741)

SCSL-04-15-T
(26974-26980)

26974

THE SPECIAL COURT FOR SIERRA LEONE

In Trial Chamber I

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

Acting Registrar: **Mr. Herman von Hebel**

Date filed: **20th March 2007**

The Prosecutor

-v-

Issa Hassan Sesay
Morris Kallon
Augustine Gbao

Case No. SCSL-2004-15-T

PUBLIC
DEFENCE REPLY TO PROSECUTION RESPONSE TO APPLICATION FOR LEAVE TO APPEAL 2nd MARCH 2007 DECISION

Office of the Prosecutor
James C. Johnson
Peter Harrison

Defence Counsel for Sesay
Wayne Jordash
Sareta Ashraph

Defence Counsel for Kallon
Shekou Touray
Charles Taku
Melron Nichol-Wilson

Defence Counsel for Gbao
Andreas O'Shea
John Cammegh

Introduction

1. The Defence herewith files its Reply to the Prosecution Response ("The Response")[1] to the Defence Application ("The Application")[2] for Leave to Appeal the Trial Chamber's 2nd March 2007 Decision.

Exceptional Circumstances

The Chamber Has Jurisdiction to Clarify Decisions

2. The Prosecution and the Defence agree that the Trial Chamber has jurisdiction to clarify its own decisions. It is agreed that this jurisdiction exists empowering the Court to clarify its decisions after they have been delivered or published and this is not limited to the correction of clerical errors.[3] It is further agreed that the Trial Chamber is "capable of clarifying or explaining the precise consequences of the original Rule 98 decision".[4] This jurisdiction can be invoked to explain the specific consequence of the findings made within the Decision.[5]

3. As previously noted by the Trial Chamber during the currency of the proceedings in the CDF case, this jurisdiction can be invoked by a party seeking the interpretation of a decision.[6] Thus it is agreed that the Trial Chamber erred in law by concluding that its jurisdiction to clarify decisions, once published, is limited to clerical issues.[7]

4. The Prosecution's tortuous explanation for this error fails to deal with the issue of the error of jurisdiction. The Prosecution's explanation is that the Trial Chamber was correct

---

[1] *Prosecutor* v. *Sesay et al.*, SCSL-04-15-736, "Prosecution Response to Sesay Defence Application for Leave to Appeal 2nd March 2007 Decision", 15th March 2007.
[2] *Prosecutor* v. *Sesay et al.*, SCSL-04-15-723, "Application for Leave to Appeal 2nd March 2007 Decision", 5th March 2007.
[3] The Prosecution stated: "A Trial Chamber has the power to clarify interlocutory decision or orders". Response, paragraph 9, citing *Prosecutor* v. *Blagovevic and Jokic*, IT-02-60-T, "Decision on Prosecution's Motion for Clarification of Oral Decision Regarding Admissibility of Accused's Statement", Appeals Chamber, 18th September 2003, and *Prosecutor* v. *Blaskic*, IT-95-14-A, "Decision on Prosecution's Preliminary Response and Motion for Clarification Regarding Decision on Joint Motion of Hadzihasanovic, Alagic, and Kubuara of 24 January 2003", Appeals Chamber, 23rd May 2003. The Prosecution also cites decisions stating that a trial chamber has jurisdiction to reconsider orders or decisions "if the existence of a clear error of reasoning has been demonstrated or if reconsideration is necessary in order to prevent an injustice" or to vary orders or decisions. Response, paragraph 10.
[4] Response, paragraph 12.
[5] *Ibid.*
[6] *Prosecutor* v. *Norman et al.*, SCSL-04-14-477, "Joint Motion for the First and Second Accused to Clarify the Decision on Motion for Judgement of Acquittal Pursuant to Rule 98", 27th October 2005, paragraph 1.
[7] *Prosecutor* v. *Sesay et al.*, SCSL-04-15-718, "Decision on Defence Request for Clarification on Rule 98 Decision", 2nd March 2007, paragraph 5.

in refusing to provide the clarifications sought by the Sesay Defence because the Request for Clarification ("The Request") rests "on matters that had not been dealt with in the Rule 98 Decision, or which went beyond the scope of Rule 98 proceedings"[8] whereas *Norman*[9] concerned matters which explained the specific consequence of the original Rule 98 decision. The agreed error of jurisdiction is the substance of the Defence complaint. It is a complaint which is neither concerned with the Appellate review jurisdiction pursuant to Rule 120 of the Rules of Procedure and Evidence ("The Rules")[10] or with the jurisdiction of a Trial Chamber to vary its decisions. It is an error that cannot be explained by attempts to distinguish the Request for from the request in the CDF case *unless* the difference is that *Norman* concerned clerical errors whereas the Request did not. This is obviously not the case.

5. The Prosecution's failure to deal with the Trial Chamber's error in not recognising the *existence* of jurisdiction, whilst proffering an alternative "explanation" for the failure to *exercise* the jurisdiction in the Sesay case, confuses the question of the existence of jurisdiction with the question of how the jurisdiction ought properly to be exercised.

6. The first question concerns whether the Trial Chamber *has* jurisdiction to act to clarify. It is submitted that the error of law is clear. It is in the interests of justice and fairness that a court can clarify its own decisions. The jurisdiction is outlined in the plain words used in relation to *Norman*. The denial of this remedy on an inconsistent and partisan basis is an exceptional circumstance justifying leave to appeal. The fact that both parties agree that the Trial Chamber erred in law ought to leave the matter in no doubt.

The Clarifications Sought are Capable of Being Clarified

7. It is neither good law nor sound reasoning to attempt to limit a Tribunal's general discretion to deal with a lack of clarity (or even a party's lack of understanding) in criminal proceedings. It is in the interests of justice and fairness to provide a party, acting in good faith, with any reasonable explanation sought. An Accused should not to be

---

[8] Response, paragraph 17.
[9] *Prosecutor* v. *Norman et al.*, SCSL-04-15-550, "Decision on Joint Motion of the First and Second Accused to Clarify the Decision on Motions for Judgment of Acquittal Pursuant to Rule 98", 3rd February 2006 ("Norman").
[10] The Prosecution misinterpreted the use of the word review in the Defence Application at paragraph 9. The word review is used synonymously with the word clarification. It should be read in the context of the Application as a whole which deals exclusively with the issue of clarification and not review pursuant to Rule 120 of the Rules of Procedure and Evidence.

forced to guess at the case against him. The forensic decisions made ought not to be reduced to guess work. If an explanation would assist an Accused to present his defence more effectively then clearly it is in the interests of justice and fairness that this explanation be provided.

8. There is no reason to limit a Tribunal's ability to clarify *any* issue, whenever and however it is needed. It does not matter whether the clarifications sought are proximate (or not) to the Decision which gave rise to or exposed the need for clarification. An Accused's right to seek clarification should not be restricted without compelling reasons and certainly not on the basis of artificial academic delineations such as those propagated by the Prosecution in their Response. It is trite law that general discretions, exercisable to achieve justice between parties, ought not to be fettered without good reason. It is noteworthy that the Response provides no reason why the general clarification jurisdiction ought to be restricted or limited. It is submitted that a compelling reason is required before any limit or restriction is placed upon an Accused's right to seek clarification on issues which impact upon fair trial rights.

9. In any event the Prosecution's attempt to distinguish between *Norman* and the Request is demonstrably flawed. In the first place, the Rule 98 procedure concerned every substantive paragraph of the Indictment and thus any subsequent question concerning the meaning or effect of the remaining charges concerns the consequences of the Rule 98 Decision. This might not be the case with other less far-reaching and fundamental Decisions but it is the nature of the Rule 98 procedure: it concerns the *whole* Indictment and the scope and meaning of the remaining charges.

10. Moreover each requested clarification in the Request is directly based upon or arises from part of the Rule 98 Decision. Each requested clarification – although it may not have been the original focus of the Decision – is intimately connected to, became apparent from the substance and detail of the Decision, or is within the scope of the Rule 98 proceedings insofar as every Count of the Indictment remains part of the Prosecution case against Mr. Sesay. It follows from the latter that a Request to clarify any remaining paragraph of the Indictment must be concerned with clarifying or explaining the precise consequences of the original Decision.

Irreparable Prejudice

11. The Prosecution submits that the "primary purpose of Rule 98 is not to inform the Accused of the case against him, but to ensure judicial economy by proceeding only with those counts on which sufficient evidence has been adduced. ... A Rule 98 [decision] only gives an accused knowledge of the counts remaining against him."[11] The Prosecution cites no authority for this proposition. In actuality, the purpose of Rule 98 is for due process considerations:

> Basically, the whole idea behind – the ratio [sic] behind the creation or the insertion of our rules of Rule 98 *bis* in its original form was the following: that the accused has a right to remain silent, and if the Prosecution has in regards – relation to any particular count not brought forward evidence which is sufficient to sustain a conviction later on, then the accused should not be in a position where he has to defend himself in any way.[12]

12. Even if the Prosecution were correct, which the Defence disputes, and Rule 98 was simply a procedure designed to ensure judicial economy, this is not inconsistent with the immoveable requirement that Mr. Sesay must know (i) which specific allegations supporting each count remain part of the Prosecution's case and (ii) the breadth of the Indictment as presently pleaded. The Requests for clarification fall squarely within these categories. The clarifications would ensure that Mr. Sesay knows the case he must meet.

13. These questions ought to be uncontroversial and answers readily available. No doubt these questions will have to be answered after the completion of the Defence evidence. There appears to be no reason why they ought not to be answered at this stage. This would be fair to the Accused *and* would provide greater specificity which would narrow the case thus ensuring judicial economy. The alternative, to leave the Accused in the dark and wait until the end of the case, simply elevates legal argument and semantics above the interests of justice and fairness. A judicial system – involving the potential life imprisonment of an individual – which provides a detailed explanation of the charges only when delivering its verdict cannot provide real justice, only irreparable prejudice.

---

[11] Response, paragraph 21

[12] Judge Agius, speaking about the amendments to Rule 98 in the ICTY in *Prosecutor* v. *Oric*, IT-03-68-T, Trial Transcript, 4th May 2005, pages 7848-49.

Conclusion

14. The Trial Chamber erred in law in not recognising its own jurisdiction to clarify decisions. Consequently, the Trial Chamber erred in law in not clarifying the Rule 98 Decision. This is exceptional because this Trial Chamber clarified the Rule 98 Decision in *Norman*. An irreparable prejudice would result if the Rule 98 Decision is not clarified in that Mr. Sesay will not know for which allegations he remains liable. Both the exceptional circumstances requirement and the irreparable prejudice requirement for leave to appeal are satisfied.

15. The Leave to Appeal should be granted.

Dated 20th March 2007.

Wayne Jordash
Sareta Ashraph

26980

BOOK OF AUTHORITIES

Decisions and Orders

Prosecutor v. *Sesay et al.*, SCSL-04-15-718, "Decision on Defence Request for Clarification on Rule 98 Decision", 2nd March 2007.

Prosecutor v. *Norman et al.*, SCSL-04-15-550, "Decision on Joint Motion of the First and Second Accused to Clarify the Decision on Motions for Judgment of Acquittal Pursuant to Rule 98", 3rd February 2006.

Prosecutor v. *Blagovevic and Jokic*, IT-02-60-T, "Decision on Prosecution's Motion for Clarification of Oral Decision Regarding Admissibility of Accused's Statement", Appeals Chamber, 18th September 2003.

Prosecutor v. *Blaskic*, IT-95-14-A, "Decision on Prosecution's Preliminary Response and Motion for Clarification Regarding Decision on Joint Motion of Hadzihasanovic, Alagic, and Kubuara of 24 January 2003", Appeals Chamber, 23rd May 2003.

Motions

Prosecutor v. *Sesay et al.*, SCSL-04-15-736, "Prosecution Response to Sesay Defence Application for Leave to Appeal 2nd March 2007 Decision", 15th March 2007.

Prosecutor v. *Sesay et al.*, SCSL-04-15-723, "Application for Leave to Appeal 2nd March 2007 Decision", 5th March 2007.

Prosecutor v. *Norman et al.*, SCSL-04-14-477, "Joint Motion for the First and Second Accused to Clarify the Decision on Motion for Judgement of Acquittal Pursuant to Rule 98", 27th October 2005.

Transcripts

Prosecutor v. *Oric*, IT-03-68-T, Trial Transcript, 4th May 2005, pages 7848-49.