



Case No. SCSL-03-02-PT  
THE PROSECUTOR OF  
THE SPECIAL COURT  
V.  
ALEX TAMBA BRIMA

22 July 2003  
11.00 A.M

HEARING ON APPLICATION FOR BAIL

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Before the Judge:

**Benjamin Mutanga Itoe**

For the Registry:

**Ms Musu Kamara**  
**Ms Mariana Goetz**

For the Prosecution:

**Mr James Johnson**  
**Mr Nicholas Browne-Marke**

For the accused Alex Tamba  
Brima:

**Mr Terrence Michael Terry**

For the Attorney General:

**Mr Joseph G. Kobba**

1 [BRI22JUL03 - MD]

2 Tuesday, 22 July 2003

3 [Bail application]

4 JUDGE ITOE: Appearances, please.

5 MR TERRY: May it please Your Lordship, Terrence Michael  
6 Terry for the applicant, for the accused. I want only to say, My  
7 Lord, with your leave, that it appears the order has been  
8 reversed to read that at the last hearing I do recall the habeas  
9 corpus application took precedent for the bail. But if I get the  
10 court register correctly, she announced the bail application. I  
11 don't know whether that is as a result of your direction. I'm  
12 just a little bit concerned.

13 JUDGE ITOE: I think so. It may also be correct to say  
14 that I did indicate that there were -- that the two applications  
15 were independent of each other.

16 MR TERRY: That's correct, My Lord.

17 JUDGE ITOE: But they would be given the consideration, you  
18 know, on their merit.

19 MR TERRY: Yes, My Lord. It doesn't matter which comes  
20 first.

21 JUDGE ITOE: It doesn't matter which comes first.

22 MR TERRY: Absolutely not.

23 MR BROWNE-MARK: Yes, My Lord. For the respondent, James  
24 Johnson, and Nicholas Browne-Marke.

25 JUDGE ITOE: Accused stand. This is my ruling on this  
26 application.

27 1. Mr Tamba Alex Brima, the applicant in this matter, is  
28 in custody as standing charged before the Special Court of Sierra  
29 Leone on a 17 count indictment, preferred against him by the

1 Prosecutor of the Special Court. The charges allege crimes  
2 against humanity and international humanitarian law committed by  
3 -- allegedly committed by the applicant in the Territory of  
4 Sierra Leone, crimes which come within the context of the  
5 Provisions of Article 1 of the agreement between the United  
6 Nations and the Government of Sierra Leone, creating the Special  
7 Court, on the one hand, and also those of Articles 1 -- 1, 2, 3,  
8 4, 5, 6 and 7 of the Statute of the said Court on the other.

9 The applicant appeared before me as a designated pre-trial  
10 Judge on the 17th of March 2003, when he was arraigned on each  
11 and all the counts of the indictment brought against him. He  
12 pleaded not guilty to all of them. He was, however, at the end  
13 of that procedure, or that process, remanded in custody on the  
14 same day pending the commencement of his trial.

15 On the 28th of May 2003, the applicant's counsel, Terrence  
16 Michael Terry, filed this motion for bail or for provisional  
17 release of his client and this, pursuant to the provisions of  
18 Rule 65 of the Rules of Procedure and Evidence of the Special  
19 Court for Sierra Leone. The factual basis on which the motion is  
20 founded are as follows:

21 That the applicant, Tamba Alex Brima, is presently  
22 suffering from serious medical problems, which require daily  
23 care, namely, diabetes and hypertension. That the applicant is  
24 having frequent nightmares at the Bonthe Detention Facility and  
25 that his general health and sight are fast deteriorating and I  
26 quote "he has not been able to see any eye specialist."

27 That the accused is a married man with a son, and the wife  
28 is unemployed, and the accused is the sole breadwinner, so the  
29 continued detention of the accused will cause untold suffering to

1 his wife and child financially and otherwise.

2 That the continued detention of the accused is prejudicial  
3 to him and continues to impair his access to his counsel  
4 regarding his defence for the ensuing trial proper.

5 That his trial will be delayed because the finishing of the  
6 construction works of the Special Court in Freetown is going to  
7 be delayed beyond early 2004.

8 That the accused will appear for his trial.

9 That the accused will not pose a danger to any victim,  
10 witness or other person.

11 In addition to the aforementioned facts, the applicant  
12 swore to an affidavit on 23rd May 2003 in the Special Court  
13 Detention Facility in Bonthe. The applicant relies mainly on the  
14 facts deposed to in paragraphs 2 to 34 of his affidavit. In the  
15 affidavit he states that if released on bail he will appear for  
16 his trial and would not pose a danger to victims or witnesses, or  
17 to other persons, conditions which are stipulated under Section  
18 65 (B) to guarantee his release.

19 Counsel for the applicant, in making his submissions on the  
20 law, referred to Rule 65(A). He argues that his client in his  
21 affidavit deposes to the fact, in fact, makes the engagement that  
22 he will appear for trial and if released would not pose a danger  
23 to any victim, witness or other person. He argues that under  
24 Rule 65(D) the Court has a discretion to impose such conditions  
25 as may be determined or may be deemed appropriate upon granting  
26 bail. He submits that the Court grant conditional or  
27 unconditional release to his client.

28 Furthermore, counsel for the applicant argues that the  
29 purported warrant of arrest did not order the arrest of his

1 client, Tamba Alex Brima; that the warrant of arrest was not  
2 served on him and that Judge Bankole Thompson lacked jurisdiction  
3 and acted in excess of his jurisdiction when he granted the order  
4 on 7th March 2003; that the orders ordered by the Judge were  
5 fundamentally flawed and violated the provisions of Rule 47 of  
6 the Rules of Procedure and Evidence.

7 He concludes by arguing that the Court releases the  
8 applicant on bail conditionally or unconditionally. The  
9 respondents on their part argued that the legality of the arrest  
10 and detention of the accused person is not relevant to an  
11 application for bail. The respondents contend that by applying  
12 for bail in this case the accused has conceded to the legality of  
13 his arrest and detention. That as far as the validity of the  
14 applicant's arrest, on the warrant of arrest and the order of  
15 transfer and detention is concerned, the respondents are adopting  
16 their arguments advanced in their application for habeas corpus  
17 which is annexed to their reply.

18 That Rule 65 of the Rules of the Special Court is similar  
19 to Rule 65 of the ICTY Rules of Procedure as amended on 12th  
20 December 2002. It should be noted that this amendment deleted  
21 the phrase and the requirement of "exceptional circumstances"  
22 under which the accused could be granted bail. That following  
23 Rule 65 and the jurisprudence of the ICTY, detention remains the  
24 rule, and release an exception and this, notwithstanding the  
25 deletion of the phrase "exceptional circumstances" from the Rule  
26 in relation to granting bail to detainees.

27 The respondents, in so submitting, are urging me to arrive  
28 at the same conclusion as did the ICTY, because the now amended  
29 wording of their Rule 65 is virtually on all fours with the

1 wording of Rule 65 of the Rules of Evidence and Procedure of the  
2 Special Court; that the applicant will not appear for trial if  
3 released.

4 In so submitting, the respondents state that the Court has  
5 no means to execute its own warrant. That the conflict in this  
6 country puts the regular armed forces and the police of Sierra  
7 Leone in disarray and that because they are just rebuilding, they  
8 will find great difficulty in finding the accused who flees and  
9 seeks to evade recapture.

10 The cases of Sam Bockarie and Johnny Paul Koroma, both of  
11 whom are still wanted persons, wanted in courts, by the  
12 Prosecutor of the Special Court are cited to highlight the risk  
13 in according bail to the applicant who is alleged to have  
14 belonged to the same cause as those in flight today.

15 That if the applicant is released and escapes to embattled  
16 countries like Liberia or Ivory Coast, tracking him down or  
17 recapturing him for him to stand trial would be an uphill if not  
18 an impossible task. Generally, the respondents argued that the  
19 applicant, on the submissions of his counsel, and even on the  
20 facts contained in his own sworn affidavit, does not fulfil the  
21 conditions spelt out in Rule 65(B) of the Rules for Bail to be  
22 granted to him.

23 In the course of the hearing on 15th July 2003, counsel for  
24 the applicant urged the Court to dismiss the submissions of the  
25 respondents on the grounds that they are said to have been filed  
26 on 5th June 2000, a date long before the Special Court was even  
27 created. The respondents in reply pleaded a typographical error,  
28 the typographical slip and error, as being at the origin of what  
29 the respondent's counsel was contending. He added that we should

1 be concerned with the date on which the application was filed,  
2 that is, on 5th June 2003.

3 The respondent's explanation appears to me convincing. The  
4 correction of 2003 instead of 2000 is accordingly granted and is  
5 so ordered. In reply to the submissions of the respondents,  
6 counsel for the applicant made further submissions to restate  
7 what he raised in his earlier submissions including other  
8 arguments in reply to assertions and arguments made by the  
9 respondents.

10 Rule 65 of the Rules of Procedure and Evidence around which  
11 this controversy on bail is brewing stipulates as follows, and I  
12 would like to reproduce these provisions in extenso.

13 "65(A). Once detained, an accused shall not be granted  
14 bail except upon the order of a judge or Trial Chamber.

15 65(B). Bail may be ordered by a judge or a Trial Chamber  
16 after hearing the state to which the accused seeks to be released  
17 and only if it is satisfied that the accused will appear for his  
18 trial and if released will not pose a danger to any victim,  
19 witness or other person."

20 In applying these provisions, as I have said earlier,  
21 counsel for the respondent submits that they must be interpreted  
22 to mean that a release on bail or what in other words is referred  
23 to as a provisional release constitutes an exception and  
24 continued detention the rule.

25 This interpretation of Rule 65 by the respondents is based  
26 on case law from the Tribunal of Yugoslavia as cited in their  
27 submissions. It would be recalled, however, that the original  
28 ICTY version of Rule 65(B) read as follows:

29 "Provisional release may be ordered by a Trial Chamber only

1 in exceptional circumstances after hearing the host country and  
2 only if it is satisfied that the accused will appear for trial  
3 and if released will not pose a danger to any victim, witness or  
4 other persons. "

5 This ICTY version of Rule 65 was amended on 17th November,  
6 1999, and came into force in ICTY on 6th December 1999 in the  
7 following form:

8 "65(B). Release may be ordered by a Trial Chamber only  
9 after giving the host country and the state to which the accused  
10 seeks to be released the opportunity to be heard and only if it  
11 is satisfied that the accused will appear for trial and if  
12 released will not pose a danger to any victim, witness or other  
13 person. "

14 The amended version of this rule no longer contains the  
15 very strong component and the element of "in exceptional  
16 circumstances" which appeared to have been the justifying factor  
17 for the silently developing rule based on release on bail, being  
18 the exception and continued detention, the rule.

19 It would be recalled that the ICTR, moving towards the  
20 direction of ICTY and of the Special Court whose rules were  
21 adopted on 8th March 2003, but without the phrase "in exceptional  
22 circumstances" also amended this same Rule 65(B) at their Plenary  
23 on 27th May 2003 by striking out, like the ICTY did, and I  
24 imagine for the same reasons, the phrase "in exceptional  
25 circumstances. "

26 What is interesting is that the ICTY, even after deleting  
27 the phrase "in exceptional circumstances, " from Rule 65(B)  
28 effectively on 6th December 1999 still rendered the majority  
29 judgment on 8th October 2001, in the case of the *Prosecutor*



1     *versus Momcilo Krajisnik and Biljana Plavsic*, still standing the  
2 grounds that granting bail is the exception to the rule. Quite  
3 contrary to *Krajisnik's* decision, in the case of the *Prosecutor*  
4 *vs Brdanin* on provisional release, the Trial Chamber, still of  
5 the ICTY, clearly states that due to the fact that exceptional  
6 circumstances were removed from 65(B), the presumption is that  
7 release will now be the norm.

8             Also in the case of *Ilijkov vs Bulgaria* of the United --  
9 the European Court of Human Rights, it was held that the burden  
10 of proof to establish the fact for bail may not rest with the  
11 accused person but on the Prosecution. This decision went  
12 further to state that the earlier decision in *Momcilo Krajisnik*  
13 and *Biljana Plavsic* went further to state that even where the  
14 accused fulfils the criteria for granting bail the Court was not  
15 bound to grant the bail. This very important and interesting  
16 case, which was decided on the basis of two of the Learned  
17 Judges, a majority judgment, with a dissenting judgment by Judge  
18 Patrick Robinson. Judge Robinson, to reproduce and paraphrase  
19 him succinctly, is of the opinion that at no time should  
20 detention be the rule and liberty the exception as decided by his  
21 colleagues. In so holding he is of the opinion that the majority  
22 decision seriously compromises the right to liberty and is in  
23 contravention of the international customary law standards and  
24 conventions particularly, and amongst others, those of Article 9  
25 sub-section (3) of the International Covenant of Civil and  
26 Political Rights (the ICCPR).

27             This Article states as follows:

28             "It shall not be a general rule that persons awaiting trial  
29 shall be detained in custody but release may be subject to

1 guarantees to appear for trial."

2 To properly apply the provisions of section 65(B) they must  
3 be interpreted as Lord Herschel pointed out in the case of the  
4 *Bank of England vs Vagliano Brothers*, in the first instance by  
5 examining the language used and what the natural meaning is  
6 uninfluenced by any considerations derived from the previous  
7 state of the law and not to start enquiring on what the law  
8 previously stood.

9 Under Rule 65 the following conditions for granting bail  
10 can be discerned by just an ordinary reading of its contents. It  
11 is the Judge's discretion or the discretion of the Trial Chamber  
12 to grant bail. The Judge or the Trial Chamber will grant bail  
13 after hearing the state to which the accused seeks to be  
14 released. The Judge or the Trial Chamber, in the exercise of  
15 that discretion in favour of the accused, only does so if he is  
16 satisfied that the accused will appear for trial. The Judge or  
17 the Trial Chamber should also be satisfied before ordering his  
18 release that the accused, if released, will not pose a danger to  
19 any victim, or witnesses or other persons.

20 On the proposition that the continued detention is the  
21 rule, and release the exception, it is my opinion that in  
22 applications of this nature the duty is on the applicant as an  
23 applicant in the proceedings before the Judge or the Trial  
24 Chamber to satisfy the Court factually and legally that he  
25 fulfils the conditions necessary for the discretion to be  
26 exercised in his favour as pleaded in his application.

27 I also am of the opinion that thereafter the Prosecution  
28 bears the burden to equally convince and satisfy the Judge or the  
29 Trial Chamber legally and factually that the accused is not or

1 does not satisfy the conditions required to enable him to benefit  
2 from a release on bail.

3 In effect, just as the accused justifies his release, the  
4 Prosecution must demonstrate to the satisfaction of the Court, of  
5 the Judge or the Trial Chamber, that there are good reasons for  
6 continuing to deprive the detainee of his fundamental human right  
7 to liberty. This position finds its justification in the  
8 provisions of Article 17(3) of the Statute of the Special Court  
9 which is a restatement of a principle of Customary International  
10 Law and which states that the accused shall be presumed innocent  
11 until he is proven guilty, and that the burden of executing this  
12 duty lies with the Prosecution.

13 It would indeed be remarkable if the contrary were the case  
14 as it would represent a major defection from global trends to  
15 accord respect and attachments to very entrenched, tested,  
16 respected and universally accepted principles of Customary  
17 International Law, particularly where they touch and border on  
18 the liberty of the individual which is one of the most, if not  
19 the most sacred fundamental human rights that exist.

20 Guided by these principles it is necessary to examine  
21 whether the applicant, Mr Tamba Alex Brima, from his sworn  
22 affidavit and the submissions of his counsel, meets the legal  
23 criteria for a release on bail. The applicant, in a long  
24 affidavit, pledges amongst other things that he will appear for  
25 trial if released on bail and that he will not pose a danger to  
26 any victim, witness or any other person.

27 He says he is married and has one child. Considering the  
28 gravity of the offence for which he is charged, no evidence has  
29 been adduced as to the availability of enough guarantees at his

1 disposal in the event of the Court being minded to grant him bail  
2 in application of Rule 65(D) of the Rules of Evidence.

3 The respondents have pleaded that the offences are of  
4 particular gravity and that if granted bail he would not appear  
5 for trial. They further argue that the Sierra Leonean Police  
6 Force is in a stage of transformation and that if the accused  
7 escapes through the very permeable frontiers, it would be  
8 difficult to recapture him, as is the case up to date of other  
9 indictees, like, Sam Bockarie and Johnny Paul Koroma. The  
10 representative of the Honourable and Learned Attorney-General,  
11 representing the State of Sierra Leone has, in accordance with  
12 the provisions of Rules 65(B), made both written and oral  
13 submissions which are on the same lines as those of the  
14 Prosecution and, like the latter, he is urging the Court to  
15 refuse the application of Mr Tamba Alex Brima.

16 In considering applications for bail under section 65(B),  
17 the greatest apprehension that surfaces immediately and at all  
18 times is the possibility of the accused, if released, to appear  
19 or not to appear for his trial.

20 In this regard, it is important to consider a number of  
21 other factors which are not incompatible with the spirit of the  
22 elements in Rule 65(B) and which are linked to the element of  
23 flight of the accused, namely, the gravity of the offences for  
24 which he is charged, the character and antecedents and  
25 association of the accused and the community ties which he has,  
26 which the accused enjoys, interference with the course of justice  
27 like posing a danger to victims or witnesses or to other persons.

28 Another consideration for granting or refusing bail is the  
29 need to preserve public order. In the circumstances, and the

1 facts of the case before me, and the flight of indictees, actual  
2 and potential, as I have already referred to, I am comforted in  
3 the decision of *Stogmuller vs Austria*, where it was decided that  
4 on the risk that the accused would fail to appear for a trial,  
5 bail should be refused where it is certain that the hazards of  
6 flight would seem to be a lesser evil than continued  
7 imprisonment.

8 In yet another case of *Neumeister vs Austria* it was  
9 observed that in granting bail it is relevant to consider the  
10 character of the person, his morals, his home, his occupation,  
11 his assets etc etc.

12 In the present case, the applicant does not exhibit assets  
13 to the satisfaction of the Court to show his stakes and  
14 attachment in the society to which he is seeking to be released.  
15 Besides, there is a lot of skepticism in the engagements he has  
16 made in his own personal affidavit.

17 In the case of *Momcilo Krajisnik* the majority judgment of  
18 the ICTY had this to say:

19 "As to the undertakings given by the accused himself the  
20 Trial Chamber cannot but note that it is given by a person who  
21 faces a substantial sentence and if convicted has therefore a  
22 considerable incentive to abscond."

23 This holds good for the contents of the applicant's  
24 affidavit. One other important factor, to be considered in  
25 adjudicating on applications for bail, is the preservation of  
26 public peace. In the case of *Letellier vs France* it was decided  
27 that where the nature of the crime alleged is likely, and the  
28 likely public reaction is such that release of the accused may  
29 give rise to public disorder, then a temporary detention on

1 remand may be justified. In the *Letellier* case, Mrs Letellier,  
2 twice a divorcee, was running a bar and living with a third  
3 husband. She hired killers who assassinated her ex-husband. She  
4 applied for bail which was refused on the grounds that the social  
5 repulsion to her crime was such as would disturb the public peace  
6 if she were released on bail.

7 The applicant in this case is alleged to have committed  
8 very serious crimes against the people of Sierra Leone, the  
9 society to which he seeks to be released. Having regard to the  
10 row and the public disorder that his release might, I say might,  
11 provoke in a society where the wounds created by the civil war  
12 are still healing, like in Mrs Letellier's case, I do consider  
13 him ineligible for bail under the provisions of section 65 of the  
14 Rules of Procedure and Evidence.

15 Counsel for the applicant has, in canvassing for bail,  
16 again raised the argument based on the illegality of the  
17 detention and the warrant of arrest and of detention, just as he  
18 did in his application for habeas corpus for this same applicant.  
19 He has raised the mistaken identity of his client, the fact that  
20 the warrant of arrest did not contain a specific mention ordering  
21 the arrest of his client who says he is called Tamba Alex Brima  
22 and not Alex Tamba Brima.

23 After a thorough examination of the arguments so advanced,  
24 I disagree with the contention of the Prosecution that the  
25 legality of the arrest and detention of an accused person is not  
26 relevant to an application for bail.

27 I do not agree either with the further submission that by  
28 applying for bail in this case the accused has conceded to the  
29 legality of his arrest and of his detention. These contentions

1 are too dangerous and hazardous to be accepted, in criminal law  
2 and practice, in the light of the doctrine of the presumption of  
3 innocence of the detained person and the possibility offered him  
4 to contest by all available means, and at all times, the legality  
5 of his detention, which this applicant has been doing all along.

6 These two contentions by the respondents are accordingly  
7 dismissed as frivolous, baseless, and contrary to the principles  
8 on which criminal law is administered side by side fundamental  
9 customary international law principles.

10 This said, I will now turn to the illegalities and  
11 arguments raised by the applicant in support of the application  
12 for bail.

13 The following are the main points amongst others raised in  
14 support of the illegalities: That the applicant is called Tamba  
15 Alex Brima and not Alex Tamba Brima; that he has never served in  
16 the Sierra Leonean Army and could therefore not have risen to the  
17 rank of a staff sergeant; that the warrant of arrest was  
18 defective in that it did not explicitly order the arrest of his  
19 client, thereby rendering the arrest of his client and his  
20 detention illegal; that section 47 was not complied with in  
21 signing the indictment, thereby rendering it illegal.

22 As far as the first and the second points are concerned  
23 this is a matter to be examined during the trial because the  
24 applicant was charged both as Alex Tamba Brima and as Tamba Alex  
25 Brima, the latter which he claims to be his name.

26 As to the defect alleged on the warrant of arrest and  
27 detention, it is observed that even though no express order  
28 ordering the arrest, ordaining the arrest of the applicant, the  
29 said warrant of arrest and detention were issued against him, and

1 in names with which he is identified. And like in other  
2 allegations concerning his identity, the Trial Chamber will be  
3 better placed to resolve all the issues raised.

4 In the light of the foregoing analysis the application for  
5 bail or for provisional release introduced by the applicant lacks  
6 any merits either on the basis of the interpretation of Rule  
7 65(B) of the Rules of Procedure and Evidence of the Special Court  
8 for Sierra Leone, or on the basis of the illegalities alleged and  
9 linked to the detention of the applicant.

10 The application is accordingly dismissed. The accused will  
11 continue to remain in custody pending his trial.

12 [Whereupon the application for bail adjourned  
13 accordingly]

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