780)

SCSL-04-15-T
(28273 — 28280)

THE SPECIAL COURT FOR SIERRA LEONE

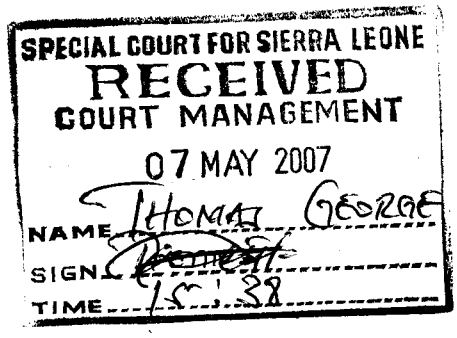
BEFORE:

28273

Hon. Justice Bankole Thompson, Presiding
Hon. Justice Benjamin Itoe
Hon. Justice Pierre Boutet

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

Date filed: **7th May 2007**



The Prosecutor

-v-

Issa Hassan Sesay

Case No: SCSL-04-15-T

Reply to Prosecution Response to Defence Motion Seeking a Stay of the Indictment and Dismissal of All Supplemental Charges (Prosecution's Abuse of Process and/or Failure to Investigate Diligently)

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Introduction

1. On 24th May 2007 the Defence filed a Motion seeking a "Stay of the Indictment and Dismissal of all Supplemental Charges (Prosecution's Abuse of Process and/or Failure to Investigate Diligently)" ("the Motion").[1] The Prosecution filed a Response on the 1st May 2007 ("The Response").[2] Herewith the Defence files its reply.

Has the Prosecution actively sought new evidence according to its ongoing assessment of the evidence in its case?

2. The Prosecution's Response is a masterly disposition in avoiding the pertinent issues of fairness and fair play. The Prosecution has abandoned these essential principles in favour of academic debate.

3. The issue is not whether proofing is permissible or desirable,[3] nor whether proofing can be used to elicit additional details or information[4] relevant to the *existing* charges. The fact that the Prosecution is constrained to quoting jurisprudence in support of the practice of proofing *generally* – rather than dealing with the clear issues of fairness which arise as a result of *this* so-called proofing – is illustrative of the lack of jurisprudential support for their rolling disclosure program and moulding practice. In truth the real issue is not even whether the Prosecution's conduct was intended to be or deliberately unfair.

4. ***The real issue is what is the extent of the unfairness that has resulted from these practices, lawful or otherwise, and can it be remedied?*** This is a question the Prosecution has studiously avoided addressing. Annexes A and B of the Motion sets out in detail the unfairness which has arisen. The Prosecution's failure to address this issue demonstrates both the Prosecution's inability to provide an adequate explanation and their unwillingness to countenance any unfairness in their drive to convict the RUF accused.

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[1] *Prosecutor v. Sesay et al*, SCSL-04-15-T-765, "Defence Motion Seeking a Stay of the Indictment and Dismissal of All Supplemental Charges (Prosecution's Abuse of Process and/or Failure to Investigate Diligently)", filed on behalf of the Accused Issa Sesay, 24th April 2007.
[2] *Prosecutor v. Sesay et al*, SCSL-04-15-T-775, "Response to Defence Motion Seeking a Stay of the Indictment and Dismissal of All Supplemental Charges (Prosecution's Abuse of Process and/or Failure to Investigate Diligently)", 1st May 2007.
[3] *See* paragraph 7 of the Response.
[4] *See* paragraph 8 of the Response.

5. The linguistic distinction the Prosecution seeks to draw between this unacceptable practice and the practice of identifying "accurately, before the witness testifies, all matters relevant to the case that are within the witness's knowledge"[5] is a wonderful use of words but has no place in the trial of any human-being facing the prospect of the remainder of his life in custody.

6. A reasonable and fair Prosecutor would not need to rely upon such semantic distinctions but would detail with specificity its own practice and explain how *its* practices have remained fair, notwithstanding the multiplication of factual allegations against Mr. Sesay. This explanation should detail why it is fair to continue to investigate in order to create and add to new factual bases for conviction to the existing charges. This necessity for a straightforward and accessible explanation on this issue is obvious.

7. Instead, the Prosecution criticizes the Defence for failing to pursue the remedy of recall or exclusion of evidence in a "timely manner".[6] This distraction is without merit. First, given the amount of new factual bases for conviction created during the course of the Prosecution case, the earliest time the resulting unfairness could properly be comprehensively considered was at the end of the Prosecution's case. Second, the Prosecution fails to identify any prejudice to them that has resulted. The impossibility of a remedy is the same now as it was at the end of the Prosecution's case. Third, the Defence does not suggest that the unfairness resulting from the Prosecution's ongoing moulding process can be remedied by recall. It cannot. The Defence's submission was that "some of the unfairness could have been cured" but not sufficiently to provide the Accused with a fair trial. The recall of 36 of the most crucial witnesses brings with it inherent and almost certain insurmountable difficulties not least of which is that this process would provide the Prosecution with further opportunities to mould the evidence.

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[5] *See* paragraph 14 of the Response.
[6] *See* paragraph 23 of the Response.

8. Given the Trial Chamber's Decision of 2nd August 2006[7] and the finding that the recall of witnesses on a single factual allegation against Gbao could not be achieved without occasioning a breach of Article 17(c) of the Statute – the right for the accused to be tried without undue delay – and Rule 26*bis* – the right to a fair and expeditious trial, it is nonsensical for the Prosecution to claim that if "some or all of the applications [for recall] had been granted, it may have been possible for the relevant witnesses to have been recalled" prior to the close of the Prosecution case.

9. In other words, given the nature and quantity of the recall necessary in the case of Mr. Sesay, recall could never have been a viable remedy. The Prosecution's failure to address this issue, either by advancing any view on the amount of unfairness extant or how it might be cured given the 2nd August 2006 Gbao Decision, is an exercise in legal niceties. It is nothing less than an abdication of their putative role as Ministers of Justice.

10. The Defence has been placed into an invidious position. During the course of the Trial the Defence filed a number of applications seeking to exclude "new evidence".[8] The applications were all rejected on the basis that the disputed evidence was not "new" notwithstanding that the specific factual allegations had previously not been disclosed to the Defence and in plain ordinary language were "new".

11. The Trial Chamber noted that the specific factual allegations, creating new bases for conviction, were instead "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".[9] The Defence sought, through a series of applications, the meaning of this novel concept[10] but the term remains unclear and unexplained.

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[7] *See Prosecutor v. Sesay et al*, SCSL-l-04-15-623, "Written Reasons on Majority Decision on Oral Objection taken by Counsel for the Third Accused, Augustine Gbao, to the Admissibility of Portions of the Evidence of Witness TF1-371", 2 August 2006.
[8] *See* paragraph 18 of the Response, referring to Decisions of the Trial Chamber: 27th February 2006, 20th March 2006, 1st June 2005, and 3rd February 2005.
[9] *See, for example*, 3rd February 2005 Decision.
[10] *See, for example*, *Prosecutor v. Sesay*, SCSL-04-15-461, "Defence Motion Requesting the Exclusion of Paragraphs 1, 2, 3, 11 and 74 of the Additional Information provided by TF1-117, Dated 25th, 26th 27th and 28th October 2005", 12th January 2006.

12. Moreover, it has been stated in a number of decisions that the Defence had *sufficient* notice of the disputed factual allegations and, despite their apparent creation of new bases for conviction, the disputed allegations did not "significantly alter the incriminating quality of the evidence of which the Defence" had notice.[11] The term thus appeared – until the 2nd August 2006 Gbao Decision – to permit the continuous admissibility of all new factual allegations of crime falling within the broad temporal frame of the Indictment. The only reasonable interpretation of these decisions was that the Defence had no grounds to claim *any* prejudice.

13. The apparent permissibility of all new factual allegations was subsequently abused by the Prosecution who used this novel and unprecedented flexibility to re-investigate and mould the evidence around its increasingly unreliable case. The Prosecution **protected its improper program** by filing a series of responses to Defence complaints in which it repeatedly stated that the Defence had **no reason whatsoever** to complain and **no prejudice whatsoever could** arise from its ongoing disclosure program.[12] The Prosecution argued on a number of occasions that "the Indictment, the Pre-trial Brief and the Supplemental Pre-Trial Brief have already provided notice to the Defence. These documents all give notice which is more than adequate as to the extent of the Accused's criminal responsibility for the acts alleged".[13] The continued suggestion by the Defence of inadequate notice has been termed "frivolous" by the Prosecution on a number of occasions[14] and the Defence suggestions were roundly rejected by the Trial Chamber in every resulting decision.

14. According to both the Trial Chamber and the Prosecution, there could not have been any basis for recall given that the Defence was not prejudiced by either a lack of notice or by any increased incrimination. The Defence could not have done more to

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[11] *See, for example*, paragraphs 28 and 29 of 1st June 2005 Decision.
[12] *See, for example*, paragraph 20 of *Prosecutor v. Sesay et al*, SCSL-04-15-466, "Prosecution Response to 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", 23rd January 2006, in which the Prosecution, referring to the addition of allegations concerning (i) the use of small soldiers in Kono, Tongo and the border areas; (ii) the killing and mutilating of civilians in Kono; and (iii) the burning of houses in Kono did not constitute new evidence and the defence "had and continue to enjoy adequate notice to defend these allegations".
[13] *See, for example*, paragraph 20 of *Prosecutor v. Sesay et al*, SCSL-04 15-T-483, "Prosecution Response to Defence Motion Requesting the Exclusion of Evidence of Witness TF1-113", 17th February 2006.
[14] Ibid paragraph 24.

express its contrary view. The Prosecution could not have done more to express its view that notice was adequate.

15. On the 10th July 2006, the Prosecution, in an astonishing *volte-face*, acknowledged that unfairness could arise from their rolling disclosure program.[15] This was not an admission of principle or an indication of fair play, albeit late in the trial, but simply the preparation of a response to any appeal against conviction. The present Response owes more to this anticipation than it does to any *bona fides* concern about prejudice to the Defence or fairness of the process – both of which appear to have been ignored or long since abandoned.

16. The Defence cannot fairly or rationally be held responsible for not advancing a solution to its claimed prejudice in light of the Trial Chamber's rulings and the purported *bona fides* submissions of the Prosecutor who sought to deny any prejudice until expedience forced this acknowledgment. The Defence could not sensibly advance prejudice giving rise to the need for recall in light of these prevailing circumstances. The "failure" of the Defence to bring the applications during the course of the Prosecution case is rightly described by the Prosecution as not arising from "ineffective assistance of [defence] counsel". This fault lies elsewhere and ought to be acknowledged.

Conclusion

17. The trial of Mr. Sesay is irremediably tainted by the conduct of the Prosecution, which has inculcated a process that has subverted the very premise of an adversarial process. It has brought about the deliberate obliteration of the point in time *prior* to the commencement of the Prosecution case when the allegations stop and the defence begins. Neither semantics nor legal gymnastics can disguise this unfortunate fact. The conduct outlined is so offensive to justice and propriety and/or it has caused such irremediable unfairness, that the Indictment must be stayed for abuse of process. In the alternative the Defence repeats its request that all the charges arising from the so-called proofing process be dismissed as unfairly adduced and giving rise to irremediable unfairness.

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[15] *Prosecutor v. Sesay et al*, SCSL-04-15-593, "Prosecution Response to Sesay Motion for a Ruling that the Defence has been Denied Cross-Examination Opportunities", 10th July 2006.

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Dated 7th May 2007

Wayne Jordash
Sareta Ashraph

LIST OF AUTHORITIES

Decisions

Prosecutor v. Sesay et al, SCSL-04-15-623, "Written Reasons on Majority Decision on Oral Objection taken by Counsel for the Third Accused, Augustine Gbao, to the Admissibility of Portions of the Evidence of Witness TF1-371", 2 August 2006.

Motions

Prosecutor v. Sesay et al, SCSL-04-15-461, "Defence Motion Requesting the Exclusion of Paragraphs 1, 2, 3, 11 and 74 of the Additional Information provided by TF1-117, Dated 25th, 26th 27th and 28th October 2005", 12th January 2006.

Prosecutor v. Sesay et al, SCSL-04-15-466, "Prosecution Response to 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", 23rd January 2006.

Prosecutor v. Sesay et al, SCSL-04-15- 483, "Prosecution Response to Defence Motion Requesting the Exclusion of Evidence of Witness TF1-113", 17th February 2006.

Prosecutor v. Sesay et al, SCSL-04-15-593, "Prosecution Response to Sesay Motion for a Ruling that the Defence has been Denied Cross-Examination Opportunities", 10th July 2006.

Prosecutor v. Sesay et al, SCSL-04-15-T-765, "Defence Motion Seeking a Stay of the Indictment and Dismissal of All Supplemental Charges (Prosecution's Abuse of Process and/or Failure to Investigate Diligently)", 24th April 2007.

Prosecutor v. Sesay et al, SCSL-04-15-T-775, "Response to Defence Motion Seeking a Stay of the Indictment and Dismissal of All Supplemental Charges (Prosecution's Abuse of Process and/or Failure to Investigate Diligently)", 1st May 2007.