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SCSL-2004-15-PT
(336 - 342)

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IN THE SPECIAL COURT FOR SIERRA LEONE

THE TRIAL CHAMBER

Before: The Trial Chamber
Judge Bankole Thompson presiding
Judge Benjamin Itoe
Judge Pierre Boutet

Registrar: Mr Robin Vincent

Date filed: 19th February 2004

Case No. SCSL 2004 – 15 – PT

In the matter of:

THE PROSECUTOR

Against

**ISSA SESAY
MORRIS KALLON
AUGUSTINE BAO**

**RESPONSE TO PROSECUTION'S MOTION TO AMEND THE
INDICTMENT**

Office of the Prosecutor

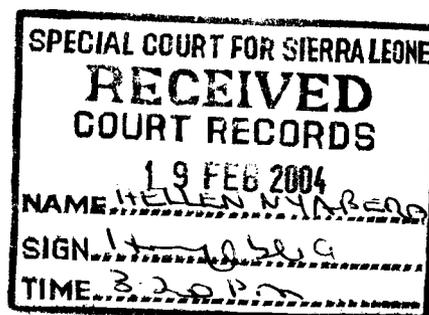
Mr Luc Cote, Chief of Prosecutions
Mr Robert Petit

Counsel for Augustine Bao

Mr Girish Thanki,
Professor Andreas O'Shea
Mr Kenneth Carr

Counsel for co-accused

Mr Timothy Clayson for Issa Sessay
Mr James Oury and Mr Steven Powles for Morris Kallon



A. Procedural background

1. The indictment against Augustine Bao was confirmed on 16 April 2003. The indictments against his co-accused on the current indictment (as amended on) were confirmed a little earlier on 7th March 2003. The initial appearances of these accused then took place on the 15, 21 and 25th March before their Honours Judge Itoe and Thomson respectively;
2. The current indictment results from an amendment ordered by the Trial Chamber after a decision to join the indictments against the said three accused. The substance of the allegations against the accused have not changed as a result of their joinder into one consolidated indictment;
3. The prosecution now submits a request to amend the indictment by adding a fresh and different count, that is forced marriages. This is a count which is factually and legally quite distinct from any existing count. Yet the prosecution does not offer a proper factual and legal basis for its request. It produces no supporting material or fresh evidence to justify the said count in support of its motion to amend. It further has not demonstrated why the count or the evidence to support it could not have been included in the original charges, forming the basis of the arrest of the accused, or at least before the respective indictments were approved;
4. The prosecution further wishes to amend certain time periods and places for offences. Save in one respect the prosecution fails to demonstrate that it has come into possession of fresh evidence that could justify seeking an amendment at this stage of the proceedings;
5. The prosecution further seeks an amendment in proposal I by way of including alternative spellings to place names. The defence has no objection to these amendments;

B. Nature of discretion to grant or refuse leave to amend in terms of Rule 50 of the Rules of Procedure and Evidence

6. While it is the prerogative of the Prosecutor to amend the indictment, this prerogative is supervised by the Trial Chamber. The Prosecutor has an opportunity to amend the indictment without leave before its approval. Once it has been approved it becomes the premise of the trial. Thereafter, the Trial Chamber has a discretion whether to grant or refuse further requests for amendment. In *Prosecutor v Niyitigeka* and also in *Prosecutor v Bizimungu* it was aptly noted that ‘once the indictment is confirmed, the Prosecutor’s power to confirm an indictment is not unlimited and must be considered in the light of the overall interests of justice as envisaged by Rule 50(A)’;¹

7. It is respectfully submitted that in order to preserve the integrity of proceedings and ensure the highest standards of fairness in a trial the Trial Chamber has the right and duty to closely scrutinise any request for amendment that is made after the approval of the indictment. It is further submitted that such supervision of the prosecution’s amendments should become stricter after the accused has pleaded to the indictment, exercising greater caution in permitting amendments as the trial approaches. It is submitted that this follows if the rights of the accused to fair and prompt notice of the charges, knowledge of the basis of his arrest, a speedy trial and the right to adequate time and facilities to prepare for trial are all to be respected;

8. It is therefore submitted that the discretion of the Trial Chamber is a broad one, but one which should be exercised having full regard to the rights of the accused and reasonableness of the conduct of the prosecution;

C. Supporting material or fresh evidence

9. When requesting leave to amend the indictment the prosecution clearly has the onus to establish the factual and legal basis of the proposed amendment.² The prosecution seems to interpret the notion of factual basis to mean the factual grounds for the count, when it is submitted what is also important is the factual context of its failure to seek an amendment at an earlier stage. The prosecution does not indicate if or when it has received any fresh evidence to substantiate the proposed new count of forced marriages. It simply states that it will rely on existing disclosure on the defence. Furthermore, the prosecution has failed to show why it could not have sought the proposed amendment at an earlier stage. It is respectfully submitted that, when requesting leave to amend, the prosecution must establish a factual premise to its request for leave, and afford the defence an opportunity to respond to that asserted factual basis. It is submitted that the onus to establish the basis of the prosecution's request has not been discharged in this case and that such leave should therefore not be granted.

D. Due diligence on the part of the prosecution

10. It is respectfully submitted that the Trial Chamber, before granting leave to amend after it has approved an indictment, must be satisfied that there are good reasons why the inclusion of the new count or the amendment of the indictment could not have been sought at an earlier stage. It is submitted that the prosecution must not be permitted to take a tactical advantage of the defence through the unnecessarily late inclusion of a count in an indictment.³ The prosecution has exclusive knowledge of the extent and nature of its investigations. Thus, the prosecution's bone fides and reasonableness in

¹ See *Prosecutor v Bizimungu et al* (Government II), , ICTR 99-50-I, Decision on the Prosecutor's Request to File an Amended Indictment, 6th October 2003 par 26

² See *Prosecutor v Bizimungu et al* (Government II), ICTR 99-50-I, Decision on the Prosecutor's Request to File an Amended Indictment, 6th October 2003 (Trial Chamber II).

³ See *Prosecutor v Karamera et al* (Government I)ICTR 98-44-T, Decision of 19th December 2003 (AC); and *Prosecutor v Kovacevic*, Decision stating reasons for Appeals Chamber's Order of 29 May 1998, 2 July 1998

seeking a particular amendment can only be monitored by the defence and the court if the prosecution has established the factual basis of its proposed amendment with sufficient clarity to enable the conduct of the prosecution to be discernable. Again, the defence should be in a position to respond to the prosecution's request, based on the its assertions in this respect;

11. In principle, although the prosecution may conduct continuing investigations, it is submitted that it has a duty to inform the accused of the charges against him at the earliest opportunity. This follows from the requirement, enshrined in article 17(4)(a) of the Statute of the Special Court for Sierra Leone and international instruments including articles 9 and 14 of the International Covenant on Civil and Political Rights of 1966,⁴ article 6(3)(a) of the European Convention of Human Rights and articles 7(4) and 8(2)(b) of the American Convention on Human Rights,⁵ that the accused be informed promptly of 'all' the charges against him. This principle not only protects the accused from unlawful arrest but also incorporates the notion that the accused should know the whole case against him as soon as possible to preserve the integrity and fairness of the trial. The duty to supply prompt information on charges also follows from the right to time and facilities to prepare one's case as well as the right to a speedy trial;

12. In this case the prosecution's motion does not clarify or afford the defence an opportunity to respond as to the extent to which the prosecution has acted with diligence in seeking the proposed amendment. The defence and the court are not appraised of the necessary information as to whether or when fresh evidence was obtained and what prevented the inclusion of this count at an earlier stage;

E. Justification of resultant delay

⁴ Articles 9 and 14 (3) (a) differ to the extent that the former relates specifically to the time of the arrest, whereas the latter is expressed in general terms. Article 14(3)(a) provides for the right 'to be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him.

⁵ Articles 7(4) and 8(2)(b) differ to the extent that the former relates specifically to the time of the arrest, whereas the latter is expressed in general terms. Article 8(2)(b) provides for the right to 'prior notification to the accused in detail of the charges against him'.

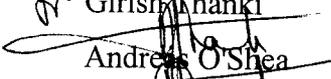
13. While a trial date has not been set at the date of this response, one may have been set by the time the court decides this question, since a status conference is envisaged for the beginning of March 2004. In all the circumstances including the limited budget of the court it should be clear to all parties that the setting of a trial date is imminent and likely to be envisaged for a date as early as the month of May 2004. If the proposed amendment is accepted, the prosecution may seek to disclose further witness statements (a matter on which there is no clarity from the prosecution motion) and the defence may require additional time to investigate the substance of the additional charge. Furthermore, the inclusion of this proposed count will require a further initial appearance of the accused and a period of fourteen days for the defence to file further preliminary motions in terms of Rule 50 (B) and (C). This may require a postponement of the commencement of the trial or the presentation of evidence depending on the nature of the preliminary motions submitted. The prosecution suggests that the defence would need no further time to prepare since its proposed change is a matter of legal characterization. However, the accused had no previous notice that the particular charge of forced marriages formed part of the prosecution case. The reference to other inhumane acts is far too vague for this purpose;
14. The prosecution refers to the case of *Prosecutor v Karamera et al*, decided before the Appeals Chamber of the International Criminal Tribunal for Rwanda, for its proposition that there has not been undue delay. The Appeal Chamber in that case referred the matter back to the Trial Chamber on the basis that it had taken into account irrelevant considerations and not taken into account relevant ones. The Trial Chamber subsequently, on 13th February 2004, decided to grant the prosecution's amendment partially.⁶ However, the case was very different from the present one since in its arguments before the Trial Chamber the prosecution relied on fresh evidence discovered or obtained subsequent to the confirmation of the indictment and developments in the jurisprudence as a justification for not having made its proposed amendments

earlier. In its decision on amendment of 13th February 2004, the Trial Chamber examined in detail the prosecution's assertion of fresh evidence in order to determine whether the prosecution had acted with due diligence in seeking its amendment.

15. For such reasons, it is submitted that, having regard to the accused right to be tried without undue delay under article 17(4)(C) of the Statute, the prosecution's delay in seeking its amendment can only be justified to the extent that it can demonstrate that any consequent further delays are a reasonable sacrifice having regard to inter alia its own diligence and do not cause prejudice to the accused. It is submitted that this onus has not been discharged.

THEREFORE THE DEFENCE HEREBY MAKES THE FOLLOWING PRAYER:

It is respectfully requested that the prosecution request to amend the indictment be rejected save in the one respect indicated hereinbefore at paragraph 5 of this response.


for Girish Thanki

Andrew O'Shea

for Kenneth Carr

⁶ *Prosecutor v Karamera et al (Government I)*, (TC III-ICTR) Decision Relative a la Requete du Procureur aux Fins d'Etre Autorise a modifier l'Acte d'Accusation, 13th February 2004