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SCSL-04-15-T
(24183-24189)

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IN THE SPECIAL COURT FOR SIERRA LEONE

THE TRIAL CHAMBER

Before: The Trial Chamber

Judge Bankole Thompson, Presiding
Judge Pierre Boutet
Judge Benjamin Itoe

Registrar: Mr Lovemore G Munro SC

Date filed: 21 July 2006

Case No. SCSL 2004 – 15 – T

In the matter of:

THE PROSECUTOR

Against

ISSA SESAY
MORRIS KALLON
AUGUSTINE GBAO

PUBLIC
DEFENCE JOINT RESPONSE TO PROSECUTION MOTION TO ADMIT INTO EVIDENCE A DOCUMENT REFERRED TO IN CROSS-EXAMINATION

Office of the Prosecutor

Christopher Staker
James C. Johnson
Peter Harrison

Defence Counsel for Issa Sesay

Wayne Jordash and Sareta Ashraph

Defence Counsel for Morris Kallon

Shekou Touray, Charles Taku and Melron Nicol-Wilson

Defence Counsel for Augustine Gbao

Andreas O'Shea and John Cammegh

SPECIAL COURT FOR SIERRA LEONE
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A. Introduction

1. By its motion of 11 July 2006,[1] the prosecution request the admission into evidence of UN Board of Inquiry Report 00/19 on the basis that it was referred to by counsel for the defence in cross-examination, and making reference to Rule 89 (C) of the Rules of Procedure and Evidence.

2. The defence does not object to the admission into evidence of those paragraphs of the report specifically referred to by counsel for the third accused, merely because these specific parts do not prejudice the accused. We do, however, object to the wholesale admission of the said report.

B. Reference to the report in cross-examination

3. It is first of all submitted that counsel's reference to this report during questioning has no particular bearing on this issue since the report was not placed in front of the witness and the witness merely acknowledged the existence of a report but did not acknowledge any knowledge of the particular statements being put to him, either to dispute them or confirm them. This is the reason why the matter could not be taken any further by counsel and there was no need to show the witness the report or seek to have the relevant part exhibited.

4. Secondly, the prosecution had the opportunity to re-examine on this matter and seek to have the report exhibited while the witness was in the box. This would have afforded the defence the opportunity to re-cross the witness on the report, with leave of the Chamber. Now the only option open to the defence would be to seek the recall of the witness, thereby occasioning delay in the trial.

[1] Prosecution Motion to Admit into Evidence a Document Referred to in Cross-Examination, 11 July 2006, Doc 594.

5. Accordingly, the defence invites the Chamber to reject the reference in cross-examination to the report as any basis for the admission of this evidence.

C. The application of Rule 89 (C)

Applicable principles to the exercise of the discretion under Rule 89(C)

6. The real issue here is whether this report should be admitted under Rule 89(C) employing the Chamber's discretion set out therein. This provision permits the admission of evidence where it is relevant. The admission of evidence under this provision is an exercise of discretion and not an absolute right. It is submitted that in the exercise of the discretion the Chamber will take into account the overall fairness to the accused of the admission of such evidence. This is premised on the underlying and basic principle reflected in Article 17 of the Statute: that is the right to a fair trial.

7. The question of fairness becomes particularly relevant where it is sought to admit documentary evidence which incorporates forms of testimony and interpretation of testimony on events subject to counts in the indictment. In such cases, it is submitted that the protection of the fundamental fairness of the trial requires the Chamber to have regard to the manner in which and the time at which this evidence is being tendered, as well as the opportunity to cross-examine on such evidence.

Grounds for the non-application of the discretion under Rule 89 (C)

8. There are three forms of prejudice which may arise here and should be avoided. First, the wholesale admission of untested hearsay evidence should be discouraged. Second, the Chamber should not permit the prosecution to take unfair advantage of its own failure to seek the admission of evidence at a

time which would have afforded reasonable opportunity to the defence to challenge its contents through cross-examination. Third, the Chamber should not permit the admission into evidence a document which has not been disclosed to the defence in violation of the prosecution's disclosure obligations, leading to the inability of the defence to make use of such material with earlier witnesses.

Legal precedents for the non-admission of documentary evidence offending the right to cross-examine

9. The preference for live testimony and the requirements of a fair trial have on occasion led to the exclusion of documentary evidence before international criminal tribunals. In the trial before the International Criminal Tribunal at Nuremberg, the Tribunal refused to admit the affidavit of the former Chancellor of Austria, Schuschnigg, into evidence pointing out that the parties were at liberty to call the witness who was nearby and readily available for testimony. The Tribunal upheld an objection from the defence which emphasied that such important evidence should entail respect for the principle of direct evidence and the accused would feel prejudiced in his rights as granted under the Charter.[2]

10. In the case of *Kordic and Cerkez*, the Trial Chamber held in the case of 7 witness statements that their admission into evidence was not 'an appropriate case for the exercise of its discretion under that provision [Rule 89(C)], as it would amount to the wholesale admission of hearsay untested by cross-examination'.[3] Neither was the report submitted with the witness statements as part of the same *dossier* admitted into evidence.

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[2] See *Trial of Major War Criminals at Nuremberg*, II IMT Proceedings, 384 *et sec*

[3] See *Prosecutor v Kordic and Cerkez*, Decision on the Prosecution Application to Admit the Tulica Report and Dossier into Evidence, 29 July 1999, par 23.

Factual context to the admission of this evidence

11. The above mentioned elements of prejudice arise here by virtue of the nature of the contents of the report and its annexes and the time at which the prosecution seeks to admit the report. With respect to content, this report incorporates the annexure of a number of witness statements and interviews which make direct reference to events described in the indictment with express references to the accused in this trial. It does not appear that the prosecution have included the annexed witness statements. It is therefore not clear whether the prosecution are only seeking to admit part of the document: i.e. the report without the annexures. The report itself contains further hearsay summary or verbatim repetition and interpretation of these witness statements and interviews and direct references to the accused in this trial.

12. As regards the timing of the prosecution application, all the witnesses which were envisioned to give live evidence as to these events have passed and gone, without the prosecution making any attempt to review this document with them or admit it into evidence. Consequently, the defence has had no opportunity to test this evidence through the makers of the statements themselves or even the live witnesses which have come before the court. There is no indication that the makers of the statements annexed to and referred to in this report are not accessible and readily available for cross-examination.

Breach of disclosure obligations

13. Further, it is of particular relevance that the report makes extensive reference to the views and observations of one Ngondi, who gave evidence in the 7th trial session without the prosecution seeking to admit the report through this witness or even disclosing the report on the defence. This was in itself a breach of Rule 66(A)(i) and (ii), as well as (having regard to aspects of

Ngondi's statements about concerns about the disarmament process) Rule 68 of the Rules of Procedure and Evidence.

D. Conclusion

14. It is respectfully submitted that counsel's reference to the report in cross-examination is of no consequence in these particular circumstances and the wholesale admission of the untested hearsay evidence on central matters in the trial contained in this report in these circumstances is fundamentally unfair and militates against the exercise of the Chamber's discretion under Rule 89 (C) in that regard.

15. It is suggested that granting leave to recall the witnesses on UNAMSIL events is not the most appropriate remedy as it would cause delay in this trial. Such delay would be undue delay since it could have been avoided by the prosecution disclosing and seeking the admission of this report at an earlier stage in the trial.

ACCORDINGLY, it is requested that the prosecution motion be denied or in the alternative granted only in respect of those parts of the report specifically referred to by counsel in cross-examination.

And in the alternative:

That if the prosecution motion is granted with respect to the entire report that the witnesses dealing with attacks against UNAMSIL be recalled for cross-examination on the matters and facts raised in this report and its annexures.

Wayne Jordash
FOR ISSA SESAY

Seku Touray pp.
FOR MORRIS KALLON

Andreas O'Shea
COURT APPOINTED COUNSEL FOR AUGUSTINE GBAO

21 July 2006