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SCSL-04-16-T
(15119 - 15130)

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SPECIAL COURT FOR SIERRA LEONE
OFFICE OF THE PROSECUTOR
Freetown – Sierra Leone

Before:	Judge Teresa Doherty, Presiding Judge Judge Richard Lussick Judge Julia Sebutinde
Registrar:	Mr. Lovemore Munlo
Date filed:	30 September 2005

THE PROSECUTOR	**Against**	**Alex Tamba Brima** **Brima Bazzy Kamara** **Santigie Borbor Kanu**

Case No. SCSL – 2004 – 16 – T

PROSECUTION RESPONSE TO JOINT DEFENCE MOTION FOR LEAVE TO RECALL WITNESS TF1-023

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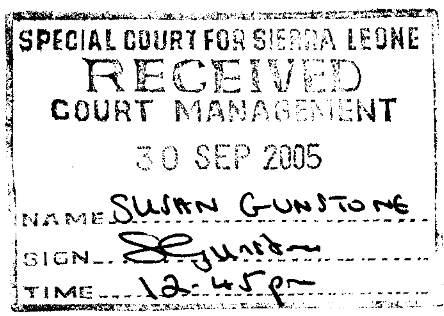

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I. INTRODUCTION

1. On 28 September 2005 the Defence filed its "Joint Defence Motion for Leave to Recall Witness TF1-023" ("Joint Defence Motion") seeking leave, pursuant to Rule 54, to have the Prosecution recall witness TF1-023 for cross examination.
2. The Joint Defence Motion states that no Defence Counsel was in a position to cross examine the witness at the time she had been called. It is asserted that the then Counsel for the first accused was unable to validate information given by the assigned investigator, who had that morning been suspended. It is further asserted that Counsel for the second and third accused were hampered by the joint defence strategy.
3. The Joint Defence Motion argues that the witness should be recalled on the following grounds:
    i. Any information gathered by the suspended investigator had to be verified, particularly that relating to witness TF1-023. This was so because the allegations concerning the conduct of the investigator were so serious as to raise doubts in the mind of the defence as to the accuracy and truthfulness of the information provided by the investigator. That information had been shared with other defence teams.
    ii. The behaviour of the investigator was not of the making or condoned by Defence Counsel or the accused and the defence case should not be prejudiced by the behaviour of others.

iii. Witness TF1-023 gave evidence as to the jungle names, nicknames or aliases by which the Prosecution assert the first and third accused are also known. The accused are entitled to a fair trial and to cross examine witnesses.

4. The Prosecution submits that the Joint Defence Motion should be dismissed.

II. PROCEDURAL HISTORY

5. On 9 March 2005 the Prosecution called witness TF1-023.[1] On 10 March 2005, as the examination in chief resumed, the witness stated that she had been threatened the previous day.[2]
6. Two reports provided to the Office of the Prosecutor on the morning of 10 March 2005 alleging certain incidents with respect to the witness were provided to the Chamber and Defence Counsel, copies having previously been served upon the Office of the Principal Defender.[3] That material, in so far as it related to the investigator assigned to the first accused, concerned an allegation that he had disclosed the identity of the witness to others.
7. An order for an investigation was made pursuant to Rule 77(C)(iii). The Chamber also made certain interim orders, including the suspension of the investigator.[4]
8. The examination in chief of witness TF1-023 was then concluded.[5]
9. The then Counsel for the first accused stated that he was unable to cross examine the witness because first, material in his possession obtained from the suspended investigator may be tainted and, secondly, the whole Defence team was under scrutiny.[6] Counsel for the third accused stated that he could not cross examine because Defence Counsel had between themselves agreed on a certain order of cross examination.[7] The then Counsel for the second accused stated that he was unable to cross examine because first, he did not have an investigator on his team

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[1] See Trial Transcript, 9 March 2005, p. 26.
[2] See Trial Transcript, 10 March 2005, p. 3, lines 5-6.
[3] See Trial Transcript, 10 March 2005, p. 6 lines 9-13. This is in contradistinction to the statement that the Prosecution "had made some investigations" in paragraph 1 of the Joint Defence Motion.
[4] See Trial Transcript, 10 March 2005, p. 15 line 6 – p. 16 line13.
[5] See Trial Transcript, 10 March 2005, p. 41.
[6] See Trial Transcript, 10 March 2005, p. 42, lines 4-14.
[7] See Trial Transcript, 10 March 2005, p. 42, lines 16-19.

and, secondly, the fact that Counsel may be required to give evidence before some hearing in the future, meant that he did not have "adequate time and facilities to prepare this cross examination". Counsel further stated that the Human Rights Act [sic] stretched "right across the horizon of the world".[8]

III. LEGAL PRINCIPLES

10. Rule 85 establishes the rules for the presentation of evidence. In particular, Rule 85(B) establishes that examination in chief, cross examination and re examination shall be allowed in each case delineated in Rule 85(A). Rule 90(F) establishes a mandatory obligation upon the Trial Chamber to exercise control over the mode and order of interrogating witnesses and presenting evidence so as to (i) make the interrogation and presentation effective for the ascertainment of truth; and (ii) avoid the wasting of time.

11. Relevant jurisprudence from the *ad hoc* international tribunals concerning the recall of witnesses is clearly summarized in *The Prosecutor v Bagosora.*[9] In that case the Prosecution sought leave to recall its own witnesses. It was stated:

    "A party seeking to recall a witness must demonstrate good cause, which previous jurisprudence has defined as a substantial reason amounting in law to a legal excuse for failing to perform a required act. In assessing good cause, the Chamber must carefully consider the purpose of the proposed testimony as well as the party's justification for not offering such evidence when the witness originally testified. The right to be tried without undue delay as well as the concerns of judicial economy demand that recall should be granted only in the most compelling circumstances where the evidence is of significant probative value and not of a cumulative nature. For example, the Chamber has intimated in this case that the recall of a witness might be appropriate where a party demonstrates prejudice from an inability to put significant inconsistencies to a witness which arise from previously unavailable Rwandan judicial documents."

12. This statement of principle was adopted in the later decision of *The Prosecutor v Simba*, arising from circumstances in which the defence sought the recall of a prosecution witness for further cross-examination.[10] In that case the Chamber

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[8] See Trial Transcript, 10 March 2005, p. 43, lines 3-18.

[9] *Prosecutor v Bagosora*, "Decision on the Prosecution Motion to Recall Witness Nyanjwa", ICTR-98-41-T, 29 September 2004, para 6.

[10] *Prosecutor v Simba*, "Decision on the Defence Motion to Recall Witness KEL for Further Cross-

noted that the Defence had not given any precise information about the purpose of further cross examination.[11]

13. In *Prosecutor v Brdjanin*, the Chamber considered that the Defence would be able to demonstrate good cause to have Prosecution witnesses recalled if disclosure of exculpatory material pursuant to Rule 68 had not been made within sufficient time and the Defence could demonstrate that the lateness of the disclosure prejudiced the preparation or the presentation of the defence.[12]

IV ARGUMENT

14. The Prosecution submits that the Joint Defence Motion has failed to demonstrate good cause as to why witness TF1-023 should be recalled for cross-examination. The Prosecution further submits that notwithstanding that the arguments made in the Joint Defence Motion are done so jointly, it is incumbent upon the Trial Chamber to consider whether or not each accused has individually demonstrated good cause, as each Defence Counsel made a choice on behalf of his client to decline to cross examine the witness.

The Irrelevance of the Suspension of the Investigator

15. Despite asserting, both in oral submissions on 10 March 2003 and in the Joint Defence Motion, that the suspension of the investigator for the first accused meant that information obtained by him could not be relied upon before it was verified, Defence Counsel have failed to articulate why such verification was necessary.

16. It is to be remembered that the act of suspension was an interim measure in response to an allegation that the investigator had knowingly violated an order of a Chamber, specifically that in contravention of the Oral Decision on Prosecutions Motion for Protective Measures Pursuant to Order to the Prosecution for Renewed Motion for Protective Measures Dated 2 April 2004 of 3 February 2005, the investigator disclosed the name of a protected witness. The allegation – which

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Examination", ICTR-01-76-T, 28 October 2004, para. 5.

[11] Ibid, para. 9.

[12] *Prosecutor v Brdjanin*, "Decision on Motion for Relief from Rule 68 Violations by the Prosecutor and for Sanctions to be Imposed Pursuant to Rule 68*bis* and Motion for Adjournment while Matters Affecting Justice and a Fair Trial can be Resolved", IT-99-36-T, 30 October 2002, para. 26.

was no more than an allegation[13] – was as narrow as that. It did not extend to any allegation that the investigator had discharged his information gathering function improperly or ineptly. There was no reason for Defence Counsel for the first accused to conclude that all information hitherto obtained by that investigator was rendered suspect by an allegation that, in an isolated instance, the investigator had revealed the name of a witness.

17. Far from raising "doubts in the minds of the defence as to the quality and indeed the veracity of the information" already obtained by the investigator, as argued in the Joint Defence Motion,[14] on 10 March 2005 the allegation produced a spirited defence of the investigator by the then Counsel for the first accused. Indeed Counsel implied malfeasance on the part of other Special Court staff, stating that the incident giving rise to the allegation was the second occasion on which the investigator had been "attacked".[15] It was also stated that a complaint about the incident had been separately forwarded by the Office of the Principal Defender to both the Registrar and the Chief of Security.[16]

18. Defence Counsel have stated on numerous occasions that they have adopted a joint defence strategy and that information gained by the investigator for one accused is shared with the defence teams for the others. The investigators had "conferred with each other".[17] This pooling of information obtained by different investigators prior to 10 March 2005 had evidently raised no doubts as to the accuracy or veracity of the information contributed to that pool by the investigator for the first accused. It therefore seems even more unlikely that a single allegation of misbehaviour totally unconnected with his information gathering function could raise doubts as to the quality and veracity of the information previously

[13] In this context, see the comments of Justice Sebutinde, Trial Transcript, 10 March 2005, p. 47, lines 2-19.
[14] Joint Defence Motion, para. 5.
[15] See Trial Transcript, 10 March 2005, p. 10, lines 22-29. The absence of doubt as to the utility and truthfulness of the investigator on the part of Defence Counsel for the first accused at the time of the suspension of the investigator is, to a certain extent, confirmed by the subsequent behaviour of Counsel in declining the assistance of a replacement investigator: see Trial Transcript, 14 March 2005, p. 3 line 16 – p. 5 line 19 and 5 April 2005, p. 3 line 22 to p. 27, line 12.
[16] See Trial Transcript, 10 March 2005, p. 17 lines 26-29.
[17] See Trial Transcript, 10 March 2005, p. 49 lines 13-23. See also Trial Transcript, 14 March 2005 p. 2 lines 21-29, where Mr Knoops stated ..."our position is still that the investigator's information is to a certain extent shared with the other Defence teams. ... as mentioned last week, we intend to share the information we get."

gathered by him.

19. Further, the material used in a cross examination derives from various sources. So much was acknowledged by the then Counsel for the first accused, when he stated that the sources of material were his client, putative witnesses and his investigator.[18] In the absence of specifically identifying material obtained exclusively from the investigator which had not already been "verified" by instructions or information from potential defence witnesses, or indeed the information from other defence investigators, it is implausible to suggest that doubts as to the information from the investigator consequent upon the allegation of misconduct rendered Counsel incapable of cross examining the witness.[19]

20. The Prosecution further submits that the suspension of the investigator for the first accused cannot be relied upon by Counsel for the second and third accused to explain their failure to cross examine witness TF1-023 at the time she had been called and thereby demonstrate good cause for her to be recalled. The adoption of a joint defence strategy does not relieve Counsel from the obligation of exercising professional judgement on behalf of his client. Irrespective of the choice made by the then Counsel for the first accused to decline to cross examine witness TF1-023, the remaining Defence Counsel had a duty to protect the interests of their individual clients.

21. A previous agreement as to the order in which Counsel would undertake cross examination[20] and an assertion – without substantiation – that the paralysation [sic] of an investigator for one Defence Counsel also affects the ability of other Defence Counsel to cross examine effectively[21] cannot change the fact that Counsel for the third accused made a forensic decision to decline cross examination. He must be taken to have intended the consequences of that decision.

22. Despite the assertion in the Joint Defence Motion that the position of the second

[18] See Trial Transcript, 10 March 2005, p. 46, lines 9-13.
[19] This is particularly so given that the Defence had been in possession of the statement of witness TF1-023 since 3 June 2003, 6 November 2003 and 19 November 2003 (respectively) in redacted form and since 26 January 2005 in unredacted form.
[20] See Trial Transcript, 10 March 2005, p. 42, lines 16-19.
[21] See Trial Transcript, 10 March 2005, p. 49, lines 24-27.

and third accused was put by Counsel for the third accused,[22] the transcript reveals that the then Counsel for the second accused did not rely upon the spectre of tainted information at all. As outlined above, he stated that his team was without an investigator – a fact not previously raised with the Chamber and seemingly not an impediment to his cross examination of the first two Prosecution witnesses and also a fact not relied upon in the Joint Defence Motion; that the possibility that Counsel may be required to give evidence before a future hearing deprived him of adequate time and facilities to prepare the cross examination – a cross examination which it could have been reasonably foreseen would take place that same day; and a vague reference to the Human Rights Act.[23] Again, Counsel must be taken to have exercised individual forensic judgement and to have accepted the likely consequences of it.

23. This is particularly so as the Learned Presiding Judge clearly articulated that there was no right to have the witness recalled and asked all three Counsel separately if they would make an application to do so in the future. All indicated in the affirmative and were told that those applications would be dealt with at the appropriate time.[24]

The Accused have not been Prejudiced by the Behaviour of the Investigator

24. As to the second ground articulated in the Joint Defence Motion, the Prosecution submits that the alleged behaviour of the investigator did not prejudice the accused. As argued above, the situation in which the evidence of witness TF1-023 remains unchallenged in cross examination arose through the decision of each Defence Counsel, cognizant of the potential consequences of that decision.

25. It is beside the point whether there was any misconduct by the investigator of the nature alleged or whether or not any such behaviour was condoned by the accused or Defence Counsel. Justice Sebutinde clearly made the point that no one had been impugned, not even the investigator.[25] The point is that in the face of a narrow, single incident allegation unconnected with the previous performance of

[22] Joint Defence Motion, para. 2.
[23] See Trial Transcript, 10 March 2005, p. 43, lines 3-18.
[24] See Trial Transcript, 10 March 2005, p. 41, line 20 – p. 43, line 22.
[25] See Trial Transcript, 10 March 2005, p. 47, lines 2-19.

the investigator for the first accused, all three Defence Counsel made individual choices on behalf of their clients to interpret that allegation as possibly tainting certain unspecified information and rendering all cross examination impossible.

26. There was more than one choice open to Defence Counsel on 10 March 2005. The obvious one was to cross examine the witness. If it transpired that the investigator was subsequently proven to have improperly revealed the name of the witness and if this finding did give rise to a concern that certain information provided by the investigator and used in the cross examination was "tainted" and if this could then be shown to have prejudiced the cross examination of the witness, the Defence would be in a far stronger position to show good cause as to why the witness should be recalled for (further) cross examination. This is in contradistinction to the articulated justification for failing to cross examine the witness at all, being a matter of speculation upon speculation.

27. In short, the behaviour of the investigator did not prejudice the rights of the accused. Rather, the lack of cross examination is a direct result of choices made by Defence Counsel.

Fair Trial Rights and the Right to Cross Examine

28. The Joint Defence Motion argues that it is imperative that the identification evidence by witness TF1-023 of names or aliases attributed to the first and third by the Prosecution be tested by the Defence.

29. The Prosecution submits that this ground cannot be relied upon by the second accused to justify the decision of his Counsel to decline cross examination on 10 March 2003. No issue has been made by him as to the aliases attributed to him.

30. The Pre-Trial Briefs filed on behalf of the first and second accused raise identification as an issue. It is argued that the first accused does not "accept that he was ever nicknamed 'Gullit'".[26] Similarly, with respect to the third accused, the question of mistaken identity is raised in that "the name '55' was used or misused by several other persons, individuals or organizations".[27] It is therefore

[26] Prosecutor v Brima, Kamara and Kanu, Case No. SCSL-2004-16-PT, Defence Pre-Trial Brief for Tamba Alex Brima, 17 February 2005, para. 5.

[27] Prosecutor v Brima, Kamara and Kanu, Case No. SCSL-2004-16-PT, Kanu – Defence Pre-Trial Brief and Notification of Defenses Pursuant to Rule 67(A)(ii)(a) and (b), 22 March 2004, para. 29.

to be expected that Counsel for the first and third accused would challenge all such identification evidence.

31. This strategy would not be dependent upon information supplied by an investigator, either in general or about particular witnesses. Rather, it would derive from instructions and produce a consistent approach to all witnesses who identified the first accused as Gullit and the third accused as 55. To attribute the failure of the then Counsel for the first and third accused to cross examine the witness even as to this issue to the hypothetical tainting of unspecified information collected by the investigator for the first accused consequent upon an allegation of unrelated misconduct is, the Prosecution submits, disingenuous.

32. Further, witness TF1-023 stated that she had seen Brigadier Gullit at Benguema, that the rebels had told her his name and that he was the senior commander.[28] The witness did not give evidence linking the name Gullit with the name Alex Tamba Brima. Witness TF1-023 gave no evidence about anyone named Santigie Kanu.[29]

33. The Prosecution submits that the lack of a consistent approach to evidence of identification demonstrated by Counsel for the first and third accused, coupled with the limited identification evidence given by witness TF1-023 falls far short of demonstrating prejudice to the accused sufficient to justify the recall of this witness.

V CONCLUSION

34. The Prosecution submits that the Joint Defence Motion has failed to establish good cause to have witness TF1-023 recalled for cross examination by any accused. There has been no demonstration of a substantial reason amounting in law to a legal excuse for failing to perform the required act of cross examining the witness when she was called.

35. In considering both the sole articulated purpose of recalling the witness – to challenge identification evidence – and the justification for not cross examining at the relevant time – the speculative tainting of unspecified information obtained

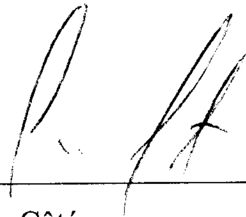
[28] See Trial Transcript, 10 March 2005, p. 30.

[29] At p. 30 lines 22-23 of the transcript of 10 March 2005 the witness mentioned Brigadier 55 and then corrected herself when she said "they said he was Brigadier Five-Five. Sorry, Brigadier Gullit. Sorry."

from an investigator alleged to have done no more than revealed the name of a protected witness, the situation is not one of the most compelling circumstances. All Defence Counsel made individual forensic choices, understanding the consequences of those choices. Further, the Joint Defence Motion demonstrates no significant prejudice to the first and third accused, and no prejudice to the second accused, if the witness is not recalled.

36. Accordingly, the Prosecution submits that the Joint Defence Motion should be dismissed.

Dated this 30th day of September 2005,
In Freetown.



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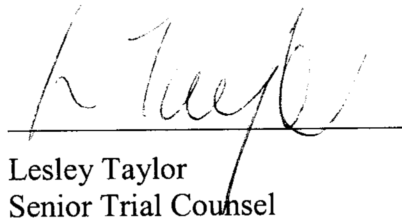

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TABLE OF AUTHORITIES

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