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SCSL-04-15-T

(25165-25170)

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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: Monday 4 September 2006

Case No. SCSL 2004 – 15 – T

In the matter of:

THE PROSECUTOR

Against

ISSA SESAY
MORRIS KALLON
AUGUSTINE GBAO

PUBLIC
REPLY TO PROSECUTION APPLICATION FOR LEAVE TO APPEAL DECISION ON ADMISSIBILITY OF PORTIONS OF THE EVIDENCE OF WITNESS TF1-371

Office of the Prosecutor

James Johnson
Peter Harrison
Nina Jorgensen
Vincent Wagona

Court Appointed Counsel for Augustine Gbao

Andreas O'Shea
John Cammegh

Counsel for co-accused

Wayne Jordash and Sareta Ashraph for Issa Sesay
Shekou Touray, Charles Taku and Melron Nicol-Wilson for Morris Kallon

1. On 2 August 2006 the Trial Chamber decided by majority to expunge from the records evidence of witness TF1-371 purportedly linking the Third Accused, Augustine Gbao, to unlawful killings in Kono District.[1] The prosecution filed an application for leave to appeal that decision on 21 August 2006,[2] which the defence received on 23 August 2006. The prosecution grounds its application on two alternative grounds, the first being an alleged error in the exclusion of the relevant portions of evidence, and the second being the assertion that the Chamber was not empowered to expunge evidence from the record. The defence for Gbao opposes such application in the following terms.

2. In terms of Rule 73(B) of the Rules of Procedure and Evidence, leave to appeal may only be granted in exceptional circumstances and to avoid irreparable prejudice to a party. Each of these requirements must be independently satisfied.

A. Exceptional circumstances

1. Exclusion of evidence

3. The prosecution founds its argument on exceptional circumstances in its first ground of appeal principally on its assertion that the Trial Chamber erred in its analysis leading to its decision. As the prosecution itself rightly points out, it has already been held that the probability of an erroneous ruling does not of itself constitute exceptional circumstances. Further, there is nothing exceptional about the fact of dissent. Both these matters could be taken into consideration, but far more is required to satisfy the test of exceptional circumstances.

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[1] *Prosecutor v Sesay , Kallon and Gbao*, Majority Decision on Oral Objection taken by Counsel for the Third Accused, Augustine Gbao, to the Admissibility of Portions of Evidence of Witness TF1-371, 2 August 2006, SCSL-04-15-T-623

[2] Prosecution Application for Leave to Appeal Majority Decision on Oral Objection taken by Counsel for the Third Accused to the Admissibility of Portions of Portions of the Evidence of Witness TF1-371, 21 August 2006, SCSL-04-15-T- 636.

4. None of the issues raised by way of example by this Trial Chamber as possible contexts for exceptional circumstances arise here, and no other exceptional feature has been demonstrated. Questions relating to the admissibility of evidence are common place in these proceedings and in international criminal proceedings generally, and there is nothing exceptional about the issue or the ruling in this particular instance. While it is one of the rare occasions upon which the defence have successfully applied for the exclusion of evidence, this cannot be considered as an exceptional circumstance and the issue of exclusion of evidence to protect the rights of the accused has been raised on numerous occasions both before the Special Court and other tribunals.

5. The prosecution import other elements in their conclusion on exceptional circumstances for their first ground without any discussion of them. However, again there is nothing exceptional about the issues of relevance and admissibility, regardless of the stage of the proceedings, disclosure or the yardstick of fundamental fairness.

2. Expunging the record

6. The prosecution is wrong in suggesting that the question of the power of the Trial Chamber to expunge evidence is to be decided for the first time before the Special Court. The issue has been raised before this Trial Chamber on at least two occasions, in particular by learned counsel for the prosecution, Mr Harrison, and the Chamber has on each occasion not accepted that it may not do it.[3] It is in fact the first time that the prosecution has taken the step of challenging through appeal the use of the power even though it has been exercised by the Trial Chamber expressly against the prosecution interest on prior occasions. This militates against the suggestion of the exceptional nature of the question.

[3] See for instance exchange between counsel for the prosecution and the bench during the testimony of witness TF1-078 on 22 October 2004, open session, transcript at page 52-3 (order for deletion made at 11.59, line 25 on page 52 and interchange at 12.00).

7. Furthermore, in this instance that part of the record could not assist the Appeals Chamber in any significant way later since the decision to expunge was not based on relevance but on the effect on the fairness of the trial of the admitted fact by the prosecution of leading evidence regarding Kono against the third accused at that late stage of the trial. In any event the Chamber's order to expunge the records is confined to the words eminating from the witness and not all references to what the witness had said. The essence of the contents of the offending evidence was nonetheless placed on the record in the submissions of learned counsel Cammegh[4] and the prosecution did not contest that description. Therefore, the Appeals Chamber would not lose sight of the nature of the allegedly offending material. It follows in our submission that the particular circumstances in which this evidence was expunged does not give rise to exceptional circumstances because the Appeals Chamber would be addressing an issue which was academic on the facts.

8. Finally, in our submission there can be nothing exceptional in the nature of the power to expunge the record simply because it is not in fact an unknown procedure in criminal proceedings and clearly and unambiguously falls under Rule 54, in the absence of any provision which is arguably designed to prohibit it.

B. Irreparable prejudice

1. Exclusion of the Evidence

10. In respect of its first ground of appeal, the prosecution submits that where relevant evidence is excluded it necessary suffers prejudice. This is not actually so and demonstrates a misunderstanding on the part of the prosecution of its own function. It is not the function of the prosecution to secure a conviction at all costs. The prosecution is akin to a Minister of Justice and it is equally in the interests of the prosecution not to rely on evidence which will

[4] See Transcripts of 24 July 2006, closed session, pp 7-8, from line 29 on page 7 onwards.

entail or give the perception of taking unfair advantage of the accused. *Ipso facto* it cannot always be to the prosecution's prejudice that evidence is excluded. It is submitted that in this instance the prosecution does not suffer prejudice because it cannot possibly be in the interests of the prosecution to rely on evidence produced in a manner which is blatantly unfair on the accused, whether or not any blame could be attached to the prosecution.

11. The prosecution further argues the alleged prejudice is irreparable on the basis of the fact that the evidence is excluded from consideration and the inconvenience of recalling witnesses at the Appeals stage. However, it is common practice to recall witnesses at the Appeals stage if it is deemed necessary for the determination of issues on appeal and this therefore cannot in itself give rise to irreparable prejudice. Furthermore, it is no more impractical to recall the witnesses now than it is on appeal. In fact, it would case less difficulties at the appeals stage because at this stage it is likely to further prolong an already long trial and therefore impact upon the right to a trial without undue delay.

12. Expunging the record

9. As to its second ground of appeal, the prosecution attempt to invoke a challenge to the power of the Trial Chamber to expunge evidence from the record. This power plainly exists in appropriate circumstances under Rule 54 of the Rules of Procedure and Evidence without any need to resort to inherent powers. The fact that the evidence has been expunged not cause irreparable prejudice to the prosecution on appeal. It may be that the Appeals Chamber would not see the expunged portions, but this is also the case where the prosecution is not permitted to adduce evidence in advance and the evidence never becomes part of the record. This occurs regularly when a party is not permitted to put a question to a witness or place a document in front of him as a result of the application of rules on admissibility. It also occurs when the question of the admissibility of evidence is determined on the content of witness statements prior to the party dealing with the matter with the witness.

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10. The result is partly different here because of the Chamber's own decision to allow the evidence to come out further prior to making its decision. This exercise was justified because if the Chamber subsequently ruled in favour of the Defence, the evidence would not be used against the accused. The Defence should not now suffer the consequences of this action on the part of the Trial Chamber either before the Trial Chamber or the Appeal Chamber

11. In any event, the prosecution is not prejudiced because it would only normally be useful for the Appeals Chamber to see that portion of the evidence if it had been excluded on grounds of relevance, which is not the case here. When the issue of admissibility was decided on grounds of the unfairness to the accused facing allegations in relation to Kono in circumstances where prior witnesses have not been cross-examined on it, that issue is one which is reviewable by the Appeals Chamber without any necessity of reference to the exact words of the witness on how Gbao is implicated, when the fact of potential implication is not contested by the prosecution.

12. Further and or in the alternative, even if which is not accepted, it would be necessary for the Appeals Chamber to review the exact words of the witness, such words have in any event remained reflected in the record by virtue of defence counsel's verbatim reference to those words in his submissions to the Trial Chamber.

Andreas O'Shea
For Augustine Gbao

Done at The Hague, 2 September 2006