SCSL-2003-06-PT-05
(1152-1168)

SPECIAL COURT FOR SIERRA LEONE
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IN THE TRIAL CHAMBER

Before: His Lordship, The Rt. Hon. Judge Benjamin Mutanga Itoe

Registrar: Robin Vincent

Date: 22nd day of July 2003.

The Prosecutor against

Tamba Alex Brima

SCSL-03-06-PT

RULING ON THE APPLICATION FOR THE ISSUE OF A WRIT OF HABEAS CORPUS FILED BY THE APPLICANT

Office of the Prosecutor:
Mr. James Johnson
Mr. Nicolas Browne-Marke

Attorney General:
Mr. Joseph G Kobba

Applicant Counsel:
Mr Terrence Michael Terry

Registry:
Mrs. Musu Kamara
Ms. Mariana Goetz

HIS LORDSHIP, THE RT. HON. JUDGE BENJAMIN MUTANGA ITOE:

JUDGE: This is my Ruling on this Application.

The Applicant in these proceedings, Tamba Alex Brima, stands indicted by the Prosecutor of the Special Court of Sierra Leone and is currently remanded in custody on a 17 count indictment dated 3rd of March 2003, preferred against him, and charging him with diverse crimes he committed against humanity and international humanitarian law in the territory of Sierra Leone, crimes which come within the context of the provisions of Article 1 of the Agreement between the United Nations and the Government of Sierra Leone, creating the Special Court for Sierra Leone on the one hand, and also those of Articles 1,2,3,4,5,6,7 of the Statute of the said Court on the other.

Since the Applicant considers his detention illegal, his counsel, Mr Terence Michael Terry, on the 28th of May, 2003, filed a motion in the Registry of the Special Court for leave for the issue of a Writ of "Habeas Corpus" as well as for an Order for a Writ of "Habeas Corpus ad subjiciendum" releasing the Applicant from his present detention which he argues, is unlawful and illegal, and this, pursuant to Rules 54 of the Rules of Procedure and Evidence of the Special Court of Sierra Leone, and under the "Habeas Corpus" Act of 1640 and1816.

This motion is brought against the following Respondents: The Director of Prisons of the Republic of Sierra Leone, The Officer in charge of the Special Detention Facility in Bonthe, and Any other Official who might at the time, have been holding the Applicant in custody.

Having been designated pursuant to Rule 28 of the Rules of Procedure and Evidence to adjudicate on this matter, and considering the urgency of the application, I issued an Order on the 18th of June 2003, granting leave for the Writ of "Habeas Corpus"

to be filed, but no immediate date was fixed for the hearing of the substantive matter for two reasons; the first being the prolonged but justified absence of Learned Counsel for the Applicant, Mr. Terence Michael Terry, who was out of the jurisdiction and secondly, the necessity in my opinion, for the submissions so filed to be served on the Honourable and Learned Attorney General and Minister of Justice of the Republic of Sierra Leone, the State to which the accused seeks to be released if the application were granted.

I accordingly made an Order to this effect, and this, in execution of the inherent discretion of the Court to make certain Orders which are in consonance with the overall objectives of fostering good practices aimed at enhancing and reinforcing the supremacy of the Rule of Law and of the Due Process.

In so doing, I have taken cognisance of the fact that Rule 65(B) of the Rules on 'Bail' contains these provisions and that since applications touching on either Bail or on " Habeas Corpus" if granted, produce the same effects of releasing the accused to the State of Sierra Leone, it was equitable, fair, in conformity with legal norms, and acceptable, to order that the Attorney General be associated to these proceedings, served with the submissions of the Parties, and heard on the application for " Habeas Corpus", a procedure which I agree and appreciate, is not provided for by the Rules of Procedure and Evidence of the Special Court.

Following the Order, the submissions of all the Parties were served on the Learned and Honourable Attorney General for him to submit on issues raised therein, and eventually to appear personally or to be represented at the hearing of the application, and this, following my decision to hold such a hearing in open Court pursuant to the provisions of Rule 73, in addition to the submissions which have been filed by the parties.

At the hearing on the 15th of July, 2003, Counsel representing the parties including the Honourable Attorney General's representative, Mr. Joseph. G. Kobba, made oral submissions and arguments to sustain their respective cases.

For the Applicant, his counsel, Mr. Terry, based his arguments on the illegality of the detention of his client on the following grounds:

-That the name of the person detained is not the same as the person mentioned in the indictment, and further that his identity was mistaken as he did not, as alleged in the indictment, join the Sierra Leonean Army in 1985, and never rose and could not of course have risen to the rank of a Staff Sergeant. The Applicant contends that to that extent, the indictment so approved was, and continues to be fundamentally flawed, invalid and tantamount to a miscarriage of Justice.

-That the warrant of arrest was not served on the Applicant on the date of his arrest by any competent authority.

-That the indictment is defective in that no prima-facie case was established against the Applicant before it was approved and signed by the Judge and that this was in violation of the provisions of Article 47 of the Rules of Procedure and Evidence of the Special Court.

The Respondents in reply to the arguments in support of the application for the issue of a Writ of "Habeas Corpus" have, on their part, canvassed the following arguments:

-That the Application should be rejected on the grounds that neither the Statute nor the Rules of Procedure and Evidence of the Special Court, make provisions for the Writ of "Habeas Corpus" and that it is unknown to the Rules of the Special Court.

- That if the Court were to decide that the Defence motion would be dealt with as the motion under Rule 72 or 73 challenging the lawfulness of the Applicant's detention, such a motion should be rejected on its merits for the following reasons:

-That the contention that the Provisions of Rule 47 of the Rules have been violated is unfounded as all what is required to conform with these provisions had been done by the Respondents who filed the indictment for approval by the designated Judge. The Respondents in any event further contend that the Applicant failed to demonstrate in what sense and it what way the provisions of Rule 47 had been violated.

-On the argument that the indictment is flawed ex-facie because it erroneously contained information to the effect that the Applicant joined the Sierra Leonean Army in 1985 and rose to the rank of a Sergeant, the Respondent in reply, argued in effect that the issue of the veracity of a fact pleaded in an indictment relates to and in fact touches and borders on examining the merits of the case and that this issue can only be determined by the Trial Chamber after hearing the totality of the evidence.

-On the said warrant of arrest which the Applicant contends is flawed for reasons advanced by his counsel, Mr. Terry, in open Court in that it did not, nor did the Judge specifically order the arrest of the Applicant whose identity is contested, the Respondent has canvassed the arguments that the said warrant dated the 7th of March, 2003, is clearly and unambiguously entitled 'Warrant of Arrest and Order for Transfer and Detention.

-On the Applicant's argument that his arrest was flawed because the said warrant of arrest was not served on him, the Respondents contend and seek to rely on the Declaration dated the 31st of May, 2003, of "Moris Lengor" a Police investigator in the Prosecutor's Office, who solemnly declared that the warrant was duly served on the Applicant before he was arrested.

On the allegation that the rights of the Applicant have been grossly violated, the Respondent argue that his rights as guaranteed under Article 17 of the Statute have been properly respected.

On the argument by the Respondent that the Special Court cannot apply the procedure of "Habeas Corpus" because it does not form part of the Judiciary of the Republic of Sierra Leone nor is it a Sierra Leonean Court, Counsel for the Applicant, Mr. Terence Michael Terry, submits on the contrary, that the Special Court for Sierra Leone is clearly part of the Courts of Sierra Leone and that to that extent, as an Adjudicating Body, it falls under the supervisory jurisdiction of the Supreme Court of the Republic of Sierra Leone to which applications for "Habeas Corpus", as provided for by Section 125 of the 1991 Constitution of the Republic of Sierra Leone, can be brought. This Section provides as follows:

'The Supreme Court shall have supervisory jurisdiction over all other Courts in Sierra Leone and over any adjudicating authority, and in the exercise of its supervisory jurisdiction shall have power to issue such directions, orders or writs including writ of "Habeas Corpus", orders of certiorari, mandamus and prohibition, as it may consider appropriate for purposes of enforcing or securing the enforcement of its supervisory powers.'

This argument, the Respondent submits, should be rejected. In making this submission, the Respondent relies on the provisions of Sections 10 and 11 of the Special Court Agreement 2002 Ratification Act, 2002.

Section 10 of this Act reads and I quote:

"The Special Court shall exercise the jurisdiction and the powers conferred upon it by the agreement in the manner provided in the Rules of Procedure and Evidence of

the International Criminal Tribunal for Rwanda in force at the time of the establishment of the Special Court as adapted for purposes of the Special Court by the Judges of the Special Court as a whole".

Section 11 (2) of the same Ratification Act provides as follows and I quote: "The Special Court shall not form part of the judiciary of Sierra Leone".

In his oral arguments in Court, Mr. Terry, Counsel for the Applicant, urged me to hold and to declare that the Provisions of Section 11 (2) of the 2002 Ratification Act, in so far as they are contrary to or inconsistent with the provisions of Sections 125 of the Constitution of Sierra Leone, should, to the extent of that inconsistency, be declared unconstitutional and to quote him, "ex facie" null and void.

Mr. Terry went further and urged me to stay these proceedings and to state a case to the Supreme Court of Sierra Leone for a directive on what he called 'this important constitutional question'. It is in the background of these arguments that I will now proceed to examine the merits and demerits of the application before me.

On the preliminary issue of the propriety of the Special Court entertaining an application for "Habeas Corpus", a fact which surfaces in the proceedings, albeit subtly, as a preliminary objection by the Respondents to this application, I will like to observe that this historic Common Law Writ is founded basically on the principle that no individual should be subjected to an illegal detention.

Indeed, one of the most regularly and too-often deplored breaches of human rights today is the violation of individual liberties which are guaranteed not only by the provisions of Article 3 of the Universal Declaration of Human Rights but also, by practically all democratically inspired Constitutions of Countries of the world, and particularly, those of Member States of the United Nations Organisation.

It is my opinion that because the right to liberty is too sacred to be violated by whoever, any Court faced with or called upon to rule on applications of this nature, in whatever form they may be brought, should, for reasons based on the universal resolve and determination to uphold by all lawful means, respect by all and sundry and in all circumstances, of this entrenched fundamental human right, should entertain such applications and refrain from dismissing them merely on technical pretexts or niceties, geared at and designed to prevent them from being entertained and examined.

This is the philosophy that has guided me all along in granting the application "ex-parte" on the 18th of June 2003, for leave to file the substantive application for the issue of the writ of "Habeas Corpus". In so doing, I agree with the submission of the Respondents that the procedure for granting a release through a Writ of "Habeas Corpus" features nowhere in the Rules for Procedure and Evidence which are applicable to the Special Court. However, entertaining this Writ is dictated by the imperatives of universally ensuring the respect of human rights and liberties.

Besides, this application can be assimilated to a motion brought under Section 73 of our Rules of Procedure and Evidence which, like in this case, which, just as a single Judge can handle applications for Writs of "Habeas Corpus", confers on a single Judge of the Trial Chamber designated under Rules 28 of the Rules of Procedure, the right to handle issues of this nature, after hearing the parties.

In the case of the ***Prosecutor vs Radoslav Brdanin,*** in the matter of an application for the issue of a writ of "Habeas Corpus" in the favour of the Applicant, the Trial Chamber of The International Criminal Tribunal for Yugoslavia (ICTY), on the 8th of December, 1999, composed of His Lordship, Judge Antonio Cassese, Presiding, and Their Lordships, Florence Ndepele Mwachande Mumba ,and David Hunt, Judges, had this to say:

"This Tribunal has no power to issue Writs in the name of any Sovereign or other Head of State. But the Tribunal certainly does have both the power and the procedure to resolve a challenge to the lawfulness of detainees in detention."

This decision was preceded by that of ***Jean Bosco Barayagwiza vs The Prosecutor,*** where the Appeal's Chamber of the International Criminal Tribunal of Rwanda (ICTR) presided over by His Lordship. Judge Gabrielle Kirk Mc Donald, flanked by Their Lordships, Judges Mohamed Shahabuddeen, Lalchand Vorah, Wang Tieya and Rafael Nieto-Navia, made the following remarks, and I quote;

"Although neither the Statute nor the Rules specifically addressed Writs of "Habeas Corpus" as such, the notion that a detained individual shall have recourse to an independent judicial officer for a review of the detaining authorities' act, is well established by Statute and Rules".

In the light of the above analysis, I hold that the Applicant's Writ of "Habeas Corpus" is properly before me, and this, notwithstanding the objection of Learned Counsel for the Respondents, Mr. Browne-Marke, based on the failure of the Applicant to file a proper substantive Writ after he had obtained leave to file same. In this regard, I will like to observe that an examination of the traditional practice in filing Writs of "Habeas Corpus" is, as in this case, and as it is indeed permissible, to couple the application for leave with the substantive application and to file and serve them at the same time since the application for leave to file Writs of this nature is hardly refused at that preliminary level.

Turning now to the merits and substance of this application, one of the very hotly contested and interesting issues in this matter is whether, as Mr Terry, Counsel for the Applicant contends, the Special Court is part of the judicial hierarchy of the Courts of Sierra Leone as provided for under the provisions of the Constitution of the Republic of Sierra Leone.

It should be recalled here that the Special Court was created by Resolution No. 1315, 2000 of the Security Council dated the 14th of August, 2000, and an Agreement dated the 16th of January, 2002, signed between the United Nations and the Government of Sierra Leone to which is annexed, the Statute that forms an integral part of the said Agreement. The Special Court was so created because of the deep concern expressed by the Security Council at the very serious crimes committed within the territory of Sierra Leone, against the People of Sierra Leone and the United Nations and Associated Personnel, and the need to create an independent Special Court to prosecute persons who bear the greatest responsibility for the commission of serious violations of international humanitarian law and crimes committed under the Sierra Leonean law.

Article 1(2) of the Agreement setting up the Special Court stipulates as follows and I quote:

"The Special Court shall function in accordance with the Statute of the Special Court for Sierra Leone. The Statute is annexed to this Agreement and forms an integral part thereof."

Article 14 (1) of the Statute provides as follows and I quote:

"The Rules of Procedure and Evidence of the International Criminal Tribunal for Rwanda obtaining at the time of the establishment of the Special Court shall be applicable mutatis mutandis to the conduct of legal proceedings before the Special Court."

Sub-Section 2 of the same Article provides as follows and I quote:

"The Judges of the Special Court as a whole may amend the Rules of Procedure and Evidence or adopt additional rules where the applicable Rules do not or do not adequately provide for a specific situation. In so doing, they may be guided, as appropriate, by the Criminal Procedure Act, 1965, of Sierra Leone."

This provision underscores the fact that the Sierra Leonean Criminal Procedure Act, 1965 which is an emanation of the Sierra Leonean Parliament, the Municipal Legislative Organ of this Country and which regulates the procedure and conduct of proceedings in all Courts vested with criminal jurisdiction by the 1991 Constitution of the Republic of Sierra Leone, is not applicable to the proceedings in the Special Court, even though it equally, like the Sierra Leonean Criminal Courts, is vested with an essentially criminal jurisdiction, albeit, of an international character.

Pursuant to the provisions of Article 14 sub 1 and sub 2 of the Statute, all Judges of the Special Court of Sierra Leone at a Plenary Meeting held in London, adopted, on the 8th of March, 2003, Rules of Procedure and Evidence which today are applicable in the functioning of the Special Court and very independently of any other Rules of Procedure and Evidence and least still, of those contained in the Sierra Leonean1965 Criminal Procedure Act, or any other which are an emanation of the municipal legislative mechanisms of the Republic of Sierra Leone.

Viewed from another perceptive, the Special Court of Sierra Leone holds its existence, not to the Constitution or to the Parliament of the Republic of Sierra Leone, but solely to the Security Council Resolution No: 1315 2000, of the 14th of August 2000 and the International Agreement between the United Nations and the Government of Sierra Leone which set it up. This Resolution and Agreement are both international instruments which had to come into force as required by international law and practice, following a ratification instrument of the Government of Sierra Leone. It is this formality that warranted the enactment by the Sierra Leonean Parliament, of the Special Court Agreement Ratification Act 2000, and this,

very long after the coming into force of the 1991 Constitution of the Republic of Sierra Leone.

From these dates, it can be deduced that the Sovereign People and the equally Sovereign Parliament of the Republic of Sierra Leone, in enacting the 1991 Constitution in time of peace, never could have enacted or even envisaged constitutional provisions for structures which were supposed to regulate a post civil war stabilizing institution which is what the Special Court of Sierra Leone represents today.

In interpreting therefore the provisions of Sections125 of the Constitution of the Republic of Sierra Leone or of any other provisions, I am guided by the dictum in the case of the ***Bank of England vs Vagliano Brothers*** where His Lordship, The Learned Lord Justice Hercshel had this to say:

'I think the proper cause is in the first instance to examine the language of the Statute and to ask what its natural meaning is'. The natural meaning, the natural interpretation of Section 125 and other provisions of the Sierra Leonean Constitution is that these provisions are only meant to apply to the Courts of Sierra Leone and the Courts which come within the judicial hierarchy of the Constitution of the Republic of Sierra Leone.

I therefore hold that application of Section 125 and other sections of the Constitution which had been referred to by Learned Counsel for the Applicant, is only limited to the Courts created by the 1991 Constitution of Sierra Leone and not to a post 1991 International creation that owes it existence to an international instrument of the Security Council and an equally International Agreement between the United Nations and the Government of Sierra Leone.

To crown it all, Section 10 of the Special Court Agreement Ratification Act provides, and I quote:

'The Special Court shall exercise its jurisdiction and powers conferred upon it by the Agreement.' Section 11(2) of the same Ratification Act provides:

"The Special Court shall not form part of the Judiciary of Sierra Leone."

In the course of arguments in Court, Learned Counsel for the Applicant, Mr Terence Terry, urged me to state a case to the Supreme Court of Sierra Leone on the constitutionality of the provisions of Article 11 (2) of the Ratification Act 2002 which he submitted, are unconstitutional in so far as they are inconsistent with the provisions of the 1991 Constitution of the Republic of Sierra Leone.

It is my considered opinion in this regard that the jurisdiction of the Special Court is limited only to matters that fall under the provisions of the Statute and the Agreement. Indeed, nowhere in these two instruments is the Special Court of Sierra Leone subjected to the jurisdiction of the Supreme Court of Sierra Leone, nor is it empowered or authorised to state cases to that Court or even to get into examining issues relating to constitutionality or even arrogating itself with the competence of declaring unconstitutional, a sovereign enactment of the Sovereign Legislature of the Republic of Sierra Leone or Acts of its Executive Organs.

I therefore hold, from the foregoing analysis, that the Special Court, even though created by a special International Agreement between the United Nations and the Government of Sierra Leone, and even though, by that same International Agreement, Distinguished Judges, Counsels and Jurists of Sierra Leonean origin are appointed to serve on it, is not, should not, and cannot be considered as forming an integral part of Courts of the Republic of Sierra Leone. Rather, it is, to all intents and purposes, a Special International Criminal Jurisdiction whose mandate is

defined by Security Council Resolution Number 1315, 2000 of the 14th of August,2000, and further that all appeals from the Trial Chamber of the Special Court lie, in the last resort, not to the Supreme Court of The Republic of Sierra Leone, but before its Appeal Chamber which is the highest and final jurisdiction in its judicial hierarchy. It therefore has no connection with the Supreme Court of Sierra Leone nor is it subjected to its jurisdiction, supervisory or otherwise.

Having examined the constitutional, procedural, and jurisdictional issues of this matter, I will now address the most important aspect on which the application for "Habeas Corpus" is based, that is, the alleged illegality of the detention of the Applicant.

In this regard, I would like to refer to a very well known principle that was laid down in the case of Zamir vs the United Kingdom 40 DR 42 at page 102 where it was decided that the burden of proving the legality of the detention rests on the State. In contesting the legality of the detention of the Applicant, Learned Counsel, Mr. Terry, contends that the Applicant in his affidavit affirms that his name is Tamba Alex Brima and not Alex Tamba Brima as appears in the indictment filed by the Prosecutor and subsequently approved by His Lordship, Judge Bankole Thompson pursuant to the provisions of Rule 47 of the Rules of Procedure and Evidence.

To buttress this argument, Counsel for the Applicant alleges that the indictment contains erroneous information in that it alleges that his client had joined the Sierra Leonean Army in 1985 and rose to the rank of a Staff Sergeant. He argues and has produced documentary evidence of correspondences his Chambers has had with the Headquarters of the Sierra Leonean Army, showing that the Applicant has never been enrolled in the Sierra Leonean Army. He therefore contends that the said indictment was fundamentally flawed. He also argued that the warrant of arrest was equally flawed for similar reasons.

On the contested identity of the Applicant, I observe from the indictment that it reads as follows: The Prosecutor versus Alex Tamba Brima also known as aka Tamba Alex Brima aka Gullit. Could this not be interpreted as charging the same Applicant before me who admits that his real names are Tamba Alex Brima as is alleged in the indictment? Besides, the indictment alleges and attaches another name to the Applicant's name, that is, 'Gullit'. When the Applicant was called up with all these names and arrainged before me on the 17th of March, 2003, as well as when he was called up and again appeared before me on the 15th of July, 2003, he, also known as (aka) Tamba Alex Brima Aka Gullit, did not contest the fact that he is also called 'Gullit'

Since he took the plea as Alex Tamba Brima, I will like to imagine without concluding, that he could be one and the same person that the Prosecutor is targeting as Alex Tamba Brima. Even if a doubt is created in respect of his having served in the Sierra Leonean Army, I cannot at this stage, as a designated Pre-trial Judge, resolve this issue which I consider properly within the competence and jurisdiction of the Trial Chamber and which, in my judgement, is the rightful venue to examine evidence on those facts which touch on the indictment and on the warrant of arrest in the course of the trial of the Applicant.

Learned Counsel for the Applicant also challenged the legality of the warrant of arrest on the basis that it did not contain an Order by the Judge to specifically arrest Tamba Alex Brima. In this regard, I observe that the relevant provisions of Rules 47 (H) and 55 do not consecrate a format for a warrant of arrest. It would appear to me sufficient, if, as the instant warrant does, the name of the person to be arrested is specified and the said person is identified and arrested accordingly. In any event, having been taken into custody, a mere technical flaw in the warrant of arrest neither renders the said arrest nor the detention based on that arrest, illegal.

On the contention by learned Counsel for the Applicant that the approved indictment was flawed in that it was signed ex-parte by the Judge when a prima-facie case was not established by the Prosecutor, I would like to refer to the relevant portions of the Rules.

Under Rule 47 (A), the Judge is conferred with powers to approve the indictment.

Under Section 47 (C) It is stated that the indictment shall contain and be sufficient if it contains the name and particulars of the suspect, a statement of each specific offence of which the named suspect is charged, and a short description of the particulars of the offence. It shall be accompanied by a Prosecutor's summary briefly setting out the allegations he proposes to prove in making his case.

Under Section 47 (E), the designated Judge shall review the indictment and the accompanying material to determine whether the indictment should be approved. The Judge shall approve the indictment if he is satisfied that:

(a) "The indictment charges the suspect with a crime or crimes within the jurisdiction of the Special Court"; and
(b) "The allegations in the Prosecutor's summary would, if proven, amount to the crime or crimes as particularized in the indictment"

From the foregoing analysis, it is clear that the Application by the Prosecutor for the approval of the indictment is made to the Judge ex-parte and that the Judge, in my opinion, either applying the objective or subjective test, approves it as such. The Prosecutor cannot indeed at that stage, without having called evidence in Court, be expected to establish a prima-facie case nor can the Judge, in such circumstances, without evidence having been so adduced, so find. Indeed, all the indictment needs to satisfy for it to be approved is what is contained in Rule 47 (E) and not that the documents so submitted should establish a prima-facie case against the accused.

Once the Judge at this stage is satisfied that the indictment and the facts accompanying it, if proven, amounts to the crime or crimes particularized in the indictment, he should, without more, like His Lordship, Judge Bankole Thompson did, sign the indictment so submitted by the Prosecutor.

Since this argument, like all others relating to the illegality of the Applicant's detention, fail to justify the case the Applicant set out to establish in order to secure the immediate release by the granting and issuing of a Writ of "Habeas Corpus", I accordingly dismiss it and at the same time, dismiss the application for the issue of the Writ of "Habeas Corpus in his favour because the arguments of Learned Counsel for the Applicant, Mr. Terence Michael Terry, even though very profoundly and ingenuously presented, lack the legal merits to meet the standards required for the issue of a Writ of this nature, and particularly in a situation such as this, where the Prosecution has fully discharged the burden placed on it to justify the legality of the Applicant's detention.

The application for the issue of this Writ is therefore refused and is accordingly dismissed.

The Applicant will continue to remain in custody.

Done at Freetown, this 22nd day of July 2003

HIS LORDSHIP, THE RT. HON. JUDGE BENJAMIN MUTANGA ITOE.