008

91

SCSL-2004-16-PT
(91-94)

THE REGISTRY

Registrar: Robin Vincent

Date: 9th day of February 2004

Prosecutor against

Alex Tamba Brima, Brima Bazzy Kamara and Santigie Borbor Kanu

(Case No. SCSL-2003-016-PT)

RESPONSE OF KAMARA TO THE PROSECUTOR'S APPLICATION FOR LEAVE TO APPEAL

Office of the Prosecutor:

Luc Cote
Robert Petit
Boi-Tia Stevens

Defence Counsel for Alex Tamba Brima:

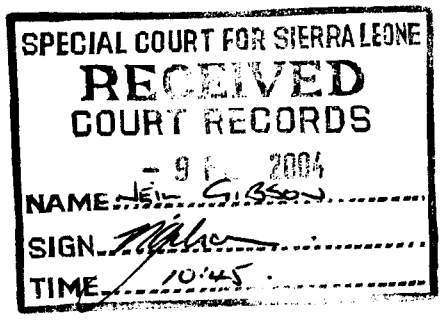
Terrence M. Terry
Defence Office

Defence Counsel for Brima Bazzy Kamara:

Ken Fleming QC
C.A. Osho Williams

Defence Counsel for Santigie Borbor Kanu:

Geert-Jan Alexander Knoops



1. The Prosecutor's application must fail for the reasons set out hereunder. Those reasons are gleaned from the Prosecutor's material and the authorities cited.

2. First, as was said by the learned Trial Chamber in *Barayagwiza*, at paragraph 11:

> "A decision to grant or deny a motion for severance is left to the sound discretion of judges of the trial chambers."

3. Second, it is in fact, as has been pointed out in *Barayagwiza*, a discretion which is exercised in determining such matters. That is acknowledged by the Prosecutor at paragraph 2, where it is said that "... the chamber exercised its discretion in denying the request for a single trial of six accused persons ...". As a result of it being the exercise of a discretion, there should be a demonstration that the discretion has miscarried in some way. The motion and the authorities do not disclose such an error in the present case. The mere fact that an Appeal Court may reach a different conclusion is not such an error in the exercise of discretion.

4. Each of the authorities cited relates to motions to sever already existing joint indictments at trials. Such motions are different to the present.

5. In the present instance, the Prosecutor saw fit to create a separate indictment for each of the accused, thus giving rights to be exercised individually, subject to the application of the rules. In the cases cited by the Prosecutor, the Court had satisfied itself at the initial stages of the process that there existed the conditions for joint indictments which enable people to be tried jointly. Precisely the opposite is true in this case.

6. Further, the Prosecutor's contention in paragraph 4 is wrong. Appealing to *Prosecutor v. Brdanin and Talic*, it is said that "the ICTY recognised that a joint trial necessarily envisages the case where each accuse may seek to blame the other and so did not consider mutual recrimination a sufficient factor to bar a joinder". The error apparent in that reasoning is that, in fact, there was a joint indictment, and these matters became arguable subsequently. The Court did not

order separate trials and so the correct proposition is that the Court did not consider mutual recrimination a sufficient factor to allow a separate trial. But, as we submitted, that is after the event where the Court had already determined that it could confirm the indictment.

7. It is said in paragraph 5 by the Prosecutor that in *Prosecutor v. Barayagwiza* "ruled that the mere intimation of a conflict of interest is in insufficient to bar joinder ...". The real issue in *Barayagwiza* was that, after there had been a joinder ordered by the learned Trial Chamber, the accused sought to, in effect, appeal against that decision. The learned Trial Chamber refused to entertain such a process, and in passing made some references to the principal. However, the order had been made for a joint trial and this was an attempt to go behind that order. It has no application in the present situation.

8. The learned Trial Chamber's decision from which the Prosecutor seeks to appeal is one exuding careful deliberation (the analysis summary in paragraph 28) and well founded commonsense (the factors set out in paragraph 44 and following). It takes into account the factions and their respective command (paragraphs 46, 47) structures and enables the defence to investigate, properly, the particular issues against a particular accused (paragraph 48).

9. The Prosecutor has made disclosure to the accused Kamara of some 298 statements and assorted documents. It is inconceivable that all of those statements and documents contain evidence against Mr Kamara and it would be improper to create a circumstance where the Prosecutor seeks to prove its case with a deluge of material, and then, hopefully by some process of percolation, some case seeps through against Mr Kamara. So much is conceded in paragraphs 13, 14 and 15 of the Prosecution argument.

10. Paragraph 13 claims serious prejudice to the Prosecution by not having a trial of six accused persons.

11. Paragraph 14 is an acknowledgment by the Prosecutor that, unless all of the witnesses are called, the Prosecution may not have the "ability to prove its case beyond reasonable doubt".

12. Paragraph 15 states specifically that "The Prosecution intends to lead essentially the same evidence against each accused person …".

13. The spectre of a trial consisting of 298 witnesses and/or statements is oppressive in the extreme and fails to take into account the differing origins of differing groups, and the historical development of those particular groups, as well as the individual rights of Mr Kamara.

14. As to the Prosecutor's "equality of arms" argument, the Prosecutor's strategy is to carpet bomb the accused from high altitude hoping that some fragment or other will pierce the solitary accused's defence. Such is not a case of equality of arms, but abuse of his prosecutorial function. It is for the Prosecutor to be precise, with adequate particularity, so that an accused knows precisely the case against him. We refer to our Motion in respect of defects in the indictment, yet to be determined by this learned Trial Chamber.

15. Finally, Rule 73(B) creates an exception to the rule that there will be no interlocutory appeal. It is only in "exceptional circumstances" that such leave can be given to appeal. There is no basis upon the Prosecutor's material for the granting of such leave, because there are no "exceptional circumstances".

16. Accordingly, the application of the Prosecutor should be dismissed.

pp Gallagher-Hamides

Kenneth C. Fleming Q.C.
Lead Defence Counsel