SPECIAL COURT FOR SIERRA LEONE

Case No. SCSL-2004-16-T

Before: Judge Teresa Doherty, Presiding
Judge Julia Sebutinde
Judge Richard Lussick

Registrar: Robin Vincent

Date filed: 13 May 2005

THE PROSECUTOR

against

ALEX TAMBA BRIMA

BRIMA BAZZY KAMARA

and

SANTIGIE BORBOR KANU

JOINT DEFENCE RESPONSE TO PROSECUTION REQUEST FOR LEAVE TO CALL AN ADDITIONAL WITNESS PURSUANT TO RULE 73*bis*(E)

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I INTRODUCTION

1. In response to the "Prosecution Request for Leave to Call an Additional Witness Pursuant to Rule 73*bis*(E)" ("**Prosecution Request**") of 4 May 2005, the Defence herewith files its "Joint Defence Response to Prosecution Request for Leave to Call an Additional Witness Pursuant to Rule 73*bis*(E)" ("**Response**").

II GOOD CAUSE REQUIREMENT

2. Rule 73*bis*(E) indicates that the Prosecutor may, after the commencement of the trial "if he considers it to be in the interests of justice, move the Trial Chamber for leave to reinstate the list of witnesses or to vary his decision as to which witnesses are called."

3. As indicated in *Prosecutor v. Sesay et al.*, and specified in para. 9 of the Prosecution Request, in order to accomplish the test of Rule 73*bis* the Prosecution needs to fulfill the following four requirements:

   (i) The circumstances being argued to demonstrate 'good cause' are "directly related and material to the facts in issue";

   (ii) The evidence to be provided by the witness is "relevant to determining the issues at stake and would contribute to serving and fostering the overall interest of the law and justice";

   (iii) "That granting, at this stage, leave to call new witnesses and the disclosure of new statements, will not unfairly prejudice the right of the accused to a fair and expeditious trial as guaranteed by Article 17(4)(a) and 17(4)(b) of the Statute as well as by the provisions of Rules 26*bis* of the Rules";

(iv) And, finally, that the evidence "could not have been discovered or made available at a point earlier in time notwithstanding the exercise of due diligence on their part."[1]

Ad (i) – *Good Cause Directly Related to the Facts in Issue*

4. The first requirement as set out in *Prosecutor v. Sesay et al.*,[2] relates to the obligation of the Prosecution to show that the circumstances surrounding these reasons or explanations (i.e. "a credible reason, reasons or justification, for failing to either meet up with or fulfill, within the time limits imposed by Rule 66(A)(ii) of the Rules, the obligation of disclosing to the Defence, the existence of these witnesses and more importantly, the statements on which their viva voce testimony will be based") are directly related, and are material to the facts in issue. Therefore, according to the humble submission of the Defence, the Prosecution needs to show that the reasons why it is bringing forward this witness at so late a stage in the proceedings against the Accused, are directly related and material to the facts in issue.

5. The sole argument the Prosecution provides in this regard is that upon receipt of Ms. Vann's report on October 5, 2004, dealing with sexual violence, they decided not to include this particular witness on the witness list. It states that "[t]he Prosecution also came to the conclusion that one aspect of sexual violence did warrant an expert opinion being presented to the Trial Chamber (...)."[3]

6. According to the Defence, however, the Prosecution fails to indicate that the reasons why it is bringing forward this witness at so late a stage in the proceedings against the Accused, are directly related and material to the facts in issue, although it formulated this criterion in its own motion under para. 9 thereof.

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[1] *Prosecutor v. Sesay et al.*, SCSL-2004-15-PT, Decision on Prosecution Request for Leave to Call Additional Witnesses and Disclose Additional Witness Statements, 11 February 2005, para. 35.
[2] Referred to in footnote 1 above.
[3] Prosecution Request, para. 13.

7. The Defence therefore submits, by not fulfilling one of the criteria as set out in *Prosecutor v. Sesay*, which recent case law on this matter by this Special Court, the Prosecution fails to prove that the requirements of Rule 73*bis* have been fulfilled, and the Defence therefore contends that the Prosecution Request should be dismissed.

Ad (ii) – *Testimony Should Be Relevant*

8. As to the second requirement, the relevance of the purported testimony, the Prosecution dedicated a separate subtitle "(ii) Relevance and materiality of expert testimony."[4] However, the substance of this subparagraph only deals with an explanation of the curriculum vitae of this proposed witness' history and experience, and in no way explains why her proposed testimony is of such "strong relevance and materiality"[5] to the underlying case against the Accused. Although in the preceding para. 21 of the Prosecution Request an indication is given that "the evidence the Prosecution seeks to have admitted is highly relevant and important for the presentation of the Prosecution's case," but nowhere it is explained *why* then her testimony is so relevant.

9. The Defence submits that thus the Prosecution has also failed to fulfill this second requirement, and thus the Prosecution Request should be dismissed.

Ad (iii) – *No Unfair Prejudice*

10. The Prosecution asserts in para. 27 of the Prosecution Request that the addition of Mrs. Bangura will cause "minimal prejudice" to the Defence. The Defence submits that this prejudice is in fact more than "minimal" unfair to the Defence, insofar as the Prosecution was in a position from 14 February 2005 to inform the

[4] See p. 5 of the Prosecution Request.
[5] Prosecution Request, para. 29.

Defence of its intention to call Mrs. Bangura as a witness, and by failing to do so, the "minimal prejudice" should be considered substantially unfair to the Defence, thus violating the third requirement as set out in the aforementioned decision in *Prosecutor v. Sesay et al.*

11. In addition to this, the Prosecution indicated on 1 March 2005 that "we are very hopeful and we believe that this -- the Prosecution case will be finished before summer recess."[6] Therefore, stating in the Prosecution Request that "this witness is not expected to testify until a later stage of proceedings,"[7] without indicating that it changed its mind concerning the finishing of the Prosecution case, the Defence holds that this witness will, in fact, be heard, before the summer recess, that is, before 5 August 2005. The Defence respectfully contends that this is not "sufficient time with which to investigate and prepare rebuttal evidence for Mrs. Bangura's testimony."[8]

12. Also this additional argument makes that the Defence submits that calling this witness at this stage of the proceedings causes unfair prejudice to the Defence, and thus, the Prosecution Request should be denied.

Ad (iv) – *New Evidence Could Not Have Been Discovered Earlier*

13. The Prosecution, in paras. 15 – 21, explains its reasons for the delay in bringing forward this witness. The Defence contends, however, that these reasons are insufficient to support this particular requirement as set out in *Prosecutor v. Sesay et al.*

14. In para. 19 of the Prosecution Request, the Prosecution indicates that on 14 February 2005, "the Prosecution sent a letter of instruction to Mrs. Bangura to produce a written report and to testify on behalf of the Prosecution."

[6] Transcript, 1 March 2005, p. 20 (lines 15 – 16).
[7] Prosecution Request, para. 28.
[8] Prosecution Request, para. 27.

Consequently, the Prosecution knew from that date onwards that they would propose to have Mrs. Bangura to testify for the Prosecution.

15. The Prosecution indicates in the subsequent paragraphs the reason why the report was only submitted to the Defence in May of this year. The Defence does not dispute the fact that in general it can take some time to prepare an (expert) report. However, the Prosecution fails to indicate why it could not inform the Defence shortly after 14 February 2005 of its intention to hear Mrs. Bangura as a witness.[9] If the Defence would have been notified at that time, it would have known of her existence as a witness before the start of the trial. By only notifying the Defence after the trial has been going on for several months, *knowing* that this witness would bring forward a report, the Defence submits that the Prosecution has acted in violation of Rule 73*bis*. By disclosing the information of this witness at an earlier stage, the Defence could have more properly prepared its Defence case, and moreover, as Trial Chamber I indicated in *Prosecutor v. Norman*, "we reassert the principle that the Prosecution should not be allowed to surprise the Defence with additional witnesses and should fulfil in good faith its disclosure obligations."[10]

16. In the second place, the Defence does not understand why it took the Prosecution *four months* to select this particular witness, which seems not comprehensible as such. No sufficient reason is provided as to this time lapse, knowing in October 2004 that the trial would start in the beginning of 2005.

17. In conclusion the Defence therefore holds that the Prosecution also failed to fulfil the fourth and last requirement of Rule 73*bis* as interpreted by Trial Chamber I. The Defence submits that no good cause has been established by the Prosecution, and therefore the Prosecution Request should be dismissed.

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[9] As can be deducted from para. 12 of the Prosecution Request, the Prosecution in the case of proposed witness Ms. Vann indeed put her name on the Witness List which was filed on 26 April 2004, while her final report was only received by the Prosecution on 5 October 2004.

[10] *Prosecutor v. Norman et al.*, Case No. SCSL-2004-4-T, Decision on Prosecution Request for Leave to Call Additional Expert Witness Dr. William Haglund, 1 October 2004, para. 15.

III SEPARATE MOTION UNDER RULE 94*bis*

18. The Defence wishes to indicate to the honorable Trial Chamber that the Defence, at the same time of filing this Response, also files a separate motion under Rule 94*bis* of the Rules.

IV CONCLUSION

19. Based on the foregoing arguments, the Defence prays the honorable Trial Chamber to deny the Prosecution Request and thus:

(i) to exclude the proposed witness from the Prosecution Witness List, and

(ii) to deny the Prosecution request to admit the proposed witness's report, attached as Annex B to the Prosecution Request, into evidence.

Respectfully submitted,
On 13 May 2005

Geert-Jan A. Knoops Glenna Thompson Mohamed Pa-Momo Fofana