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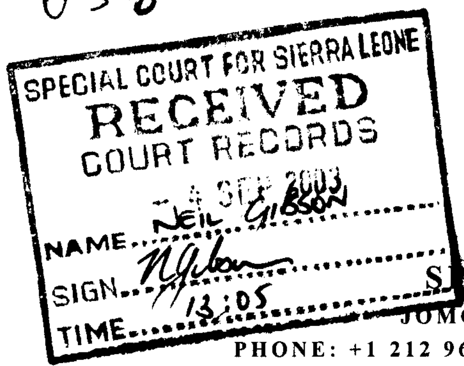

SCSL-2003-06-PT-058
(1135-1151)

SPECIAL COURT FOR SIERRA LEONE
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IN THE TRIAL CHAMBER

Before: His Lordship, The Rt. Hon. Judge Benjamin Mutanga Itoe

Registrar: Robin Vincent

Date: 22nd day of July 2003.

The Prosecutor against Tamba Alex Brima

SCSL-03-06-PT

RULING ON A MOTION APPLYING FOR BAIL OR FOR PROVISIONAL RELEASE FILED BY THE APPLICANT

Office of the Prosecutor:
Mr. James Johnson
Mr. Nicolas Browne-Marke

Attorney General:
Mr. Joseph G Kobba

Applicant Counsel:
Mr Terrence Michael Terry

Registry:
Mrs. Musu Kamara
Ms. Mariana Goetz

1 HIS LORDSHIP, THE RT. HON. JUDGE BENJAMIN MUTANGA ITOE:
2
3 This is my ruling on this Application.
4
5 Mr Tamba Alex Brima, the Applicant in this matter, is in
6 custody and stands indicted before the Special Court of Sierra
7 Leone on a 17 count indictment, preferred against him by the
8 Prosecutor of the Special Court.
9
10 The charges include crimes against humanity and International
11 Humanitarian Law allegedly committed by the Applicant in the
12 territory of Sierra Leone, crimes which come within the context
13 of the Provisions of Article 1 of the Agreement dated the 16th of
14 January, 2002, between the United Nations and the Government
15 of Sierra Leone, creating the Special Court for Sierra Leone on
16 the one hand, and also those of Articles 1, 2, 3,4,5, 6 and 7 of the
17 Statute of the said Court annexed to the Agreement, on the
18 other.
19
20 The Applicant appeared before me as a designated Pre-trial Judge
21 on the 17th of March, 2003, when he was arraigned on each of
22 the counts of the indictment brought against him. He pleaded
23 not guilty to all of them. He was however, at the end of that
24 process, remanded in custody on the same day pending the
25 commencement of his trial.
26
27 On the 28th of May, 2003, the Applicant's Counsel, Mr Terence
28 Michael Terry, filed this motion for bail or for the provisional
29 release of his client and this, pursuant to the provisions of Rule
30 65 of the Rules of Procedure and Evidence of the Special Court
31 for Sierra Leone.
32

1 The arguments on which the Motion is founded and as are
2 highlighted in Counsel's written submissions are as follows:-
3
4 -That the Applicant Tamba Alex Brima is presently suffering from
5 serious medical problems which require daily care namely,
6 diabetes and hypertension:
7
8 -That the Applicant is having frequent nightmares at the Bonthe
9 Detention Facility, and that his general health and sight are fast
10 deteriorating because and I quote:
11
12 "He has not been able to see any eye specialist".
13
14 -That the Applicant is a married man with a son, and the wife is
15 unemployed, and the Accused is the sole breadwinner, so the
16 continued detention of the Accused will cause untold suffering to
17 his wife and child financially and otherwise.
18
19 -That the continued detention of the accused is prejudicial to him
20 and continues to impair his access to his counsel regarding his
21 defence for the ensuing trial.
22
23 -That his trial will be delayed because the finishing of the
24 construction works of the Special Court in Freetown is going to
25 be delayed beyond early 2004.
26
27 -That the Accused will appear for his trial.
28
29 -That the Accused will not pose a danger to any victim, witness or
30 other person.
31
32 In addition to the aforementioned facts, the Applicant swore to

an affidavit on the 23rd of May, 2003, in the Special Court Detention Facility in Bonthe. The Applicant relies mainly on the facts deposed to in Paragraphs 2 to 34 of this affidavit. In the affidavit, he states that if released on bail, he will appear for his trial and will not pose a danger to victims or witnesses, or to other persons, conditions which are stipulated under Section 65 (B) as a guarantee to secure his release.

Counsel for the Applicant in making his submissions on the law refers to Rule 65(A). He argues that his client in his affidavit deposes to the fact, in fact, makes the engagement that he will appear for trial and if released will not pose a danger to any victim, witness or other person. He argues that under Rule 65(D) the Court has a discretion to impose such conditions as may be determined or may be deemed appropriate upon granting bail. He urges the court to grant conditional or unconditional release to his client.

Furthermore, Counsel for the Applicant argues that the purported warrant of arrest did not order the arrest of his client, Tamba Alex Brima; that the warrant of arrest was not served on him and that Judge Bankole Thompson lacked jurisdiction and acted in excess of his jurisdiction when he granted the Order on the 7th of March, 2003; that the Orders made by the Judge were fundamentally flawed and violated the provisions of Rule 47 of the Rules of Procedure and Evidence. He concludes by urging that the Court releases the Applicant on bail conditionally or unconditionally.

The Respondents on their part argued that the legality of the arrest and the detention of the accused person are not relevant to an application for bail. The Respondents contend that by

1 applying for bail in this case the Accused has conceded to the
2 legality of his arrest and detention.
3
4 That as far as the validity of the Applicant's arrest or the warrant
5 of arrest and the order of transfer and detention are concerned,
6 the Respondents are adopting their arguments advanced in their
7 application for "Habeas Corpus" which is annexed to their reply.
8 That Rule 65 of the Rules of the Special Court is similar to Rule
9 65 of the Rules of Procedure and Evidence of the International
10 Criminal Tribunal for Yugoslavia (ICTY) as amended on the12th
11 of December, 2002.
12
13 That following Rule 65 and the jurisprudence of the ICTY,
14 detention is the rule and a release on bail, the exception, and
15 this, notwithstanding the deletion of the phrase 'in exceptional
16 circumstances' from Rule 65 in relation to granting bail to
17 detainees. The Respondent in so submitting, is urging me to
18 arrive at the same conclusion as did the ICTY, because the now
19 amended wording of their rule 65 is virtually the same with the
20 wording of Rule 65 of the Rules of Procedures and Evidence of
21 the Special Court.
22
23 That the Applicant will not appear for trial if released. In so
24 submitting, the Respondents state that the Court has no means
25 to execute its own warrant. That the conflict in this Country put
26 the regular Armed Forces and the Police of Sierra Leone in
27 disarray and that because they are just rebuilding and
28 reconstituting these forces, they will find great difficulty in
29 apprehending the Accused should he seek to evade a recapture
30 and his trial. The cases of Sam Bokarie, and Johnny Paul
31 Koroma, both of whom are still 'wanted persons' by the
32 Prosecutor of the Special Court tend to highlight the risk in

granting bail to the Applicant.

That if the Applicant is released and escapes to embattled Countries like Liberia or Ivory Coast, tracking him down or recapturing him to stand trial would be an up hill if not an impossible task.

Generally, the Respondents argued that the Applicant, on the submissions of his Counsel and even on the facts contained in his own sworn affidavit, does not fulfil the conditions spelt out in Rule 65 (B) of the Rules for bail to be granted to him.

In the course of the hearing on the 15th of July, 2003, Counsel for the Applicant urged me to dismiss the submissions of the Respondents on the grounds that they are said to have been filed on the 5th of June, 2000, a date long before the Special Court was even created. The Respondent in reply pleaded a typographical error as being at the origin of what the Applicant's Counsel was contending. He added that we should be concerned with the date on which the application was filed, that is, on the 5th of June, 2003. The Respondents explanation appears to me convincing. The correction of 2003 instead of 2000 is accordingly granted and is so ordered.

In reply to the submissions of the Respondents, Counsel for the Applicant made further submissions to restate what he raised in his earlier submissions including other arguments in reply to assertions and arguments made by Respondents.

Rule 65 of the Rules of Procedure and Evidence around which this controversy on bail is brewing stipulates as follows, and I would like to reproduce these provisions in extension:

65 (A) 'Once detained, an Accused shall not be granted bail except upon the order of a Judge or Trial Chamber'.

65(B) 'Bail may be ordered by a Judge or a Trial Chamber after hearing the State to which the Accused seeks to be released and on only if it is satisfied that the Accused will appear for his trial and if released will not pose a danger to any victim, witness or other person'.

In applying these provisions and as I earlier indicated, Counsel for the Respondents submits that they must be interpreted to mean that a release on bail or what in other words is referred to as a provisional release, constitutes an exception and continued detention, the rule. This interpretation by the Respondents of Rule 65 is based on case law from the International Criminal Tribunal of Yugoslavia (ICTY) as cited in their submissions.

It would be recalled however, that the original ICTY version of Rule 65 (B) reads as follows: "Provisional release may be ordered by a Trial Chamber only 'in exceptional circumstances' after hearing the host country and only if it is satisfied that the Accused will appear for trial and if released will not pose a danger to any victim, witness or other persons".

This ICTY version of Rule 65 was amended on the 17th of November, 1999, and came into force in ICTY on the 6th of December, 1999, in the following form:

65 (B) 'Release may be ordered by a Trial Chamber only after giving the host country and the state to which the Accused seeks to be released the opportunity to be heard and only if it is

1 satisfied that the Accused will appear for trial and if released will
2 not pose a danger to any victim, witness or other person'.
3
4 The amended version of this Rule, it is observed, no longer
5 contains the very strong component and the element of 'in
6 exceptional circumstances' which appeared to have been the
7 justifying factor for the silently developing legal concept
8 consecrating a 'Release on Bail' as being the exception and
9 'Continued Detention', the rule.
10
11 It would be recalled that the International Criminal Tribunal for
12 Rwanda, (ICTR) moving towards the direction of ICTY and of
13 the Special Court for Sierra Leone whose Rules were adopted on
14 the 8th of March, 2003, but without the phrase 'In exceptional
15 circumstances' also amended this same Rule 65 (B) at their
16 Plenary on the 27th of May, 2003, by striking out, like the ICTY
17 did, and I imagine for the same reasons, the phrase 'in
18 exceptional circumstances'.
19
20 What is interesting is that the Trial Chamber of the ICTY, even
21 after effectively deleting the phrase 'in exceptional circumstances',
22 from Rule 65 (B) on the 6th of December, 1999, still rendered a
23 majority judgement on the 8th of October, 2001, in the case of
24 the ***Prosecutor vs Momcilo Krajisnik*** and ***Biljana Plavsic,*** still
25 standing its earlier grounds that granting bail is the exception and
26 detention, the Rule. The Trial Chamber also appeared to have
27 adopted the principal that even where the Accused fulfils the
28 criteria for granting bail, the Court was not bound to grant the
29 bail.
30
31 In what however appears to be contrary to the *Krajisnik's* decision
32 and precisely in the case of the ***Prosecutor vs Brdanin*** on

provisional release, the Trial Chamber, still of the ICTY, clearly states that due to the fact that 'exceptional circumstances' were removed from the provisions of Rule 65 (B), the presumption is that release will now be the norm. In the case of ***Ilijkov vs Bulgaria*** *Case No. 33977196 of 26th July, 2001*, the European Court of Human Rights held that the burden of proof to establish the granting of bail may not rest with the Accused person, but on the Prosecution .

This very important and interesting case which was decided on the basis of a majority decision of two of the Honourable Learned Judges with a dissenting opinion by His Lordship the Honourable Judge Patrick Robinson. Honourable Judge Robinson, to highlight his reasoning succinctly, is of the opinion that at no time should detention, as his Colleagues decided, be the rule, and liberty, the exception. In so holding, he is of the opinion that the majority decision seriously compromises the right to liberty and is, to that extent, in contravention of International Customary Law principles and Conventions, particularly and amongst others, those of Article 9 Sub-Section 3 of the International Covenant of Civil and Political Rights, (the ICCPR). This Article provides as follows:-'It shall not be a general rule that persons awaiting trial shall be detained in custody but release may be subject to guarantees to appear for trial'.

To properly apply the provisions of Rule 65 (B), they must be interpreted by examining the language used and what the natural meaning is.

Under Rule 65, the following conditions for granting bail can be discerned by just an ordinary reading of the way it is worded.

1

2 -It is the Judge's discretion or that of the Trial Chamber to grant
3 bail.
4
5 -The Judge or the Trial Chamber will grant bail only after hearing
6 the State to which the Accused seeks to be released.
7
8 -The Judge or the Trial Chamber, in the exercise of that
9 discretion in favour of the Accused, only does so if he is satisfied
10 that the Accused will appear for trial.
11
12 -The Judge or the Trial Chamber should also be satisfied before
13 ordering his release that the Accused, if released, will not pose a
14 danger to any victim, or witnesses or other persons.
15
16 On the submission by the Respondent that continued detention
17 is the rule, and release on bail the exception, it is my opinion that
18 in applications of this nature, the onus is on the Applicant, as the
19 eventual beneficiary of the measure solicited, to satisfy the Judge
20 or the Chamber factually and legally, that he fulfils the conditions
21 necessary for the exercise of this discretion in his favour as
22 pleaded in his application. I am further and also of the opinion,
23 that thereafter, the Prosecution equally bears the burden, to
24 convince and satisfy the Judge or the Trial Chamber legally and
25 factually, that the Accused is not likely to fulfil the conditions
26 required to enable him to enjoy the benefit of the exercise by the
27 Judge or the Trial Chamber, of their inherent discretion to
28 release him on bail or not. In effect, just as the accused canvasses
29 for and justifies his release, the Prosecution bears the traditional
30 burden of equally demonstrating to the satisfaction of the Judge
31 or the Trial Chamber, that there are good reasons for continuing
32 to deprive the detainee of his fundamental human right to

1 liberty.

2

3 This position finds its justification in the provisions of Article 17
4 (3) of the Statute of the Special Court which is a restatement of a
5 well known, tested and surviving principle of Customary
6 International Law which is that the Accused shall be presumed
7 innocent until he is proven guilty, and that the burden of proving
8 his guilt lies with the Prosecution.

9

10 It would indeed be remarkable if the contrary were the case as it
11 would represent a major defection from global trends that
12 hitherto have accorded respect and an attachment to very
13 entrenched, tested, respected and universally accepted principles
14 of Customary International Law, particularly where they touch on
15 and affect the liberty of the individual which is one of the most, if
16 not the most sacred and most frequently abused of all
17 fundamental human rights that exist and are internationally
18 recognised.

19

20 Guided by these principles, I will now turn to examine the issue
21 of whether the Applicant, Mr. Tamba Alex Brima, from his sworn
22 affidavit and the submissions of his Counsel, meets the legal
23 criteria for a release on bail.

24

25 In his long affidavit, the Applicant pledges amongst other things,
26 that he will appear for trial if released on bail and that he will not
27 pose a danger to any victim, witness or any other person. He says
28 he is married and has one child.

29

30 However, considering the gravity of the offence for which he is
31 charged, no evidence has been adduced nor has any fact been
32 sworn to, as to the availability of enough guarantees at his

1 disposal in the event of the Court being minded to grant him bail
2 in application of Rule 65 (D) of the Rules of Evidence.
3
4 The Respondent has highlighted the fact that the offences for
5 which he is indicted are of particular gravity and that if granted
6 bail, the Applicant would not appear for trial. They further argue
7 that the Sierra Leonean Police force is in a stage of
8 transformation and that if the accused escapes through the very
9 permeable frontiers, it would be difficult to recapture him as is
10 the case up to date, of other indictees like, Sam Bokarie and
11 Johnny Paul Koroma. The Representative of the Honourable and
12 Learned Attorney General, representing the State of Sierra
13 Leone, has, in accordance with the provisions of Rules 65 (B),
14 made both written and oral submissions which are on the same
15 lines as those of the Respondent and like the latter, he is urging
16 the Court to refuse Mr. Tamba Alex Brima's application for bail.
17
18 In considering applications for bail under Rule 65 (B), the
19 greatest apprehension that surfaces immediately and at all times is
20 the possibility of the accused, if released, to appear or not to
21 appear for his trial. In this regard, it is important to consider a
22 number of other factors which are not incompatible with the
23 spirit of the elements in Rule 65 (B) and which are linked to the
24 element of a possible flight of the accused, namely, the gravity of
25 the offences for which he is indicted, the character, antecedents
26 and association of the accused, and community ties which he has,
27 and which the accused enjoys in society, including a possible
28 interference with the course of justice like posing a danger to
29 victims or witnesses and other persons. Another factor to be
30 addressed and considered in granting or refusing bail in a case of
31 this nature is the need and imperatives to preserve public order.
32

In the circumstances and the facts of the case before me, coupled with the flight of indictees, actual and potential, as have already been referred to, I would like to refer to the decision of ***Stogmuller vs Austria*** 1 EHRR 155, where it was decided that 'on the risk that the Accused would fail to appear for trial, bail should be refused where it is certain that the hazards of flight would seem to be a lesser evil than continued imprisonment'. In yet another case of ***Neumeister vs Austria*** 1 EHRR 91, it was observed that in granting bail, it is relevant to consider the character of the person, his morals, his home, his occupation and his assets.

In the present case, the Applicant does not exhibit any assets to show to the satisfaction of the Court, his stakes and attachment in the society to which he is seeking to be released. Besides, there is a lot of scepticism in the engagements he has made in his own personal affidavit. In the case of *Momcilo Krajisnik* the majority judgement of the ICTY had this to say, and I quote;

"As to the undertakings given by the accused himself, the Trial Chamber cannot but note that it is given by a person who faces a substantial sentence if convicted and therefore has a considerable incentive to abscond". These comments indeed hold good for the contents of the Applicant's affidavit.

One other important factor to be considered in adjudicating on applications for bail is the preservation of public peace. In the case of *Letellier vs France* 14 EHRR 83, it was decided that where the nature of the crime alleged and the likely public reaction is such that a release of the Accused may give rise to public disorder, then, a temporary detention or remand may be justified. In the *Letellier* case, Mrs. Letellier, twice a divorcee, was running a

restaurant and living with a third husband. She hired killers who assassinated her ex- husband. Arrested and detained, she applied for bail which was refused on the grounds that the social repulsion and resentment to her crime was such as would disturb the public peace if she were released on bail.

Counsel for the Applicant has, in canvassing for bail, again raised the argument of the illegality of the detention and of the warrant of arrest and of detention, just as he did in his application for Habeas Corpus for this same Applicant. He has also raised the mistaken identity of his client, and the fact that the warrant of arrest did not contain a specific mention ordering the arrest of his client who he says is called ' Tamba Alex Brima' and not ' Alex Tamba Brima' .

After a thorough examination of all the arguments so advanced, I disagree with the contention of the Respondent that the legality of the arrest and detention of an Accused person is not relevant in an application for bail. I do not agree either with the further submission by the Respondent that by applying for bail in this case, the Accused has conceded to the legality of his arrest and of his detention. These submissions are too dangerous and hazardous to be accepted in criminal law and practice particularly in the light of the doctrine and privilege of the presumption of the innocence which a detained person enjoys and the possibility offered him to contest by all available means and at all times, the legality of his detention, which is just what this Applicant has in fact been doing all along. These two submissions by the Respondent are accordingly dismissed as frivolous, baseless, and contrary to the principles on which criminal law and the fundamental principles of Customary International Law are based and administered.

1

2 This said, I will now turn to the illegalities and arguments raised
3 by the Applicant in support of the application for bail. The
4 following are the main points amongst others raised in support of
5 the illegalities.

6

7 -That the Applicant is called Tamba Alex Brima and not Alex
8 Tamba Brima.

9

10 -That he has never served in the Sierra Leonean Army and could
11 therefore not have risen to the rank of a Staff Sergeant as alleged
12 in the indictment.

13

14 -That the warrant of arrest was defective in that it did not
15 explicitly order the arrest of his client, thereby rendering his
16 arrest and detention, illegal.

17

18 -That Rule 47 was not complied with in signing the indictment,
19 thereby rendering it illegal.

20

21 As far as the first and second points are concerned, these, in my
22 considered opinion, are matters to be examined during the trial
23 because the Applicant was charged both as Alex Tamba Brima
24 and as Tamba Alex Brima, the latter which he claims to be his
25 real name.

26

27 As to the alleged defect on the warrant of arrest and of detention,
28 it is observed that even though there is no express order ordering
29 the arrest of the Applicant, the said warrant of arrest and of
30 detention were issued against him and in names with which he is
31 now identified. As regards the other allegations related to his
32 identity, the Trial Chamber would be the proper venue to

1 resolve all the issues so raised.

2

3 In concluding I observe that the Applicant is indicted for having
4 allegedly committed very serious crimes against humanity and the
5 People of Sierra Leone, the State to which he seeks to be released.

6

7 Having regard to the foregoing analysis of the facts and
8 arguments raised in the examination of his Application and
9 considering;
10 Firstly, the likely possibility of his escaping or the probable
11 impossibility of locating or recapturing him if released, or
12 Secondly, the likelihood of a public disorder, and
13 Thirdly, the possibility of likely recriminations, as was raised in
14 the Letellier Case,
15 all of which are possible consequences that his release may
16 provoke in this society where very deep wounds caused by the
17 civil war are still healing, it is my considered opinion that this
18 Application, notwithstanding the contents of the written
19 submissions and arguments advanced by Learned Counsel on the
20 Applicant's behalf, lacks any credible merit and therefore fails to
21 satisfy the conditions laid down in Rule 65 of the Rules of
22 Procedure and Evidence, to warrant the exercise in his favour, of
23 the discretion to grant bail or a provisional release.

24

25 The Application is accordingly dismissed.

26

27 The Applicant will remain in custody pending his trial.

28

29

30

1 Done at Freetown, this 22nd day of July 2003

2

3

4

5 HIS LORDSHIP, THE RT. HON. JUDGE BENJAMIN MUTANGA ITOE.

6

7

8

9

10 Seal of the Special Court

11