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SCSL-2004-14-T
(12212 - 12213)

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The Prosecutor v. Norman, Fofana and Kondewa Case no. SCSL-2004-14-T

Special Court for Sierra Leone

Before: Judge Benjamin Mutanga Itoe, Presiding Judge
Judge Bankole Thompson
Judge Pierre Boutet
Registrar: Robin Vincent
Date: 28th February 2005

THE PROSECUTOR

Against

SAMUEL HINGA NORMAN, MOININA FOFANA and ALLIEU KONDEWA

CASE NO. SCSL-2004-14-T

**RESPONSE OF THIRD ACCUSED TO PROSECUTION'S URGENT MOTION FOR
A RULING ON THE ADMISSIBILITY OF EVIDENCE**

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SPECIAL COURT FOR SIERRA LEONE
PROSECUTOR GENERAL
COURT OFFICE
28 FEB 2005
NAME: J. HINGA NORMAN
SIGN: [Signature]
TIME: 10:42

I. INTRODUCTION

1. The defense for the Third Accused (the “**Accused**”) hereby submits its response to the “Urgent Prosecution Motion for a Ruling on the Admissibility of Evidence” (the “**Motion**”).¹
2. The Indictment against the Accused dated 24th June 2003 was filed on 26th June 2003 and amended on 4th February 2004 for the purpose of consolidation. Neither document makes any reference to gender crime, sexual violence, rape, or sexual assault.
3. On 9 February 2004 the Prosecution filed a “Request for Leave to Amend the Indictment” (the “**Request for Amendment**”) in order to add crimes of sexual violence.² On 20 May 2004 the Chamber declined the Request.³
4. The Prosecution now seeks the admission of evidence which relates to allegations of sexual violence, upon the suggestion that such evidence is relevant to Counts Three and Four of the Indictment.

II. SUBMISSIONS

A. The Proposed Evidence is Irrelevant

5. The Accused agrees that the acts described in the Motion could form the basis of a conviction for Inhumane Acts (Count Three) and Violence to Life (Count Four) but only if the Indictment set forth such allegations.

¹ Document No. SCSL-04-14-T-341.

² Document No. SCSL-04-14-PT-107.

³ “Decision on Prosecution Request for Leave to Amend the Indictment,” 20 May 2004, Document No. SCSL-04-14-T-113.

6. Despite that the Prosecution had multiple opportunities to set forth such allegations, it failed to do so in its original Indictment, its Consolidated Indictment and its Response to the Accused's Motion for Bill of Particulars.
7. The Prosecution itself notes that "[a]ny evidence which related to the unlawful activities of the Civilian Defence Force ("CDF") is relevant *in the context of the Indictment against each of the Accused...*"⁴ A consideration of relevancy depends upon an analysis of the Indictment itself.
8. The Prosecution concedes that the unlawful acts about which evidence admission is sought is "not specifically particularised in the Indictment"⁵ but argues that they are "subsumed by the broad definitions pertaining to serious bodily harm and serious mental harm [since] such terms encompass the extensive range of consequences and injuries suffered by the witnesses."⁶
9. The Prosecution explains that "[i]t is not practical to include, within the particulars, all the factual variations of unlawful acts that could lead to serious bodily harm and serious mental harm."⁷ Although the Accused is mindful of the pressures placed upon the Prosecution, practicality is simply not the standard to which the Prosecution is held with regard to the preparation of an Indictment.
10. Nor is it fair to characterize the Accused as objecting on the basis that it has not been given "*all the factual variations* of unlawful acts that could lead to serious bodily harm and serious mental harm."⁸ The Accused faces an Indictment which lacks any precision with regard to: the time period alleged; the geographical location(s) involved; the number of victims; the identity of victims; and the identity of perpetrators. It is understood that the nature of the crimes involved makes this kind of precision impossible and he accepts that this level of precision

⁴ Document No. SCSL-04-14-T-341, para. 11.

⁵ Document No. SCSL-04-14-T-341, para. 30.

⁶ Id.

⁷ Id.

⁸ Document No. SCSL-04-14-T-341, para. 31(emphasis added).

satisfied the Chamber when it confirmed the Indictment. But the latitude granted to the Prosecution is not unfettered.

11. Difficult practical considerations cannot abrogate the Prosecution's responsibilities vis a vis the rights of the Accused to be informed of the charges against him with adequate specificity to prepare his defense.
12. Relative to the sufficiency of the Indictment, the question is whether it can be said to have included crimes whose nature was made clear enough for the Accused to prepare his defense. Otherwise the Chamber cannot be satisfied that this right has been effectuated.
13. The Prosecution argues that the Accused should be satisfied with the "notice" given by virtue of discovery materials which contain reference to crimes of sexual violence. With respect, discovery is not the means through which the Accused is informed of the case against him. It is the Indictment which serves this function.
14. The Accused has received literally thousands of pages of discovery, including statements and documents whose relevance is quite limited. This is the expected and appropriate result of a system of rules which compels the Prosecution to provide broad discovery.
15. By way of demonstration, the Prosecution may want to submit a certain report because of one particular section. Even in such a case he must turn over the entire document. In doing so he is not signaling to the Accused that he must prepare a response to every single item mentioned in the report. The same is true of a witness interview. If, for example, a witness speaks about events that happened outside the time period or geographical area set forth in the Indictment, the Accused is not being signaled that he must now prepare a defense that goes beyond that which was alleged in the Indictment.

16. It is not incumbent upon the Accused to cull through discovery in the hope of stumbling upon the right combination of allegations. He proceeds on the basis of the Indictment.
17. In his “Reply to the Response of the First Accused to the Prosecution’s Urgent Prosecution Motion for Ruling on Admissibility of Evidence and Objection to Other Crimes Evidence” the Prosecution defends the practice of cumulative pleading.⁹ The argument is misplaced, given that the Indictment fully lacks any such pleading of crimes of sexual violence. Indeed this failure is the heart of the problem.
18. The Prosecution argues that the administration of justice would be “brought into disrepute if evidence relating to unlawful acts, which potentially fall under more than one category of offences, was not adduced based on a definitional distinction.”¹⁰ In so doing the Prosecution dismisses the fundamental rights guaranteed to the Accused and reduces the matter to one of a “definitional distinction.” Such an interpretation is not consistent with the principles articulated in the Statute of the Special Court of Sierra Leone,¹¹ the African Charter.¹²

B. Admission of the Evidence Would Prejudice The Accused By Unduly Delaying the Proceeding

19. The Prosecution argues that “[t]he adduction of the subject evidence will not cause any delay in the trial as the subject material has been disclosed, in some

⁹ Document No. SCSL-04-14-T-344.

¹⁰ Document No. SCSL-04-14-T-341, para. 34.

¹¹ “In the determination of any charge against the accused pursuant to the present Statute, he or she shall be entitled to the following minimum guarantees, in full equality... *To be informed promptly and in detail in a language which he or she understand of the nature and cause of the charge against him or her.* Statute of the Special Court of Sierra Leone, Article 17(4)(a) (emphasis added).

¹² “Every individual shall have the right to have his cause heard. This comprises... (c) *the right to defence*, including the right to be defended by counsel of his choice.” African Charter, Article 7 (emphasis added).

form for over 12 months.”¹³ It is noteworthy that the Chamber reached the opposite conclusion in denying the “Request for Amendment”.¹⁴

20. Given that the Indictment contained no reference to crimes of sexual violence, the fact that the “Request for Amendment” to include such crimes was denied, there was no reasonable basis for the Accused to have focused his defense with such charges in mind. He acted appropriately and should not be penalized for failing to speculate about crimes not included in the Indictment.
21. Given that no such investigation or preparation has been taken, we are left with the reality that the Accused is not prepared to confront and cross examine evidence of sexual violence. As the Prosecution argued so poignantly in its “Request for Amendment,” crimes of sexual violence are by their nature very difficult to investigate.¹⁵ While the investigators who are working on the Accused’s case are quite experienced, they have no training or experience in handling cases of sexual violence and cannot reasonably be expected to undertake their investigation without adequate footing.
22. To adequately respond to such evidence, the Accused would need additional time and this time would result in an undue delay in his trial. This violates the rights guaranteed him by the Statute of the Special Court of Sierra Leone and the African Charter.¹⁶

¹³ Document No. SCSL-04-14-T-341, para. 33.

¹⁴ Document No. SCSL-04-14-T-113.

¹⁵ Document No. SCSL-04-14-PT-107.

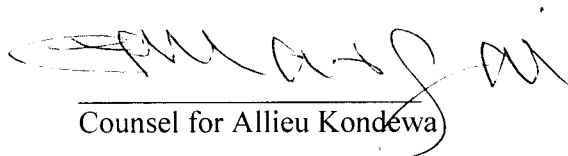
¹⁶ “In the determination of any charge against the accused pursuant to the present Statute, he or she shall be entitled to the following minimum guarantees, in full equality... © To be tried without undue delay.” (Statute of the Special Court of Sierra Leone, Article 17(4)©). “Every individual shall have the right to have his cause heard. This comprises... (d) the right to be tried within a reasonable time by an impartial court or tribunal..” (African Charter, Article 7).

III. CONCLUSION

23. For the reasons stated above, the subject evidence is not relevant and its admission at this stage would prejudice the defense by unduly delaying the proceedings.

Done in Freetown

28th February 2005.


Counsel for Allieu Kondéwa