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THE STATE

VS.

FODAY KALLAY & ORS.

**JUDGMENT DELIVERED
BY THE HONOURABLE
MR. JUSTICE P.O. HAMILTON**

ON THE 5TH DAY OF APRIL 2006

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THE STATE Vs. FODAY KALLAY & ORS.

This matter originally started with a thirty – one (31) count indictment and a total of twenty – seven (27) accused persons.

Following a no case submission on behalf of the accused persons in which sixteen (16) accused persons were discharged and there were eleven (11) accused persons left for whom it was ruled that they have a case to answer.

The prosecution decided to proceed with counts 1 to 10 and counts 29 to 31. In relation to counts 11 to 28 the prosecution did not lead evidence on them but applied that they do remain in the file.

In the submission of no case to answer the prosecution conceded that no evidence has been led on counts 29 to 31 and all accused persons were discharged.

I was now left to consider counts 1 to 10 which deals with the offence of conspiracy to murder contrary to section 4 of the offences against the persons act 1861 (OAPA).

The accused persons were then re- numbered. The 1st to 6th accused retained their positions whilst the 8th became 7th 10th became 9th 13th became 10th and 14th became 11 accused.

I shall refer to them in their present number. This trial proceeded by trial by judge alone, that is i was both judge and jury. Counts 1 to 10 deals with conspiracy to murder contrary to section 4 of the (oapa 1861. The particulars of offence on all the counts relates to divers days between 8th July 1999 and 15th September 2000 at okra hill area in the koya chiefdom, port Loko district in the northern province of the republic of Sierra Leone that the accused persons conspired together and with other persons unknown to murder Haja, Betty, Lucy J.T., Morlai Kamara, Zainab, Mummy, Captain Killer and Mr. Williams.

Section 4 of oapa 1861 provides: “all persons who shall conspire, confederate and agree to murder any person whether subject to his Excellency the president or notand whoever shall solicite, encourage, persuade or shall propose to any person to murder any other person shall be guilty of a misdemeanor and shall be convicted thereof.....”

The prosecution must prove a conspiracy between the accused persons or between them and any other persons unknown the object of which was to murder the persons named in the counts contained in the indictment.

What then in law is conspiracy? This is an agreement between two or more persons to do an unlawful act or to do a lawful act by an unlawful means. Where it rests on intention only it is not indictable. However, where two agree to carry it into effect the very plot is an act itself and the act of each of the parties, promise against promise, actus contra actum. This offence can only exist with the consent of two or more persons and their agreement is an advancement of their intention which each has conceived in his mind which then passes from a secret intention to the avert act of mutual consultation and agreement.

Thus an agreement by two or more persons is conspiracy even if the conspirators did nothing in pursuance of the said agreement. Conspiracy involves the element of "mens res" in that the prosecution must prove not only an agreement between the conspirators to carry out an unlawful purpose, as signified by words or other means of communication between them but also an intention in the mind of the alleged conspirator to carry out the unlawful purpose.

In conspiracy, it must be proved that the alleged conspirators were acting in pursuance of a criminal purpose held common between them and that each conspirator knew there was in existence or coming into existence a scheme which went beyond the illegal act which he agreed to do. To convict of conspiracy it is not necessary for the conspirators to have concocted the scheme which is the subject matter of the charge nor that they should have originated it. If a conspiracy is formed and a person later joins it afterwards he is as guilty as the original conspirators.

In a charge of conspiracy, unlike other offences, the acts and declarations of anyone of the conspirators in furtherance of the common design may be given in evidence against any other conspirator and this applies where the charge is one of a crime committed in pursuance of the conspiracy.

It is for me sitting as both the judge and the jury to remind myself that before evidence can be given of the acts and declarations of one conspirator against another the existence of the conspiracy must be proved and also the

facts that the parties were members of same conspiracy and that the act in question was done in furtherance of the common design.

The law having been set out as above, it is for me to remind myself sitting as judge of both law and facts that this is a criminal trial for which the burden of proof rests on the prosecution to prove the guilt of the accused persons beyond reasonable doubt and not for the accused persons to prove their innocence. Where the prosecution succeeds the accused persons must be found guilty and convicted. Where they fail, the accused persons must be found not guilty and acquitted and discharged; similarly where there is a reasonable doubt created on the basis of the evidence led that reasonable doubt must be resolved in favour of the accused persons he must be acquitted and discharged.

It is for me to also remind myself that this is a case of plurality of accused persons for which i must look at the evidence against each accused person but subject to the law relating to conspiracy wherein acts and declarations of one accused person against another accused person may be used as evidence against that other accused person.

What was the evidence led both for the accused persons and the prosecution? It is for me to review briefly the evidence led in order to arrive at a reasonable conclusion. The evidence to be considered now is in relation to the 1st 2nd 3rd 4th 5th 6th 7th 8th 9th 10th and 11th accused persons as they have now been numbered although the changes only affect 11th and 12th accused who are now 10th and 11th accused i.e Kai Komba Koroma and James Dove Edwin whilst all others still retained their original numbers.

Pw1 Ambrose Michael Sorula detective police inspector tendered charge statements of 3rd accused as exh. A and the charge statement of 5th accused as exh. B. Pw2 Andrew Abu Bakarr Turay p.c. 1286 tendered the charge statement of 1st accused as exh. H and the charge statement of 4th accused as exh. J. In xxd. He said he has been in the police for 17 years and took no part in this investigation except that he obtained charge statements. He knew that the accused persons from whom he obtained statements were detained for more than 72 hours. In rexxd he stated that in police force he acts only on instructions from superiors and in this case he cannot grant bail.

Pw4 Alfred Bashiru Sesay detective inspector of police tendered in evidence the voluntary cautioned statement of 2nd accused as exh. Q the voluntary

cautioned statement of 8th accused as exh. R, the voluntary cautioned statement of 10th accused as exh. S.

P.w.5 Jane Martha Tommy Dwp/Sgt 4543 tendered the charge statement of the accused as exh. T. P.W.6 Mohamed Koroma Dpc 268 tendered the voluntary cautioned statement of the 6th accused as exh. X. In XXD she said that the 6th accused was not incarcerated at the C.I.D. and cannot tell whether he was incarcerated before he made his statement. The 5th accused was brought to the C.I.D. but cannot tell from where he came from. They were three in the room where he made a statement which lasted for over 5 hours. The 5th accused did volunteer to make a statement. He is not in a position to say that all what the 5th accused said were against 1st accused. He was only present when 5th accused made his statement. The 1st accused was not present when 5th accused made his statement. He can recall what happened 5 years ago. The 5th accused did say he once suffered from mental illness. He never informed the authorities. He cannot tell whether 5th accused was mentally sick or not.

Pw8 Claude Brima P.C. 5644 rendered in evidence the voluntary cautioned statement of 4th accused as exh. AA the charge sheet statement of 7th accused as exh. Aa2 and charge cautioned statement of 9th accused as exh. Aa3. In xxd he said the 4th accused denied the allegation put to him.

PW10 Abu Bakarr Kargbo P.C. 2541 tendered in evidence the voluntary cautioned statement of the 8th accused as exh. AA6 and the voluntary cautioned statement of 9th accused as exh. Aa7. Abdul kawusu koroma (pw11) tendered in evidence the voluntary statement of 1st accused as exh. Aa8. In xd from C.A. Osho – Williams Esq. He said the statement commenced on 10/9/2000 and it was the day of "operation thunderbolt". He understands meaning of thunderbolt is to get west side boys off their base without their knowledge. He has heard about "thunder" which is a powerful force. If thunder is used with another word it means a very forceful operation. In the statement he read thunderbolt several times. He saw 1st accused made his statement which he witnessed. He cannot tell the state of 1st accused when he made his statement.

PW12 Samuel Momodu Vandy Dp/Sgt. 1325 tendered the charge statement of 6th accused as exh. Aa10. Pw13 Paul Sitta Mustapha Conteh P.C. 1644 tendered the voluntary cautioned statement of 3rd accused as exh. Aa12. Answering questions in xxd he said he was investigating the subversive

activities of westside boys and by that he means murder, robbery and kidnapping. From his statement there is nothing leading to these offences. The 3rd accused said he was fighting against the RUF. Apart from 3rd accused he obtained statement from no other person. The 3rd accused in his statement did say himself and others wanted to overthrow the 1st accused Foday Kallay. Pw14 Emmanuel Cole Dp/Sgt. 2099 tendered in evidence the voluntary cautioned statement of 10th accused as exh. Aa13 and the charge statement of 11th accused as exh. Aa14.

Pw15 Alie Sankoh P.C. 4865 tendered in evidence the voluntary cautioned statement of 7th accused as exh. Aa16. Pw17 Musa Brima Bangura who was formerly a lieutenant but now a major in the AFSL recognises 1st 2nd 4th and 5th accused who narrated how he was captured at the west side jungle together with some British soldiers. He narrated at length the way he was maltreated at the Westside jungle and as to how 1st accused gave orders that he should not be killed. He was locked up and beaten by some boys. His evidence was more in relation to count 31 but it fell short to grant a conviction. The accused persons were all acquitted and discharged on that count.

This was briefly the prosecution case when on a no case submission some of the accused persons were discharged and these 11 were then asked to put in their defence.

It is my duty to once again warn myself as both judge of law and facts that this is a criminal trial for which the burden of proof is on the prosecution to prove it's case beyond reasonable doubt and not for the accused to prove their innocence. Where the prosecution does lead sufficient evidence against the accused persons they must be found guilty and convicted. Where the prosecution fails the accused persons must be found not guilty and acquitted and discharged; similarly there is a reasonable doubt created based on the evidence that reasonable doubt must be resolved in favour of the accused persons and they must be acquitted and discharged.

However the version of the accused persons must also be considered as it is their own case. Some accused persons relied on their statements while some elected to give evidence on oath and call witnesses in their defence. It must be noted that these statement are part of the case for the prosecution.

1st accused elected to give evidence on oath and call 1 witness. 2nd accused relied on his statement to the police and relied on the statement of the 1st accused as his witness. 3rd accused relied on his statement and called no witnesses. 4th accused elected to give evidence on oath and call no witnesses. 5th accused relied on his statement and called no witnesses. 6th elected to give evidence on oath and called one Papa alias bomblast as his witness. 7th accused elects to give evidence on oath and called no witnesses. 8th accused elected to give evidence on oath and called one witness i.e the director of records at Central Prison Pademba Road. 9th accused elected to give evidence on oath and called one witness Papa Bangura alias bomblast. 10th accused elects to give evidence on oath and called two witnesses. Saidu Mansaray of prisons for his records and Papa Bangura 11th accused elects to give evidence on oath and called no witnesses.

I shall first consider the statements of the accused persons in portions that touch and concerns the offences of conspiracy.

The 1st accused in his statement after narrating at length his position in the army and his involvement in the west side said "....."Sometime in early july 2000 i ordered the execution of Borbor Tommy alias J.T. Morlai Kamara, Zainab and Mummy. My instructions were carried out by Colonel Savage. After the execution the bodies were buried in the jungle at the brigade. The reason for these executions were occasioned by the revelations they made. All four had conspired together to witch me and deprive me of my enviable position through the power of witch craft they proved this to the full view of everybody in the west side jungle when each of them confessed to their deeds apart from these executions nobody else was executed during my time as commander. The allegation that i threatened and actually killed some people who attempted to leave the jungle and join the peace process is false

The second accused in part of his statement exh. Q said "....." Another violent incident which took place was the killing of borbor tommy alias J.T. LT. Col. Morlai kamara, Zainab and Mummy. The instructions for such killing was given by Brigadier Kallay. The reason for the killing was that they have bewitched him to deprive him of his position as leader of west side jungle. Brigadier Kallay in my presence executed nine people. Out of that number-six are women and three men.

The third accused in his statement exh. Aa12 said after narrating his role in the armed forces said ".....": In the administration of the west side jungle it is only managed by majors and colonels. They exercise the authority delegated to them by Brigadier Kallay and they give out orders to various commanders of the west side. During Brigadier Kallay's regime if anyone is caught violating the laws of the jungle you are either punished or executed by the security of Kallay. In the case of the witchcraft incident done. Names of the victims said to be witchcraft are Bobor Tommy alias J.T., Morlai Kamara, Zainab and Mummy....." the 4th accused said ".....all the atrocities caused by the Westside boys were no news to Foday Kallay..... In August 2000 Foday Kallay shot the following Bobor Tommy alias J.T. Zainab Bangura and her 3 months old baby boy whose name I cannot tell. Lt. Colonel Morlai and other all about 36 in number were shot dead in different camps. I cannot tell why he killed them. The corpse were abandoned in the Magbeni River. Some were buried in mass graves at the Brigade Headquarters. On the orders of brigadier Foday Kallay Lt. Col. Sillah Bah and Lt. Col. Sankoh alias Kuntobi shot and killed one Westside call Capt. Killer at the Brigade Headquarter, Rogbere Bana.....this incident took place in my presence even though I was based at Camp Eagle. In the jungle Brigadier Kallay was the one that gave the order for the victims to be executed. The 1st accused Foday Kallay states that before he was taken to Pademba Road he was at okra hills. He was a soldier and lance corporal in rank. He never knew the other accused persons except in prisons. He can't recall between 8/7/99 to 15/9/2000 because it has been a long time. He does know the other accused persons as he was absent minded he did mention Mummy, Zainab, Morlai and Bobor Tommy alias J.T. who are now dead through gun shot. They died accidentally, he does believe in witch craft. He gave the orders that the four be shot but cant now tell the names of those who shot at them. He was in the complainant when they were executed. His orders were carried out. On re-examination he said the accused he mentioned were in the complainant with him but were not present when the four were shot. He said that all the orders he gave were due to witch craft.

The 2nd accused Osman Sesay said he was in Makein between 1999 and the year 2000. He knew west side when he was arrested by some west side boys under the command of Foday Kallay the 1st accused. He was taken to the west side where he was beaten seriously by some boys who alleged he was a spy for Government. He does not know Haja, Iye and others but did hear that Foday Kallay 1st accused has killed them. He never told Foday Kallay

about witch craft. He was sentenced one day when Foday Kallay sent to arrest him and said he would kill him if he does not speak the truth. He threatened to kill him on a Sunday but did not do it. He left and was on his way to Port Loko when he was arrested. On examination he said he was in Makeni in the year 2000 and he was not at west side in the year 1999. That he is not a military man and was unfortunate to be in the west side jungle by then. He knows Kombole jungle (70) miles away from Kabala. There where fighters in it but he was not one of them. He was supplied with rifle and bullets before his arrest to west side jungle he was at Kabala. There were people arrested in the west side jungle. He heard about the killings and these are the atrocities he spoke about. He knows 1st 2nd 3rd and 5th accused. That he knew the other in the jaw-jaw when he was arrested there. The 1st accused has a personal grudge for him.

The 6th accused Jonathan Maxwell said he knows 7th 8th 10th and 11th accused when he was arrested on 1st June 2000 at Gbanie facing Portee Wharf on an assignment by Brigadier Bomblast. He was arrested by the British Troops. He was never in the Westside but in the Army. He was in prison when he heard that 1st accused is the head of west side jungle and has never met 1st accused before. On examination, he said was once a soldier from 1991 to 1993. he does not agree that he was a west side boy.

The 10th accused stated he was a soldier between 1999 and 2000 assigned to Bannie Village under the command of Brigadier Bomblast. He knows 6th 7th 8th and 11th accused as they worked together. He only knew 1st accused at central prisons Pademba Road. In cross-examination, he said the four he mentioned he knew as Bannie in the colony which is Port Loko district where 5th battalion was based. He knows Papa Bangura. He does not know 1st accused as commander. On the 1st June 2000, he was serving the Government on 6th January 1999, he was taken out of Pademba Road prisons and he settled at Okra Hills.

DW, Hassan Bangura states that he knows 6th 7th 8th 10th and 11th accused who fought along side with him when the RUF was advancing to Freetown between Masiaka and Rogbere Junction when he was commander of 5th battalion. Those he named were with him between May and June 2000. he knows Bannie along the Lungi axis. They were arrested on 1st June 2000 at Bannie village. Whilst there he received a message. He then met the Chief of Defence Staff since some British soldiers arrested some men there. He went to collect them at CID but was told they were now at Pademba Road

prisons. He too was later detained at Pademba Road prisons. He never knew Foday Kallay the 1st accused. The area was called west side. In cross-examination from Robbin-Mason Esq. he said that he visited central prisons on the 5th June 2000 and found the people there. They were at 5th Battalion under his command. He was at west side between November 1999 and January 2000. He recalls 6th January 1999 when he was in Makeni, west side was formed in 1999. Between January 1999 and January 2000 he was in Makeni. Before he joined west side it was in operation. For the one year he was not there he cannot tell what happened. He can not tell what they did there during that one year. In Re-examination he said he was there at Makeni under the supervision of Johnny Paul Koroma and all those assigned were under Government orders.

DW2, Saidu Mansaray a Prison Officer with the rank of ASP narrated his duties of which one is records Officers at Central Prisons Pademba Road, Freetown and has to take records of persons taken to Prisons. He then produced and tendered the record book of prisons as exhibit AA18. In it the following accused were received into the Central prisons – 8th accused on 1st February 2007 accused on 1st June, 2000, 11th accused on 1st June, 2000, 10th accused on 1st June, 2000 6th accused on 1st June, 2000 and 4th accused on 1st June, 2000. This was the defence evidence.

The statements of 4th, 6th, 7th, 8th, 10th and 11th accused are all the same in that they were at Gbanie near Portee Wharf when some British Military Officers arrived by boat to enquire why they were there as Soldiers. They were loaded on boats and taking to Lungi on the 1st June, 2000 at the Police. Later they were taken to the Pademba Road Prisons on the 1st June, 2000. These statements are in line with the evidence of DW,2, Saidu Mansaray as is contained in the records of the Prisons.

The evidence ~~45~~ contained in their statements was that they were at Gbanie Village which is far away from Okra Hills. This raises an alibi which has not been disproved by the prosecution in their evidence. Does this bring them within the web of conspiracy as contained in the indictment? The definite answer is in the negative. Secondly the defence evidence as is contained in that of DW2 Saidu Mansaray ought to be closely looked at in relation to the entire evidence led in this matter in order to arrive at a reasonable conclusion.

The 1st and 2nd accused especially 2nd accused whose statement gave a graphic and detailed account is indeed clear that they are the king pin in the entire act of conspiracy as detailed in their statements.

DW1 stated that he cannot tell what happened at the west side between 8th July 1999 and 1st January, 2000 since he became a commander when he came to the west side jungle as its commander from January, 2000.

FINDING AND CONCLUSION

Considering the totality of the evidence both for the prosecution and the defence it is clear the 1st accused admitted he is the king in the whole episode and stated that those who did carry out his orders are not in court such as Cyborg Captain Nigeria, Kontobee and captain Med. The 1st accused admitted that he carries all the blame in the entire episode and in the conspiracy since it is clear in his evidence on oath that those whom he conspired with in his atrocities are not in court. His association with Cyborg, Captain Nigeria, Kontobee who are not in the dock clearly goes to meet the requirement of the conspiracy charge in the use of the phrase and with other persons unknown". The unknown persons were named by the 1st accused in his evidence. Secondly he stated in evidence about witch craft which he believes in. I will not comment on it as I do not believe in it this all I can say. The 2nd, 3rd, and especially 5th accused have been his co-actors in this ploy within the conspirators gang.

In conclusion I find the following guilty on counts 2, 3, 5, 7, and 9 and not guilty on counts 1, 4, 8 and 10. they are 1st, 2nd, 3rd, 5th, 7th, 8th and 9th accused i.e. Foday Kallay, Osman Sesay, Mohamed Bangura, Mohamed Savage, Foday Kamara II, Fofana and Samuel Kargbo.

The evidence against the following is not sufficient in my humble opinion and would find them not guilty on all the ten (10) counts of conspiracy and acquit and discharge them. They are 4th, 6th, 10th, and 11th accused that is Mohamed Sidiquee, Jonathan Maxwell Kai, Komba Koroma and James Dove Edwin.

Let me put on record my thanks and appreciation to the DPP Mr. O.V. Robbin-Mason, A.K.A. Barbar and C.A. Osho – Williams who acted for all

accused persons for their time and effort in seeing this matter come to an end thus ending a sad and big chapter in the judicial history of this country.

Mr. Osho Williams in mitigation that justice be tampered with mercy. The accused persons are young men and must be given a second chance in life. Submit they have regretted all their deeds in this action and that they should be given the chance.

ALLOCUTUS

- 1ST Accused begs for mercy
- 2nd Accused begs for mercy
- 3rd Accused begs for mercy
- 5th Accused begs for mercy
- 7th Accused begs for mercy
- 8th Accused begs for mercy
- 9th Accused begs for mercy

SENTENCE

Each accused should serve a prison sentence of ten (10) years on each of the six (6) counts with sentences to run concurrently and to commence on 5th April, 2006

Signed:

P.O. Hamilton J.A.

Delivered on the 5th day of April 2006

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MASTER AND REGISTRAR