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(25320 - 25326)

SPECIAL COURT FOR SIERRA LEONE
OFFICE OF THE PROSECUTOR
Freetown - Sierra Leone

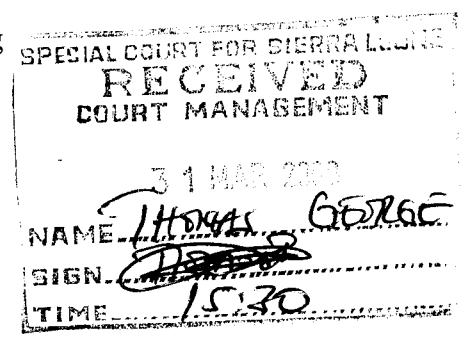
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APPEALS CHAMBER

Before: Justice George Gelaga King, Presiding
Justice Emmanuel Ayoola
Justice Raja Fernando
Justice Renate Winter
Justice Jon M. Kamanda

Registrar: Herman von Hebel

Date filed: 31 March 2008



THE PROSECUTOR

Against

**Issa Hassan Sesay
Morris Kallon
Augustine Gbao**

Case No. SCSL-04-15-T

PUBLIC

**PROSECUTION REPLY TO "SESAY RESPONSE TO PROSECUTION APPEAL SUBMISSIONS
REGARDING DECISION ON REQUEST TO LIFT PROTECTIVE MEASURES"**

Office of the Prosecutor:
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I. INTRODUCTION

1. On 3 March 2008, the Prosecution filed its “Prosecution Notice of Appeal and Submissions Regarding ‘Decision on the Sesay Defence Motion Requesting the Lifting of Protective Measures in Respect of Certain Prosecution Witnesses’”.¹ On 14 March 2008, the Defence for the First Accused filed its “Public Sesay Response to Prosecution Appeal Submissions Regarding Decision on Request to Lift Protective Measures”.²
2. As noted by the Sesay Defence, the Response was filed out of time.³ However, the Prosecution observes that according to the “Practice Direction for Certain Appeals before the Special Court”,⁴ the deadline for filing the Response was 10 March 2008 and not 13 March 2008.⁵
3. The Prosecution files this reply to the Response pursuant to Rule 107⁶ and the Appeals Practice Direction.⁷

II. ARGUMENT

Ground One: Witness statements originally disclosed under Rule 68

4. In relation to the Prosecution’s first argument under this Ground that the Trial Chamber failed to strike the correct balance between the rights of the Accused and those of witnesses and victims, the Sesay Defence assert that this argument “lacks jurisprudential support”⁸ and that the approach taken by the Trial Chamber followed “settled law”.⁹ These Defence submissions fail, however, to squarely deal with the issue raised by the Prosecution that while the position may be settled at the ICTR it is

¹ *Prosecutor v. Sesay, Kallon, Gbao*, SCSL-04-15-T-1021, “Prosecution Notice of Appeal and Submissions Regarding ‘Decision on the Sesay Defence Motion Requesting the Lifting of Protective Measures in Respect of Certain Prosecution Witnesses’”, 3 March 2008 (“**Prosecution Appeal**”).

² *Prosecutor v. Sesay, Kallon, Gbao*, SCSL-04-15-T-1053, “Public Sesay Response to Prosecution Appeal Submissions Regarding Decision on Request to Lift Protective Measures”, 14 March 2008 (“**Response**”).

³ Response, para. 2.

⁴ Practice Direction for Certain Appeals Before the Special Court, 30 September 2004 (“**Appeals Practice Direction**”).

⁵ Appeals Practice Direction, para. 8.

⁶ Rules of Procedure and Evidence of the Special Court for Sierra Leone, as amended (“**Rules**”).

⁷ Appeals Practice Direction, para. 9.

⁸ Response, para. 7.

⁹ *Ibid*, para. 6.

not so settled at the Special Court for Sierra Leone (“SCSL”).¹⁰ Further, the settled position at the ICTR is in relation to the application of a rule governing the disclosure of exculpatory evidence which is not drafted in similar terms to the equivalent rule at the SCSL.¹¹

5. In addition, should the Appeals Chamber decide in its discretion to be guided by the ICTR jurisprudence, the ICTR authority cited in the Response does not support the extensive disclosure sought by the Defence.¹² The Defence seek disclosure of the full unredacted statements of witnesses which were previously disclosed under Rule 68.¹³ Statements disclosed under Rule 68 are redacted to remove information relating to the witness’ identity and non-exculpatory material. The ICTR authority cited supports disclosure of “the *identity* of [the] witness ... and any portions of the statement redacted to protect the witness’s *identity*” [emphasis added].¹⁴ Disclosure of material other than that which “must be considered to be exculpatory within the meaning of Rule 68” is not ordered.¹⁵
6. Therefore, the Defence claim that “[t]he Prosecution has cited no circumstances that would distinguish the instant case from this line of authority or the norm”¹⁶ is without merit and ignores the extensive submissions made by the Prosecution regarding the differences between the ICTR rule and case law governing disclosure of exculpatory evidence and the equivalent position at the SCSL.
7. Further, the Defence allege that “[t]he Prosecution has wilfully misinterpreted” Rule 68.¹⁷ This allegation is frivolous. As is evident from the plain reading of Rule 68(B), the second sentence of this sub-Rule is to extend the obligation on the Prosecutor to disclose exculpatory material beyond the 30 day deadline referred to in the first sentence.¹⁸

¹⁰ Prosecution Appeal, paras. 28 – 38.

¹¹ See in particular Prosecution Appeal, para. 28.

¹² See Response, para. 5 citing *Prosecutor v. Bagosora et al.*, ICTR-98-41-T, “Decision on Disclosure of Identity of Informant”, 24 May 2006, para. 5.

¹³ Response, para. 10.

¹⁴ See footnote 12.

¹⁵ *Ibid.*

¹⁶ Response, para. 7.

¹⁷ Response, para. 8.

¹⁸ The purpose of the second sentence of Rule 68(B) was commented on para. 23 in *Prosecutor v. Norman et al.*, “Decision on Motion to Compel the Production of Exculpatory Witness Statements, Witness

8. Finally, protective measures are not sought by the Prosecution in any of the proceedings before the SCSL on the basis of its “collective paranoia”.¹⁹ Protective measures are sought and granted on the basis of evidence provided to the SCSL’s Trial Chambers which supports the existence of subjective and objective threats faced by witnesses. Measures are not granted by Trial Chambers without thought and simply to assuage the Prosecution’s collective paranoia. If credible and relevant evidence is not provided by the Prosecution in support of its request protections, then the measures sought are denied.²⁰ When such measures are imposed then they are imposed to limit the risk faced by witnesses. To expand the number of persons who will be in receipt of the identities of protected witnesses obviously increases the risks faced by witnesses. Therefore, to increase the risk without due consideration as to whether there is a diminution in the threat level faced by witnesses, is an error of law. The assertion made by the Defence that the fact that the ex-RUF witnesses are protected by a 2004 Decision which was simply drafted with the aim of protecting witnesses expected to testify in the RUF trial²¹ ignores the effect of Rule 75(F)(i) and the fact that witnesses protected by such decision have testified in the Taylor trial.²² No evidence is given by the Defence in any of their submissions regarding the diminution of the threat faced by Taylor witnesses.²³

Ground Two: Witness statements originally disclosed under Rule 66

9. The Defence state that the Prosecution’s arguments under this Ground are difficult to discern.²⁴ The Prosecution refers in this regard to its submissions in paragraphs 51 to 56 which encapsulate the essence of the argument.

Summaries and Materials Pursuant to Rule 68.”, 8 July 2004: “...the most recent amendment to the rule ... clearly puts beyond doubt the issue of the continuing nature of the Prosecutor’s obligation to disclose exculpatory material under Rule 68(B) by re-enacting that provisions as a qualifying clause to the new sub-rule (B).” However, the Chamber did not consider what was meant by a the obligation on the Prosecutor “to make a statement”.

¹⁹ Response, para. 14.

²⁰ *Prosecutor v. Taylor*, SCSL-03-01-T-427, “Decision on Confidential Prosecution Motions SCSL-03-01-T-372 and SCSL-03-01-T-385 for the Testimonies of Witnesses to be Held in Closed Session”, 26 February 2008.

²¹ Response, para. 15.

²² See for example the testimony of TF1-026 - *Prosecutor v. Taylor*, Trial Transcript, 14 February 2008, page 3837, lines 7 - 17.

²³ No evidence is given in the Response, para. 16.

²⁴ Response, para. 17.

10. In relation to the Prosecution's argument that the order to disclose the full unredacted statements of the Rule 66 witnesses failed to strike the correct balance between the rights of the Accused, the rights of witnesses and the rights of the Prosecution and also applied Rule 66(A)(ii) without hearing submissions from the Prosecution on the Rule, the Prosecution highlights Rule 66(B). Rule 66(B) provides that the Prosecution may apply to a Judge designated by the President sitting *ex parte* and *in camera*, but with notice to the Defence, to be relieved from the obligation to disclose pursuant to Sub-Rule (A). Rule 66(B) clearly applies to all of the Prosecution's disclosure obligations set out in Rule 66(A) and is not limited to any sub-part.²⁵ The existence of this Rule reflects the need for a balancing exercise to be conducted between the various interests. As is clear throughout the Prosecution's submissions, disclosure of full unredacted statements at the SCSL cannot be ordered under either Rule 66(A) or Rule 68 on the basis of an assessment of the needs of the Defence alone. The decision to order disclosure is a discretionary one and the rights of witnesses, victims and the Prosecution must be considered as part of the decision making process.

Ground Three: Witness Contact through WVS

1. In the Response, the Defence ignore the fact that the witnesses at issue are currently Prosecution witnesses protected by orders which require the Prosecution rather than WVS to make contact with them in order to seek consent to an interview with the Defence.²⁶ The submissions made by the Defence regarding the Prosecution's support for contact to be made through WVS relate to submissions and comments made by the Prosecution in relation to contact with Defence witnesses. The Prosecution, therefore, seeks consistency in relation to the application of existing orders and submits there is no reason to depart from a process with which Prosecution

²⁵ For example, the ICTY equivalent to Rule 66(B) was at one stage limited only to disclosure made by the prosecutor pursuant to the equivalent of SCSL Sub-Rule 66(A)(iii). However, ICTY Rule 66(C) has been amended and is now drafted in similar terms to SCSL Rule 65(B). In the *Blagojević* case, the Prosecution was relieved of its obligation to disclose certain specified witness statements pursuant to Rule 66(C) (see *Prosecutor v. Blagojević*, IT-02-60-PT, "Joint Decision on Motions related to Production of Evidence", 12 December 2002, para. 16).

²⁶ See the Prosecution Appeal at paras. 59 and 65 which set out the existing orders directing how contact must be made with Prosecution witnesses.

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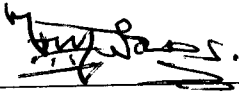
witnesses are familiar and comfortable.

III. CONCLUSION

12. On the basis of the above submissions and those set out in the Prosecution Appeal, the Prosecution appeal should be allowed.

Filed at Freetown, on 31 March 2008

For the Prosecution,



61 Pete Harrison

INDEX OF AUTHORITIES

A. ORDERS, DECISIONS AND JUDGEMENTS

Prosecutor v. Sesay, Kallon, Gbao, SCSL-04-15-T

1. *Prosecutor v. Sesay, Kallon, Gbao, SCSL-04-15-T-1021*, “Prosecution Notice of Appeal and Submissions Regarding “Decision on the Sesay Defence Motion Requesting the Lifting of Protective Measures in Respect of Certain Prosecution Witnesses”, 3 March 2008
2. *Prosecutor v. Sesay, Kallon, Gbao, SCSL-04-15-T-1053*, “Public Sesay Response to Prosecution Appeal Submissions Regarding Decision on Request to Lift Protective Measures”, 14 March 2008

Prosecutor v. Taylor, SCSL-03-1

3. *Prosecutor v. Taylor, SCSL-03-01-T-427*, “Decision on Confidential Prosecution Motions SCSL-03-01-T-372 and SCSL-03-01-T-385 for the Testimonies of Witnesses to be Held in Closed Session”, 26 February 2008
4. *Prosecutor v. Taylor, SCSL-03-01-T*, Trial Transcript, 14 February 2008

Prosecutor v. Norman, Fofana, Kondewa, SCSL-04-14

5. *Prosecutor v. Norman et al.*, “Decision on Motion to Compel the Production of Exculpatory Witness Statements, Witness Summaries and Materials Pursuant to Rule 68.”, 8 July 2004

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6. *Prosecutor v. Blagojević, IT-02-60-PT*, “Joint Decision on Motions related to Production of Evidence”, 12 December 2002
<http://www.un.org/icty/blagojevic/trialc/decision-e/021212.pdf>

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7. *Prosecutor v. Bagosora et al.*, ICTR-98-41-T, “Decision on Disclosure of Identity of Prosecution Informant”, 24 May 2006
<http://69.94.11.53/ENGLISH/cases/Bagosora/decisions/240506b.htm>

B. RULES OF PROCEDURE AND EVIDENCE AND PRACTICE DIRECTIONS

1. Rules of Procedure and Evidence of the Special Court, as amended
2. Practice Direction for Certain Appeals Before the Special Court of 20 September 2004