596 SCSL-04-14-T 18245

(18245 – 18273)

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

Before: Hon. Justice Pierre Boutet, Presiding
Hon. Justice Bankole Thompson
Hon. Justice Benjamin Mutanga Itoe

Interim Registrar: Mr. Lovemore G. Munlo SC

Date filed: 15 May 2006

**THE PROSECUTOR** **Against** **Samuel Hinga Norman**
**Moinina Fofana**
**Allieu Kondewa**

Case No. SCSL-04-14-T

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**PUBLIC**

**PROSECUTION RESPONSE TO 'URGENT JOINT DEFENCE MOTION REGARDING THE PROPRIETY OF CONTACTING DEFENCE WITNESSES'**

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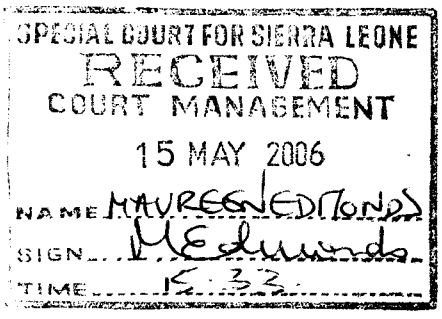

## I. INTRODUCTION

1. The Prosecution hereby responds to the motion entitled "Urgent Defence Motion Regarding the Propriety of Contacting Defence Witnesses" (the "**Motion**"), filed on the joint behalf of all three Accused on 11 May 2006.[1]
2. The Motion requests "clarification" from the Trial Chamber as to the propriety of the Prosecution contacting and interviewing confirmed Defence witnesses during the defence case, prior to their testimony. The Motion then also seeks an order that any statements that have been taken from Defence witnesses by the Prosecution should be deemed inadmissible.
3. For the reasons given below, the Motion should be denied. The Prosecution submits that in the absence of any order of the Trial Chamber to the contrary, there is no restriction on the right of one party to contact or interview witnesses proposed to be called by the other party, prior to their testimony. Should any such contact be made, the parties of course remain subject to all of their professional obligations.

## II. ARGUMENT

4. The applicable law in this area has been articulated by the Appeals Chamber of the ICTY, which has stated in clear terms that:

> Article 18(2) of the Statute [Article 15(2) of the Special Court Statute[2]] vests the Prosecution with "the power to question suspects, victims and witnesses". In doing so, the Prosecution may "seek the assistance of the State authorities concerned." Rule 39 of the Rules [Rule 39 of the Special Court Rules[3]] provides that in conducting an investigation the Prosecution may "summon and question suspects, victims and witnesses". Thus it is clear that the Prosecution has the power to request interviews with potential

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[1] *Prosecutor v. Norman et al.*, SCSL-04-14-T-594, Registry pages 18233-18242.

[2] Article 15 of the Special Court Statute provides that: "The Office of the Prosecutor shall have the power to question suspects, victims and witnesses, to collect evidence and to conduct on-site investigations. In carrying out these tasks, the Prosecutor shall, as appropriate, be assisted by the Sierra Leonean authorities concerned". Article 15(2) of the ICTY Statute provides that "The Prosecutor shall have the power to question suspects, victims and witnesses, to collect evidence and to conduct on-site investigations. In carrying out these tasks, the Prosecutor may, as appropriate, seek the assistance of the State authorities concerned".

[3] Rule 39(i) provides that in the conduct of an investigation, the Prosecutor may: "(i) Summon and question suspects, interview victims and witnesses and record their statements, collect evidence and conduct on-site investigations".

defence witnesses and may seek assistance from state authorities to facilitate this contact.

***Witnesses to a crime are the property of neither the Prosecution nor the Defence; both sides have an equal right to interview them.*** Where, however, a person for any reason declines to be interviewed, the Prosecution does not have the power to compel the person to attend an interview or to respond to questions posed by the Prosecution. As the Trial Chamber correctly indicated, if the Prosecution or the Defence wishes to compel an unwilling person to submit to a pre-trial interview, then it must seek the assistance of the Chamber pursuant to Rule 54. Only subpoenas and other orders issued by the Tribunal have a legally binding effect that is enforceable by the application of criminal sanctions.

When a person has declined to be interviewed, the Prosecution is entitled to take reasonable steps to persuade the person to reconsider his decision. However, ***the mere fact that the person has agreed to testify for the Defence does not preclude the Prosecution from interviewing him provided of course that there is no interference with the course of justice.*** Particular caution is needed where the Prosecution is seeking to interview a witness who has declined to be interviewed by the Prosecution, since in such a case the witness may feel coerced or intimidated.[4]

5. Or, in the words of the Presiding Judge of a Trial Chamber of the ICTY:

> JUDGE SCHOMBURG: That it's quite clear, I think it's an absolute misconception by the side of the Defence to believe that when they call a witness, the witness is a kind of property and untouchable for any other Defence team or the Prosecution. This is not the case. A witness is a witness, and already in the beginning of this Tribunal in the Tadic case, it was stated that whenever a witness enters a courtroom, it is a witness of the Court and no longer a witness of the one or the other party. Therefore, you don't have any special rights exclusively to hear this witness. And therefore, to ask the Prosecution to wait until this case is closed [before contacting Defence witnesses], this in no way possible.[5]

6. The Motion seeks to argue that this decision of the ICTY Appeals Chamber is distinguishable on the ground that it was concerned only with contacts at the pre-trial

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[4] *Prosecutor v. Mrksić*, IT-95-13/1-AR73, 'Decision on Defence Interlocutory Appeal on Communication with Potential Witnesses of the Opposite Party', Appeals Chamber, 30 July 2003 (emphasis added).

[5] *Prosecutor v. Stakić*, IT-95-24-T, Trial Chamber, Transcript, 20 February 2003, p. 12475 (lines 3-12). This was said in the context of a witness who was testifying for the defence, but who was also a proposed prosecution witness in a subsequent case dealing with the same crime base. The Presiding Judge indicated in this quote that there was no requirement for the prosecution to wait until the defence case had closed in the first case before contacting the witness.

stage, before any potential witnesses are "attached" to either party.[6] However, it is a fundamental principle in criminal as well as civil proceedings, recognised in the quote of the ICTY Appeals Chamber above, that there is no property in a witness. A witness is never "attached" to either of the parties, at any stage of the proceedings.[7] The Motion does not establish any relevant distinction between contacts made in the pre-trial phase and the trial phase.

7. The Prosecution submits that there are very legitimate reasons for Prosecution interviews with Defence witnesses. The Prosecution needs to undertake reasonable investigations in order to be able to meaningfully test the Defence evidence, and it is the duty of the Prosecution to do so. Speaking with the witness directly can be an important part of that investigation. For instance, the Prosecution may need even to establish that the witness is in fact the person that he or she claims to be. The Prosecution may also need to confirm that the witness really does have the background that he or she claims to have. The Prosecution may further need to ascertain, for instance, whether the person has any previous criminal record, or any significant unknown associations. In order to do this, it may be necessary to speak to the witness to obtain details that can be independently verified or disproved. Where the Prosecution contacts Defence witnesses, this is not on the assumption that the

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[6] Motion, footnote 11.

[7] See, for instance, *R v. Brown* 1997 CarswellOnt 5992 (Canada: Ontario Court of Justice), at para. 5 ("Both parties in any criminal prosecution are entitled to make such proper contact with a witness as is thought necessary or desirable in preparing the case" (quoting the Report of the Attorney General's Advisory Committee on Charge Screening, Disclosure and Resolution Discussions)) and "A request may be made of a witness to attend for an interview by anyone but the witness may decline to participate"); *R v. Munro* 1991 CarswellOnt 3538 (Canada: Ontario Court of Justice), at para. 5 (making an order preventing an accused personally from being present when prosecution witnesses are interviewed by defence counsel, but accepting that "Defence counsel can, of course, speak to any witnesses if such witnesses so agree to speak. There is no property in a witness."). The prosecution, when interviewing defence witnesses, can be relied upon to respect the rights of the accused: see, for instance, *R v. Higgins* [2003] EWCA Crim 2943 (England and Wales: Court of Criminal Appeal), at paras. 37-38: ("It is trite to say that there is no property in a witness, whether prosecution or defence. Provided that interviews are undertaken, as these were, in compliance with all the relevant PACE [Police and Criminal Evidence Act] formalities and requirements, there can be no complaint of abuse of process on that account alone. However, where, as here, the interviewees are potential defence witnesses in an impending criminal trial, investigating officers have to keep an eye on the trial and its fairness as well as on their own investigation when conducting their interviews. [...] What is important is that investigating officers should not act in such a way in their questioning in interview so as to brow-beat or intimidate a potential defence witness -- who may be a witness of truth -- from giving evidence in support of a defendant. [...] So, where an exercise of this sort is undertaken by the police before trial, it requires sensitivity and scrupulous attention to accuracy and fairness to both the interviewee and to the trial ahead").

Prosecution will necessarily obtain information that can be used in court to undermine the reliability or credibility of the witness. However, if in the course of such contacts the Prosecution does obtain such material, there is no reason why it cannot legitimately be used for that purpose.

8. This general position is of course subject to any contrary order of the Trial Chamber. It has not been uncommon in the practice of international criminal courts and tribunals for witness protection measures to impose conditions on contacts by one party with witnesses proposed to be called by the other party. However, the conditions imposed by such witness protection orders are not standard or uniform, and will necessarily vary depending on the particular circumstances of the case, and on what the Chamber issuing the order considers to be necessary in those circumstances. There would be no need for such measures to be specified in witness protection orders if the Prosecution was "automatically" subject to restrictions of the kind proposed by the Defence even in the absence of an order.

9. As paragraph 4 of the Motion acknowledges, there is nothing in the Rules to prevent such contacts between one party and proposed witnesses for another party. Paragraph 5 of the Motion suggests that some restrictions on such contacts should be imposed by Rule 89(B) of the Rules. However, the Motion merely asserts this, without giving any explanation as to how such restrictions might flow from Rule 89(B). Rule 89(B) is concerned with rules of evidence (such as the rules concerning the admissibility of certain types of evidence, and the way that certain facts are to be proved), and not with questions such as whether one party can contact persons who are proposed witnesses for another party. Paragraph 6 of the Motion suggests that restrictions on Prosecution contacts with Defence witnesses are imposed by Article 17(4) of the Statute, dealing with the rights of the accused. Again, the Motion merely states this, without giving any explanation as to how such restrictions might flow from Article 17(4), and without explaining how the rights of the Accused could be affected by the Prosecution contacting Defence witnesses. The Prosecution notes that the Motion does not seek to rely on Rule 95.[8] The Prosecution notes that in once case before the

[8] Rule 95 provides that: "No evidence shall be admitted if its admission would bring the administration of justice into serious disrepute".

ICTR, the Trial Chamber found that no case had been made by the Defence for excluding under Rule 95 evidence obtained by the Prosecution from Defence a witness,[9] even where the Prosecution was in violation of a witness protection order in contacting the witness.[10]

10. Paragraph 7 of the Motion suggests that it is "customary" that once a list of witnesses is made known, permission is sought by one party before approaching confirmed witnesses of the other side. The use of the word "customary" in the Motion appears to be a concession that where this is done, is done as a courtesy rather than as a matter of obligation. It is noted that in the *Stakić* case referred to above, the Presiding Judge noted that "as an ***act of courtesy*** and in the absence of general rules, the Prosecution would be prepared just to contact or to inform the other party in advance".[11] Even if this were to be regarded as a customary courtesy, such custom would admit of exceptions where, in the professional opinion of the lawyers or investigators concerned, there is justification for this. A departure from courtesy cannot of itself be said to be inconsistent with the rights of an accused. The Motion certainly does not establish how this could be the case.

11. Paragraphs 8-10 of the Motion argue that it is unfair, and inconsistent with the principle of "equality of arms" to allow the Prosecution to conduct interviews with confirmed defence witnesses, when the Defence was foreclosed of the same opportunity to have contacts with Prosecution witnesses, due to the protective measures in place. However, the reason for this disparity between the Prosecution and the Defence is that the Prosecution applied for, and was granted, protective measures for Prosecution witnesses, while the Defence made no application for protective measures for Defence witnesses. It is untenable to suggest that there is an inconsistency with the principle of equality of the parties to grant a request made by one party, if the other party has not made a similar request and been granted the same. In the AFRC case, the Defence ***did*** apply for protective measures, and an order was

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[9] *Prosecutor v. Kamuhanda*, ICTR-99-54A-T, 'Decision on Kamuhanda's Motion for Disclosure of Witness Statements and Sanction of the Prosecutor', Trial Chamber, 29 August 2002, para. 16.

[10] *Ibid.*, para. 20.

[11] *Prosecutor v. Stakić*, IT-95-24-T, Trial Chamber, Transcript, 20 February 2003, p. 12473 (lines 18-21) (emphasis added); see also p. 12473 (lines 12-13) (enquiring whether "the Prosecution would regard it as an ***act of courtesy*** to act or to inform the other party in advance" (emphasis added).

made in that case imposing conditions on contacts by the Prosecution with Defence witnesses.[12] The Defence could have done the same in this case but chose not to.

12. Paragraph 11 of the Motion argues that the Prosecution should notify the Defence of its intention to contact Defence witnesses "As a matter of fundamental fairness". However, it does not explain why fundamental fairness dictates this, in the absence of an order of the Chamber imposing such restrictions on contacts with witnesses. Indeed, the Motion appears to concede that this "may not reflect the state of the law in a technical sense", and appears to acknowledge that this would merely be a "better practice" to "avoid allegations" that might otherwise subsequently be made. The Motion fails to explain how a departure from what the Defence considers to be the "better practice" violates the rights of the Accused.

13. Paragraph 12 of the Motion argues that there ought to be "automatic" restrictions on the right of the Prosecution to contact Defence witnesses, since "A contrary rule will encourage the filing of applications for protective measures". The Motion provides no evidence that this would be so. The Motion argues that the Defence "did not imagine that it might need to seek protective measures with respect to Prosecution agents". However, if there is no actual legal rule preventing such contacts, the need for an order to restrict any such contacts is evident.

14. Paragraphs 13-19 of the Motion argue that it is "necessary" for the Trial Chamber to "endorse certain procedural safeguards" in respect of Prosecution contacts with Defence witnesses. It is unclear from the Motion whether it is requesting the Trial Chamber to make an order for protective measures giving effect to such "procedural safeguards", or whether the Motion is seeking to suggest that these proposed "procedural safeguards" have always been a legal requirement. If the latter is the case, the Motion is certainly incorrect, for the reasons given above. On the basis that the Motion is now seeking an order for protective measures for the future, the Prosecution responds to these paragraphs as follows.

15. Paragraphs 13 and 16 of the Motion suggest that the requested protective measures are necessary to protect Defence witnesses from "harassment" and "coercive tactics".

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[12] *Prosecutor v. Brima et al.*, SCSL-04-16-T-488, 'Decision on Joint Defence Application for Protective Measures for Defence Witnesses' 09 May 2006.

The Prosecution takes issue with the suggestion that it must be presumed that the Prosecution is coercing or harassing Defence witnesses. The Prosecution fully accepts that it has no power to compel Defence witnesses to speak to the Prosecution (at least, without first obtaining a subpoena), and that when seeking to interview Defence witnesses, the Prosecution is subject to all applicable professional obligations, and should be sensitive and scrupulous to ensure that a Defence witness does not feel coerced or intimidated. However, the mere fact that the Prosecution does contact a Defence witness does not give rise to any presumption that there is any coercion or intimidation.

16. Paragraphs 16 and 19 of the Motion suggest that the mere fact that Prosecution interviews with Defence witnesses are conducted at police stations with the assistance of the police gives rise to a danger that witnesses feel compelled to speak with the Prosecution. The Prosecution does not admit that this is the case. Under Article 17(1) of the Special Court Agreement, the Government of Sierra Leone is required to "cooperate with all organs of the Special Court at all stages of the proceedings", and in particular, "to facilitate access to the Prosecutor to sites, persons and relevant documents required for the investigation". The Prosecution submits that there is nothing improper in seeking the assistance of the Sierra Leonean police in contacting persons it wishes to interview. It is usually the case that Special Court investigators need the assistance of the local police, particularly in rural areas, in order to locate witnesses, and to make facilities available for conducting interviews. This is also in the interests of the witnesses concerned, to enable them to be interviewed in private, away from other members of the community. The police exist to serve and protect the community, and there is no evidence that individuals in Sierra Leone, or Defence witnesses in particular, generally live in fear of, or feel intimidated by, the police.
17. It is conceded that care needs to be taken by the Prosecution to ensure that witnesses do not feel coerced or intimidated, but it cannot be assumed that witnesses necessarily feel coerced or intimidated merely because an interview is conducted at a police station. If it is suggested that a particular witness felt coerced or intimidated, this would need to be examined on a case by case basis, in the light of the circumstances of each particular case.

18. Accordingly, the Prosecution submits that the Trial Chamber should deny the request in the Motion that all statements taken by the Prosecution from Defence witnesses should be excluded under Rule 95. A statement of such a witness could only be excluded if the Defence were to establish, in relation to a particular witness, that the criteria of Rule 95 applied in relation to that particular witness.
19. In relation to the witness Wuyata Sheriff, paragraph 17 of the Motion argues that "there is no indication to suggest that full and free consent was given by this witness". This argument presupposes that there is some kind of presumption that any Defence witness who agrees to speak to the Prosecution must do so because they feel intimidated. There is no such presumption. The Defence Motion contains nothing to suggest that that full and free consent was not given by this witness. Attached as Annex B is a statement by OTP Senior Investigator Joeph Saffa, concerning the circumstances of the OTP interview with Ms. Sheriff. There is no evidence before the Trial Chamber that gives any indication that Ms Sheriff felt harassed or intimidated.
20. In relation to the witness Joe Nunie, attached as Annex C is a further statement by OTP Senior Investigator Joeph Saffa, concerning the circumstances of that interview. The Prosecution notes that this witness did make certain allegations concerning this interview while testifying on 11 May 2006, which are inconsistent with the annexed statement. It is submitted that it is unnecessary for the Trial Chamber to resolve this inconsistency, since this witness declined to be interviewed by the OTP, and there is therefore no statement from this witness that the Defence could seek to have excluded.

## III. CONCLUSION

21. The Prosecution submits that the Defence Motion must accordingly be denied.
22. Nevertheless, the Prosecution is aware of the importance of ensuring that when Defence witnesses are contacted by the Prosecution, they do not feel intimidated or coerced. To allay any possible concerns, the Prosecution will refrain from seeking to interview any further persons who are listed as Defence witnesses in this case, until the Trial Chamber has ruled on the Motion. The Prosecution would, however, request

that the Motion be decided on an expedited basis, in order not to unduly hinder ongoing investigations by the Prosecution.

23. Furthermore, if the Motion is rejected, the Prosecution proposes to take the following steps on any future occasion on which the Prosecution may seek to interview Defence witnesses in this case:

(1) The Prosecution will seek to establish contact with the witness via the Victims and Witnesses Unit ("VWU"). Like the OTP, it is expected that the VWU will need to enlist the aid of the local police to locate the witnesses, and to make facilities for the interview available.

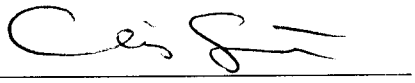
(2) The Prosecution will at the commencement of any interview with a Defence witness provide the witness with a document in the form of Annex A, and have the document read to the witness in the witness's own language, if the witness does not speak English. The Prosecution will also request the VWU to request the local police to inform the witness of the substance of Annex A when approaching the witness to arrange an interview.

(3) The Prosecution will reinforce to its investigators the need to be especially vigilant when interviewing persons who are listed as Defence witnesses in this case to ensure that the witness is aware that the interview is voluntary and that the witness is under no coercion.

(4) Should any of these measures prove to be impracticable in the future, the Prosecution will revert to the Trial Chamber.

Filed in Freetown,
15 May, 2006.
For the Prosecution,

Desmond de Silva, QC
Prosecutor



Christopher Staker
Deputy Prosecutor

## Index of Authorities

### A. ORDERS, DECISIONS AND JUDGMENTS

SCSL cases

1. *Prosecutor v. Brima et al.*, SCSL-04-16-T-488, 'Decision on Joint Defence Application for Protective Measures for Defence Witnesses', 09 May 2006.

ICTY and ICTR cases

2. *Prosecutor v. Stakić*, IT-95-24-T, Trial Chamber, Transcript, 20 February 2003, p. 12475 (lines 3-12). [http://www.un.org/icty/transe24Stakic/030220IT.htm]

3. *Prosecutor v. Mrksić*, IT-95-13/1-AR73, 'Decision on Defence Interlocutory Appeal on Communication with Potential Witnesses of the Opposite Party', Appeals Chamber, 30 July 2003. [http://www.un.org/icty/mrksic/appeal/decision-e/030730.htm]

4. *Prosecutor v. Kamuhanda*, ICTR-99-54A-T, 'Decision on Kamuhanda's Motion for Disclosure of Witness Statements and Sanction of the Prosecutor', Trial Chamber, 29 August 2002, para. 16. [http://69.94.11.53/ENGLISH/cases/Kamuhanda/decisions/290802.htm]

Canadian cases

5. *R v. Brown* 1997 CarswellOnt 5992 (Canada: Ontario Court of Justice), at para. 5.

6. *R v. Munro* 1991 CarswellOnt 3538 (Canada: Ontario Court of Justice), at para. 5.

7. *R v. Higgins* [2003] EWCA Crim 2943 (England and Wales: Court of Criminal Appeal), at paras. 37-38.

### B. OTHER AUTHORITHIES

8. Rules of Procedure and Evidence of the Special Court for Sierra Leone, 14 May 2005, Rules 39, 89 and 95.

9. Statute of the Special Court for Sierra Leone, 16 January 2002, Article 15.

10. The Special Court Agreement, 2002, Article 17.

1997 WL 1933921 (Ont. Gen. Div.), 1997 CarswellOnt 5992

1997 CarswellOnt 5992

R. v. Brown

Her Majesty The Queen and Lawrence Augustus Brown, Gary George Francis, O'Neil Grant and Emile Mark Jones

Ontario Court of Justice (General Division)

Trafford J.

Judgment: February 25, 1997
Docket: None given.



Counsel: Sandra Kingston, William McKenzie and Kenneth Campbell, for Her Majesty the Queen.

William Hechter, Jeffrey Kerzner and Frank Addario, for Lawrence Augustus Brown.

Michael McLachlin and Ava Arbuck, for Gary George Francis.

Karen McArthur and Chris Kostopoulos, for O'Neil Grant.

David Midanik and David Layton, for Emile Mark Jones.

Subject: Criminal

Criminal law.

Evidence.

Cases considered by Trafford J.:

> R. c. Khela, 43 C.R. (4th) 368, [1995] 4 S.C.R. 201, 102 C.C.C. (3d) 1, 129 D.L.R. (4th) 289, 188 N.R. 355, 32 C.R.R. (2d) 257 (S.C.C.) -- referred to
>
> R. v. Stinchcombe (1991), [1992] 1 W.W.R. 97, [1991] 3 S.C.R. 326, 130 N.R. 277, 83 Alta. L.R. (2d) 193, 120 A.R. 161, 8 C.R. (4th) 277, 18 C.R.R. (2d) 210, 68 C.C.C. (3d) 1, 8 W.A.C. 161 (S.C.C.) -- considered

Trafford J.:

1997 WL 1933921 (Ont. Gen. Div.), 1997 CarswellOnt 5992

**Brown et al (No. 5) The Editing of the Notes of the Principal Investigating Officers**

1 This is an application by the accused for an order determining the relevance or otherwise of those portions of the notes of the principal investigating officers edited out by the Crown prior to production to the defence. On a review of this nature the Crown must justify its refusal to disclose information - it has the evidentiary and persuasive burden to demonstrate compliance with the general rule requiring disclosure of all relevant information. Information should not be withheld if there is a reasonable possibility that withholding it will impair the right of the accused to make full answer and defence. See *R. v. Stinchcombe* (1991), 68 C.C.C. (3d) 1 (S.C.C.) @ 12.

2 To facilitate the review by the Court the Crown tendered as exhibits copies of the notes of the four officers - Detective Sergeant Gauthier, Detective Sneddon, Detective Sergeant Clarke and Detective Miller. Those portions of them that have been deleted from the copies produced to the defence were bracketed. Brief marginal notations were made to describe the reason for the editing - "...other investigation...", "...witness particulars...", "...confidential informants..." and "...confidential investigative techniques..." were the phrases used in this case. I read the bracketed information to satisfy myself of the accuracy of the marginal notations. This led to some further disclosure in Court when specific aspects of this information were brought to the attention of the Crown Attorney. When I otherwise was satisfied of the correctness of the marginal notations, counsel for the accused were given an opportunity to make submissions. They did so giving me examples of how information in these categories may be of assistance to the conduct of the defence in this trial. With the benefit of those submissions I read the bracketed portions of the notes again.

3 All of the information in the categories of "...other investigations...", "...confidential informants..." and "...confidential investigative techniques..." is clearly irrelevant to this case. There is nothing in any of them that might be of assistance to the defence. None of it need be produced. However, the other category - "...witness particulars..." - is a more difficult task for the Court. It includes for many witnesses their addresses, telephone numbers, social insurance numbers, dates of birth, license numbers, personal identification numbers, pager numbers, vehicle identification numbers, credit card numbers, numbers on police records and entry codes for apartment buildings. The defence wishes to have sufficient of this information to permit them to independently and thoroughly investigate the background of persons who may be called as witnesses for the Crown and to otherwise use it in the preparation of the defence. The Crown is opposed to the disclosure of this information because of concerns it has for the safety of its witnesses.

4 In this case Detective Sergeant Gauthier has received information from seven material witnesses for the Crown of threats made to them, directly or indirectly. With one exception, the accused are not implicated in the threats. No arrest has been made as a result of these complaints. Examples of the information received include "...(x) has a gun and (the witness) should be bumped off because he was a rat ... (the accused) are in the Strikers Posse and will get (the witness) in Jamaica ... the word is in the jungle that (the witness) is responsible for Grant and Brown being in jail and they want to get you ... we know your name and what you did ... we know you went to the cops ... we are the real bad guys and you better watch out ... you could be blown away ... we know where you live, where you work and everything about you ... we have a body bag with your tag ... you are an informant/watch your back/you are a dead man ... you are (the witness)/someone is here showing your picture saying you testified about (the accused)...". All of these witnesses have expressed fears for their safety and all of them told Detective Sergeant Gauthier they do not want their names and addresses given to the defence counsel. While some of these witnesses did not testify at the preliminary hearing, the disclosure made about them is complete. Their cooperation with the investigators and Crown Attorneys is less than it was prior to these complaints to Detective Sergeant Gauthier. All of them have a link, present or past, to a community in Toronto known as Lawrence Heights which is the area where the accused lived or frequented prior to their arrests.

5 In the circumstances of this case the decision of the Crown Attorney to withhold the witness particulars for these witnesses is a proper exercise of prosecutorial discretion. The timing of disclosure of information relevant to the conduct to the defence is within the discretion of the Crown and disclosure may be delayed where there is legitimate concern for the safety of witnesses. See *R. v. Stinchcombe, supra* at pp. 8-9. This discretion is, however, reviewable by a trial judge. In conducting such a review the Court must recognize there is no property in a witness. Both the Crown and the defence are entitled to make proper contact with a witness to advance the preparation of the

case. As was noted in the Report of the Attorney General's Advisory Committee on Charge Screening, Disclosure and Resolution Discussions at p. 227:

> ...the provision of addresses, and other information that can facilitate contact with a witness, is in the discretion of Crown Counsel, which discretion is, of course, reviewable by the trial judge. In exercising this discretion, it cannot be forgotten that there is no property in a witness. Both parties in any criminal prosecution are entitled to make such proper contact with a witness as is thought necessary or desirable in preparing the case. Therefore, the withholding of addresses by the Crown cannot frustrate the practical exercise of this right....

It is also important for the Court to recognize the rights of witnesses to privacy. They have no legal obligation to speak to counsel before testifying. Neither the Crown nor the defence can compel a witness to attend for an interview. Moreover, a Court ought not order a witness to attend for such an interview unless the witness has been properly served with a subpoena and has been given a reasonable opportunity to be heard on the issue. A request may be made of a witness to attend for an interview by anyone but the witness may decline to participate. The choice belongs to the witness.

6 Witnesses must know that the Courts will respect their legitimate interests in being fairly treated by everyone in the administration of justice. They are a critical component of a fair trial - the integrity of the trial process and its capacity to make reliable findings of fact is dependent upon them. The confidence of the public in the criminal justice system is dependent, in part, upon its ability to recognize the need to protect witnesses against abusive, harassing, threatening or otherwise improper treatment in and out of Court and to respond effectively to any such unfortunate occurrence.

7 In this case the defence has proper disclosure of the information relating to these seven witnesses. Therefore, this is not a case where the immediate disclosure of the addresses and phone numbers is necessary to properly care for the right of the accused to make full answer and defence. Compare *R. c. Khela* (1995), 102 C.C.C. (3d) 1 (S.C.C.). Nor is it a case where it is appropriate to leave the disclosure of this information entirely within the discretion of the Crown. The delay to date has been a warranted one but given the importance of these witnesses the defence is entitled to a reasonable, but not unfettered, opportunity to conduct its own independent investigation of them. Such an opportunity is entirely within the discretion of the witnesses as they may lawfully decline to cooperate in any such initiative. To accommodate these competing interests and to ensure an orderly treatment of these issues, the following steps shall be taken.

> 1. At the request of the defence, the Crown Attorney shall make available to the defence a room in the courthouse suitable for a confidential interview of the seven witnesses by counsel of record.
>
> 2. The interviews to be conducted, if any, are strictly confidential - no Crown Attorney or police officer is to be present unless requested by the defence.
>
> 3. The fact of an interview and any and all information obtained during it is to remain strictly confidential. No person, including the witness, the defence counsel, the accused and any other person present for any such interview may disclose any information relating to the interview except as may be necessary in the conduct of the trial itself.
>
> 4. Each and all of the seven witnesses shall be written a letter jointly signed by all principal counsel of record advising them of the request of the defence to interview them at the courthouse. The letter is to advise the witnesses in the clearest of terms of the existence of this ruling and of the right of the accused to interview them subject to their right to decline to participate in any such interview - the decision is strictly theirs to make. Care is to be taken to ensure the witnesses are not left with the impression they should not grant the defence an interview. The letter is to convey to the witnesses that any such interview will be by the defence counsel of record without any police officer or Crown Attorney present. Moreover, they are to be informed of the order of the Court requiring all persons involved in the interview to maintain the confidentiality of the interview process strictly.

8 For a discussion of this approach and the related themes see the Martin Report at pp. 262, 227-228, 217 and 173.

9 The effect of this ruling is to provide the defence with a reasonable opportunity to conduct an independent investigation of these seven witnesses if they are prepared to cooperate with the defence. The witnesses are provided with a reasonable opportunity to make an informed decision. Requiring the Crown Attorney to provide the facilities for an interview at a neutral location and prohibiting disclosure of the interview and its substance by any of its participants, except as may be necessary in the trial itself, cares for the legitimate safety concerns of the witnesses. This, I believe, is an optimal recognition of the rights and obligations of all of the affected persons, including the right of the accused to make full answer and defence.

10 Accordingly, the editing of the notes as proposed by the Crown is approved by the Court.

END OF DOCUMENT

1991 WL 1138815 (Ont. Prov. Div.), 1991 CarswellOnt 3538

1991 CarswellOnt 3538

R. v. Munro

Her Majesty the Queen against John Carr Munro David Frederick Ahenakew Peter Kenneth Manywounds Solomon G. Sanderson Douglas L. Cuthand James Patrick Woods Lawrence O. Russell

Ontario Court of Justice (Provincial Division)

Nadelle Prov. J.

Heard: January 31, 1991
Judgment: January 31, 1991
Docket: None given.



Proceedings: Additional reasons, (February 26, 1991), Doc. (Ont. Prov. Div.)

Counsel: M. Lindsay, Q.C., D. Macdougall, for Crown

J. Nelligan, Q.C., R. Houston, Q.C., N. Boxall, D. Galbraith, C. Haskell, P. McCann, for Accused

Subject: Criminal

***Nadelle O.C.J.*, (Orally):**

1 Defence counsel has requested that I allow Mr. Munro to communicate with witnesses to be called by the prosecution, prior to their testimony being given. The reason for this request is that Mr. Munro requires such communication to fully prepare his defence to these charges. The communication would, of course, be substantially, if not all, concerned with the testimony to be given.

2 The pleas of not guilty were entered and testimony began on January 28th, 1991. The first two weeks set aside for this trial dealt with a number of pre-plea motions. Up until January 28th, 1991, there was nothing prohibiting Mr. Munro from discussing the charges or evidence with anyone. Mr. Munro had the time between the laying of the charge in December of 1989 to January 27th, 1991 to speak to these witnesses. That time frame might even be longer than that since Mr. Munro, I can assume, was well aware he was being investigated long before the charges were actually laid.

3 At some stage, at least by early 1990, Mr. Munro would have become aware of the names of the witnesses and

the general nature of their testimony through the various disclosure processes employed in this investigation and trial preparation.

4 The trial has now commenced. Prior to the first witness testifying, I made an order excluding witnesses from the courtroom. The order was in response to a defence counsel request.

5 If Mr. Munro were now to be allowed to communicate with witnesses to be called by the prosecution about evidentiary matters, it could very well leave the impression that the exclusion of witnesses order was being circumvented. I am not, for a moment, suggesting Mr. Munro would knowingly undermine the exclusion order. However, the appearance that justice is being done must be maintained. Crown counsel today has also brought forth a valid point and that is that the witnesses being interviewed may feel pressured simply because of the presence of the accused. Mr. Munro and many of the witnesses had some form of close relationship, whether being through family, friends, political or employer-employee. Defence counsel can, of course, speak to any witnesses if such witnesses so agree to speak. There is no property in a witness.

6 Therefore, I am directing that Mr. Munro not communicate with any witnesses to be called by the prosecution about any aspect of this trial. Mr. Munro shall also not be present when counsel or his designate interviews witnesses Crown intends to call.

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Westlaw

2003 WL 22358302
2003 WL 22358302 (CA (Crim Div)), [2003] EWCA Crim 2943
**(Publication page references are not available for this document.)**



Regina v. Terry Higgins
No: 200206315/C3
Neutral Citation Number: [2003] EWCA Crim 2943

Court of Appeal Criminal Division

CA (Crim Div)

Before: Lord Justice Auld Mr Justice Aikens Mr Justice Grigson

Tuesday, 7th October 2003

**Representation**

Mr Donoghue appeared on behalf of the Appellant.

Mr H Roberts appeared on behalf of the Crown.

**JUDGMENT**

LORD JUSTICE AULD:

**1.** On 2nd October 2002, before His Honour Judge Farmer QC and a jury in the Crown Court at Newport, the applicant, Terry Higgins, was convicted by a majority of ten to two on count 1 of a two count indictment of causing grievous bodily harm with intent. He was also unanimously convicted, in circumstances that we shall describe, on count 2 of the indictment of inflicting grievous bodily harm in respect of the same assault, the subject of count 1.

**2.** His application for leave to appeal against conviction was referred to this Court by the Registrar. We have heard argument on the application and have granted leave. With the consent of the applicant we have treated the hearing of his application as the hearing of the appeal. We refer to him from now on as the appellant.

**3.** The facts giving rise to the prosecution and conviction were in outline as follows. On 12th April 2002 there was an amateur exhibition boxing match at a rugby club near Newport. The appellant's son, Jason Higgins, was one of the fighters. After his fight a spectator, James Thomas, the victim of the appellant's alleged attack, made a derogatory comment about Jason. The prosecution case was that the appellant took offence at this, and in the dressing room afterwards in the presence of Jason and others deliberately headbutted Thomas in the mouth causing him serious facial injuries. The appellant's case was that it was an accident, an accidental clash of heads in which he, too, was injured. So the main issue in the case was whether the headbutt was deliberate or accidental.

**4.** In interview after his arrest the appellant told the police of Thomas's offensive remark about his son. He said that when he remonstrated with him about it in the changing room, Thomas, who had a glass of beer in his hand, struck out at him with it and that there was then an accidental clash of heads when he, the appellant, raised his hands in self-defence. The appellant also gave the police the name of four potential witnesses who, he believed, would be able to confirm his account.

**5.** Before continuing with the story, we should mention that the appellant was at that time also the subject of a police investigation called "Operation Landscape". The police believed that in three earlier prosecutions he had dishonestly secured his acquittal in two and the reduction of a charge in a third by putting forward defence witnesses to lie for him. When the appellant named four potential defence witnesses on this occasion the police resolved, as part of that investigation, to interview them with a view, if dishonesty of that sort was afoot, to stop it happening in this prosecution. Accordingly they interviewed the four persons, taking witness statements under section 9 of the Criminal Justice Act 1967 from three of them, namely, Jason Higgins, his girlfriend Joanne Davey and Jason's boxing coach David Johns. The fourth, Darren Johns, David Johns's son and a friend of Jason, did not make a witness statement. The witness statements of Jason, Joanne Davey and David Johns broadly supported the appellant's account. Darren Johns, when the police spoke to him about it, confirmed at least part of the appellant's account, namely, that Thomas walked towards the appellant holding a glass at the material time.

**6.** In early July, some three months before the trial, the police arrested all four of the appellant's potential witnesses on suspicion of conspiracy with the appellant to pervert the course of justice in this prosecution. Then, in the first fortnight of July, the police interviewed each of them in tape recorded PACE interviews. We shall say more about those

interviews later in the judgment. Suffice it to mention here that, by the time of them, the police had obtained witness statements from those on whom the prosecution intended to rely, in particular, Thomas, the victim of the alleged attack, and Robert Turley, a 15 year old, and also of other persons present at or near the scene. The police appeared to have formed the view that, in the light of those statements and other prosecution material, the four potential witnesses had already lied to them and were likely to lie on oath in the appellant's support at the forthcoming trial.

**7.** At the start of the trial Mr Donoghue, who appeared for the appellant and who appears for him in this appeal, applied to the judge for a stay of the prosecution as an abuse of process. He did so in the course of a three day hearing on the ground that the manner and conduct of the police interviews of the four potential witnesses had been unfairly prejudicial to the defence and had thus violated Article 6 of the European Convention of Human Rights, in particular paragraph 6(3)(b)(ii). The judge refused the application in a full and carefully reasoned ruling.

**8.** In the trial that followed the prosecution relied principally on the evidence of Thomas and Turley, both of whom said that the appellant had deliberately headbutted Thomas. The prosecution also relied on the evidence of others who gave no complete or direct evidence of the alleged headbutt itself, but were supportive in peripheral ways of the prosecution case.

**9.** The appellant gave evidence consistent with the account that he had given to the police of accident, that is, of an accidental clashing of heads when he raised his hands in self-defence as Thomas lunged at him with the glass. Of the four potential defence witnesses whom he had named to the police, only two gave evidence on his behalf, Jason, his son, and Joanne Davey, Jason's girlfriend. Both gave an account broadly similar to that of the appellant -- accident in the course of self-defence.

**10.** The judge, in summing up the case to the jury, directed them on the single difference between count 1, causing grievous bodily harm with intent, and count 2, inflicting grievous bodily harm, namely, the need to prove in count 1, an intent to cause really serious bodily harm. He told them that the two counts were alternatives, but count 2 was the less serious of the two, and that there were, therefore, two stages to their enquiry: (1) were they sure that the appellant deliberately headbutted Thomas; if yes, (2) were they sure that he intended to cause him really serious bodily harm?

**11.** This is how he put it at page 10E--H in the transcript of his summing-up:

"So, there are two stages in your enquiry, you may think. First, are we sure that he deliberately headbutted Mr Thomas? If the answer is yes, then at least guilty of count 2. If the answer is no, not guilty of everything. If you are sure that it is at least guilty of count 2, then you go on to consider the second question which is, 'Are we sure that at the time he deliberately headbutted Mr Thomas he intended to cause him really serious physical injury?' Do you follow? So, those are the two stages and those are the two questions."

**12.** The judge summed up the case to the jury over the best part of a morning and sent them to their room to consider their verdict at about quarter to one. They returned just over two and a half hours later, at about 3.20 p.m.. In response to the court clerk's question, "On either count have you reached a verdict on which you are all agreed?", the jury foreman replied "Yes". The clerk in turn asked, "Which count have you reached a verdict on which you are all agreed?" The jury foreman replied, "Count 2". When asked whether the jury found the appellant guilty or not guilty on that count, the foreman replied "Guilty". In response to the clerk's enquiry whether it was unanimous, he replied "yes".

**13.** The judge then said to the jury "You will need to continue to deliberate on count 1 ..." and gave them a majority direction on it. Neither the foreman nor any member of the jury demurred at the prospect of having to continue to deliberate on count 1, in particular, there was no indication that they had already reached a verdict either way on that count. The jury retired again at 3.25 p.m. and returned just over half an hour later at 3.59 p.m. with a majority verdict of ten to two for guilty on count 1.

**14.** As we have just concluded the story with the taking of the verdicts, we shall deal first with the second of the grounds of appeal, relating to that matter. Mr Donoghue submitted that, as the two counts were alternatives and the jury had already convicted the appellant of the lesser offence in count 2, the subsequent conviction on count 1 is unlawful and inconsistent with the verdict on count 2 and should be quashed. He said that the jury had been clearly directed of the alternative nature of the two charges and that, once they had returned a verdict in respect of count 2, that effectively brought the trial to

an end. He submitted that the judge was not entitled to give the jury the majority direction in respect of count 1 and to invite them to deliberate on it. There was, he said, an unambiguous verdict of guilty on count 2 and that was the end of it. He said that in any event -- and this was a quite separate submission -- that the subsequent majority verdict on count 1 must, in the circumstances in which it was returned, be unsafe.

**15.** Mr Roberts, for the respondent, acknowledged that both verdicts could not stand, but submitted that the Court should quash the verdict on count 2, not on count 1. He, too, relied on the clear direction of the judge to the jury that the offences were alternative, but also on the way in which the judge had directed them as to the order, the stages, in which they should consider the two alternatives. First, on the issue whether the headbutt was deliberate and, if it was, that would make the appellant guilty of, as the judge put it, "at least count 2", and then whether he had intended to cause grievous bodily harm with intent, when it would amount to the offence charged in count 1. Mr Roberts maintained that the jury foreman's answers to the court clerk's initial questions, that they were not at that stage unanimous about the extra ingredient of intent requisite for count 1, entitled the judge to direct them to continue to consider it and to give them the majority direction for the purpose, given the length of time that they had been considering their verdicts. In response to the second of Mr Donoghue's submissions on this ground, he submitted that there was no ambiguity or unsafety on the majority verdict on count 1.

**16.** In our view, this ground of appeal fails. Where, as here, a jury inadvertently return convictions on two alternative counts arising out of the same incident, one lesser than the other, but consisting also of one or more ingredients of the other, and there is no ambiguity or reason to consider the conviction of the more serious unsafe, the proper course for this Court is to quash the conviction on the lesser offence. If authority is needed for that proposition is to be found in R v Harris (1969) 53 Cr App R 376, in which Edmund Davies LJ, giving the judgment of the Court, said that in such circumstances the conviction of the lesser charge merges with the conviction of the graver. See also R v Cummerson (1968) 52 Cr App R 519, where the Court quashed one of two verdicts in respect of the same conduct where the charges, though different in form, had essentially the same ingredients. See also R v Hill (1993) 96 Cr App R 456.

**17.** The more important question in this case is whether, in the circumstances that we have described, the verdict on count 1 is safe. It is unfortunate that the judge permitted the jury to return a verdict on count 2 before it had indicated that it had reached a verdict one way or another on count 1. Given the overlap between the two charged offences that he indicated to the jury when describing them as alternatives, he should not have permitted them to return a verdict on count 2, if at all, until after they had decided on their verdict on count 1.

**18.** The ruling of this Court in R v Fernandez [1997] 1 Cr App R 456 is a case in point. There, the jury was permitted to return first a verdict of guilty to handling which had been charged as an alternative to charges of theft and robbery, on which they also subsequently returned guilty verdicts. Hobhouse LJ, giving the judgment of the Court, held that the judge should have told the jury that he would not take a verdict on the handling charge before verdicts on the theft and robbery charges. In the event of the jury having inadvertently not following that order he should have declined to accept the verdict on the alternative count and, if he inadvertently accepted it, it should ordinarily be quashed on appeal. The Court did quash the handling verdict, but not the more serious verdicts of theft and robbery.

**19.** Returning to this case, as the two counts were alternatives it would, in any event, have been wiser to direct the court clerk, on learning that the jury had reached an unanimous verdict on count 2, not to return it until they had completed their deliberations on the other more serious alternative. But these exchanges with jury foreman take place quickly, often, as here, towards the end of a full day, and the judge cannot always be ready, or ready in time, to avert such errors.

**20.** In our view, the verdict on count 1 is not, in the circumstances, unsafe. We say that for the following reasons. First, the essential issue for the jury was, as we have said, whether the headbutt was deliberate. It was a short step for the jury on the evidence before them, given the severity of the headbutt and the serious injuries that it had caused, to conclude that it was done with intent to cause those injuries. Second, the judge could not have made it plainer than he did that the two offences were alternatives. Third, he directed them clearly as to the overlapping nature of the ingredients required for proof of each offence, count 2 being the same as count 1, save for the extra ingredient of intent. Fourth, the jury gave no indication, when true to the staging of their

consideration as directed by the judge they had informed the clerk that they were agreed that the headbutting was deliberate, that they had also reached a concluded verdict one way or another on the question of intent. If they had done so, that is to say reached such a verdict, surely they would have given some hint of it when the judge directed them to continue to consider count 1. And, in due course, as in Harris and Fernandez, they went on to convict him on that count, the more serious count, albeit by a majority.

**21.** Accordingly, as in Harris and Fernandez, we consider it appropriate in the circumstances to quash the conviction on count 2, but not that on count 1, the subject of the appeal.

**22.** The second ground of appeal raises more profound concerns. Mr Donoghue submitted that the judge should have stayed the prosecution because there was bad faith on the part of the police in interviewing the four potential defence witnesses in the way they did, and/or because their conduct in that respect was unfairly prejudicial to the appellant's defence, and as such violated his right to a fair trial under Article 6(3)(b) of the Convention. We return now in a little more detail to those interviews and their aftermath.

**23.** First, it should be noted that, although the police arrested all four on suspicion of conspiracy with the appellant to pervert the course of justice, they have not to date charged them or the appellant with that offence. And they have not charged the two of the four potential witnesses who did give evidence for the appellant with perjury. So, regardless of the manner in which the four were interviewed as suspects, the result was that they approached the trial as potential witnesses with an unresolved threat of prosecution, a sword, as Mr Donoghue referred to it, hanging over their heads.

**24.** We have seen and read transcripts of all the interviews. There were many of them and in each case they were lengthy and repetitive. The length of them is reflected in about 325 pages of transcript. The pattern of each was much the same, repeated questioning in great detail on the original story given, seeking, as more and more detail was extracted, to open up differences between the two versions, those given originally and those given later in the interviews. Then, having opened up such differences, the police confronted the interviewees with them and with the contradictory statements of proposed prosecution witnesses. And in each case the interviews culminated with suggestions from the police that the interviewees were lying and had been put up to it by the appellant, or by each other, all of which they denied.

**25.** The tenor of each of the interviews towards their end was that the police knew they had lied in their earlier accounts to them: three in their section 9 witness statements. The police also variously suggested that the appellant had dishonestly secured the favourable outcomes in earlier prosecutions in a similar manner, by recruiting lying witnesses. Their questions, particularly towards the end of the interviews, were assertive and confrontational, but not untypical of rigorous testing in cross-examination by police of suspects in interview.

**26.** Their questioning was in some instances cautionary, with particular regard to the interviewees' potential roles as defence witnesses for the appellant. The police told them that they would be at risk of perjury charges, as well as the current charge under consideration of conspiracy to pervert the course of justice, if they gave untrue evidence.

**27.** In the case of Jason Higgins one of the interviewing officers misled him -- lied Mr Donoghue suggested -- by putting it to him that Darren Johns had told them in interview that Jason had told him that he had not witnessed what had happened. All of that conduct, submitted Mr Donoghue, showed that the police were acting in bad faith and that in accordance with the judgment of this Court in Schlesinger [1995] Crim LR at 137 that is enough to get the appellant home under the heading of abuse of process. He maintained that one has only to consider the manner and conduct of the interviews and put them along side the fact that, to this day, the police have taken no step to prosecute anyone for the conspiracy which they were so forcefully asserting at that time. The clear picture, he submitted, was of a concerted effort by the police to interfere with and intimidate persons likely to give evidence for the appellant by instilling fear into them, by minutely examining their proposed evidence before trial, and by poisoning them against the appellant.

**28.** Mr Roberts, in his submissions for the Crown, maintained that the police should not be criticised for doing in this way what they were entitled to do, namely, vigorously investigating as part of a wider exercise the possibility that these people were fabricating their accounts at the appellant's behest. The police had a duty, he submitted, to take steps to prevent such perversion in the course of justice if

they reasonably suspected it, as well as to enquire into suspected past misconduct.

**29.** He stressed that the interviews were all conducted strictly in accordance with the PACE Code, proper cautions were administered, they were tape recorded and the interviewees were permitted to have legal representatives present, and two of them, Jason Higgins and Joanne Davey, did have a solicitor with them throughout. He said that the witnesses, if truthful, had nothing to fear, and that it is not unusual for defence witnesses who have made statements to the police to be interviewed about them. As to the forceful challenging of them in the interviews, he said that they would face the same treatment in cross-examination in the witness box at trial if their evidence was not accepted by the prosecution. Mr Roberts, in the course of his submissions, conceded that it was a reasonable inference from the manner and conduct of the police interviews of the four persons that the police were seeking to prevent them from giving what they, the police, believed would be false evidence. That is, he said, the purpose was to make clear to them that, if they did give false evidence, it was likely they would be charged with perjury.

**30.** We turn now to the second limb of Mr Donoghue's submissions on this ground that, regardless of the presence of bad faith on the part of the police, the history of the matter shows that there was unfair prejudice to the appellant in the effect of the questioning on some of the potential defence witnesses. He acknowledged that Jason Higgins came up to proof in the witness box and firmly supported his father's defence of accident, as he had done from the beginning. He agreed, too, that Joanne Davey also gave evidence broadly in accordance with her witness statement, though in somewhat vaguer terms. But, he said, David Johns had, in the interviews, watered down his witness statement, saying that he had not been able to see the whole incident as clearly as he had indicated in that statement. And when it came to trial he refused to give evidence, and defence counsel did not consider it appropriate to require him to do so. As to Darren Johns, his relevant contribution to the evidence might have been, as he initially told the police, that he had seen Thomas come forward with a glass in his hand. It is true that in persistent questioning in interview he came to admit what he had described originally might have been interpreted by others as a deliberate headbutt. However, although he attended the trial, Mr Donoghue decided not to call him. He was apparently reluctant to give evidence.

**31.** Drawing on that outcome at trial, Mr Donoghue submitted that there was prejudice in three respects and the judge should have so found. First, one of the witnesses, David Johns, changed his mind, second, Darren Johns was frightened and, third, the police had secured, through their searching and vigorous interviewing techniques, a sneak preview of the defence case.

**32.** As we have said, the judge considered the matter over three days of argument and some evidence, and gave a fully reasoned ruling on it. Having correctly set out how he should approach the issues raised by the application and summarising the submissions of Mr Donoghue and Mr Roberts, the judge considered the content of the interviews. It is plain that his reading of the transcripts left him somewhat uneasy about parts of them. This is what he said about them first at page 8A--C of the transcript of his ruling:

"These interviews are by no means a model of how interviews should be conducted. They were very long. They were, no doubt, difficult for all involved and it is right that errors of procedure, errors of assertion, were made and they were serious errors, errors which could have led to witnesses being misled and altering their position."

**33.** At page 9B--D:

"In my judgment, when they conduct interviews of this sort and when they are investigating allegations of this sort, the interviewing officers are entitled to put to the interviewees the detail of what has happened, test that detail against other evidence by way of either repeating that other evidence or rehearsing that other evidence to the interviewee or challenging the interviewee with other questions. That was done in this case at some length and on occasions with a degree of firmness over and above what one would normally expect."

**34.** However the judge went on to conclude that he was not persuaded that what was done had been either oppressive or unfair, or done in bad faith, as distinct from over enthusiasm, misjudgment, or negligence. He observed that only one witness, David Johns, had changed his position as a result of the interviews, which he had explained was due to his having been confronted with other witnesses' accounts that the police had put to him and convinced him that he must have been wrong in his witness statement. The other three witnesses, the judge observed, had held to their original respective accounts.

**35.** As to the exercise as a whole, the judge expressed the view that it was not an unusual procedure for potential witnesses to be given an opportunity to reconsider their original stand and that there was a public interest in the police pursuing such a serious and, they believed, continuing problem. The judge also referred to the safeguards for a fair trial inherent in the trial process itself. Finally, he rejected the suggestion that the police had gained an unfair advantage over the defence in the form of a dress rehearsal in cross-examination of defence witness so as to render a fair trial impossible.

**36.** Affair anxious consideration, we have come to the conclusion that the judge was right, on the material before him and us, to hold that the police had not acted in bad faith and that the manner of their investigation of these matters had not deprived the appellant of a fair trial. The starting point, as the judge recognised, is that the police are entitled, indeed have a duty to investigate conduct that they suspect to be intended to pervert the course of justice. It is a serious matter, if it has taken place. If it is about to take place it is a serious matter. And the police have a proper interest in preventing it as well as bringing culprits to book after the offence if they fail to prevent it beforehand.

**37.** Equally the police are entitled, if they suspect that potential defence witnesses in an impending prosecution are conspiring to deceive the court, to investigate such conduct and, if necessary, interview the suspects. It is trite to say that there is no property in a witness, whether prosecution or defence. Provided that interviews are undertaken, as these were, in compliance with all the relevant PACE formalities and requirements, there can be no complaint of abuse of process on that account alone. However, where, as here, the interviewees are potential defence witnesses in an impending criminal trial, investigating officers have to keep an eye on the trial and its fairness as well as on their own investigation when conducting their interviews. They may prove to be right or wrong in their suspicions. The testing of the defence witnesses in cross-examination at trial may provide an effective answer one way or another.

**38.** What is important is that investigating officers should not act in such a way in their questioning in interview so as to brow-beat or intimidate a potential defence witness -- who may be a witness of truth -- from giving evidence in support of a defendant. If he or she is not a witness of truth, that may, as we have said, be demonstrated in the trial process; that is what it is for. Or, if there are still suspicions about the truthfulness of the witnesses after they have given evidence, then that may be the time to pursue the investigation with vigour. So, where an exercise of this sort is undertaken by the police before trial, it requires sensitivity and scrupulous attention to accuracy and fairness to both the interviewee and to the trial ahead.

**39.** Sadly, as the judge said, there were some shortcomings in these police interviews. The officers did overstep the mark in some respects. However, we do not consider that they were acting in bad faith, that is with a view to depriving the appellant of a fair trial, or that, viewed as a whole, their behaviour was oppressive or unfair. They overdid it on occasion, perhaps through over enthusiasm and/or bad judgment and/or carelessness. We agree with the judge in his conclusion, however, that the appellant had not established bad faith in the sense for which he contended of an intention to undermine the defence case, or at all.

**40.** As to prejudice, we agree, too, that there was in the event no prejudice to the defence case as a result of the officers' interviewing techniques. We say that whether we look at it -- in the context of abuse of process -- of the appellant's task to satisfy us on a balance of probabilities that he has suffered such prejudice, or -- in the context of the prosecution proving that the appellant had a fair trial, in particular under Article 6 paragraph 3(b) -- of his ability to prepare for and present his defence at trial.

**41.** Jason Higgins and Joanne Davey were, as we have said, unmoved by the officers' questioning. They stuck to their original story in the witness box. Darren Johns also substantially held to his original limited recollection of the incident. Only David Johns moved partly from his original account, as any witness of a confused and sudden outburst of violence might do when pressed to recall in far greater detail than he had given in his witness statement exactly what he had seen, or inferred, given the presence of possible obstruction of his view by others present at the time. His change was one of frank acknowledgment that he might have got it wrong in one respect, not that of a man brow beaten into admission that he had lied or been intimidated into changing his story.

**42.** Accordingly, we are satisfied that there was no prejudice to the fairness of the appellant's trial. There certainly was no breach of Article 6(3)(b). For all those reasons we dismiss the appeal.

**43.** MR DONOGHUE: My Lord, could I raise the issue of the representation in this case? The registrar granted representation by counsel only. The sequence of events in this case, however, are that during the trial there was a firm of instructing solicitors that Mr Higgins had the benefit of. The lady who sits behind worked for that firm. She moved to a new firm and in due course Mr Higgins would move to that firm. The lady behind me has been working practically pro bono in dealing with some preparation for this appeal. The reason for that is that there were some seven tapes that needed to be listened to in relation to another lady on Operation Landscape. I would ask this Court to consider whether this Court would grant a representation certificate to cover the preparation and conduct of this appeal not only for counsel but solicitor as well to reflect the work and presentation of the interviews? I know the Court is aware there are some 325-odd pages of transcript or work done on his behalf.

**44.** LORD JUSTICE AULD: The lady did a lot of work in the preparation of the documentation did she?

**45.** MR DONOGHUE: I am sorry?

**46.** LORD JUSTICE AULD: The lady did a lot of work in the preparation of that documentation?

**47.** MR DONOGHUE: Yes, and also these tapes. I know this Court has not been troubled with them but we have listened to them to ensure they were not of any relevance. They were seven interview tapes with another person.

**48.** LORD JUSTICE AULD: We might have been troubled with them.

**49.** MR DONOGHUE: You would have been, but as a result of her efforts your Lordships were not.

**50.** LORD JUSTICE AULD: Yes, we extend the certificate to include the services of your instructing solicitor to whom we are grateful as well as we are to you, Mr Donoghue.



END OF DOCUMENT

**ANNEX A**

The Office of the Prosecutor of the Special Court is requesting an interview with you to assist it in its ongoing investigations.

You are under no obligation to speak to us. We are seeking your voluntary co-operation. If you do not wish to speak to us, you are free to leave now. If you decide to speak to us, you are free to end the interview at any time and to leave.

We are aware that you have been asked to testify as a witness for the Defence before the Special Court. As a witness before the Special Court, you are required to tell the truth. If you agree to speak to us, it is important that what you tell us is the truth. We are not seeking to influence what you say in any way.

You should also be aware that if you do agree to speak to us, the Prosecution may ask you when you testify in court as a witness about anything you tell us.

**ANNEX B**

12 May 2006

MEETING WITH WUYATA SHERIFF

On 24th March 2006, Magnus Lamin and I conducted an interview with Wuyata Sheriff. The interiview took place at Koribondo Police Station. I asked the questions in both Mende and Krio and translated the answers to Magnus Lamin who took down the notes.

Wuyata Sheriff was brought to us by Michael Dumbuya (Sergeant), the Officer Commanding (O/C) Koribondo Police Station. When we met with her, I introduced us as investigators from the Office of the Prosecutor (OTP), Special Court for Sierra Leone (SCSL). I told her we were talking to her in her capacity as wife of Dauda Sheriff who was the Kamajor RSM in charge of Discipline in Koribondo and for her to tell us what she knows about the activities of Kamajors in Koribondo.

The interview took place in a peaceful atmosphere, no threats or promises were made to her. At the end of the interview the statement was read back to her and she admitted it to be true and correct. She signed the statement by appending her right thumb print.

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Joseph Saffa
Senior Investigator

**ANNEX C**

12 May 2006

MEETING WITH JOE NUNIE

On the 18th January 2006, Aiah Komeh and I went to Bo Police Station and told Detective Inspector John Williams, the Crime Officer, Bo Police Station, that we wanted to talk to Joe Nunie.

He was contacted and at about 11:00 am, Aiah Komeh and I attended to him. I introduced us as investigators from the Office of the Prosecutor (OTP) and told him that we were there to talk to him as Commander of CDF (Kamajors) in the Southern Province. He said he was happy to meet with us and stated that before that time some members from the OTP had met him. He did not tell us who these people were and what was discussed with them. Joe Nunie advised that he was the Deputy Battalion Commander for CDF next to Joe Timide. He said that members of the Defence Team have met him to testify in the defence case of Hinga Norman. He therefore said that he was going to reserve his opinion for the court. He however said that before then he had always said that he was willing to testify at the Special Court about what he knows whether he was called by Prosecutions or Defence. He maintained that his door was always open to people from the Special Court. The meeting lasted for about ten (10) minutes.

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Joseph Saffa
Senior Investigator