

(1131 - 1135)



SPECIAL COURT FOR SIERRA LEONE

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THE TRIAL CHAMBER

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

Registrar: Robin Vincent

Date: 8th of December, 2004

PROSECUTOR

Against

SAM HINGA NORMAN
 MOININA FOFANA
 ALLIEU KONDEWA
 (Case No.SCSL-04-14-PT)

SEPARATE CONCURRING OPINION OF JUDGE BANKOLE THOMPSON ON DECISION
 ON ALLIEU KONDEWA'S MOTION FOR SERVICE OF THE CONSOLIDATED
 INDICTMENT AND FURTHER APPEARANCE

Office of the Prosecutor:

Luc Côté
 James Johnson

Court Appointed Counsel for Sam Hinga Norman

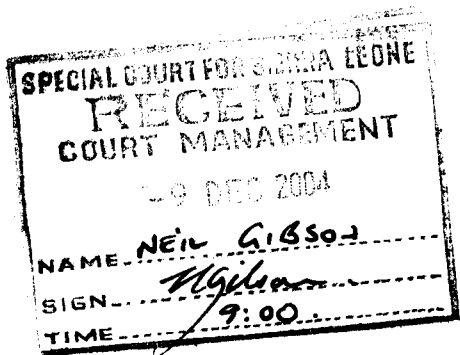
Dr. Bu-Buakei Jabbi
 John Wesley Hall, Jr.
 Tim Owen, Q.C.

Court Appointed Counsel for Moinina Fofana:

Michiel Pestman
 Arrow Bockarie
 Victor Koppe

Court Appointed Counsel for Allieu Kondewa:

Charles Margai
 Yadda Williams
 Ansu Lansana



I. Introduction

1. As to the merits of the instant Motion, I entirely subscribe to and endorse the majority Decision of the Chamber written by my learned brother, Hon. Judge Pierre Boutet, on the specific issues raised by the Third Accused in his application to the Court. I do feel judicially compelled however, to adopt my own reasoning and put forward my own reasons in a brief Separate Concurring Opinion. To begin with I do adopt, in their entirety, the reproduction of (1) The Procedural History, (2) The Defence Motion and (3) The Prosecution's Response as set out in the main Decision.

II. Non-Service of the Consolidated Indictment

2. The first specific issue for determination raised by this Motion is that of the alleged failure to serve the Consolidated Indictment. The contention of the Third Accused on this issue is that he was not served the said document in the manner stipulated by law. Unquestionably, it is trite law that under the Rules of Procedure and Evidence of this Court, it is mandatory for an accused person to be served a copy of the indictment personally at the time the accused is taken into the custody of the Court or as soon as possible thereafter. To this effect is Rule 52(A) which mandates "personal service" to be effected by giving the accused a copy of the indictment approved in accordance with Rule 52(B).

3. In two recent Decisions on this issue¹ this Trial Chamber consistently held that while failure to serve the Consolidated Indictment personally on the Accused persons is a procedural error, such procedural error *alone* would not, in and of itself, unfairly prejudice the Accused's right to a fair trial. In those Decisions, the Trial Chamber did find that there was non-compliance with Rule 52, as a matter of fact and of law.

4. Consistent with the *ratio decidendi* of those Decisions, and noting in the context of this application that the records of the Court Management Office show that the Third Accused was not personally served with the Consolidated Indictment as prescribed by Rule 52(B), but that service was effected on his Counsel, I agree that there has been a breach of Rule 52(B) in relation to the Third

¹ *The Prosecutor against Sam Hinga Norman, Moinina Fofana, Allieu Kondewa* (Case No. SCSL-04-14-T) Decision on First Accused's Motion for Service and Arraignment On the Consolidated Indictment , 29 November 2004, and *The Prosecutor against Sam Hinga Norman, Moinina Fofana, Allieu Kondewa* (Case No. SCSL-04-14-T) Decision on Second Accused's Motion for Service and Arraignment on the Consolidated Indictment 6th December, 2004.



Accused's entitlement to be personally served with a copy of the Consolidated Indictment in conformity with the Order of the Trial Chamber made pursuant to its Joinder Decision of the 22nd day of January, 2004 in this case.² I also agree that such non-compliance does not procedurally invalidate the trial proceeding for two key reasons. The first is that such omission or defect does not, *without more*, prejudice the right of the Second Accused to a fair trial especially based on my recollection and assessment of the procedural steps so far in this case as correctly outlined in the majority Decision. My second reason is that *where an accused person has pleaded "not guilty" to a charge or charges in an indictment he shall, "without further form, be deemed to have put himself upon his trial, and after such a plea, it shall not be open to the accused, except with leave of the Court, to object that he is not properly upon his trial by reason of some defect, omission or irregularity relating to the depositions, or preliminary investigation, or any other matter arising out of the preliminary investigation."*³ It is my considered view, therefore that the Third Accused is estopped from contending that he is not properly upon his trial having pleaded "not guilty" to the indictment.

III. Alleged Differences Between the Original Indictment and Consolidated Indictment.

5. On the second issue of the alleged differences between the *Original* Indictment and the *Consolidated* Indictment, after a meticulous comparison of both accusatory instruments I agree that the *Consolidated* Indictment does contain additions as to geographic locations, as detailed in the majority Decision. I also agree that these additions and elaborations are not *new* allegations. They are emanations from a successful challenge by the Third Accused to the form of the *Original* Indictment following a Motion filed by the said Third Accused on Defects in the Form of the Indictment, complaining of lack of specificity and particularity in respect of certain counts where the formulations "but not limited to these events", "including but not limited to", and "included but were not limited to" had been used in the aforesaid indictment.⁴ The Chamber found that these formulations were "impermissibly broad" except in so far as they relate to 'events', 'locations' and 'dates' *simpliciter*.

² See *Prosecutor against Sam Hinga Norman, Moinina Fofana, Allieu Kondewa*, Decision and Order on Prosecution Motion for Joinder, para 35(3)

³ Article 14(2) of the Statute of the Court authorizes recourse to the jurisprudence of Sierra Leone for guidance (albeit as a matter of discretion), whenever the Rules of Procedure and Evidence of the Court "do not, or adequately provide for a specific situation." It is crystal-clear that there is, at present, no rule of the Special Court on the legal effect or consequence of a plea of "not guilty" by an accused to an indictment as a matter of procedure. For instance, does non-compliance with a rule of procedure necessarily result in a nullity? Evidently, the Sierra Leone law does not adopt this approach. See section 133(1) and (2) of the *Sierra Leone Criminal Procedure Act 1965*.

⁴ *The Prosecutor against Allieu Kondewa*, Decision and Order on Defence Preliminary Motion for Defects in the Form of the Indictment (Case No. SCSL-2003-12-PT) dated 27th day of November, 2003 para 11.

In essence, it was precisely in determining the issue of the extent to which, in the context of the framing of indictments within the jurisdiction of the Special Court, the required degree of specificity or particularity had been met in relation to the pleadings of the allegations in the *Original* Indictment preferred against the Third Accused, that the Trial Chamber did, in respect of the additions and elaborations now complained of, order that the Prosecution, pursuant to the Chamber's *Decision on the Defects in the Form of the Indictment*, file a *Bill of Particulars* providing further and better particulars in response to the Third Accused's objections to the form of the *Original* Indictment. In effect, these additions and elaborations came to be incorporated in the *Consolidated* Indictment through the instrumentality of the *Bill of Particulars* which was already part of the *Original* Indictment.

6. Based on the reasoning and finding in paragraph 5 herein, I opine that the Third Accused is clearly estopped from challenging the validity of the *Consolidated* Indictment, his conduct being patently that of approbating and reprobating. It is trite learning that courts of justice do frown upon such a litigating posture. It is highly improper and irregular for a party to litigation to complain of lack of specificity in respect of certain material allegations and then, when provided with such further and better particulars, to shift position and complain, as it were, about over-pleading. Having so held, the only question that remains to be addressed is whether the Third Accused is entitled to a re-arraignment on the *Consolidated* Indictment incorporating as it does the *Bill of Particulars* which became an integral part of the *Original* Indictment as a consequence of the Third Accused's successful challenge to the form of the Indictment on the grounds of lack of particularity in respect of certain geographic locations.

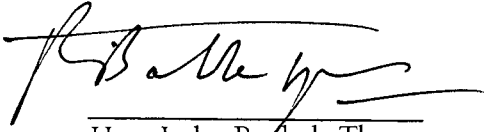
III. The Issue of Re-Arraignment

7. I make shortshrift of the issue of re-arraignment by noting that since the *Consolidated* Indictment is neither an *amended* nor a *new* indictment, no re-arraignment is legally necessary or mandatory.

IV. Conclusion

8. I, accordingly, concur in the Conclusion as set out in the majority Decision and Order therein dismissing the Motion in its entirety.

Done in Freetown, Sierra Leone, this 8th day of December, 2004


Hon. Judge Bankole Thompson

