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SCSL-04-15-T
(18378 - 18388)



# THE SPECIAL COURT FOR SIERRA LEONE

**BEFORE:**

**Justice Pierre Boutet, Presiding**
**Justice Benjamin Itoe**
**Justice Bankole Thompson**

**Registrar:** **Mr. Lovemore G. Munlo S.C.**

**Date filed:** **20th March 2006**

**The Prosecutor**

**-v-**

**Issa Hassan Sesay**

**Case No: SCSL – 2004 – 15 – T**

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**PUBLIC**
**SESAY DEFENCE RESPONSE TO PROSECUTION REQUEST FOR LEAVE TO CALL ADDITIONAL WITNESSES AND FOR ORDER FOR PROTECTIVE MEASURES PURSUANT TO RULES 69 AND 73*bis* (E).**

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SPECIAL COURT FOR SIERRA LEONE
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COURT MANAGEMENT
20 MAR 2006
NAME NEIL GIBSON
SIGN [signature]
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1. The Prosecution's Request for Leave to Call Additional Witness and for Order for Protective Measures Pursuant to Rules 69 and 73 *bis* (E) (the "Motion")[1] is in form and substance an *ex parte* application, which denies the Defence any meaningful opportunity to address the "interests of justice" and "good cause" requirement. The Prosecution have a duty to provide the Trial Chamber *and* the Defence with sufficient information/argument to be able to assess, with precision, the overall impact of the addition of its proposed witness. The Prosecution have failed to provide a clear and precise description of the factual allegations which will form the substance of the testimony of the proposed witness. The Prosecution's attempt to deprive the defence of this material, on the spurious basis that they are unable to disclose a redacted copy of the statement for security reasons, has reduced their own arguments to mere assertion and opinion which the Defence are unable to assess and therefore effectively counter. The right of the Defence to engage in the adversarial process has, consequently, been reduced to a sham.

2. It is accepted that the relevant broad principles are contained in the *Prosecutor v Sesay et al,* Decision on Prosecution Request for Leave to Call Additional Witnesses[2] and the *Prosecutor v. Sesay et al,* Decision on Prosecution Request for Leave to Call Additional Witnesses and Disclose Additional Witness Statements[3] in which the Trial Chamber was guided by the principles outlined in the case of *Nahimana*, namely:

> "In assessing the "interests of justice" and good cause" Chambers have taken into account such considerations as the materiality of the testimony, the complexity of the case, prejudice to the Defence, including elements of the surprise, on-going investigations, replacements and corroboration of evidence. The Prosecution's duty under the Statute to present the best available evidence to prove its case *has to be balanced* against the right of the Accused to have adequate time and

[1] SCSL-04-15-T-513, 10th March 2006
[2] SCSL-04-14-T-221, 29th July 2004 (the "July 2004 Decision")
[3] SCSL-04-15-T-320, 11th February 2005 (the "February 2005 Decision")

facilities to prepare his Defence and his right to be tried without undue delay."[4]

**Non – Disclosure**

3. The Prosecution's Motion alludes to the need for a close analysis of the testimony of the additional witness[5] to allow a proper assessment of the impact of the proposed new evidence in light of the progress of the trial and the justification offered by the Prosecution. The Prosecution unusually even suggest that the Trial Chamber should consider Article 17 of the Statute when deliberating on the Motion.[6] However, this asserted approach is wholly undermined by the Prosecution's actual approach which deprives the Accused of either the statement of the proposed additional witness (or a comprehensive summary) or substantive argument on the issues, which would allow a reasoned assessment of the resulting prejudice and thereafter the consequences to the trial process.

4. It is disingenuous and illogical to suggest – as the Prosecution do – that it has been necessary to file the extracts of the proposed witness's evidence *ex parte* to protect the identity of the witness,[7] and yet simultaneously seek an order to serve redacted copies of witness statements on the Defence.[8] Neither the Prosecution nor the Trial Chamber is in a position to accurately weigh the consequences of this application unless the Defence are given a proper opportunity to consider the detail of the evidence of the proposed witness in light of the Prosecution and Defence case.

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[4] Prosecutor v. Nahimana, ICTR-99-52-I, "Decision on the Prosecutor's Oral Motion For leave to Amend the Selected Witnesses", Trial Chamber, 26 June 2001, para. 20, (the "Nahimana Decision"). Emphasis added.
[5] July 2004 Decision and Para. 7 of the Motion.
[6] Para. 8 of the Motion.
[7] See Para. 13 of the Motion.
[8] See Para. 19 of the Motion.

5. The Motion provides the Defence with a generalised summary of *some* of the additional evidence.[9] The description is sufficiently broad to cover every count on the indictment but rarely rises above a generalised description of broad areas and issues. The Prosecution's summary provides nothing more than notice that the proposed witness will give evidence relevant to all the indictment and to some of the events in the Pre-trial Brief. In light of the sheer breadth of the indictment and the incompleteness of the Pre-trial Brief, this does not amount to reasonable notice of the actual testimony of the proposed witness.

6. The Prosecution have a duty to disclose to the Defence the additional factual allegations which will be forthcoming from the additional witness. The Defence could then outline how the late introduction of these facts –whether corroborative or new– would cause delay or prejudice. It ill behoves the Prosecution to assert with such confidence that the Defence will only need three months to prepare[10] for the testimony whilst simultaneously refusing to disclose the facts which would allow the Defence an opportunity to challenge this assertion in light of previous factual evidence, previous witnesses and previous cross examination.

7. The summary provided does not allow for the Defence to assess whether the proposed addition is an RUF or a Sierra Leone Army insider. It does not allow the Defence to know whether the additional witness is a low level insider or a more significant witness such as Mike Lamin. In the event that it was a RUF insider such as the latter, this type of addition would have a completely different impact on the trial process than a mere rank and file RUF or AFRC/SLA insider. For example a rank and file insider might only need the recall of one or two witnesses whereas the addition of a witness with the breadth of knowledge of a high ranking and long standing RUF insider would necessitate the recall of many prosecution witnesses to deal with the new facts or details, which would inevitably be introduced into the prosecution case. If the Trial Chamber grants

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[9] See Para. 12 of the Motion, which notes "The evidence of the proposed witness will include, but is not limited to".
[10] See Para. 14 of the Motion.

the prosecution their application, and a redacted copy (followed by an unredacted copy in due course) the Defence will then be in a position to conduct the necessary assessment. At this stage however the Trial Chamber will have been deprived of any detailed argument by the Defence which therefore may lead to an incomplete assessment of the ensuing disruption to the trial process. It will be too late at that stage to prevent the disruption and too late to ameliorate much of the prejudice to the accused (for example delay).

**Moulding of the case.**

8. The Defence have alleged on two separate occasions that the Prosecution are re-interviewing their existing witnesses in light of their ongoing assessment of the strengths or otherwise of their case against the Accused[11]. They are moulding their case as the evidence unfolds. In other words they are intentionally seeking additions to the factual allegations against the Accused through their process of re-interviewing witnesses. The Prosecution assert that this is "proofing" but it is not – it is re-interviewing with the discovery of new factual allegations as an objective. On two separate occasions the Prosecution have refused to admit or deny the allegation. The allegation presently remains unanswered.

9. It is the submission of the Defence that the addition of any witness, at this stage of the proceedings, would provide the Prosecution with further means by which they could continue and improve upon their improper practice. The Prosecution no doubt intend to call the witness at the end of their case as a means of "plugging" any gaps in their case according to their ongoing analysis of how their case has progressed. The Prosecution will undoubtedly re-interview their witness

[11] See *Prosecutor v Sesay et al,* SCSL-04-15-T-493, Defence Motion requesting the Exclusion of Evidence (as indicated in Annex A) arising from the Additional Information provided by Witness TF1-168 (14th 21st January and 4th February 2006), TF1-165 (6th/7th February 2006) and TF1-041 (9th, 10th 13th February 2006), 23rd February 2006, para. 14 and *Prosecutor v Sesay et al,* SCSL-04-15-T-461, Defence Motion Requesting the Exclusion of Paragraphs 1,2,3,11 and 14 of the Additional Information provided by Witness TF1-117 dated 25th, 26th, 27th and 28th October 2005, 12th January 2006, para. 19.

as he/she arrives in Freetown to ensure that the evidence maximally incorporates the Prosecution's final assessment of their case.

**Stage of Proceedings**

10. The stage of the application may be a crucial and definitive consideration in the assessment of this Motion. As noted in the case of *Bagosora,*[12] the

> "delayed close of the Prosecution case does not change the fact that the new witnesses would be added at a very advanced stage of the Prosecution case, meaning that most of the Prosecution case has now already been heard. The Chamber reiterates that Rule 66 provides the framework in which disclosure by the Prosecution is to take place; Rule 73*bis* (E) is an exceptional measure where the interests of justice mandate a departure from Rule 66. The Chamber considers that it would be unfair to the Defence to be faced with entirely new witnesses when their reasonable expectation would be that the Prosecution is closing its case and Defence is already aware of all the evidence to be called. If the witnesses were to be added, the Defence would have been deprived of the opportunity to use the evidence of these new witnesses to cross examine previous Prosecution witnesses who testified to similar issues".

**Other Merits**

11. This failure is compounded by the scarcity of argument contained in the Prosecution's Motion concerning potential prejudice. Trial Chambers, at both the ICTR and the ICTY, have been rigorous in their assessment of the potential prejudice to the Accused arising from this type of Motion. Contrary to the Prosecution's submissions this analysis ought not to be restricted to the narrow issue of whether the defence has sufficient time to prepare or whether the trial will be unduly delayed by the additional evidence.[13] As the Trial Chamber in *Karemera*[14] noted,

> "The Prosecution's duty under the Statute to present the best available evidence to prove its case has to balanced against the right of the Accused

[12] Prosecutor v. Bagosora, ICTR-98-41-T, "Decision on Prosecutor's Second Motion For Reconsideration of the Trial Chamber's Decision on Prosecutor's Motion for Leave to Vary the Witness List Pursuant to Rule 73 BIS (E), para. 8 & 9.
[13] See Paragraph 14 of the Motion.
[14] Prosecutor v. Karemera, ICTR-98-44-T, "Decision on Variance of the Prosecution Witness List, 13th December 2005, para. 12. (the "Karemera Decision")

to have adequate time *and facilities* to prepare his Defence (sic) and his right to be tried without undue delay" (Emphasis added).

11. This focus on defence facilities – and not merely time or delay – is abundantly clear from the analysis conducted by the Trial Chamber in the *Nahimana* Decision which considered the many possible *practical* consequences of the Prosecution's proposed additions. It carefully weighed whether the additional witnesses would "present new facts" which the Defence had not been able to contradict during previous cross examinations,[15] whether the witnesses gave direct or indirect evidence,[16] whether the trial would be unduly delayed,[17] whether the witness was merely corroborative or would adduce duplicate evidence[18] and the fact that some of the additional witnesses were designed to rebut the recent notice of an Accused's alibi.[19] In the Karemera Decision, the Trial Chamber also considered, "the reasons for adding witnesses, the date on which the proposed witnesses would be called, and the stage of the proceedings".[20]

12. The Prosecution state the law and then do not address it in their application. Whether this is because the Prosecution genuinely believe that the addition of a witness - whose evidence covers the whole of the indictment (temporally and factually), at the close of the Prosecution case does not engage a myriad of legal issues or give rise to a real risk of potential prejudice, or whether their approach simply reflects a hope that the real issues will be obscured is not clear. Nonetheless the Defence submit that the reoccurring failure, evidenced again in the present Motion, to address either the ICTY or ICTR jurisprudence or the substantive arguments in their pleadings is a regrettable feature of the Prosecution strategy. It deprives the Trial Chamber of proper debate and it deprives the Accused of the minimum guarantees contained in Article 17 of the Statute.

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[15] the Nahimana Decision, para. 11, 22 and 32.
[16] Supra. Para. 17.
[17] Supra. Para.17.
[18] Supra. 17, 26 and 29.
[19] Supra. 26.
[20] para. 11.

**Due Diligence**

13. On a review of the Prosecution's Motion there are only two arguments advanced. Both arguments are given scant attention. In the first place the Motion advances the argument that there will be no prejudice to the Defence but yet offers no argument beyond the abstracted assertion that the three months is sufficient time to prepare for the witness[21]. No support is offered for this assertion. It is simply an unsupported opinion.

14. The only other argument advanced by the Prosecution in support of their application is that there has been no undue delay in the making of the present application.[22] It is impossible for the Defence to assess the assertion that the Prosecution have exercised due diligence in obtaining this evidence. How could the Defence (i) assess whether it is true that "from 2002 to 2005, the Prosecution actively sought to discover the witness's whereabouts," (ii) assess the efforts made to secure the witness's cooperation or (iii) assess how long it would have reasonably taken to consider whether to seek "good cause to add the proposed witness to the core witness list"[23] without any disclosure of the underlying information. The Prosecution offer nothing more than bald unsupported assertions of due diligence, whilst denying the Defence an opportunity to engage with the argument.

**Conclusion**

**Objection one**

15. The Defence can not meaningfully contribute to this debate. The reality ought to be stated - the Prosecution have made an *ex parte* application. It has failed in its duty to bring the issues fairly and comprehensively to the Trial Chamber and importantly the Defence. The Prosecution have intentionally denied the Defence the material it needs to argue its case, rendering its rights all but illusory. It is

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[21] See Para. 14 of the Motion.
[22] See Para. 10 of the Motion.
[23] See Para. 10 of the Motion.

submitted that the Trial Chamber should order the Prosecution to disclose enough of the evidence to enable the Defence an opportunity to contribute to this debate. It is submitted that the Prosecution should be ordered to provide argument in a new Motion on their view of the consequences of this evidence in light of the new or newly discovered corroborative facts and the advanced stage of the Prosecution case.

**Objection two**

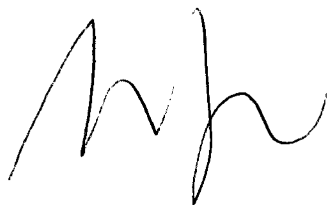
16. The Defence also opposes the application on the basis that it is wholly unfair to introduce *any* insider witness of any seniority whose evidence spans such a broad range of subjects. It is inevitable that this type of witness will introduce new factual allegations and details into the Prosecution case, which the Defence will have been unable to challenge throughout the course of the Prosecution case. This will inevitably cause the recall of many witnesses, which will lead to undue delay which is unfair to the Accused and against the interests of justice.

**Objection three**

17. In light of the Prosecution's continued failure to deny the Defence allegation that they are moulding their case to suit the evidence as it unfolds in breach of fundamental fair trial rights[24] the Defence submits that the present Motion is nothing less than an application to further this improper practice. The Defence submit that the interests of justice mandate that the Trial Chamber should require that the Prosecution deal fairly and squarely with the allegation, *before the Trial Chamber grants the present request*. It would be wholly wrong to accede to a request which would allow the Prosecution a further opportunity to continue the improper practice, without requiring that the Prosecution deal comprehensively with the allegation.

[24] See footnote 11 above.

Dated 20th March 2006



Wayne Jordash

Sareta Ashraph

Chantal Refahi

## BOOK OF AUTHORITIES

*Prosecutor v Sesay et al,* SCSL-04-14-T-221, Decision on Prosecution Request for Leave to Call Additional Witnesses, 29th July 2004

*Prosecutor v. Sesay et al,* SCSL-04-15-T-320, Decision on Prosecution Request for Leave to Call Additional Witnesses and Disclose Additional Witness Statements, 11th February 2005

*Prosecutor v. Nahimana*, ICTR-99-52-I, Decision on the Prosecutor's Oral Motion For leave to Amend the Selected Witnesses, Trial Chamber, 26 June 2001.

*Prosecutor v. Bagasora,* ICTR-98-41-T, Decision on Prosecutor's Second Motion For Reconsideration of the Trial Chamber's Decision on Prosecutor's Motion for Leave to Vary the Witness List Pursuant to Rule 73 *bis* (E).

*Prosecutor v. Karemera*, ICTR-98-44-T, "Decision on Variance of the Prosecution Witness List, 13th December 2005.

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