SCSL-04-15-T 18254

506

(18254 - 18259)

IN THE SPECIAL COURT FOR SIERRA LEONE

THE TRIAL CHAMBER

Before: The Trial Chamber

Judge Pierre Boutet, presiding
Judge Bankole Thompson
Judge Benjamin Itoe

Interim Registrar: Mr Lovemore G Munro SC

Date filed: 2nd March 2006

Case No. SCSL 2004 – 15 – T

In the matter of:

THE PROSECUTOR

Against

ISSA SESAY
MORRIS KALLON
AUGUSTINE BAO

PUBLIC GBAO RESPONSE TO PROSECUTION MOTION TO AMEND THE INDICTMENT

Office of the Prosecutor

Desmond de Silva QC
James Johnson
Peter Harrison

Counsel for Augustine Bao

Andreas O'Shea
John Cammegh

Counsel for co-accused

Wayne Jordash and Sareta Ashraph for Issa Sessay
Shekou Touray, Charles Taku and Melron Nicol-Wilson for Morris Kallon

18255

Scope of defence opposition to prosecution motion

1. We do not oppose the amendment sought in relation to paragraph 31 of the Indictment, but do oppose the other requests.

Distinct nature of the power to amend the indictment and the affect of the indictment on the question of conviction

2. The prosecution have compounded the questions of the power to amend the indictment with that of the affect of the way an indictment is particularised on the question of conviction. It should be noted at the very outset that these are distinct questions. The principle authority upon which the prosecution relies, *Dossi*,[1] concerned the latter question and not that of the power to amend the indictment, which the Court found it unnecessary to decide upon in its post conviction analysis. Likewise, the Appeals Chamber decision referred to[2] dealt with the validity of a conviction based on testimony falling slightly outside the estimated time frame in the indictment, rather than the power to amend.

The substantive nature of the proposed amendments

3. The prosecution seeks to persuade the Chamber that the proposed amendments do not add new charges but merely correct the particulars of the time frame of the existing charges. The changes are being portrayed as cosmetic in nature, not changing the substance of the allegations.

4. It is submitted that this is misconceived when one examines the impact of the proposed changes. This is not a case as in *Dossi* where a particular identified criminal act is according the evidence later than it is specified in the indictment as having taken place. The prosecution is not asserting that the alleged acts may have taken place before or after June 1998. It has alleged the

[1] *R v Dossi* 13 Cr App R 158 (CA)
[2] *Prosecutor v Rutaganda* (ICTR-96-3-A), Judgment (AC), 26 May 2003

commission of specific criminal acts prior to June 1998 and stands by that assertion which forms the basis of the indictment in its current form. It is now asserting additional criminal behaviour of a similar nature to that allegedly committed before that date and now right up to 31 January 2000, a substantially later date. It is therefore laying additional charges against the accused. The fact that it is asserting acts which can be legally categorised in the same way as acts alleged on earlier dates does not alter this reality. The failure to give specificity in relation to the actual crimes in paragraphs 48, 62 and 80 only reinforces the importance of the dates in the indictment for the purpose of providing adequate notice to the accused. On the prosecution's own admission this was the purpose of specifying the dates.

5. It has been held in the ICTY that when 'entirely new factual situations in support of existing counts are added, even though the count remains pleaded in the same terms of the Statute, these substitutions may nevertheless amount to new charges.'[3] It is apparent from the testimony upon which the prosecution relies in its motion, as exemplified in Annex A, that it relies on new factual situations taking place at later times under the general umbrella of unlawful killings, physical violence and burning and looting respectively.

6. Accordingly, this does not fall within the categorisation of 'identifying dates with greater particularity or detail' (category B in the Appeals Chamber decision[4]) but rather as 'substantive changes, which seek to add fresh allegations amounting... to new allegation in respect of an existing charge'.

Lack of due diligence on the part of the Prosecutor

7. It is respectfully submitted that where the prosecution seeks to amend the indictment, the onus lies upon it to demonstrate that it has acted with adequate diligence in bringing its motion to amend in a timely manner. This is a factor,

[3] *Krnojelac* Decision, 20 May 1999, par 20
[4] *Prosecutor v Norman, Fofana and Kondewa*, Decision on the Amendment of the Consolidated Indictment, 16 May 2005, par 79

it is submitted, which the Chamber should take into account in exercising its discretion in granting or not granting leave.[5] It is relevant both to ensure that the prosecution does not take unfair advantage of the defence, wittingly or unwittingly, and also in order to determine whether any delay which might be occasioned by the amendment would be undue for the purposes of the rights of the accused under article 17 of the Statute.

8. No reasonable explanation has been offered as to why an amendment to the indictment was not sought at a much earlier stage in the proceedings. In particular on the prosecution's own admission, the testimony of five witnesses reveals the factual justification behind the amendment sought. These five witnesses have given their testimony relating to events in Kono over the last year. The first witness mentioned by the prosecution in its Annex A, witness TF1-304, gave testimony between the 11th and 13th January 2005, over a year ago. Other witnesses gave their testimony in February and April of 2005 respectively. Statements have been taken from these witnesses as early as the 16th November 2002. In the absence of a proper excuse, there has been ample opportunity for the prosecution to discover the foundation of its sought amendment at a much earlier stage, perhaps years before, with the exercise of due diligence.

Prejudice to the accused

9. The effect of the prosecution's failure to raise this issue for at least more than 12 months after it should have become apparent to the prosecution is tantamount to 'trial by ambush'. As each witness passes, the defence is led to believe that its resources and energies with respect to unlawful killings (paragraph 48), physical violence (paragraph 62) and burning and looting (paragraph 80) in Kono are to be focused on a specifically defined period in the indictment, that is 14 February 1998 to 30 June 1998. This is confirmed after each witness passes and the prosecution fails to seek an amendment.

[5] See *Prosecutor v Karemera*, Decision on Prosecutor's Interlocutory Appeal against the Trial Chamber III Decision of 8 October 2003 Denying Leave to File an Amended Indictment

10. It is implicit in the notion of giving adequate notice through the terms of an indictment that the defence is entitled to place a degree of faith in such notice as representing the bone fide intentions of the prosecution. The defence investigations as well as its approach to the cross-examination of witnesses is necessarily guided by the indictment and the conduct of the prosecution.

11. In the event that such an amendment were put into effect it would further cause undue delay because the defence would be entitled to have the witnesses relating to crimes in Kono who have testified over the last year recalled in order that it could question them with a strategy refined to the new shifting of the goal posts. This could be the only fair solution in circumstances where the prosecution had ample opportunity to give earlier notice of its intention to seek conviction on crimes alleged to have been committed in its now substantially extended period. Moreover, the defence would require additional time to investigate this additional period of time over which it is said that further crimes were committed. Such a solution would be fair only in theory because this would occasion delay which would be undue because it is a delay which could have been avoided by earlier action on the part of the prosecution.

Concluding submission

12. It is therefore submitted that the circumstances militate against the fairness of the Trial Chamber exercising its discretion under Rule 50 to permit the proposed amendments. These circumstances include:

    (a) the lack of due diligence or attempt to demonstrate due diligence in making the application;

    (b) the quantity of already given testimony affected by the application;

    (c) the potential delay in the proceedings and the fault of the prosecution in not mitigating that delay;

18259

(d) the substantive nature of the proposed changes;

(e) the fact that the changes involve an expansion rather and a narrowing or more specific framing of the prosecution case against the accused;

(f) the significant length of the expansion in time frame rendering the temporal change more than merely cosmetic;

(g) the significance of dates in this indictment where the particulars of specific crimes are not articulated with precision.

(h) The advanced stage of the proceedings generally quite apart from the lateness of the application;

(i) The resultant sanction of a modus operandi of 'mould the case as we proceed' and 'trial by ambush' which the granting of such amendments in such circumstances would entail.

It is submitted that having regard to such circumstances, it would not be fair or in the interests of justice to permit amendment of the indictment in the terms proposed by the prosecution at this stage of the proceedings.

ACCORDINGLY it is hereby requested that the prosecution motion be dismissed.

Andreas O'Shea

For Augustine Gbao

2 March 2006