501) SCSL-04-15-T (18205 - 18220) 18205

SPECIAL COURT FOR SIERRA LEONE
THE TRIAL CHAMBER

CASE NO. SCSL-04-15-T

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

Registrar: **Mr. Lovemore G. Munlo**

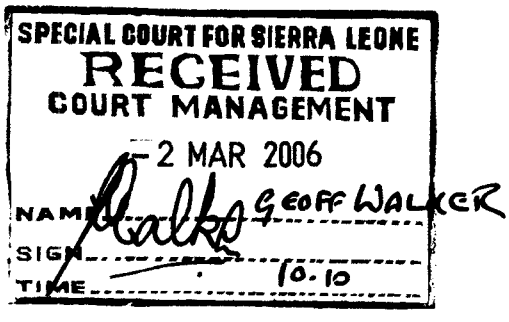
Date Filed: **1 March 2006**

PROSECUTOR **Against** **Issa SESAY**
Morris KALLON
Augustine GBAO

PUBLIC
DEFENCE RESPONSE TO PROSECUTION APPLICATION FOR LEAVE TO AMEND THE INDICTMENT ON BEHALF OF THE SECOND ACCUSED, MORRIS KALLON

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

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



The Defence for Morris Kallon hereby files its Response to the Prosecutor's Application dated 20 February 2006 for Leave to Amend the Indictment as follows:

FACTS AND BACKGROUND

1. On 7 March 2003, Justice Bankole Thompson approved the Indictment against the accused, Morris Kallon hereinafter referred to as the "Original Indictment". Kallon was arrested on 10 March 2003 and made his initial appearance on the single indictment before Justice Benjamin M. Itoe.

2. By Decision dated 27 January 2004, the Original Indictment against the individual accused, Issa Sesay, Morris Kallon and Augustine Gbao, were joined and a Consolidated Indictment filed on 5 February 2004, hereinafter referred to as the "Consolidated Indictment".

3. The Consolidated Indictment substantially modified and altered the allegations against the three Accused as contained in their respective Original Indictment, by the addition of a plethora of new allegations involving more Crime Base areas or locations and extensions of the time frames as charged in the Original Indictments. (See Paragraphs 10 and 11 of Kallon's Motion for Quashing of Consolidated Indictment filed on 10 February 2004).

4. On 9 February 2004, the Prosecution further sought the Leave of the Trial Chamber to amend the Consolidated Indictment by the addition of an entirely new count on Forced Marriage, and making corrections and/or modifications by way of extension of time frames in respect of some paragraphs, 71 and 23 to wit and some alterations to the Crime Base Areas or locations in the Consolidated Indictment (See Paragraph 5 of the Request for Leave to Amend the Indictment filed on 9 February 2004).

5. By Majority Decision of the Trial Chamber of 6 May 2004, Justice Bankole Thompson Dissenting, the Prosecution's Motion to Amend the Consolidated Indictment was allowed.

6. Before that Prosecution had filed their Pre-Trial Brief on 1 March 2004 and the Trial of Morris Kallon and his Co-accused commenced on 5 July 2004.

7. According to the Prosecution Updated Witness List filed on 20 February 2006, the Updated Witness List consists of 95 "Core Witnesses", 57 of whom have already testified and 170 "Back-Up Witnesses". The Prosecution anticipates that

the additional witnesses will be moved from the "Core List" to the "Back-Up List" (See Paragraph 5, Public Prosecutor's Updated Witness List dated 20 February 2006.)

8. At this stage of the proceedings and before the commencement of the 7th RUF Trial Session slated for the end of February 2006; and, notwithstanding the series of substantial alterations, modifications and/or amendments already allowed the Prosecution so far by the Trial Chamber; to the extent that their case against the Accused, Morris Kallon as initially framed in the Original Indictment is now substantially different with the introduction of new locations, new allegations and new extended time frames in the Amended Consolidated Indictment; the Prosecution now seeks Leave of the Trial Chamber by the Application filed on 20 February to further amend the Amended Consolidated Indictment to extend time frames for the Kono District Crime Base or location.

9. The Prosecution seek to extend the time frame laid by about One and a half years, from "Between about 14 February 1998 and 30 June 1998" to "Between about 14 February 1998 and 31 January 2000", in respect of the alleged offences of unlawful killing (Paragraph 48, Counts 3-5); Physical Violence (Paragraph 62, Counts 10-11); and Looting and Burning (Paragraph 80, Count 14), asserting that some witnesses who have testified before the Trial Chamber in relation to these crimes in Kono District have given evidence that indicates and suggests that some of the alleged crimes may have fallen outside the specific time frame already laid in the Amended Consolidated Indictment. Examples of this are given in Annex A attached to the Prosecution Application.

PROSECUTION ARGUMENTS

10. The Prosecution do not concede that an Amendment to the Indictment is even necessary in such circumstances, putting heavy reliance on the Common Law Principles expounded in *Dossi*, that if evidence at trial as to time differs from the date laid in the Count, that is not as a rule fatal to a conviction.

11. However, the Prosecution submit that it is good practice nevertheless in such circumstances to seek an amendment to the Indictment, to make the stated time periods consistent with the evidence before the Trial Chamber.

12. They further argue that there will be no need to recall any witness and no prejudice will be caused to the Accused, in that all the witnesses concerned in the present case were extensively cross-examined in respect of other Counts. More particularly, Counts 1 and 2 (Terrorizing the Civilian Population and Collective Punishments), incorporating all the other Counts laid in the Indictment and Paragraph 71 of Count 13 (Abductions and Forced Labour) in respect of Kono District, which has a broader time period to January 2000, by Leave to Amend allowed the Prosecution by the Trial Chamber.

DEFENCE ARGUMENTS

13. The Witness statements of the disputed witnesses who testified on material facts outside the scope of the Indictment were disclosed to the Defence on the following dates:

    a. TF1-304: Disclosure of the statement dated 16 November 2002 on 7 February 2004.
    b. TF1-012: Disclosure of the statements dated 16 November 2002 and 27 January 2004 on 26 May 2003 and 18 March 2004 respectively.
    c. TF1-263: Disclosure of the statements dated 21-22 September 2003 on 10 December 2003.
    d. TF1-362: Disclosure of the redacted statements dated 25 May 2004
    e. TF1-141: Disclosure of the unredacted statement dated 6 April 2003 on 26 May 2003. Disclosure of the unredacted statements dated 31 January 2003, 23 February 2003, 24 February 2003 and 4 April 2003 on 6 September 2003.

14. Accordingly, there is a protracted interval within the range of 9-24 months between the Prosecutor's discovery of the evidence alleged to be in support of the proposed new amendments, and the filing of the instant application for Leave to Further Amend the Amended Consolidated Indictment.

15. The Prosecution have on two different occasions modified and altered the Original Indictment; once on Consolidating without leave and the other after Consolidating by Leave to Amend allowed. The timing therefore of the present application to further amend the Indictment at this stage in the proceedings ought to bear heavily in the minds of the Chamber.

16. The Defence further adopts the view expressed by Justice Bankole Thompson in his Dissenting Opinion of 6 May 2004 disallowing the Prosecution Motion for Leave to Amend. That Rule 50 (a) should be interpreted "in the light of the autonomous and unique juridical features and other related factors of this tribunal in the peculiar context of its own specific needs, mandates and realities as an adjudicating body of alleged offences of not only grave international import, but also of crimes of equally grave dimensions under certain Laws of Sierra Leone", and that a proper construction of the Rule may be predicated upon the doctrine that where an indictment alleging the commission of grave crimes against international law has been approved, there should be a presumption against amendment unless the circumstances of the case so dictate.

AMENDMENTS INVOLVE ADDITIONAL NEW CHARGES

17. The Prosecutor alleges that the amendments sought relates 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.[1] The Defence, in accordance with the latest jurisprudence, considers that the test to be applied in filing an amended indictment at this stage of the proceedings is whether or not these new particulars constitute new charges. In the case of *The Prosecutor v. Tharcisse Muvunyi* at the ICTR, the Trial Chamber held the following reasoning:

> The Chamber recalls the Tribunal's jurisprudence that a motion to amend an indictment may generally be allowed for any of the following purposes: (a) adds new charges; (b) develop the factual allegations found in the confirmed indictment; and (c) make minor changes to the indictment.[2] The Chamber, however, notes that proposed amendments which add new charges are more problematic and thus require greater scrutiny and analysis in order to avoid prejudice to the rights of the Accused. It bears emphasizing that the reason for caution when new charges are added is not merely because the charges are new, for new charges in themselves do not impugn a motion to amend an indictment. It is the interest of justice in the particular circumstances of the case that make it so.[3]

18. The Defence for Morris Kallon contends that the expansion of the timeframes of the indictment constitutes news charges and should be considered very carefully by the Trial Chamber. Although the counts of the unlawful killings, physical violence and looting and burning are already stated in the Indictment, the expansion of the timeframes by about one and a half years would definitely constitute new charges in the sense of Rule 50 of the Rules of Procedure. Indeed as stated in the *Muvunyi* Decision, "some of the material contains expanded allegations that do in fact amount to new charges". [4]The Trial Chamber then gives an example in the following terms: "It is the Chamber's view that the proposed change does broaden the time frame for which the Defence may need to conduct investigations and prepare its case".[5]

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[1] Prosecution Application, para. 4.

[2] *The Prosecutor v. Casimir Bizimungu et al.*, Case No. ICTR-99-50-I, Decision on the Prosecutor Request for leave to File an Amended Indictment, 6 October 2003, para. 26.

[3] *The Prosecutor v. Tharcisse Muvunyi*, Case No. ICTR-00-55A-PT, Decision on the Prosecutor's Motion for Leave to File an Amended Indictment, 23 February 2005, para. 35. (emphasis added)

[4] *The Prosecutor v. Tharcisse Muvunyi*, (ICTR) Case No. ICTR-00-55A-PT, Decision on the Prosecutor's Motion for Leave to File an Amended Indictment, 23 February 2005, para. 40.

[5] *Ibid.*, para. 41 (i).

19. Furthermore, the new time frame given by the Prosecutor is too large and not precise enough considering the requirements of the jurisprudence developed by International Criminal Tribunals. It is clear that from several decisions that "if a precise case cannot be specified, a reasonable range of dates shall be provided".[6] This Trial Chamber has adopted the same view in framing the Indictment in time in this instant case.[7] The Defence considers that the time frame alleged by the Prosecutor, namely that events took place in the Kono District "between about 14 February 1998 and 31 January 2000 instead of 30 June 1998" is way too broad to allow the Defence to effectively prepare its defence. As stated in the case of *The Prosecutor v. Laurent Semanza*, on a similar issue:

> Paragraph 3.9 alleges that the Accused trained and distributed weapons to *Interahamwe* "as early as 1991 . . . until 1994". These paragraphs allege in a general way instances of specific conduct which, if proven, are either criminal or could be used to infer *mens rea* in support of a criminal conviction. The Indictment's use of these exceedingly broad date ranges provides grossly inadequate notice of particular conduct or events, making it difficult for the Accused to prepare his defence. Though the Prosecutor is allowed a degree of latitude where the exact dates of events are not known to her, the one to four year ranges in paragraphs 3.7, 3.8, and 3.9 are not acceptable, particularly where the allegations are devoid of any other detail that might assist the Accused in identifying the events alluded to in the Indictment.[8]

PREJUDICE TO THE ACCUSED

20. The Defence is of the view that what the Prosecutor seeks to do is likely to cause substantial prejudice to the right of the Accused to a trial without undue delay as well as to his right to prepare his defence and is likely to extend the length of the trial.

21. The Defence wishes to recall that, very often, the Trial Chamber denied the application to file an amended indictment, which brought new charges, due to the stage of the Proceedings. In both cases quoted above, namely, *The Prosecutor v. Casimir Bizimungu et al.* and *The Prosecutor v. Tharcisse Muvunyi*, the application was rejected on the ground that the trial was scheduled to start a

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[6] *The Prosecutor v. André Ntagerura et al.*, (ICTR) Case No. 96-10-T, Judgment, 25 February 2003, para. 32. See also *The Prosecutor v. Brdjanin and Talic*, (ICTY) Case No. IT-99-36-PT, Decision on Objection by Momir Talic to the Form of the Indictment, 20 February 2001, para. 22).

[7] *The Prosecutor v. Sesay et al.*, Case No. SCSL-04-15-T, Decision and Order on Defence Preliminary Motion for Defects in the Form of the Indictment, 19 November 2003, para. 7.

[8] *The Prosecutor v. Laurent Semanza*, (ICTR) Case No. ICTR-97-20-T, Judgment and Sentence, 15 May 2003, para. 50. (emphasis added)

month later. The Trial Chambers also considered that the expansions amounted to substantial changes which would cause prejudice to the Accused and that the substantial changes would necessitate that the Accused be given sufficient time to prepare his defence. Being mindful of the length of the trial and the need to complete the cases as soon as possible in light of the completion strategy, the Defence, considers that it would be highly inappropriate to adjourn the proceedings and is definitely not wiling to request an adjournment. However, considering the scale of the changes, the affect the substantial changes of the timeframe will have on the case and the necessity of the Defence to conduct further investigation, the Defence fears that it will need some time to prepare.

22. The Defence also relies on the observation of the English Court of Appeal in *R v. Johal and Ram*[9], as opposed to the *Dossi* Principle espoused by the Prosecution, to the effect that:

"The longer the interval between the arraignment and amendment, the more likely it is that injustice will be caused and in every case in which amendment is sought, it is essential to consider with great care whether the accused person will be prejudiced thereby."

The Defence submits that the protracted interval of 9 – 24 months since discovery of the evidence by the Prosecution before filing of the Application for Leave to Amend amounts to undue delay; a delay which is bound to cause prejudice against the Defence, and which if ignored will defeat the judicial guarantees and safeguards of the rights of the accused to be tried fairly and expeditiously.

23. It is submitted further that the Amendment sought if allowed will be unfair because the factual basis of the Prosecution Case on Command Responsibility of the Accused, Morris Kallon will change very significantly by the intended extension of the time frame by one and a half years and so confront him with a different and more difficult case than so originally framed, at this stage of the proceedings. Paragraphs 24 – 28 of the Amended Consolidated Indictment are relevant here.

24. The Defence is entitled to confine its attention to the case against the Accused, Morris Kallon as framed up to the time of the Amended Consolidated Indictment before the trial commenced. It is not entitled, let alone obliged, to fashion its defence to meet charges with the Prosecution might later choose to prefer by way of amendment. Accordingly, the Prosecution having resisted the need to amend, although armed with the necessary evidence long before, and only chose to do so at this stage of the proceedings , there was therefore nothing in the conduct of their case which could have led the Defence to regard the amendment as their preferred course.

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[9] 56 Cr. App. R348

25. The Defence therefore submits that the Prosecution should not be allowed to chop and change or shift the goal post each time it suits them and whenever they feel they have got it wrong, as the trial progresses. In doing so, the Accused would be deprived of the opportunity to mount the defence he would have mounted had the Prosecution Case been put in the way they now choose from the beginning or at an earlier stage than now.[10]

26. Finally, Rule 50 (B) of the rules of Procedure provides that that the Accused plead to any new charges before the Trial Chamber while the Accused will also have ten days to file preliminary motions according to Rule 50 (B) (iii). The Defence is worried that this new pleading will inevitably affect the speedy conduct of the proceedings and the right of the accused to be tried without delay.

27. The Defence considers therefore that it would not be in the interests of justice to grant the Prosecution Application.

LACK OF DUE DILIGENCE

28. The Accused has a right to be informed of the charges against him pursuant to Article 17 (4) (a) of the Statute. The Accused shall be promptly informed of the charges as well as the material facts supporting the charges. An indictment needs to be charged with sufficient precision "to ensure the integrity of the proceedings against an Accused person and to guarantee that there is no undue procedural constrains or burdens on his ability to adequately and effectively prepare his defence."[11]

29. The Defence is of the view that the lack of diligence of the Prosecution is an important factor to be considered in whether to grant leave to amend.[12] The witnesses the Prosecutor relied upon in order to seek to amend the Indictment testified in the first four trial session, meaning between July 2004 and now. After a careful review of the dates the Prosecutor obtained the statements of the witnesses and the dates these witnesses were called to testify, it is clear that the Prosecutor has delayed the filing of an amended Indictment. When the Prosecutor first led evidence outside the temporal scope of the Indictment, he should have immediately applied for leave to file an amended Indictment. As he stated himself

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[10] See O' Connor [1997] Crim. L.R 516

[11] *The Prosecutor v. Sesay et al.*, (SCSL), Case No. SCSL-04-15-T, Decisionn on Order on Defence Preliminary Motion for Defects in the Form of the Indictment, 13 October 2003, para. 6. See also, *The Prosecutor v. Kanu*, (SCSL), Decision on Defence Preliminary Motion on Defects in the Form of the Indictment, 1 April 2004, para. 33.

[12] See *Archbold International Criminal Courts, Practice Procedure and Evidence*, Sweet and Maxwell, 2005, para. 6-79.

in paragraph 14 of his Application, "there would have been little purpose in bringing it immediately after the evidence of the first witness to events in Kono District differed from the Indictment in terms of the timing of the events".

30. The Defence strongly disagrees with such a statement. In fact, the position of the jurisprudence on the issue is that the Prosecutor should have immediately filed his application, right after the first witness was heard. In the case *of The Prosecutor v. Karemera et al.*, the Trial Chamber considered that the Prosecution "should not attempt to include new charges in an amended Indictment where the allegations are, in fact, not new, but with due diligence, could have been found and charged in the confirmed Indictment". The Defence considers that it was the Prosecutor's duty to investigate further and find out whether any of the witnesses he intended to call were likely to testify on events outside the temporal scope of the Indictment.[13]

31. The Prosecutor has failed to fulfil his obligation of due diligence and should therefore not be authorized to file an amended Indictment.

32. Finally, it is a general rule in almost all legal systems that the Prosecutor is expected to know its case before it goes to trial. As stated:

> As a general matter, "the Prosecution is expected to know its case before it goes to trial" and cannot expect to "mould" the case against the accused in the course of the trial depending on how the evidence unfolds."[14] If the Defence is denied the material facts of the accused's alleged criminal activity until the Prosecution files its pre-trial brief or until the trial itself, it will be difficult for the Defence to conduct a meaningful investigation for trial until then.[15]

[13] *The Prosecutor v. Karemera et al.*, (ICTR), Case No. ICTR-98-44-I, Decision on the Prosecutor's Motion for Leave to Amend an Indictment, 13 February 2004, para. 25.

[14] *The Prosecutor v. Kupreskic et al.*, Case No. IT-95-16-A, Judgement, 23 October 2001, para. 92.

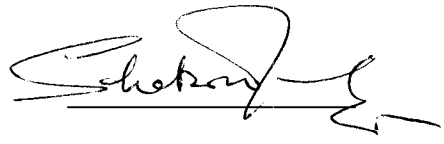
[15] *The Prosecutor v. Elizaphan and Gérard Ntakirutimana*, Case No. ICTR-96-10-A & ICTR-96-17-A, Judgment, 13 December 2004, para. 26.

CONCLUSION

For the above mentioned reasons, the Defence Team for Morris Kallon requests the Trial Chamber to dismiss the Prosecution Application for Leave to Amend the Indictment in its entirety as prayed.

Respectfully Submitted on this **1st Day** of March 2006.

Counsel for the Second Accused.



Shekou Touray
Charles Taku
Melron Nicol-Wilson
Rachel Irura

ANNEX A

LIST OF AUTHORITIES

The Prosecutor v. Karemera et al., (ICTR), Case No. ICTR-98-44-I, Decision on the Prosecutor's Motion for Leave to Amend an Indictment, 13 February 2004

The Prosecutor v. Kupreskic et al., Case No. IT-95-16-A, Judgement, 23 October 2001

The Prosecutor v. Elizaphan and Gérard Ntakirutimana, Case No. ICTR-96-10-A & ICTR-96-17-A, Judgment, 13 December 2004

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

The Prosecutor v. Sesay et al., (SCSL), Case No. SCSL-04-15-T, Decisionn on Order on Defence Preliminary Motion for Defects in the Form of the Indictment, 13 October 2003

The Prosecutor v. Kanu, (SCSL), Decision on Defence Preliminary Motion on Defects in the Form of the Indictment, 1 April 2004

Archbold International Criminal Courts, Practice Procedure and Evidence, Sweet and Maxwell, 2005

R v. Johal & Ram, 56 Cr. App. R348

The Prosecutor v. Casimir Bizimungu et al., Case No. ICTR-99-50-I, Decision on the Prosecutor Request for leave to File an Amended Indictment, 6 October 2003

The Prosecutor v. Tharcisse Muvunyi, Case No. ICTR-00-55A-PT, Decision on the Prosecutor's Motion for Leave to File an Amended Indictment, 23 February 2005

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RAYMOND FRANCIS CORLESS

Orr L.J.

stand. I think it right to add that Mr. Zucker, who has argued the case for the appellant before this Court, did not represent the appellant at the trial.

Conviction quashed.

Solicitor: G. N. Robinson, Blackburn, for the Crown.

BEFORE

1972 Feb. 25; Mar. 3

LORD JUSTICE KARMINSKI, MR. JUSTICE ASHWORTH AND MR. JUSTICE HINCHCLIFFE

BALBIR SINGH JOHAL
CURMIT KELSO RAM

Indictment—Amendment—When Permissible after Arraignment—Whether Prejudice Likely to be Caused—Indictments Act 1915 (5 & 6 *Geo.* 5, *c.* 90), *s.* 5 (1).

Section 5 (1) of the Indictments Act 1915 provides: "where before trial or at any stage of the trial it appears to the court that the indictment is defective, the court shall make such order for . . . amendment . . . as the court thinks necessary . . . unless having regard to the merits . . . the . . . amendments cannot be made without injustice."

No rule of law precludes the amendment of an indictment after arraignment, whether by adding a new count or otherwise. An amendment during the course of trial is likely to prejudice the accused person and, the longer the interval between arraignment and amendment, the more likely is it that injustice will be caused. In every case in which amendment is sought the court must consider with great care whether the accused will be prejudiced thereby.

MARTIN (1961) 45 Cr.App.R. 199; [1962] 1 Q.B. 221 considered.

The principle stated in the headnote to HARDEN (1962) 46 Cr.App.R. 90; [1963] 1 Q.B. 8 that "an amendment of a count in an indictment may not be made after arraignment if the result is to substitute another offence for that originally charged" is too widely stated.

Feb. 25; Mar. 3

BALBIR SINGH JOHAL, CURMIT KELSO RAM

would be dismissed and that the reasons for their decision would be given later.

Cur. adv. vult.

March 3. The judgment of the Court was read by ASHWORTH J.: These two appellants appeared at Birmingham Assizes in June 1971 charged with a number of offences involving in respect of each of them more than one indictment. This appeal is concerned only with the first indictment which in its original form contained only two counts: the first count charged them jointly with wounding with intent, the second charged them jointly with unlawful wounding. On this indictment they were duly arraigned and each pleaded Not Guilty; this occurred on the afternoon of June 14, and apart from arraignments on the other indictments, nothing further occurred on that day.

[After stating the facts set out above, His Lordship continued:]

The main issue in this appeal is whether the learned judge had power to allow the indictment to be amended, after arraignment, by the addition of further counts. A further issue was raised by Mr. Farrer, namely, whether the learned judge was right to refuse the application for separate trials.

It is convenient to dispose of that further issue first. Mr. Farrar conceded that it was a matter within the learned judge's discretion and it is to be noted that, when refusing the application, the learned judge expressly stated that he was doing so in the exercise of his discretion. In the judgment of this Court, he was fully justified in taking the course which he took and there is no reason to set aside the conviction of either appellant on this ground.

The main issue raises a far more difficult problem, upon which there is no direct authority, although views have been indicated about it in earlier cases. The relevant statutory provision is to be found in section 5 (1) of the Indictments Act 1915, in the following terms: "Where before trial or at any stage of the trial it appears to the court that the indictment is defective the court shall make such order for the amendment of the indictment as the court thinks necessary to meet the circumstances of

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secution it was necessary to show that what was referred to in the count was not the actual sum of money obtained but the cheque, that is, the valuable security with which in fact the building society parted. We have no hesitation in this case in supporting the action of the learned judge in amending the indictment." It should be noted that in that case the amendment was made at the close of the case for the prosecution, long after arraignment, but it does not appear to have been argued that the time of the amendment was fatal to its validity, still less was it so decided.

Some support for Mr. Farrer's contention is to be found in MARTIN (1961) 45 Cr.App.R. 199; [1962] 1 Q.B. 221. In that case the indictment was amended before arraignment, and most of the argument was directed to the issue whether the indictment was defective, within section 5 (1) of the Indictments Act 1915. At pp. 205 and 228 of the respective reports Lord Parker C.J. said: "We appreciate that no case has been reported which approves the adding of a new count before arraignment and by way of amendment, but nevertheless we consider that there is no objection in principle to this being done, provided it can be done without injustice. . . . Unless a defendant has ample warning of an intention to apply for a count to be added, the probabilities are that the addition cannot be made without injustice. After arraignment it is doubtful whether a new count can be added at all, as the defendant will not have pleaded to it nor, if the trial has started, have been put in charge of the jury on it; and if it were made, injustice, as in the cases of ERRINGTON (*supra*) and HUGHES (1927) 20 Cr.App.R. 4 show, would almost certainly be caused."

So far as the last sentence of this quotation is concerned, it is important to realise that in the present case the trial had not started, and Mr. Farrer very properly conceded that neither of the appellants was in any way prejudiced by the addition of the four further counts. All that had happened was that the appellants had been arraigned on the first two counts, and there was no difficulty in arraigning them on the further counts before the trial started.

1972
Feb. 25;
Mar. 3

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some of the earlier cases that amendment of an indictment during the course of a trial is likely to prejudice an accused person. The longer the interval between arraignment and amendment, the more likely is it that injustice will be caused, and in every case in which amendment is sought, it is essential to consider with great care whether the accused person will be prejudiced thereby.

In the present case, although amendment was made after arraignment, the situation was to all intents and purposes the same as if application to amend had been made before arraignment. In the view of this Court it would be wholly wrong to decide that in these circumstances the indictment could not be amended.

At the end of counsel's arguments this Court indicated that the appeal of each appellant would be dismissed and that the Court's reasons would be given later: this has now been done.

Appeals dismissed.

Solicitor: D. Emrys Morgan, Birmingham, for the Crown.

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

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

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

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

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

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

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

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

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

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