

SPECIAL COURT FOR SIERRA LEONE

OFFICE OF THE PROSECUTOR

FREETOWN – SIERRA LEONE

Before: Judge Teresa Doherty, Presiding Judge
Judge Richard Brunt Lussick
Judge Julia Sebutinde

Registrar: Mr. Robin Vincent

Date filed: 31 January 2005

THE PROSECUTOR**Against****SANTIGIE BORBOR KANU****Case No. SCSL – 2004 – 16 – PT**

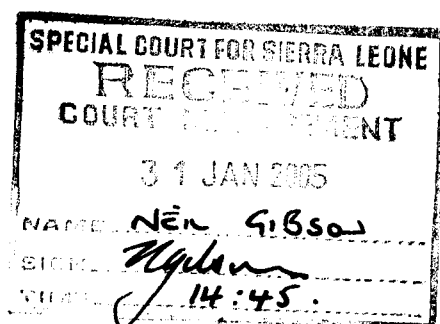
**PROSECUTION RESPONSE TO “KANU – DEFENSE MOTION FOR DISMISSAL OF
COUNTS 15 – 18 OF THE INDICTMENT DUE TO AN ALIBI DEFENSE AND LACK OF
PRIMA FACIE CASE”**

Office of the Prosecutor

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PROSECUTION RESPONSE TO “KANU – DEFENSE MOTION FOR DISMISSAL OF COUNTS 15 – 18 OF THE INDICTMENT DUE TO AN ALIBI DEFENSE AND LACK OF *PRIMA FACIE* CASE”

The Prosecution files this Response to the Defence “Motion for Dismissal of Counts 15 – 18 of the Indictment Due to an Alibi Defence and Lack of *Prima Facie* Case.”

I. BACKGROUND

1. On 19 March 2004, the Defence filed its “Kanun – Motion to Request an Order under Rule 54 with Respect to Exculpatory Evidence.” On 26 March 2004 the Prosecution indicated that it would not file a response to that motion.
2. On 1 June 2004 Judge Bankole Thompson granted the motion in “Kanun – Decision on Defence Motion in Respect of Santigie Borbor Kanu for an Order Under Rule 54 With Respect to Release of Exculpatory Evidence.” The cooperation and assistance of the competent Sierra Leonean authorities was requested.
3. On 17 July 2004 the Ministry of Defence issued a letter dated 7 July 2004 providing the Defence with the requested information available.

4. Subsequently, on 20 January 2005, the Defence filed its “Kanu – Defense Motion for Dismissal of Counts 15 – 18 of the Indictment Due to an Alibi Defense and Lack of *Prima Facie* Case” (“the Defence motion”).

II. THE DEFENCE ARGUMENT

5. The Defence motion seeks a dismissal of counts 15 to 18 of the Amended Consolidated Indictment.¹ The Defence argument, as summarised by the Prosecution, is as follows:
 - a. A particular set of factual circumstances (the detention of the Accused between June and December 2000) coupled with a factual assumption (that the Accused was in Freetown between April and June 2000) amounts to an alibi relevant to counts 15 to 18.
 - b. This alibi amounts to a complete defence to counts 15 to 18.
 - c. It is legally permissible and appropriate for the Trial Chamber to consider this defence of alibi prior to the commencement of trial because of the nature and purpose of Rule 67(A)(ii), judicial economy, and the absence of a *prima facie* case resulting from the alibi.
6. The Prosecution argues that:
 - a. The asserted factual circumstances and assumption do not amount to an alibi.
 - b. In any event, alibi is not a complete defence to counts 15 to 18 as the prosecution alleges that the criminal liability of the Accused for these counts stems from his knowledge of and participation in a joint criminal enterprise.
 - c. It is legally impermissible and inappropriate in any circumstance for the Trial Chamber to consider a defence of alibi prior to the commencement of trial. An alibi is not a defence in the true sense of the word. The raising of an alibi does no more than require the Prosecution to eliminate the reasonable possibility that he alibi is true.

¹ 13 May 2004

7. The Prosecution makes these arguments in response to what it submits are legal and factual errors in the Defence motion. However, the Prosecution respectfully informs the Trial Chamber of its intention to file a motion to amend the Amended Consolidated Indictment by withdrawing counts 15-18 against all 3 AFRC Accused. The Prosecution so informs the Trial Chamber as the granting of a motion allowing the withdrawal of counts 15-18 may render a decision on the instant Defence motion unnecessary.
8. The Prosecution decision to move the Trial Chamber to withdraw counts 15-18 is wholly unrelated to the Defence motion. The following arguments demonstrate the Prosecution view that the Defence motion is without merit. Notwithstanding this, the Prosecution has, in anticipation of and subsequent to the Order for Commencement of Trial and Scheduling Order issued 20 January 2005 nominating 7 March 2005 as the start date of the AFRC trial, undertaken a review of its case and evidence.
9. At the time when the individual Indictments against each of the 3 AFRC Accused were approved² the evidence in possession of the Prosecution adequately supported the Prosecution theory that the joint criminal enterprise as pleaded in the Indictments (and subsequently repeated in the Consolidated and Amended Consolidated Indictments) could be proven beyond reasonable doubt in relation to the entire time period relevant to all counts on the Indictments.
10. Since that time, new evidence has been obtained by the Prosecution. This evidence has been disclosed to the Defence. Upon review of this new evidence, the Prosecution is no longer of the view that the joint criminal enterprise can be proved beyond reasonable doubt after January 2000, the period of time relevant to in relation to counts 15-18. To be very clear, the Prosecution remains of the view that the joint criminal enterprise can be proven beyond reasonable doubt until January 2000 and, therefore, in relation to counts 1-14 on the Indictment.
11. The Prosecution intends to file its motion to amend the Amended Consolidated Indictment by withdrawing counts 15-18 within 7 days.

² 7 March 2003 for the Accused Brima by His Honour Judge Thompson, 28 May 2003 for the Accused Kamara by His Honour Judge Thompson and 16 September 2003 for the Accused Kanu by His Honour Judge Boutet.

III. FACTUAL ASSERTIONS

12. The Defence motion seeks dismissal of the charges on the grounds that the Accused could not have been in the districts listed in the indictment under Counts 15 -18³ at the material time. It is argued that it can be assumed that the Accused was with the army in Freetown between April 2000 and June 2000, and then established that he was detained at Cockerill Barracks between June 2000 and December 2000.
13. The Prosecution takes no issue with the fact that the records show that the Accused was incarcerated between June 2000 and December 2000. The Prosecution does contest a number of issues concerning the Defence assertions as to the whereabouts of the Accused during the months of April 2000 to June 2000.
14. The Defence acknowledges⁴ that the national authorities were unable to provide the information confirming the protestations of the Accused as to his membership in the army between April 2000 and June 2000.
15. The Defence goes on to state⁵ that the fact that the Prosecution stated that it would not file a response to the Defence Rule 54 Motion was an implicit acknowledgement that the Prosecution found merit in the Defence request. As such, applying the principle of *dubio pro reo* (which translates into giving the Accused the “benefit of the doubt”), it should now be accepted the Accused was present in the army in Freetown during this time, notwithstanding the lack of documentary evidence⁶.
16. The Prosecution submits that the fact that in March 2004 it chose not to file a response to the Defence’s Rule 54 motion can in no way equate to the acceptance of the veracity of any information subsequently obtained pursuant to a decision on that motion. Still less does it amount to an acceptance of the leap in logic that the failure of the Defence to obtain pertinent information pursuant to a decision on that motion can be settled by giving the Accused the “benefit of the doubt” because the Prosecution saw fit not to oppose the Defence attempt to gain information it deemed relevant to the trial. The Prosecution

³ Bombali, Kailahun, Kambia, Port Loko and Kono Districts.

⁴ Paragraph 20 of the Defence motion.

⁵ Paragraph 21 of the Defence motion.

⁶ Paragraph 23 of the Defence motion.

firmly rejects the principle of *dubio pro reo* under these circumstances. The Prosecution submits that the presence of the Accused in Freetown during April to June 2000 cannot be assumed on this basis.

17. Further, the Prosecution submits that even if the Accused had been a serving member of the army during these months, this does not instantly mean that he remained wholly within Freetown for the duration of this period. As Brigadier Kumbaya explained in his letter of 7 July 2004, even if the authorities were to have the records confirming the Accused's presence in the army, "In any event, such records would not show the whereabouts of Kanu on any particular day during that period."⁷
18. In addition, the Prosecution draws to the attention of the Trial Chamber one final fact, the import of which raises a further doubt as to the actual presence of the Accused in the army during the months in question.
19. In his July 2004 letter Brigadier Kumbaya states in para.5 that up until May 2000 no army personnel records were maintained. The Accused claims to have been in the army from April 2000 (one month *prior* to records being recommenced) until June 2000 (one month *after* records recommencing). Despite purporting to have joined the army one month before records recommenced, the Accused was in the army for a not insignificant length of time after recommencement of the personnel records. As such the Prosecution submits that it is a reasonable possibility that if the Accused had been in the Army at the time asserted, that fact would have been recorded in some documentary form or other from May 2000.
20. Thus, the Prosecution submits that the fact that there is absolutely no documentary evidence confirming the presence of the Accused in the army, despite claiming to have been in the army for at least one whole month after recommencement of personnel records, is enough to raise doubt as to the accuracy of the claims of the Accused.
21. Accordingly, the Prosecution submits that there is an insufficient factual basis for the alibi asserted in the Defence motion for the period April to June 2000.

⁷ Para.5

IV. ALIBI IS NOT A COMPLETE DEFENCE

22. The Defence argues⁸ that the alibi of the Accused is reinforced because none of the disclosed witness statements indicate that the Accused was personally involved in an attack on UNAMSIL personnel. The Defence further argues that a *prima facie* case on these counts no longer lies before the Trial Chamber. The Prosecution submits that these arguments reveal a fundamental misunderstanding of the nature of the allegations against the Accused.
23. The Accused is charged in the Amended Consolidated Indictment with being a member of a joint criminal enterprise. As such, it is not necessary to show the direct participation of the Accused in the commission of every crime pleaded in the Indictment. Rather, the Prosecution must establish that the Accused had knowledge of the criminal purpose and the intention to further it. The Prosecution argues that the crimes alleged in counts 15 to 18 were a reasonably foreseeable consequence of the joint criminal enterprise.
24. An alibi only exonerates an accused when direct physical presence and perpetration is the only basis upon which guilt can be established and criminal liability levied. Participating in a joint criminal enterprise (as the Accused is charged) does not require any actual physical presence, perpetration or direct involvement for every crime charged – what is required is that the Accused shared the group’s criminal purpose and participation in the joint enterprise was done in furtherance of the criminal purpose of the enterprise.

V. ASSESSMENT OF AN ALIBI DEFENCE PRIOR TO TRIAL

25. The Prosecution submits that the Defence argument that it is appropriate for the defence of alibi to be addressed before the commencement of the trial is based on a misunderstanding of the fundamental legal nature of alibi evidence and its status as a “defence”. As such, extrapolations as to the nature and purpose of Rule 67(A)(ii) and notions of judicial economy are misplaced.
26. The Prosecution submits that even if the Accused were able to fully account for his whereabouts at every moment during the months in question, that the claiming of an alibi

⁸ Paragraphs 25-6 of the Defence motion.

is not a defence in the strictest sense of the word. Thus the raising of an alibi should not be grounds upon which to have charges dismissed due to an absence of a *prima facie* case. In general terms, the raising of an alibi on the part of the Defence is merely a statement that the Accused was not in a position to commit the crime, thereby causing the introduction of a fact which may cause a reasonable doubt; the onus being on the Prosecution to dispel and discredit this reasonable doubt through the course of its prosecution.

27. This interpretation is supported by the Appeals Chamber of the ICTY in the *Delalić*⁹ judgement where it was commented that to term an alibi as a “defence” was legally inaccurate and a misuse of the term. In fact, the Appeals Chamber refers to Rule 67(A)(ii) of the ICTY Rules of Procedure and Evidence (which is phrased identically to the Special Court’s Rule 67(A)(ii)), as being “not happily phrased”.¹⁰ Expanding on its position, the Appeals Chamber ruled:

“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.”¹¹

28. Thus, the Prosecution asserts that the raising of incomplete evidence of alibi by the Accused is insufficient justification for having the charges dismissed prior to trial as sought by the Defence.

VI. CONCLUSION

29. For the above reasons the Prosecution respectfully submits that the Trial Chamber should dismiss the Defence motion in its entirety.

⁹ *Delalić et al*, Appeals Chamber Judgement, 20 Feb 2001


¹⁰ *Id.* Para.580

¹¹ *Id.* Para.581

30. The Prosecution respectfully informs the Trial Chamber of its intention to file the withdrawal motion as the filing of such a motion may render a decision on the instant Defence motion unnecessary.

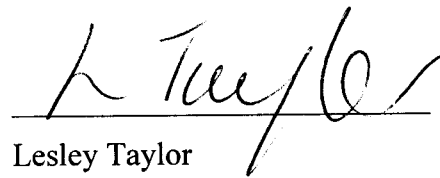
Filed at Freetown

This 31st day of January 2005



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INDEX OF AUTHORITIES

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