SCSL-04-15-T
(10452 - 10461).

THE SPECIAL COURT FOR SIERRA LEONE

Before:

Hon. Justice Benjamin Mutanga Itoe, Presiding Judge

Hon. Justice Bankole Thompson

Hon. Justice Pierre Boutet

Registrar: Mr. Robin Vincent

Date Filed: 8th February 2005

THE PROSECUTOR

V

AUGUSTINE BAO

And others

Case No: SCSL – 04 – 15 – T

APPLICATION FOR LEAVE TO APPEAL RULING

OF 3.2.05 FOLLOWING ORAL APPLICATION

FOR EXCLUSION OF STATEMENTS OF TFI-141

DATED 9.10.04, 19 and 20.10.04 ,10.1.05

Office of the Prosecutor	**Defence**
Lesley Taylor	John Cammegh
Pete Harrison	Andreas O'Shea

THE APPLICATION

1 .This is an application for leave to appeal the Trial Chamber's ruling of 3rd February 2005 on the oral application by counsel for the first and third Defendants for the exclusion of statements by witness TFI- 141 dated 9th , 19th and 20th October 2004 and 10th January 2005.

2. The Defence on behalf of Bao respectfully submit that the Trial Chamber has erred in law in its ruling that, per paragraph 25, 'the Defence has failed to demonstrate or substantiate by prima facie proof the allegations of breach by the Prosecution of Rule 66(A)(ii) of the Rules, Article 17(4) of the Statute, and the Chamber's Order for Disclosure'.

3. The Defence respectfully contend that the said ruling in effect gives circumvention to the requirements of Rule 66, availing the Prosecution a means to in effect ambush the Defence by late disclosure of both additional evidence and additional witnesses. This, in our submission, runs contrary to the original intention of the Rule and is antithetical to the fairness of the proceedings by contravening the rights of the Defendant pursuant to Article 17 (4) of the Statute.

BACKGROUND

4. Counsel for Bao followed counsel for Sesay in orally applying for the exclusion of the above-named statements on 18th January 2005. The application was founded on the

provisions of Rule 66 and the Trial Chamber's erstwhile Order that all statements made by witness TFI-141 should have been served by 26th April 2005. It was submitted that, pursuant to Rule 66 (A)(ii), further service required good cause to be shown by the Prosecution. The arguments as enunciated by the Defence are amply set out in the text of the Ruling dated 3rd February 2005 and need no repetition here.

THE LAW

5. The Defence are in agreement with the Trial Chamber's exposition of the law as set out in paragraphs 19 and 20 of the Ruling. We adopt the Trial Chamber's commentary at paragraph 19 on *Prosecutor v Bagosora* 'to the effect that in determining whether to exclude additional or supplemental statements of prosecution witnesses within the framework of prosecutorial disclosure obligations, a comparative evaluation should be undertaken designed to ascertain (i) whether the alleged additional statement is new in relation to the original statement, (ii) whether there is any notice to the Defence of the event the witness will testify to in the Indictment or Pre-Trial Brief of the Prosecution, and (iii) the extent to which the evidentiary material alters the incriminating quality of the evidence of which the Defence already had notice. In adopting this reasoning, we were underscoring the judicial function of the Chamber to ensure "that the parties act bona fides at all times."'
6. Furthermore we accept and adopt the Trial Chamber's comments in paragraph 20 concerning the key requirement of prima facie proof that the Prosecutor is in

breach of its Rule 66 obligations and its recognition of the Accused's rights as espoused by Article 17 of the Statute.

THE PREJUDICE

7. Witness TFI-141 was a Small Boy in the war. He provided no less than 5 statements to the Prosecution between January and April 2003, covering a wide expanse of events both geographically and in terms of the Indictment. Notably, *not a single statement made any reference to the Defendant Bao.* On October 9th 2004, some 19 months after his last statement, no less than 5 months outside the Trial Chamber's Order for Disclosure, and 3 months after the start of the trial, TFI-141 made a further statement. The last 3 lines of this 5-page statement (at p. 9734) state

'Augustine Gbao was with us at Juru, Niama. He ordered the flogging of a boy, a serious one which resulted in his bleeding all over. He was accused of having diamonds. Augustine Gbao had his own SBU's. His responsibility was to bring civilians who had been captured'.

The Prosecution Witness Summary at p.2284 indicates this incident is within the Kailahun Crime Base. This disclosure amounted to the first eyewitness account of Bao in Kailahun in the trial so far. The Defence for Bao were taken by surprise when the statement came to light, particularly as it placed Bao as (see paragraph 9 of the Ruling) 'a direct participant in the mistreatment of the civilians in Kailahun according to the witness'.

(It is important to add that, when the Defence objected to the statement on 18th January 2005 we were under the misapprehension we had never received this statement at all. This was due to an error within the Bao Defence team. However, while we accept we received the statement upon its disclosure in October 2004 we maintain such disclosure still falls foul of the provisions referred to above).

8. Of perhaps even greater significance was the disclosure of TFI-141's statement of 10th January 2005 which prompted the oral application of 18th January. It stated, inter alia:

' The civilians that were brought from Kono to Kailahun were handed to the G-5. I believe his name was Augustine Gbao.'

This was the first- and, having examined the papers disclosed so far- apparently the only reference in the Prosecution's entire case to Bao being a G-5. This in itself widens Bao's alleged role within the RUF organization from the original prosecution position that he was Commander of RUF Security. This, we submit, is a significant departure from the Prosecution's theory regarding Bao's role within the RUF. For such a revelation to arrive *no more than a week* before the witness was due to be called represents, in our submission, Prosecution conduct which, deliberate or not, amounts to an ambush on the Defence .

We submit that the learned Prosecutor may have acknowledged this when he submitted that the Chamber could order the Prosecution not to lead any evidence regarding the statement of 10th January 2005 (see paragraph 15 of the Ruling).

UNDISPUTED FINDINGS WITHIN THE RULING

9. With respect to Bao's position, the Defence accept that ' the allegations in the disputed statements are germane to the general allegations as set out at pages 2-8 of the Amended Consolidated Indictment and also the charges as specified and particularised in Counts1-18 thereof (paragraph 22 (i) of the Ruling).

10. The Defence also accept that ' the allegations in the said statements are germane to the basic factual allegations as specified and particularised in the Amended Consolidated Indictment and at pages 8-22 0f the prosecution's Pre-Trial brief and pages 6-94 of the Prosecution's Supplemental Pre-Trial Brief' (paragraph 22(ii)).

11. Further, the Defence accept the Trial Chamber's finding at paragraph 22 (iii) that the additional statements have congruency with the matters deposed to in the entire original statements.

FIRST GROUND OF APPEAL

12. The Defence will submit that the Trial Chamber erred at paragraph 22 (iii) of the Ruling in finding that 'the disputed statements cannot be characterised as entirely new statements having regard to their contents in relation to the original statements of the witness which were disclosed to the Defence'.

    We respectfully submit that this finding runs contrary to the test laid down in *Bagosora* as in paragraph 5 above, for the following reasons:

    i) The reference to Bao in the 9th October statement was new in relation to the original statement by simple virtue of the fact that this was the

first reference to Bao by this witness whose first statement had appeared approximately 20 months previously. The Defence would respectfully suggest that it is imaginative of the Prosecution to claim such a revelation is compatible with the principle of orality, but that the argument is a little disingenuous given the chronology of the appearance of the statements as indicated in paragraph 7 above.

In isolation, we submit the statement served to confront the Defence with a new witness at a time well outside that deemed acceptable without due cause by Rule 66.

ii) We respectfully submit that by relying on the principle of orality the Prosecution had implicitly accepted the lack of notice normally due to the Defence in disclosed statements, the Indictment or Pre-Trial Brief.

iii) We further submit, pursuant to the *Bagosora* test, that the extent to which the evidentiary material alters the incriminating quality of the evidence of which the Defence for Bao already had notice speaks for itself. Put simply, as if from nowhere the October 9th 2005 statement impugns Bao with evidence supporting counts 1-2, 10-11,12, and 13 of the Indictment. Similarly, the revelation in the 10th January 2005 statement radically departs from the traditional Prosecution case that Bao was Security Chief – a position arguably independent from the mainstream RUF chain of command- to place him within the G5, a department clearly defined **within** the Command Structure.

SECOND GROUND OF APPEAL

13. The Defence submit that the trial Chamber erred in finding at paragraph 22 (v) that 'the allegations embodied in the respective statements, taken singly or cumulatively, are not new evidence but rather separate and constituent different episodic events or, as it were, building blocks constituting an integral part of, and connected with, the same res gestae forming the factual substratum of the charges in the indictment'.

14. The Defence submit that this is far too broad a test for what constitutes new evidence. It follows, in our submission, that all the Prosecution would now need to do to 'show good cause' under Rule 66(A)(ii) would be to show that the facts alleged within the new statement are borne out of the Sierra Leonian conflict and appear to be relevant to any of the Defendants charged. In our submission, adoption of the 'building blocks' test would serve to negate, in reality, any adherence to the requirement for timely disclosure under Rule 66. In effect, the Prosecution would be granted carte blanche to serve any evidence relevant to any defendant at any time prior to his giving testimony- *even if his name did not appear in any prior statement.* The prejudice this measure would inevitably import into the proceedings is, we submit, in conflict not only with the rights confirmed by Article 17 but also runs contrary to natural justice.

REQUEST FOR LEAVE TO APPEAL PURSUANT TO RULE 73(B)

15. Rule 73(B) permits leave to appeal 'in exceptional circumstances and to avoid irreparable prejudice to a party'. As stated above, the Ruling potentially enables the Prosecution to lead incriminating evidence, corroborative **or entirely novel** at a late stage (up to just 7 days prior to testimony in the instant case) **whether the Defendant was implicated in previous statements or not.** We submit this diminishes the efficacy of Rule 66 to a dangerous extent. The Defence are arguably in a position, should this Ruling stand, where they can no longer rely on the statements, the Amended Consolidated Indictment or the Prosecution's Pre-Trial and Supplemental Briefs as a basis on which to prepare its case. We submit that this situation is, for the purposes of Rule 73(B), exceptional indeed.

16. Furthermore, we submit that the requirement for 'irreparable prejudice' under Rule 73(B) is amply satisfied. With specific reference to the case against Bao we cite 3 main reasons:

a) By virtue of introducing Bao as late as 9th October 2004 the prosecution have effectively deprived the Defence of incriminating evidence that, with due diligence, was available to the Prosecution since the witness was first proofed in January 2003. The Defence should not suffer, we submit, for the Prosecution's failure in this regard.

b) Bao announced his intention not to partake in the trial or give instructions in early July 2004. Whilst we do not seek to unduly profit from this situation, given that it is of Bao's own making, we suggest the Prosecution should not be allowed to take unfair advantage from it either in circumstances where they had ample

opportunity (5 statements between January and April 2003) to record TFI-141's account in relation to Bao.

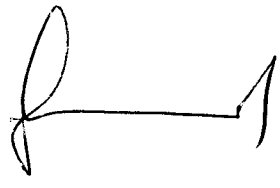
c) We respectfully adopt Mr Jordash's submissions in his Application for Leave to Appeal on behalf of Issa Sesay in relation to the Ruling's impact on the rights afforded to defendants pursuant to Article 17(4)(a),(b),(c) and Article 17(3), the full text of which need not be repeated here.

CONCLUSION

We submit the Ruling of the Honourable Trial Chamber erred in finding the Defence for Bao had not established prima facie proof, pursuant to Rule 66(A)(ii), that the Prosecution was in breach of its disclosure obligations. We further submit the ruling allows for the prejudicial and irreparable inclusion of evidence – even concerning hitherto un-named Defendants, that reaches far beyond what the Legislature must have intended. In doing so it offends the provisions of Article 17 of the Statute and natural justice.

The Defence on behalf of Bao respectfully request Leave to Appeal the Honourable Trial Chamber's Ruling.

Dated this 8th Day of February 2005



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