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SCSL-04-15-T
(27652 – 27660)

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SPECIAL COURT FOR SIERRA LEONE

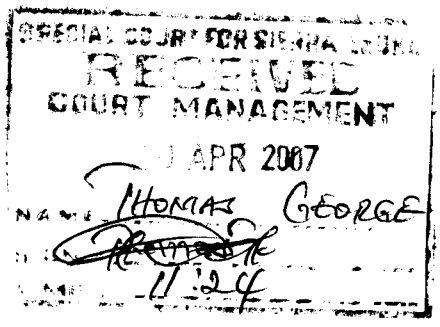
OFFICE OF THE PROSECUTOR

Freetown – Sierra Leone

Before: Hon. Justice Bankole Thompson, Presiding
Hon. Justice Benjamin Itoe
Hon. Justice Pierre Boutet

Acting Registrar: Mr. Herman Von Hebel

Date filed: 20 April, 2007



THE PROSECUTOR **Against** **Issa Hassan Sesay**
Morris Kallon
Augustine Gbao

Case No. SCSL-04-15-T

PUBLIC

REPLY TO THE PROSECUTION MOTION THAT THE SECOND ACCUSED COMPLY WITH RULE 67

Office of the Prosecutor:
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Court Appointed Defence Counsel for Kallon
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I. INTRODUCTION

1. The Second Accused's "Response to Prosecution Motion that the Second Accused Comply with Rule 67"[1] ("Response") makes two matters clear: a) that Kallon intends to advance an alibi defence; and b) that Kallon is in violation of Rule 67 (A)(ii)(a) of the Rules, which states: "As early as reasonably practicable and in any event prior to the commencement of the trial..." the Defence shall notify the Prosecution of its intent to enter the defence of alibi.
2. Two years and 9 months after the commencement of the trial Kallon notified the Prosecution of his intent to rely on alibi. Kallon also saw fit to wait until after a protective measures order was granted to the Kallon witnesses before notifying the Prosecution of his intent to rely upon an alibi defence.

II. LEX SPECIALIS

3. Alibi is a specific and unique aspect of a defence case, it is often said that alibi is not a defence at all, for example, in *Delalic et al*, the Appeals Chamber said:

> It is a common misuse of the word to describe an alibi as a 'defence'. If a defendant raises an alibi, he is merely denying that he was in a position to commit the crime with which he is charged. That is not a *defence* in its true sense at all. By raising that issue, the defendant does no more than require the prosecution to eliminate the reasonable possibility that the alibi is true.[2]

4. For this reason the common law has long recognized that an alibi should be made known to the Prosecution at the earliest possible moment.[3] Rule 67 (A)(ii)(a) codifies the common law, and when complied with, gives the Prosecution the opportunity and obligation to carry out such investigations as are warranted to ensure that judicial time and resources are not expended in a case where an accused has a clear and compelling alibi. In *Kupreskic et al*, the Prosecution withdrew the charges against the accused Katava after the Prosecution had been given proper notice to investigate and assess alibi evidence.[4]
5. Early notice and sufficiently detailed information are prerequisites of alibis, and this is

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[1] *Prosecutor v. Sesay et al*, SCSL-04-15-T-751, "Response to Prosecution Motion that the Second Accused Comply with Rule 67," 16 April 2007.
[2] *Prosecutor v. Delalic et al*, IT-96-21-A (Appeals Chamber), "Judgement", 20 February 2001, para. 581.
[3] *Russell v. The King* (1936), 67 CCC 28 (SCC).
[4] *Prosecutor v. Kupreskic et al*, IT-95-16-PT, Transcript of 19 December 1997, pp. 37-45, and "Decision on Motion by the Prosecutor for Withdrawal of Indictment Against Marinko Katava," 19 December 1997.

precisely what Rule 67(A)(ii)(a) expresses and requires from an accused. The maxim *lex specialis derogate generali* applies because of the unique nature of an alibi and the specific and narrowly drafted Rule that applies solely to alibi evidence.[5] Protective measures can be granted to witnesses, but where an alibi witness is involved *lex specialis* dictates that the specific requirements of Rule 67(A)(ii)(a) be enforced.

III. PROTECTIVE MEASURES DECISION

6. The purpose of protective measures, as stated in Rule 75, is to "order appropriate measures to safeguard the privacy and security of victims and witnesses, provided that the measures are consistent with the rights of the accused." It is consistent with the rights of the accused that protective measures allow for notice of an alibi to be given to the Prosecution, in full compliance with Rule 67, so that the Prosecution may investigate that evidence and take appropriate actions, without having to apply for adjournments to investigate the alibi.[6] The Prosecution does not threaten or intimidate witnesses and such suggestions are specious.
7. The existing protective measures decision states:

> c. The Defence for the Second Accused, Morris Kallon, shall be allowed to withhold the names or any other identifying data of its witnesses until 42 days prior to their testimony.[7]

8. The Order does not compel Kallon to withhold the names of witnesses, it says that Kallon is "allowed to withhold" the names of his witnesses.
9. Kallon is willfully violating Rule 67, and is trying to hide behind a protective measures order which gives Kallon a discretion of whether to disclose witness names or other identifying data now, or wait until 42 days before the witness testifies. From reading the Kallon witness summaries it is impossible to determine who will be giving alibi evidence, and Kallon is trying to take advantage of his own failure to comply with the Rules to further delay disclosing the alibi evidence. Without full compliance with Rule 67(A)(ii)(a) an investigation of the alibi cannot be carried out.

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[5] Where an action falls within the scope of a general provision and a specific provision then, 'the latter prevails as most appropriate being more specifically directed towards that action."

[6] The right "To be tried without undue delay" is granted by Article 17(4)(e) of the Statute of the Special Court of Sierra Leone. Kallon's lengthy delay in giving notice of the alibi may force the Prosecution to apply to call rebuttal witnesses

[7] *Prosecutor v. Sesay et al,* SCSL-04-15-T-739, "Decision on Kallon Defence Motion for Immediate protective Measures for Witnesses and Victims and for Non-Public Disclosure," 19 March 2007, para. 34. c.

10. The Prosecution will consider arguing at a later date that Kallon's ongoing refusal to comply with the Rules should lead to no weight being given to the alibi evidence. Kallon's continuing breach of Rule 67, as demonstrated by his Response to this Motion, is further evidence of the ongoing breach. In *Brima et al*, Trial Chamber II said:

> 18. However, if the defence deliberately ignores its obligations under Rule 67(A)(ii)(a), it can expect to be sanctioned by the Trial Chamber. Failure to provide timely disclosure may impair the interests of fair trial proceedings and undermine the prosecution's ability to prepare its case and investigate the evidence on which the alibi defence rests. Therefore, failure by the defence to observe its obligations under Rule 67(A)(ii)(a) will entitle the Trial Chamber to take such failure into account when weighing the credibility of the defence of alibi.[8]

III. CONCLUSION

11. Rule 67 serves an important purpose. Accused person's who seek to rely on an alibi are required to notify the Prosecution of the alibi as early as practicable and in any event prior to the start of the trial. Two years and 9 months after the commencement of the trial Kallon gave notice of an alibi notice, without giving particulars of the alibi as required by Rule 67(A)(ii)(a), and Kallon now says that he does not have to comply with Rule 67 because a protective measures order was granted. There is nothing in that Order to prevent Kallon from complying with Rule 67, and the Prosecution Motion should be granted. If Kallon does not want to rely on an alibi notice he can withdraw it, if he does want to rely upon an alibi notice he is required to comply with the Rules.

Filed in Freetown, 20 April 2007

For the Prosecution,

Pete Harrison

[8] *Prosecutor v. Brima et al,* SCSL-04-16-T-521, "Decision on Prosecution Motion for Relief in Respect of Violations of Rule 67," 26 July 2006, para. 18.

List of Authorities

A. Decisions and Judgements

Prosecutor v. Sesay et al, SCSL-04-15-T-751, "Response to Prosecution Motion that the Second Accused Comply with Rule 67," 16 April 2007.

Prosecutor v. Sesay et al, SCSL-04-15-T-739, "Decision on Kallon Defence Motion for Immediate protective Measures for Witnesses and Victims and for Non-Public Disclosure," 19 March 2007.

Prosecutor v. Brima et al, SCSL-04-16-T-521, "Decision on Prosecution Motion for Relief in Respect of Violations of Rule 67," 26 July 2006, para. 18.

Prosecutor v. Delalic et al, IT-96-21-A (Appeals Chamber), "Judgement", 20 February 2001. http://www.un.org/icty/celebici/appeal/judgement/cel-aj010220.pdf

Russell v. The King (1936), 67 CCC 28 (SCC).

Prosecutor v. Kupreskic et al, IT-95-16-PT, "Decision on Motion by the Prosecutor for Withdrawal of Indictment Against Marinko Katava," 19 December 1997. http://www.un.org/icty/kupreskic/trialc2/decision-e/71219DC2.htm

B. Transcripts

Prosecutor v. Kupreskic et al, IT-95-16-PT, Transcript of 19 December 1997, pp. 37-45. http://www.un.org/icty/transe16/971219MH.htm

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[1936] 4 D.L.R. 744, 67 C.C.C. 28

1936 CarswellBC 118

R. v. Russell

Russell v. The King

Supreme Court of Canada

Sir Lyman P. Duff, C.J.C., Rinfret, Crocket, Davis, Kerwin, Hudson, JJ.

Judgment: November 2, 1936
Docket: None given.

Proceedings: Affirmed, 51 B.C.R. 1, [1936] 3 W.W.R. 81, 66 C.C.C. 306, 1936 CarswellBC 38 (B.C. C.A.)

Counsel: *R. V. Sinclair, K.C.*, for appellant

Hon. G. McG. Sloan, K.C., N.C. Levin, for respondent

Subject: Criminal; Evidence; Criminal

Criminal Law --- Trial by indictment -- Charging jury -- Direction on alibi evidence.

Criminal Law --- Appeals -- Appeal of indictable offence -- Appeal of conviction or acquittal -- Grounds -- Misdirection to jury.

Criminal law.

Evidence.

***Sir Lyman P. Duff, C.J.C., Rinfret, Crocket* and *Davis, JJ.*:**

1 concur with Hudson, J.

***Kerwin, J.*:**

2 There are but two questions open for consideration in this Court. The first, as stated in appellant's factum, is that there should be a new trial on the ground of non-direction amounting to misdirection because the trial Judge failed

"to put the evidence for the defence in a fair, careful and adequate manner before the jury with such a lucid explanation that the jury could do it justice."

3 The defence was that the accused did not, as the Crown alleged, shoot one, Hobbs, a teller in a bank in Vancouver that was robbed. The accused stated that he was elsewhere and that the witnesses for the Crown who said that he was present were mistaken.

4 The trial Judge must, of course, place the defence before the jury but in the present case he has done so. It was argued that he should have referred to the evidence of some at least of the witnesses for the Crown, and that he should have pointed out what counsel for the accused suggested were weaknesses in their testimony. But if there was any obligation upon the trial Judge to refer to the evidence of any of such witnesses, why not to all? As a matter of law there is no such obligation and I am satisfied that the charge to the jury cannot be objected to on this ground.

5 The second point is that the trial Judge misdirected the jury in the following sentences: -- "I think perhaps in referring to the alibi, *if you are considering it seriously*, one aspect you must consider in an alibi defence is that *it must be set up at the earliest possible moment*, and ought to include a statement of where the accused was at the time of the commission of the alleged offence. It is for you to say when it was first heard."

6 It is quite apparent from this and from other parts of the trial Judge's charge that he did not consider the defence seriously, but provided he left the issue to the jury and explained that they were the sole judges thereof, it is no objection that he gave expression to his own opinion. Considering the words "if you are considering it seriously" in connection with other parts of the charge where he made it clear that the question was for them to decide, I can find nothing objectionable in law.

7 At first sight the remainder of the quotation might give rise to difficulty. If it could be fairly taken from the words "it must be set up at the earliest possible moment," that the Judge was instructing the jury as a matter of law that in order to have his defence considered, it was necessary that the accused set it up at an early time, that would be misdirection. However, even bearing in mind that the word "must" is used, this phrase when taken in connection with the rest of the charge makes it clear that this is not the case. What the learned trial Judge was doing was indicating to the jury one way in which they might test the credibility of the story told by the accused at the trial; and this is permissible. Without quoting all of the charge to the jury a reference to the following extracts will indicate that throughout the charge the trial Judge was leaving to the proper forum, the jury, the question as to whether they should believe the accused: --

> Then as to Russell. He went in the box also and he denied the whole thing. Do you believe him? That is where it is perplexing. It is for you to say whether you should have any difficulty in penetrating the evidence with which you have been confronted on behalf of the accused. Is it sufficient to displace the evidence put before you on behalf of the Crown?

8 And again: -- "If you believe Russell -- well, he was not there. But go back then, and you can draw an inference from the whole body of the evidence. Their antecedents. Beginning as I began along on the 11th January, can you reasonably conclude that the whole four of them were not in and about this unlawful visit to the bank for the purpose of robbing the bank, and out of that arose the death of Hobbs?"

9 Again the trial Judge remarks: -- "As regarding Russell you have to say, if he is a witness of the truth; defending himself as best he can."

10 Earlier in his charge and after the extract which appears at the commencement of the consideration of this point, the trial Judge went on to say: -- "Notwithstanding that alibi, if you have a reasonable doubt in regard to Russell, -- with whom I am dealing now particularly, then you will have to give him the benefit of it."

11 These extracts show clearly that the learned trial Judge did leave to the jury the essential question as to whether Russell was present and fired the shot as had been testified by various witnesses for the Crown.

12 As a branch of the second question, it was contended that the learned trial Judge contravened the imperative

direction contained in s-s. 5 of s. 4 of the Canada Evidence Act, R.S.C. 1927, c. 59, which reads as follows: -- "4(5) The failure of the person charged, or of the wife or husband of such person, to testify, shall not be made the subject of comment by the judge, or by counsel for the prosecution."

13 Counsel devoted considerable time to a discussion of the question as to whether this subsection prohibited comment by the Judge to the jury on the accused's failure to testify at the preliminary inquiry where, as here, the accused gave evidence at the trial; and reference was made to *Rex v. Mah Hong Hing* (1920), 53 D.L.R. 356, 33 Can. C.C. 195, a decision of the Court of Appeal for British Columbia, and to *Rex v. Roteliuk*, [1936] 2 D.L.R. 465, 65 Can. C.C. 205, a decision of the Court of Appeal for Saskatchewan. Other cases were also referred to but as I find it unnecessary to determine the point, I leave this important feature for future consideration. In the instant case, it seems quite clear that the words used by the trial Judge are not susceptible of meaning that he was referring to the question as to whether Russell did or did not testify or make any statement at the preliminary inquiry. There is no evidence on the point as he was not asked whether, when he was arrested, or at any other time, he had stated that he was not present at the time of the shooting. There being no such evidence did not prohibit the Judge remarking "it is for you to say when it was first heard."

14 The appeal must be dismissed.

***Hudson, J.*:**

15 The appellant Russell was convicted of murder at a trial before the Chief Justice of the Supreme Court of British Columbia and jury. From this conviction he appealed to the Court of Appeal of British Columbia and in that Court the appeal was dismissed by a majority of three to one. The dissenting Judge, Mr. Justice Martin, gave in the formal judgment as his reasons for dissent that there was in the learned trial Judge's charge misdirection and non-direction tantamount in the circumstances to misdirection in vital matters.

16 It was proved at the trial that on January 15 last a branch of the Canadian Bank of Commerce in Vancouver was entered by three bandits and robbed and that in the course of the robbery the teller was shot by one or other of these bandits and subsequently died as a consequence. Russell was identified by numerous witnesses as one of the robbers and by some as the one who fired the fatal shot. He was called as a witness on his own behalf and admitted that for some days prior to the robbery he had been living in the same house with two of the men who it is admitted took part in the robbery, that he was in hiding in that house after the robbery and remained there until arrested. He then had ammunition on his person and part of the stolen money was found under his bed. His sole defence, and that unsupported by evidence other than his own, was that at the time of the robbery and shooting he was walking by himself in another part of the city.

17 In the reasons given by Martin, J.A., for his dissent particular exception was taken to a passage in the Judge's charge reading as follows: -- "If you are considering it seriously, one aspect you must consider in an alibi defence is that it *must* be set up at the earliest possible moment, and ought to include a statement of where the accused was at the time of the commission of the alleged offence. It is for you to say when it was first heard. Notwithstanding that alibi, if you have a reasonable doubt in regard to Russell, with whom I am dealing now particularly, then you will have to give him the benefit of it."

18 Apparently the Judge was quoting from Crankshaw, at p. 1103, where it is stated: -- "The defence of an alibi ought to be set up at the earliest possible moment and ought to include a statement of where the defendant was at the time of the taking place of the alleged offence."

19 and may have inadvertently used the word "must" where the other used the word "ought."

20 This is not a statement of any rule of law but rather a statement of a rule of expediency in advancing the defence of an alibi and a test that may well be applied by a jury in weighing the evidence. However, the learned trial Judge in other portions of his charge made it abundantly clear that it was the duty of the jury to acquit the prisoner if they believed his story. At one place he said: --

> Now it is fundamentally requisite that the identity of the accused be established by the Crown. That onus --

> and it is constant, -- it does not shift -- is on the Crown. In criminal matters it is not alone so much as to whether substantial justice has been done, but whether it has been done according to law.

21 At another place,

> Then as to Russell. He went in the box also and he denied the whole thing. Do you believe him? That is where it is perplexing. It is for you to say whether you should have any difficulty in penetrating the evidence with which you have been confronted on behalf of the accused. It is sufficient to displace the evidence put before you on behalf of the Crown.
>
> Gentlemen, in considering the evidence, you will apply the test whether this evidence which you have heard, or so much of it as you believe, is inconsistent with any other reasonable hypothesis than the guilt of the prisoner.

22 It is also worthy of note that at the conclusion of the Judge's charge counsel for Russell raised objections to some things that the learned Judge had said but made no reference whatever to the passage above-quoted. In my opinion the jury cannot have been misled by what was said by the learned trial Judge. The other objections are adequately dealt with by the majority in the Court below. In my opinion the appeal should be dismissed.

23 On the argument before us Mr. Sinclair, K.C., on behalf of the appellant, brought to the attention of the Court certain irregularities at the trial not referred to in the dissenting opinion of Martin, J.A. This Court is not in a position to give effect to these objections. They are matters which might be considered on an application for executive elemency.

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