM BAZZY KAMARA aka ALHAJI IBRAHIM KAMARA, SANTIGIE BORBOR KANU aka 55 aka FIVE-FIVE aka SANTIGIE KHANU aka S. B. KHANU aka S.B. KANU aka SANTIGIE BOBSON KANU aka BORBOR SANTIGIE KANU and/or other superiors in the RUF, Junta and AFRC/RUF forces, exercised authority, command and control over all subordinate members of the RUF, Junta and AFRC/RUF forces.

35. At all times relevant to this Indictment and in relation to all acts and omissions charged herein, **ISSA HASSAN SESAY, MORRIS KALLON and AUGUSTINE GBAO,** through their association with the RUF, acted in concert with CHARLES GHANKAY TAYLOR aka CHARLES MACARTHUR DAPKPANA TAYLOR.

36. The RUF, including **ISSA HASSAN SESAY, MORRIS KALLON and AUGUSTINE GBAO,** and the AFRC, including ALEX TAMBA BRIMA, BRIMA BAZZY KAMARA and SANTIGIE BORBOR KANU, shared a common plan, purpose or design (joint criminal enterprise) which was to take any actions necessary to gain and exercise political power and control over the territory of Sierra Leone, in particular the diamond mining areas. The natural resources of Sierra Leone, in particular the diamonds, were to be provided to persons outside Sierra Leone in return for assistance in carrying out the joint criminal enterprise.

37. The joint criminal enterprise included gaining and exercising control over the population of Sierra Leone in order to prevent or minimize resistance to their

geographic control, and to use members of the population to provide support to the members of the joint criminal enterprise. The crimes alleged in this Indictment, including unlawful killings, abductions, forced labour, physical and sexual violence, use of child soldiers, looting and burning of civilian structures, were either actions within the joint criminal enterprise or were a reasonably foreseeable consequence of the joint criminal enterprise.

38. **ISSA HASSAN SESAY, MORRIS KALLON and AUGUSTINE GBAO,** by their acts or omissions, are individually criminally responsible pursuant to Article 6.1. of the Statute for the crimes referred to in Articles 2, 3 and 4 of the Statute as alleged in this Indictment, which crimes each of them planned, instigated, ordered, committed or in whose planning, preparation or execution each Accused otherwise aided and abetted, or which crimes were within a joint criminal enterprise in which each Accused participated or were a reasonably foreseeable consequence of the joint criminal enterprise in which each Accused participated.

39. In addition, or alternatively, pursuant to Article 6.3. of the Statute, **ISSA HASSAN SESAY, MORRIS KALLON and AUGUSTINE GBAO,** while holding positions of superior responsibility and exercising effective control over their subordinates, are individually criminally responsible for the crimes referred to in Articles 2, 3 and 4 of the Statute. Each Accused is responsible for the criminal acts of his subordinates in that he knew or had reason to know that the subordinate was about to commit such acts or had done so and each Accused failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof.

CHARGES

40. Paragraphs 19 through 39 are incorporated by reference.

41. At all times relevant to this Indictment, members of the RUF, AFRC, Junta and/or AFRC/RUF forces (AFRC/RUF), subordinate to and/or acting in concert with **ISSA HASSAN SESAY, MORRIS KALLON and AUGUSTINE GBAO,**

conducted armed attacks throughout the territory of the Republic of Sierra Leone, including Bo, Kono, Kenema, Koinadugu, Bombali and Kailahun and Port Loko Districts and the city of Freetown and the Western Area. Targets of the armed attacks included civilians and humanitarian assistance personnel and peacekeepers assigned to the United Nations Mission in Sierra Leone (UNAMSIL), which had been created by United Nations Security Council Resolution 1270 (1999).

42. These attacks were carried out primarily to terrorize the civilian population, but also were used to punish the population for failing to provide sufficient support to the AFRC/RUF, or for allegedly providing support to the Kabbah government or to pro-government forces. The attacks included unlawful killings, physical and sexual violence against civilian men, women and children, abductions and looting and destruction of civilian property. Many civilians saw these crimes committed; others returned to their homes or places of refuge to find the results of these crimes – dead bodies, mutilated victims and looted and burnt property.

43. As part of the campaign of terror and punishment the AFRC/RUF routinely captured and abducted members of the civilian population. Captured women and girls were raped; many of them were abducted and used as sex slaves and as forced labour. Some of these women and girls were held captive for years. Men and boys who were abducted were also used as forced labour; some of them were also held captive for years. Many abducted boys and girls were given combat training and used in active fighting. AFRC/RUF also physically mutilated men, women and children, including amputating their hands or feet and carving "AFRC" and "RUF" on their bodies.

COUNTS 1 – 2: TERRORIZING THE CIVILIAN POPULATION AND COLLECTIVE PUNISHMENTS

44. Members of the AFRC/RUF subordinate to and/or acting in concert with **ISSA HASSAN SESAY, MORRIS KALLON and AUGUSTINE GBAO** committed

the crimes set forth below in paragraphs 45 through 82 and charged in Counts 3 through 14, as part of a campaign to terrorize the civilian population of the Republic of Sierra Leone, and did terrorize that population. The AFRC/RUF also committed the crimes to punish the civilian population for allegedly supporting the elected government of President Ahmed Tejan Kabbah and factions aligned with that government, or for failing to provide sufficient support to the AFRC/RUF.

By their acts or omissions in relation to these events, **ISSA HASSAN SESAY, MORRIS KALLON and AUGUSTINE GBAO,** pursuant to Article 6.1. and, or alternatively, Article 6.3. of the Statute, are individually criminally responsible for the crimes alleged below:

Count 1: Acts of Terrorism, a **VIOLATION OF ARTICLE 3 COMMON TO THE GENEVA CONVENTIONS AND OF ADDITIONAL PROTOCOL II,** punishable under Article 3.d. of the Statute;

And:

Count 2: Collective Punishments, a **VIOLATION OF ARTICLE 3 COMMON TO THE GENEVA CONVENTIONS AND OF ADDITIONAL PROTOCOL II,** punishable under Article 3.b. of the Statute.

COUNTS 3 – 5: UNLAWFUL KILLINGS

45. Victims were routinely shot, hacked to death and burned to death. Unlawful killings included the following:

Bo District

46. Between 1 June 1997 and 30 June 1997, AFRC/RUF attacked Tikonko, Telu, Sembehun, Gerihun and Mamboma, unlawfully killing an unknown number of civilians;

Kenema District

47. Between about 25 May 1997 and about 19 February 1998, in locations including Kenema town, members of AFRC/RUF unlawfully killed an unknown number of civilians;

Kono District

48. About mid February 1998, AFRC/RUF fleeing from Freetown arrived in Kono District. Between about 14 February 1998 and ~~30 June 1998~~ 31January 2000, members of AFRC/RUF unlawfully killed several hundred civilians in various locations in Kono District, including Koidu, Tombodu, Foindu, Willifeh, Mortema and Biaya;

Kailahun District

49. Between about 14 February 1998 and 30 June 1998, in locations including Kailahun town, members of AFRC/RUF unlawfully killed an unknown number of civilians;

Koinadugu District

50. Between about 14 February 1998 and 30 September 1998, in several locations including Heremakono, Kabala, Kumalu (or Kamalu), Kurubonla, Katombo, Koinadugu, Fadugu and Kamadugu, members of the AFRC/RUF unlawfully killed an unknown number of civilians;

Bombali District

51. Between about 1 May 1998 and 30 November 1998, in several locations in Bombali District, including Bonyoyo (or Bornoya), Karina, Mafabu, Mateboi and Gbendembu (or Gbendubu or Pendembu), members of the AFRC/RUF unlawfully killed an unknown number of civilians;

Freetown and the Western Area

52. Between 6 January 1999 and 28 February 1999, AFRC/RUF conducted armed

attacks throughout the city of Freetown and the Western Area. These attacks included large scale unlawful killings of civilian men, women and children at locations throughout the city and the Western Area, including Kissy, Wellington, and Calaba Town;

Port Loko

53. About the month of February 1999, members of the AFRC/RUF fled from Freetown to various locations in the Port Loko District. Between about February 1999 and April 1999, members of AFRC/RUF unlawfully killed an unknown number of civilians in various locations in Port Loko District, including Manaarma, Tendakum and Nonkoba;

By their acts or omissions in relation to these events, **ISSA HASSAN SESAY, MORRIS KALLON and AUGUSTINE GBAO,** pursuant to Article 6.1. and, or alternatively, Article 6.3. of the Statute, are individually criminally responsible for the crimes alleged below:

Count 3: Extermination, a **CRIME AGAINST HUMANITY**, punishable under Article 2.b. of the Statute;

In addition, or in the alternative:

Count 4: Murder, a **CRIME AGAINST HUMANITY**, punishable under Article 2.a. of the Statute;

In addition, or in the alternative:

Count 5: Violence to life, health and physical or mental well-being of persons, in particular murder, a **VIOLATION OF ARTICLE 3 COMMON TO THE GENEVA CONVENTIONS AND OF ADDITIONAL PROTOCOL II**, punishable under Article 3.a. of the Statute.

COUNTS 6 – 9: SEXUAL VIOLENCE

54. Widespread sexual violence committed against civilian women and girls included brutal rapes, often by multiple rapists, and forced "marriages". Acts of sexual violence included the following:

Kono District

55. Between about 14 February 1998 and 30 June 1998, members of AFRC/RUF raped hundreds of women and girls at various locations throughout the District, including Koidu, Tombodu, Kissi-town (or Kissi Town), Foendor (or Foendu), Tomendeh, Fokoiya, Wondedu and AFRC/RUF camps such as "Superman camp" and Kissi-town (or Kissi Town) camp. An unknown number of women and girls were abducted from various locations within the District and used as sex slaves and/or forced into "marriages". The "wives" were forced to perform a number of conjugal duties under coercion by their "husbands";

Koinadugu District

56. Between about 14 February 1998 and 30 September 1998, members of AFRC/RUF raped an unknown number of women and girls in locations in Koinadugu District, such as Kabala, Koinadugu, Heremakono and Fadugu. In addition an unknown number of women and girls were abducted and used as sex slaves and/or forced into "marriages" and/or subjected to other forms of sexual violence. The "wives" were forced to perform a number of conjugal duties under coercion by their "husbands";

Bombali District

57. Between about 1 May 1998 and 31 November 1998, members of the AFRC/RUF raped an unknown number of women and girls in locations in Bombali District, including Mandaha and Rosos (or Rosors or Rossos). In addition, an unknown number of abducted women and girls were used as sex slaves and/or forced into "marriages" and/or subjected to other forms of sexual violence. The "wives"

were forced to perform a number of conjugal duties under coercion by their "husbands";

Kailahun District

58. At all times relevant to this Indictment, an unknown number of women and girls in various locations in the District were subjected to sexual violence. Many of these victims were captured in other areas of the Republic of Sierra Leone, brought to AFRC/RUF camps in the District, and used as sex slaves and/or forced into "marriages". The "wives" were forced to perform a number of conjugal duties under coercion by their "husbands";

Freetown and the Western Area

59. Between 6 January 1999 and 28 February 1999, members of AFRC/RUF raped hundreds of women and girls throughout the city of Freetown and the Western Area, and abducted hundreds of women and girls and used them as sex slaves and/or forced them into "marriages" and/or subjected them to other forms of sexual violence. The "wives" were forced to perform a number of conjugal duties under coercion by their "husbands";

Port Loko District

60. About the month of February 1999, AFRC/RUF fled from Freetown to various locations in the Port Loko District. Between February 1999 and April 1999, members of the AFRC/RUF raped an unknown number of women and girls in various locations in the District. In addition, an unknown number of women and girls in various locations in the District were used as sex slaves and/or forced into "marriages" and/or subjected to other forms of sexual violence by members of the AFRC/RUF. The "wives" were forced to perform a number of conjugal duties under coercion by their "husbands";

By their acts or omissions in relation to these events, **ISSA HASSAN SESAY, MORRIS KALLON and AUGUSTINE GBAO,** pursuant to Article 6.1. and, or alternatively, Article 6.3. of the Statute, are individually criminally responsible for the crimes alleged below:

Count 6: Rape, a **CRIME AGAINST HUMANITY**, punishable under Article 2.g. of the Statute;

And:

Count 7: Sexual slavery and any other form of sexual violence, a **CRIME AGAINST HUMANITY**, punishable under Article 2.g. of the Statute;

And

Count 8: Other inhumane act, a CRIME AGAINST HUMANITY, punishable under Article 2.i. of the Statute;

In addition, or in the alternative:

Count 9: Outrages upon personal dignity, a **VIOLATION OF ARTICLE 3 COMMON TO THE GENEVA CONVENTIONS AND OF ADDITIONAL PROTOCOL II**, punishable under Article 3.e. of the Statute.

COUNTS 10 – 11: PHYSICAL VIOLENCE

61. Widespread physical violence, including mutilations, was committed against civilians. Victims were often brought to a central location where mutilations were carried out. These acts of physical violence included the following:

Kono District

62. Between about 14 February 1998 and ~~30 June 1998~~ 31 January 2000, AFRC/RUF mutilated an unknown number of civilians in various locations in the District, including Tombodu, Kaima (or Kayima) and Wondedu. The mutilations included cutting off limbs and carving "AFRC" and "RUF" on the bodies of the civilians;

Kenema District

63. Between about 25 May 1997 and about 19 February 1998, in locations in Kenema District, including Kenema town, members of AFRC/RUF carried out beatings and ill-treatment of a number of civilians who were in custody;

Koinadugu District

64. Between about 14 February 1998 and 30 September 1998, members of the AFRC/RUF mutilated an unknown number of civilians in various locations in the District, including Kabala and Konkoba (or Kontoba). The mutilations included cutting off limbs and carving "AFRC" on the chests and foreheads of the civilians;

Bombali District

65. Between about 1 May 1998 and 31 November 1998 members of the AFRC/RUF mutilated an unknown number of civilians in various locations in Bombali District, including Lohondi, Malama, Mamaka, Rosos (Rosors or Rossos). The mutilations included cutting off limbs;

Freetown and the Western Area

66. Between 6 January 1999 and 28 February 1999, members of the AFRC/RUF mutilated an unknown number of civilian men, women and children in various areas of Freetown, and the Western Area, including Kissy, Wellington and Calaba Town. The mutilations included cutting off limbs;

Port Loko

67. About the month of February 1999, the AFRC/RUF fled from Freetown to various locations in the Port Loko District. Between February 1999 and April 1999 members of the AFRC/RUF mutilated an unknown number of civilians in various locations in the District, including, cutting off limbs;

By their acts or omissions in relation to these events, **ISSA HASSAN SESAY, MORRIS KALLON and AUGUSTINE GBAO,** pursuant to Article 6.1. and, or

alternatively, Article 6.3. of the Statute, are individually criminally responsible for the crimes alleged below:

Count 10: Violence to life, health and physical or mental well-being of persons, in particular mutilation, **a VIOLATION OF ARTICLE 3 COMMON TO THE GENEVA CONVENTIONS AND OF ADDITIONAL PROTOCOL II,** punishable under Article 3.a. of the Statute;

In addition, or in the alternative:

Count 11: Other inhumane acts, a **CRIME AGAINST HUMANITY,** punishable under Article 2.i. of the Statute.

COUNT 12: USE OF CHILD SOLDIERS

68. At all times relevant to this Indictment, throughout the Republic of Sierra Leone, AFRC/RUF routinely conscripted, enlisted and/or used boys and girls under the age of 15 to participate in active hostilities. Many of these children were first abducted, then trained in AFRC/RUF camps in various locations throughout the country, and thereafter used as fighters.

By their acts or omissions in relation to these events, **ISSA HASSAN SESAY, MORRIS KALLON and AUGUSTINE GBAO,** pursuant to Article 6.1. and, or alternatively, Article 6.3. of the Statute, are individually criminally responsible for the crimes alleged below:

Count 12: Conscripting or enlisting children under the age of 15 years into armed forces or groups, or using them to participate actively in hostilities, an **OTHER SERIOUS VIOLATION OF INTERNATIONAL HUMANITARIAN LAW,** punishable under Article 4.c. of the Statute.

COUNT 13: ABDUCTIONS AND FORCED LABOUR

69. At all times relevant to this Indictment, AFRC/RUF engaged in widespread and large scale abductions of civilians and use of civilians as forced labour. Forced labour included domestic labour and use as diamond miners. The abductions and forced labour included the following:

Kenema District

70. Between about 1 August 1997 and about 31 January 1998, AFRC/RUF forced an unknown number of civilians living in the District to mine for diamonds at Cyborg Pit in Tongo Field;

Kono District

71. Between about 14 February 1998 to January 2000, AFRC/RUF forces abducted hundreds of civilian men, women and children, and took them to various locations outside the District, or to locations within the District such as AFRC/RUF camps, Tombodu, Koidu, Wondedu, Tomendeh. At these locations the civilians were used as forced labour, including domestic labour and as diamond miners in the Tombodu area;

Koinadugu District

72. Between about 14 February 1998 and 30 September 1998, at various locations including Heremakono, Kabala, Kumala (or Kamalu), Koinadugu, Kamadugu and Fadugu, members of the AFRC/RUF abducted an unknown number of men, women and children and used them as forced labour;

Bombali District

73. Between about 1 May 1998 and 31 November 1998, in Bombali District, members of the AFRC/RUF abducted an unknown number of civilians and used them as forced labour;

Kailahun District

74. At all times relevant to this Indictment, captured civilian men, women and children were brought to various locations within the District and used as forced labour;

Freetown and the Western Area

75. Between 6 January 1999 and 28 February 1999, in particular as the AFRC/RUF were being driven out of Freetown and the Western Area, members of the AFRC/RUF abducted hundreds of civilians, including a large number of children, from various areas in Freetown and the Western Area, including Peacock Farm, Kissy, and Calaba Town. These abducted civilians were used as forced labour;

Port Loko

76. About the month of February 1999, the AFRC/RUF fled from Freetown to various locations in the Port Loko District. Members of the AFRC/RUF used civilians, including those that had been abducted from Freetown and the Western Area, as forced labour in various locations throughout the Port Loko District including Port Loko, Lunsar and Masiaka. AFRC/RUF forces also abducted and used as forced labour civilians from various locations the Port Loko District, including Tendakum and Nonkoba;

By their acts or omissions in relation to these events, **ISSA HASSAN SESAY, MORRIS KALLON and AUGUSTINE GBAO,** pursuant to Article 6.1. and, or alternatively, Article 6.3. of the Statute, are individually criminally responsible for the crimes alleged below:

Count 13: Enslavement, a **CRIME AGAINST HUMANITY**, punishable under Article 2.c. of the Statute.

COUNT 14: LOOTING AND BURNING

77. At all times relevant to this Indictment, AFRC/RUF engaged in widespread unlawful taking and destruction by burning of civilian property. This looting and burning included the following:

Bo District

78. Between 1 June 1997 and 30 June 1997, AFRC/RUF forces looted and burned an unknown number of civilian houses in Telu, Sembehun, Mamboma and Tikonko;

Koinadugu District

79. Between about 14 February 1998 and 30 September 1998, AFRC/RUF forces engaged in widespread looting and burning of civilian homes in various locations in the District, including Heremakono, Kabala, Kamadugu and Fadugu;

Kono District

80. Between about 14 February 1998 and ~~30 June 1998~~ 31 January 2000, AFRC/RUF engaged in widespread looting and burning in various locations in the District, including Tombodu, Foindu and Yardu Sando, where virtually every home in the village was looted and burned;

Bombali District

81. Between about 1 March 1998 and 31 November 1998, AFRC/RUF forces burnt an unknown number of civilian buildings in locations in Bombali District, such as Karina and Mateboi;

Freetown and the Western Area

82. Between 6 January 1999 and 28 February 1999, AFRC/RUF forces engaged in widespread looting and burning throughout Freetown and the Western Area. The majority of houses that were destroyed were in the areas of Kissy, Wellington and Calaba town; other locations included the Fourah Bay, Upgun, State House and Pademba Road areas of the city;

By their acts or omissions in relation to these events, **ISSA HASSAN SESAY, MORRIS KALLON and AUGUSTINE GBAO,** pursuant to Article 6.1. and, or alternatively, Article 6.3. of the Statute, are individually criminally responsible for the crimes alleged below:

Count 14: Pillage, a **VIOLATION OF ARTICLE 3 COMMON TO THE GENEVA CONVENTIONS AND OF ADDITIONAL PROTOCOL II,** punishable under Article 3.f. of the Statute.

COUNTS 15 – 18: ATTACKS ON UNAMSIL PERSONNEL

83. Between about 15 April 2000 and about 15 September 2000, AFRC/RUF engaged in widespread attacks against UNAMSIL peacekeepers and humanitarian assistance workers within the Republic of Sierra Leone, including, but not limited to locations within Bombali, Kailahun, Kambia, Port Loko, and Kono Districts. These attacks included unlawful killing of UNAMSIL peacekeepers, and abducting hundreds of peacekeepers and humanitarian assistance workers who were then held hostage.

By their acts or omissions in relation to these events, **ISSA HASSAN SESAY, MORRIS KALLON and AUGUSTINE GBAO,** pursuant to Article 6.1. and, or alternatively, Article 6.3. of the Statute, are individually criminally responsible for the crimes alleged below:

Count 15: Intentionally directing attacks against personnel involved in a humanitarian assistance or peacekeeping mission, an **OTHER SERIOUS VIOLATION OF INTERNATIONAL HUMANITARIAN LAW**, punishable under Article 4.b. of the Statute;

In addition, or in the alternative:

Count 16: For the unlawful killings, Murder, a **CRIME AGAINST HUMANITY**, punishable under Article 2.a. of the Statute;

In addition, or in the alternative:

Count 17: Violence to life, health and physical or mental well-being of persons, in particular murder, a **VIOLATION OF ARTICLE 3 COMMON TO THE GENEVA CONVENTIONS AND OF ADDITIONAL PROTOCOL II**, punishable under Article 3.a. of the Statute;

In addition, or in the alternative:

Count 18: For the abductions and holding as hostage, taking of hostages, a **VIOLATION OF ARTICLE 3 COMMON TO THE GENEVA CONVENTIONS AND OF ADDITIONAL PROTOCOL II**, punishable under Article 3.c. of the Statute.

Dated this day of 2006

Freetown, Sierra Leone

Desmond de Silva QC

Prosecutor