366)

SCSL-04-16-T
(14398-14403)

14398

SPECIAL COURT FOR SIERRA LEONE
JOMO KENYATTA ROAD • FREETOWN • SIERRA LEONE
PHONE: +1 212 963 9915 Extension: 178 7000 or +39 0831 257000 or +232 22 295995
FAX: Extension: 178 7001 or +39 0831 257001 Extension: 174 6996 or +232 22 295996

TRIAL CHAMBER II

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

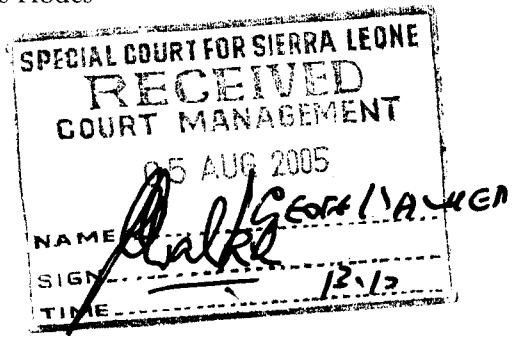
Registrar: Robin Vincent

Date: 5 August 2005

PROSECUTOR Against **Alex Tamba Brima**
Brima Bazzy Kamara
Santigie Borbor Kanu
(Case No.SCSL-04-16-T)

DECISION ON PROSECUTION REQUEST FOR LEAVE TO CALL AN ADDITIONAL WITNESS PURSUANT TO RULE 73*bis*(E)

Office of the Prosecutor:
Luc Côté
Lesley Taylor
James Hodes



Defence Counsel for Alex Tamba Brima:
Kojo Graham
Glenna Thompson

Defence Counsel for Brima Bazzy Kamara:
Andrew Daniels
Mohamed Pa-Momo Fofanah

Defence Counsel for Santigie Borbor Kanu:
Geert-Jan Alexander Knoops
Carry Knoops
Abibola E. Manly-Spain

TRIAL CHAMBER II ("Trial Chamber") of the Special Court for Sierra Leone ("Special Court"), composed of Justice Teresa Doherty, presiding, Justice Richard Lussick and Justice Julia Sebutinde;

SEISED of the Prosecution Request for Leave to Call an Additional Witness Pursuant to Rule 73*bis*(E), filed on 6 July 2005; ("Motion");

NOTING the Kanu - Defence Response to Prosecution Request for Leave to Call an Additional Witness Pursuant to Rule 73*bis*(E), filed on 8 July 2005;

NOTING the Brima - Defence Response to Prosecution Request for Leave to Call an Additional Witness Pursuant to Rule 73*bis*(E), filed on 11 July 2005;

NOTING the Joint Reply to Kanu and Brima - Defence Response to Prosecution Request for Leave to Call an Additional Witness Pursuant to Rule 73*bis*(E), filed on 13 July 2005;

CONSIDERING the Order to the Prosecution to File Disclosure Materials and Other Materials in Preparation for the Commencement of Trial, issued by Trial Chamber 1 on 1 April 2004 and the subsequent filing of a Witness List by the Prosecution on 26 April 2004;

CONSIDERING FURTHER the Order to Prosecution to Provide Order of Witnesses and Witness Statements, issued by Trial Chamber 11 on 9 February 2005 and the subsequent filing of a Revised Witness List on 21 February 2005 by the Prosecution which has been updated on 28 April 2005 and renewed on 3 August 2005;

HEREBY DECIDES AS FOLLOWS based solely on the written submissions of the parties pursuant to Rule 73(A) of the Rules of Procedure and Evidence of the Special Court (" Rules").

I. SUBMISSIONS OF THE PARTIES

Prosecution

1. The Prosecution requests the Trial Chamber to allow the inclusion of an additional witness, Lt. Col. John Petrie, to testify as to the identity of the Accused Brima and Kanu.

2. The Prosecution further requests permission from the Trail Chamber to disclose to the Defence the statement of Lt. Col. John Petrie, pursuant to Rule 66(A)(ii).

3. According to the Prosecution, the witness would prove that the Accused Brima was also known as "Gullit", and that the Accused Kanu was also known as "55".

4. The Prosecution submits that the Defence will suffer no unfair prejudice if the witness is allowed to be called. It argues that since the issue of identity was raised by the Defence, it must therefore expect that the Prosecution will bring evidence to establish the different names by which the Accused were known. Additionally, the evidence of the proposed witness will be of short compass and his statement will be disclosed in sufficient time to allow the Defence ample opportunity to prepare cross-examination.

5. The Prosecution states that it had hoped that the issue of identification could have been resolved in a more expeditious manner than by calling an overseas witness. However, the unanticipated absence of the Accused from the courtroom during the evidence of witnesses who could have identified them has made an in-court identification impossible.

JAQ.

6. Furthermore, the Prosecution submits that the issues of the time which it 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 justice.

Defence - Kanu

7. The Kanu Defence submits that the Prosecution have not established "good cause", that the calling of the additional witness would not be "in the interests of justice", and that the Prosecution Request should therefore be denied.

8. The Kanu Defence points out that the additional witness once worked for the Office of the Prosecution and submits that it is not in the interests of justice to call a witness who is a member of one of the parties to the case.

9. It submits that even if it were to be established that Kanu could be affiliated with the code name "55", this would not be conclusive evidence that Kanu was the "55" who committed certain crimes and held a particular position. Therefore, the Prosecution has failed to show that the circumstances being argued to show good cause are directly related and material to the facts in issue.

10. The Kanu Defence further submits that the Prosecution can only call additional witnesses on the basis of new evidence, and the fact that Kanu was, amongst others, referred to as "55" is not "new evidence", since he is referred to as such in the indictment.

11. It is also submitted that the evidence of the proposed witness could have been made available at an earlier point in time and that the Prosecution has not exercised due diligence in bringing it forward.

12. The Kanu Defence maintains that the Prosecution has failed to establish any of the criteria for the calling of additional witnesses established by Trial Chamber 1 in *Prosecutor v. Sesay et al.*[1]

Defence – Brima

13. The Brima Defence associates itself, mutatis mutandi, with the legal arguments and submissions made by the Kanu Defence.

Joint Prosecution Reply

14. The Prosecution argues that the previous employment of the proposed witness does not render him "one of the parties to the case." Further, the proposed witness is being called in his capacity as a former Commanding Officer of the Republic of Sierra Leone Armed Forces (RSLAF) Joint Provost

---

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

JNA

Unit as part of the International Military Advisory and Training Team (IMATT), and not as a former employee of the Office of the Prosecutor.

15. The Prosecution submits that the reason for calling the proposed witness is to adduce evidence of interactions between him and the first and third Accused prior to their arrest, and also evidence as to the origin of the names "55" and "Gullit". This evidence remains relevant even though the real issue of mistaken identity as asserted by the Kanu Defence is that other people were or could have been referred to as "55".

16. The Prosecution says that the proposed evidence is relevant because its case is that the code name "55" applied exclusively to Kanu and that Brima is also known as "Gullit". Given the nature of this evidence, a dock-identification is unnecessary.

17. It says further that it is not the Prosecution case that the evidence was wholly new. Also, it does not deny that it has had the information in its possession for some time.

18. Finally, the Prosecution submits that, where the Defence will suffer no prejudice and the Court will benefit from an enhanced understanding of the jungle or code name phenomenon and its applicability to Kanu and Brima, it would be in the interests of justice to grant the Prosecution's Request.

II. APPLICABLE LAW

19. Previous decisions of Trial Chamber 1 have dealt with the guiding principle for this kind of application, namely, that the Prosecution must demonstrate that such requests are justified by "good cause" and are in the "interests of justice."[2] More recent decisions of Trial Chamber 1 have elaborated on the considerations to be taken into account in assessing these criteria.[3]

20. The applicable law has now been reiterated by this Trial Chamber in its decision of even date, *Prosecutor v. Alex Tamba Brima et al., Decision on Prosecution Request For Leave To Call An Additional Witness (Zainab Hawa Bangura) Pursuant To Rule 73 bis (E) And On Joint Defence Notice To Inform The Trial Chamber Of Its Position Vis-à-vis The Proposed Expert Witness (Mrs. Bangura) Pursuant to Rule 94 bis., dated 5 August 2005*. The law relating to the calling of an additional witness pursuant to Rule 73 bis (E) as enunciated in that decision applies equally to the present decision.

---

[2] See Prosecutor v. Sesay et al., Decision on Prosecution Request for Leave to Call Additional Witnesses,11 February 2005; Prosecutor v. Norman et al., Decision on Prosecution Request for Leave to Call Additional Witnesses, 29 July 2004;Prosecutor v. Sesay et al., Decision on Prosecution Request for Leave to Call an Additional Expert Witness, 10 June 2005; See also ICTR cases Prosecutor v. Nahimana, Decision on the Prosecutor's Oral Motion for Leave to Amend the List of Selected Witnesses, 26 June 2001; Prosecutor v. Nyiramasuhuko et al., Decision on Prosecution's Motion for Leave to Add a Handwriting Expert to His Witness List, 14 October 2004.

[3] Prosecutor v. Sesay et al., Decision on Prosecution Request for Leave to Call Additional Witnesses and Disclose Additional Witness Statements, 11 February 2005; Prosecutor v. Sesay et al., Decision on Prosecution Request for Leave to Call an Additional Expert Witness, 10 June 2005.

III. THE MERITS OF THE APPLICATION

21. On the question of "good cause", the Prosecution explains that its reason for wishing to call the additional witness results from the Accused absenting themselves from the courtroom during the evidence of witnesses who could have identified the first Accused as "Gullit" and the third Accused as "55". According to the Prosecution, the absence of the Accused at such times was unexpected and unpredictable and has made an in-court identification impossible, so that the Prosecution now seeks to prove identity by other means. We accept this as a reasonable explanation, since we have observed the absence of the Accused from Court on many occasions when Prosecution witnesses were giving evidence.

22. In considering the "interests of justice", we note that the allegations in relation to identity are certainly not new. We also note that identification was raised as an issue in the Defence Pre-Trial briefs and that it still remains an issue. The evidence of the proposed witness is obviously relevant to that issue and, if accepted, will assist the Prosecution in discharging its onus of proving guilt beyond a reasonable doubt.

23. We note further the Prosecution's undertaking that the evidence of the propose witness will be of short compass and that his statement will be disclosed in ample time for the Defence to prepare its cross-examination. Given the apparently limited scope of the proposed testimony, it does not appear to us that any such preparation would be likely to cause undue delay to the trial.

24. We find entirely without merit the Defence argument that the Accused will suffer unfair prejudice because of the fact that the proposed witness was once employed by the Prosecution. No rule of law has been brought to our attention that would entitle us to find otherwise.[4] Under Rule 89 (C), a Chamber may admit any relevant evidence. Additionally, we note that the proposed witness will be called to give evidence which was acquired during his service with the Republic of Sierra Leone Armed Forces, not from his service with the Office of the Prosecutor.

25. Although the Rules do not define the term "interests of justice", we agree with the opinion of the ICTR "that it refers to a discretionary standard applicable in determining a matter given the particularity of the case".[5] The Prosecution concedes that it has known of the evidence for some time and that it is not wholly new evidence. However, in the particular circumstances of the present case, we do not consider that those facts disentitle the Prosecution to succeed in its application, nor do they provide the Defence with any ground to claim injustice. We accept that the need to call the additional witness only became apparent after the unexpected emergence of certain events in the trial, viz. the Accused absenting themselves.

26. Accordingly, we find that good cause has been shown by the Prosecution and that it is in the interests of justice to add Lt. Col. John Petrie to its Witness List.

---

[4] In the ICTY case Prosecutor v. Radoslav Brdanin, Decision on Prosecution's Submission of Statement of Expert Witness Ewan Brown, the Trial Chamber held that, in the case of expert witnesses, "the mere fact that an expert witness is employed by or paid by a party does not disqualify him or her from testifying as an expert witness"; In Prosecutor v. Sesay et al., SCSL - 2004-15-T, transcripts, 28.4.2005, pp. 2-38, Trial Chamber 1 called a former Prosecution investigator to testify.

[5] See The Prosecutor v. Nahimana et al., Decision on the Prosecutor's Oral Motion for Leave to Amend the List of Selected Witnesses, dated 26 June 2001, at paragraph 19.

IV. DISPOSITION

FOR THE ABOVE REASONS THE CHAMBER

GRANTS the Motion to add Lt. Col. John Petrie to the Witness List and

ORDERS the Prosecution to disclose to the Defence the statement of Lt. Col. John Petrie pursuant to Rule 66 (A) (ii) not later than Friday 12 August 2005;

FURTHER ORDERS the Court Management Section to accept the Prosecution's disclosure of this document during the Court recess and to ensure that it is served on the Defence without delay.

Done at Freetown this 5th day of August,2005.

Justice Richard Lussick | Justice Teresa Doherty | Justice Julia Sebutinde

Presiding Judge

[Seal of the Special Court for Sierra Leone]