SPECIAL COURT FOR SIERRA LEONE

Case No. SCSL-2004-16-T

Before: Justice Teresa Doherty, Presiding
Justice Julia Sebutinde
Justice Richard Lussick

Registrar: Robin Vincent

Date filed: 8 July 2005

THE PROSECUTOR

against

ALEX TAMBA BRIMA

BRIMA BAZZY KAMARA

and

SANTIGIE BORBOR KANU

KANU – DEFENCE RESPONSE TO PROSECUTION REQUEST FOR LEAVE TO CALL AN ADDITIONAL WITNESS PURSUANT TO RULE 73*bis*(E)

Office of the Prosecutor:
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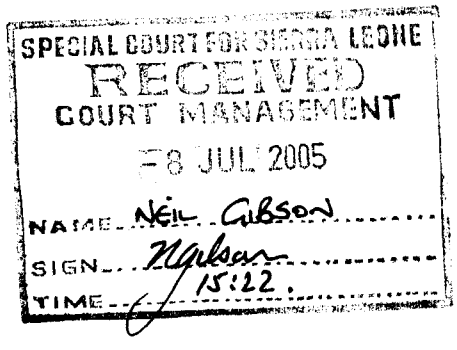

I INTRODUCTION

1. On 6 July 2005, the Prosecution filed its "Prosecution Request for Leave to File an Additional Witness Pursuant to Rule 73*bis*(E)" ("**Prosecution Request**"). The Defence herewith files its response thereto, with this "Kanu – Defence Response to Prosecution Request for Leave to Call an Additional Witness Pursuant to Rule 73bis(E)" ("**Response**").

II APPLICABLE LAW

2. Sub-Rule 73*bis*(E) provides: "After the commencement of the Trial, the Prosecutor may, if he considers it to be in the interests of justice, move the Trial Chamber for leave to reinstate the list of witnesses or to vary his decision as to which witnesses are to be called."

3. As is clear from the text of this Sub-Rule, the test to be met by the Prosecution is whether the calling of the additional witness is "in the interests of justice." Moreover, the Prosecution needs to prove "good cause" in addition to this. The Prosecution in its Request indicates the relevant applicable criteria, namely:

   (i) That the circumstances being argued to show good cause are directly related and material to the facts in issue;

   (ii) That the evidence to be provided by the witness is relevant to determining the issues at stake and would contribute to serving and fostering the overall interest of justice;

   (iii) That leave to call a new witness would not unfairly prejudice the defence; and

(iv) That the new evidence could not have been discovered or made available at an earlier point in time notwithstanding the exercise of due diligence.[1]

4. The Defence submits that these criteria have not been fulfilled by the Prosecution in this respect, and that thus, the Prosecution Request should be denied.

III LEGAL ARGUMENT

3.1 Witness Is/Was Employee of the OTP

5. The Prosecution Request mentions that Lt. Col John Petrie, whom it intends to call as a new witness, "previously the Commanding Officer of the Republic of Sierra Leone Armed Forces (RSLAF) Joint Provost Unit, as part of the International Military Advisory and Training Team (IMATT) and, subsequently, Chief of Legal Operations in the Office of the Prosecutor at the Special Court." Hence, this witness works or worked for the Office of the Prosecution of this Special Court.

6. The Defence submit that it is not in the interests of justice to call a witness to testify who is a member of one of the parties to the case. Given the fact that the weight to be given to such testimony, where one of the members of the Prosecution itself gives evidence against one of the Accused, is not expected to be very high, this Request cannot pass the threshold, as the criterion under (ii) cannot be fulfilled, and therefore also the criterion under (iii).

7. In addition, the Defence observes that the Prosecution has not indicated any reason in its Request as to why it would have one of its own (former) employees, even an employee who works/worked as a Chief of Legal Operations, testify

[1] *Prosecutor v. Sesay et al.*, Case No. SCSL-15-T, Decision on Prosecution Request for Leave to Call an Additional Expert Witness, 10 June 2005.

against the Accused. Given the fact that no supporting arguments were raised in this respect, the Prosecution should not be allowed to have such person testify. For if the Prosecution gives its arguments for this action only in its reply to this Response, the Defence will not be in a position anymore to respond to the Prosecution argument.

3.2 No Good Cause Shown for Calling this Witness

8. The Prosecution Request indicates that it wishes to call this additional witness "to testify as to the identity of the Accused Brima and Kanu,"[2] and "to prove that (...) the third Accused Kanu was also known by the jungle name, code name or nickname of '55'."[3]

9. The Defence hereby submits that proof of the name "55" as referring to the Accused, cannot necessarily adduce evidence that it was the Accused who committed certain crimes or who held a particular position, merely based upon statements in which the witness mentions a person with the name "55." In other words, even if it were to be established that Mr. Kanu could be affiliated with the code "55," it could not reasonably adduce conclusive evidence as envisioned by the Prosecution.

10. Therefore, the Prosecution should not be allowed to call this witness, and therefore the criterion under (i) cannot be proved to be fulfilled, as the circumstances being argued to show good cause are not directly related and material to the facts in issue.

11. In the Defence Pre-Trial Brief, as also referred to in the Prosecution Request in para. 11, the issue was raised of mistaken identity by indicating that besides Mr. Kanu, other people were also referred or could have been referred to by the name

[2] Prosecution Request, para. 6.
[3] Prosecution Request, para. 10.

of "55." This observation reinforces the Defence argument mentioned above under para. 9 above.

12. The Defence for Kanu therefore argues that the hearing of this witness is, besides the fact that it is not in the interests of justice, also not at all relevant, and therefore, the Defence submit that also the criterion under (ii) above, has not been fulfilled by the Prosecution. For, as also indicated in para. 9 above, the crux of the matter is whether Mr. Kanu was or was not the only person referred to as "55." Thus, by hearing an additional witness who can testify that Mr. Kanu was referred to as "55", does not provide the Prosecution with any new information, for this witness cannot testify that nobody else in the AFRC, RUF or outside of these structures was referred to as "55."

13. The Prosecution Request mentions some other reasons to call this witness – linked to the identification – namely to "explain the origin of the jungle, code or nicknames 'Gullit' and '55'," [4] and also, in the next paragraph it states that the testimony of this proposed witness "may be instrumental in establishing that Brima and Kanu were known by different names and thereby in revealing the full extent of their liability." [5] However, the Prosecution does not mention with regard to these additional reasons, that "the new evidence could not have been discovered or made available at an earlier point in time notwithstanding the exercise of due diligence" (see criterion under (iv) above). [6]

3.3 No "new evidence"

14. As indicated by the Trial Chamber in *Prosecutor v. Sesay et al.*,[7] one of the relevant criteria for allowing a new witness to testify is that this witness has "new

[4] Prosecution Request, para. 10.
[5] Prosecution Request, para. 11.
[6] *Prosecutor v. Sesay et al.*, Case No. SCSL-15-T, Decision on Prosecution Request for Leave to Call an Additional Expert Witness, 10 June 2005. See also under section 3.4 below.
[7] *Prosecutor v. Sesay et al.*, Case No. SCSL-15-T, Decision on Prosecution Request for Leave to Call an Additional Expert Witness, 10 June 2005.

evidence" (see above under iv). It is clear from the wording of this interpretation by Trial Chamber I that this provision of Rule 73*bis*(E) is meant to refer to witnesses who can testify on evidence which was not discovered at an earlier stage, therefore on new evidence.

15. The fact that Mr. Kanu was, amongst others, referred to as "55" is not "new evidence," for this was already assumed by the Prosecution at the time of the drafting of the Indictment, on which Mr. Kanu is already referred to as, amongst others, "55." Therefore, the criterion as set out under (iv) above, has not been fulfilled.

16. Thus, the Defence submits that the Prosecution Request needs to be denied.

3.4 Evidence Could Have Been Made Available Earlier

17. The Defence submits that the evidence which this proposed witness could present, could have been made available at an earlier point in time and that the Prosecution has not exercised due diligence to bring this evidence forward at an earlier stage (see requirement under (iv) above).

18. The Prosecution Request notes that "it is to be noted that the absence of the Accused from the courtroom during the evidence of witnesses who had the ability to identify the (...) third Accused as 55 has made an in-court identification impossible. This absence was unpredictable and unexpected. (...) The Prosecution is therefore seeking at this stage to prove identity by other means."[8]

19. The Defence thus understands the Prosecution argument that they only call this witness at this stage in the proceedings, in order to pursue an in-court identification, and given the fact that Mr. Kanu was not present in court during part of the trial against him and his co-Accused, these particular witnesses were

[8] Prosecution Request, para. 14.

unable to identify Mr. Kanu in court. Thus, the Prosecution alleges that it needs to call this witness from abroad to identify Mr. Kanu after all.

20. First, the Defence wishes to submit that in-court identification is not a common procedure under international criminal law. Although under Rule 89(C) of the Rules provides that "[a] Chamber may admit any relevant evidence," the Trial Chamber of the ICTY indicated that it is appropriate to "place little weight upon mere dock identification."[9] In *Prosecutor v. Tadic*, the ICTY Trial Chamber held that "the circumstances attendant upon such identification, with the accused seated between two guards in the courtroom, require the Trial Chamber to assess the credibility of each witness independently of that identification."[10] After all, an in-court identification seriously prejudices the rights of the accused, as such identification procedure has little to do with fair identification.

21. Secondly, it seems that the Prosecution argument does not coincide with the trial proceedings. Only very few of the witnesses of the Prosecution, were asked to describe Mr. Kanu – which would, according to the humble opinion of the Defence, be one of the many alternatives for in-court identification.

22. Thirdly, on no single occasion when the client was present in court, was any witness asked to identify the client in court. It would be quite coincidental that the Accused was not present in court, exactly when those witnesses who were supposed to identify him in court were going to be called.

23. The Prosecution concludes its argument in this respect by stating that "in considering this particular Application, the issues of the time which the Prosecution has known of the proposed evidence and due diligence have little weight when compared with the relevance and materiality of that evidence to facts in issue, the absence of prejudice to the Accused and the overall interests of

[9] *Prosecutor v. Jelisic*, ICTY Trial Chamber, Decision on the Motion Concerning Identification Evidence, 18 December 1998.
[10] *Prosecutor v. Tadic*, ICTY Trial Chamber, Opinion and Judgment, 7 May 1997, para. 546.

justice."[11] The Defence respectfully submits that the requirements under (i) – (iv) as set out in the *Prosecutor v. Sesay et al.*, are cumulative; the Prosecution thus needs to fulfill all four requirements. Besides the criteria mentioned under (i) – (iii), also the requirement under (iv) has not been met by the Prosecution.

24. Therefore, the Prosecution Request should be denied in its entirety.

3.5 Unfair Prejudice

25. Given the fact that Trial Chamber I formulated the criteria in *Prosecutor v. Sesay et al.*, in a cumulative way, and the Defence has already shown that the other criteria are not adhered to by the Prosecution, the Defence does not have to establish that unfair prejudice has been suffered by the Defence, but the Prosecution needs to establish that this criterion under (iii) has been fulfilled, i.e. the Prosecution needs to show that the new witness will cause unfair prejudice to the Defence.

26. Besides the speediness of the trial, which is one of the many factors to establish a fair trial, the Defence submits that it will, also on other grounds, be unfairly prejudiced if this witness be called at trial.

27. The witness is a member of the Prosecution, and is therefore expected to be biased against the Accused – not on the basis of his knowledge of the conflict, but because of his position before this Special Court. A person working for the Prosecution may be assumed to be prejudicial and not independent. In his research and work that this person will have done in his function as Chief of Legal Operations for the Office of the Prosecution, he must, without doubt, have concentrated mainly on finding evidence against the Accused, in order to be able to present the Prosecution's case in Court.

[11] Prosecution Request, para. 14.

28. The Defence submits that, by bringing forward one of its own (former) employees to testify in court, the Defence is unfairly prejudiced. Besides this, the fact that no good cause has been shown, and that the Prosecution Request is not in the interests of justice, also supports the fact that the Defence will be unfairly prejudiced by having this witness testify in Court.

3.6 Calling of an Overseas Witness

29. In para. 13 of its Request, the Prosecution mentions that it "had hoped that the issue of identification could have been resolved in a more expeditious manner than by the calling of an overseas witness. However, the position adopted by the first and third Accused makes it necessary in the interests of justice that the Application be granted given that identification remains an issue in the trial."

30. The Defence wishes to indicate first of all that, in the humble opinion of the Defence, there is no "issue of identification" as meant by the Prosecution, and as set out under section 3.3 above. For the Defence until now restricted its arguments to the potential issue of mistake of identity, in the sense that other persons were also referred to or may have been referred to as "55." Therefore, the allegation by the Prosecution that it is because of the Defence position that the Prosecution needs to call this witness, is an oversimplification of the Defence position.

31. In the second place, the Prosecution deems it necessary to call this particular witness to testify that the Accused was referred to as "55." The Defence submits that when it is the Prosecution submission that it is only able to establish proof that the Accused was also referred to as "55" merely based on this particular witness, while there were obviously many other witnesses who allegedly could

have testified on this issue (which is apparently also the Prosecution's own position[12]), the Prosecution has clearly not exercised due diligence.

IV CONCLUSION

32. For the reasons set out above, the Defence respectfully submits that the Prosecution has failed to show that it fulfilled all four, or any of the criteria as set out in the aforementioned *Prosecutor v. Sesay et al.* Decision, and thus the Prosecution Request needs to be denied in its entirety.

Respectfully submitted,
On 8 July 2005

Geert-Jan Alexander Knoops

[12] Because the Prosecution Request states in para. 14 that they expected other witnesses to identify Mr. Kanu in court. However, due to the unforeseen fact that Mr. Kanu was not present in court during a limited period of time, these particular witnesses were unable to identify him in court.

TABLE OF AUTHORITIES

- *Prosecutor v. Sesay et al.*, Case No. SCSL-15-T, Decision on Prosecution Request for Leave to Call an Additional Expert Witness, 10 June 2005.
- *Prosecutor v. Jelisic*, ICTY Trial Chamber, Decision on the Motion Concerning Identification Evidence, 18 December 1998.
- *Prosecutor v. Tadic*, ICTY Trial Chamber, Opinion and Judgment, 7 May 1997.