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SCSL-04-16-T
(15318-15323)

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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: Lovemore Munlo

Date: 10 October 2005

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

DECISION ON CONFIDENTIAL URGENT JOINT DEFENCE MOTION TO EXCLUDE EVIDENCE GIVEN BY WITNESS TFI-157 AND EVIDENCE TO BE GIVEN BY WITNESS TFI-158 BASED ON LACK OF AUTHENTICITY AND VIOLATION OF RULE 95

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

SPECIAL COURT FOR SIERRA LEONE
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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 Confidential Urgent Joint Defence Motion to Exclude Evidence Given by Witness TFI-157 and Evidence to be Given by Witness TFI-158 Based on Lack of Authenticity and Violation of Rule 95, filed on 25 July 2005; ("Motion");

NOTING the Prosecution Response to Confidential Urgent Joint Defence Motion to Exclude Evidence Given by Witness TFI-157 and Evidence to be Given by Witness TFI-158 Based on Lack of Authenticity and Violation of Rule 95, filed on 2 August 2005;

NOTING the Joint Defence Reply to Prosecution Response to Confidential Joint Defence Motion to Exclude Evidence Given by Witness TFI-157 and Evidence to be Given by Witness TFI-158 Based on Lack of Authenticity and Violation of Rule 95, filed on 4 August 2005;

CONSIDERING the oral submissions of Counsel for the Prosecution and Defence made in Court on 25 July 2005 and 26 July 2005;

HEREBY DECIDES AS FOLLOWS:

I. INTRODUCTION

1. During the cross-examination of Witness TFI-157 on 25 July 2005 it emerged that he was a close family member of Witness TFI-158, who was due to testify next, and that they lived in the same room, even during the period that Witness TFI-157 was giving evidence. On the strength of these facts, the Defence made an oral application to the Trial Chamber for orders that the evidence given so far at the trial by Witness TFI-157 be excluded, and that the intended evidence to be given by Witness TFI-158 be precluded. The Trial Chamber ruled that the Defence should file a formal motion and that, in the meantime, the evidence of Witness TFI-157 would continue. The cross-examination of the witness had to be discontinued later in the day because of problems with the Mandingo interpretation. This Motion was filed the same day. The following day, 26 July 2005, the Trial Chamber denied a Defence application to prevent the evidence of Witness TFI-158 proceeding on that day, and the evidence of that witness, who did not need a Mandingo interpreter, was heard and completed. The cross-examination of Witness TFI-157 was continued on 26 September 2005 and his evidence was then completed.

II. SUBMISSIONS OF THE PARTIES

Defence

2. In support of the Motion, the Defence primarily relies on Rule 95, which states: "No evidence shall be admitted if its admission would bring the administration of justice into serious disrepute".

3. Pursuant to Rule 95, the Defence submits that, because of the close relationship between the two witnesses and the fact that they resided together while Witness TFI-157 was giving evidence, the testimony in chief of Witness TFI-157 should be excluded in its entirety and the intended testimony of Witness TFI-158 should be precluded. It argues that the situation gives rise to "grave concern about the authenticity and independence of their respective testimony".

4. The Defence expresses its strong belief that the continuation of the testimony of Witness TFI-157 and any start of the testimony of Witness TFI-158 is highly prejudicial to the Accused.

5. Moreover, the Defence submits that the mere perception that the two witnesses can no longer be qualified as independent witnesses of fact, together with the fact that their testimony can no longer be seen as authentic, leads to the conclusion that the rights of the Accused have been violated according to Article 17(2) and Article 17(4) of the Statute. The Defence view is that "these minimum rights can only be endorsed when it is properly secured that witnesses are prevented from discussing the content of testimony already given by one of them with each other, and are prevented from giving any opportunity for such discussion".

6. Apart from seeking the orders already mentioned, the Defence asks the Trial Chamber to instruct the Prosecution to ensure that witnesses will not reside in the same room during the course of their testimony and that witnesses who have commenced their testimony are not brought into contact with other witnesses who have yet to testify.

Prosecution

7. The Prosecution submits that the Defence arguments lack merit, that the implicit allegations of collusion are groundless, and that the Motion should be dismissed in its entirety.

8. The Prosecution contends that there are already in place sufficient safeguards against contamination of testimony between witnesses. Firstly, the Defence has the right to test a witness's credibility and raise any issues as to the authenticity and independence of testimony through cross-examination. Secondly, witnesses are ordered by the Court at the end of each day not to discuss their testimony with anybody. The Prosecution points out that in the present case Witness TFI-157 was given such an order and he understood it.

9. The Prosecution further submits that a suggestion of collusion between the two witnesses is implicit in the Motion, but that the Defence failed to put this allegation to witness TFI-157 in cross-examination. Furthermore, collusion cannot be presumed from the mere fact that the two witnesses are related and have stayed together during their testimony. Collusion suggests an agreement to abuse the legal system and mislead the court, and in the present case the Defence has not elicited any evidence to establish this.

Defence Reply

10. The Defence replies that contact between witnesses, during or before their testimony, should be prevented at all times and that the contact between the two witnesses in the present case should lead to exclusion of their evidence, as it may have been tainted.

11. The Defence argues that the right to cross-examine is not an adequate remedy and cannot countervail the risk of the witnesses influencing each other.

12. The Defence submits that it is not realistic for the Prosecution to claim that the Defence should have put the suggestion of collusion to the witness, since it would be impossible to prove such possible contamination of evidence, especially since the contamination may happen without any intention to contaminate. In any event, the view of the Defence is that contamination need not be the result of collusion, but can occur unintendedly. According to the Defence, since proof of actual contamination of evidence is impossible to establish, the mere fact that the witness TFI-157 during his testimony in court, and witness TFI-158 before his testimony in court, shared a room together over the weekend, creates a suggestion that evidence may have been "contaminated" and thus their testimony needs to be excluded from evidence.

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III. DELIBERATIONS

13. As submitted by the Prosecution, the Defence failed to put any suggestion of collusion directly to Witness TFI-157 during cross-examination. Nevertheless, both witnesses were cross-examined on whether they had discussed the evidence with one another. Witness TFI-157 was asked whether he had ever told Witness TFI-158 about what he has said to investigators from the Prosecution whom he saw in his home village. He denied having said anything to the other witness about his interview with the investigators.[1]

14. Witness TFI-158 was cross-examined on whether Witness TFI-157 had told him about the evidence he had given in court. Witness TFI-158 answered that he had not been told anything of that nature by Witness TFI-157.[2] He was questioned further on whether he himself had asked Witness TFI-157 about what had happened in court, and he replied: "I didn't ask him and he did not explain anything to me".[3]

15. Witness TFI-158 was also asked about the interview with investigators in his home village. He denied telling Witness TFI-157 anything about his statement to the investigators.[4] It was also suggested to him that he had spoken about the AFRC with his brother before giving evidence in court, and he denied it.[5] He also denied speaking to colleagues about the trial.[6]

16. Thus there is nothing to show that the two witnesses had ever discussed with each other the evidence they gave in Court. All the Defence can point to is a "potential contamination of evidence". Despite this, we are urged by the Defence to exclude their testimony in its entirety, solely because they are closely related and shared the same room during the time that one of them was in the process of giving evidence in Court. In our view, it would be wrong to conclude that, as a general principle of law, witnesses in such situations are deemed to be inherently unreliable. We agree with what was said in *Tadic* that "[t]*he reliability of witnesses, including any motive they may have to give false testimony, is an estimation that must be made in the case of each individual witness.*" The court in that case held that a conclusion that a witness is deemed to be inherently unreliable can only be made "*in the light of the circumstances of each individual witness, his individual testimony, and such concerns as the Defence may substantiate either in cross-examination or through its own evidence-in-chief.*" [7]

17. The Defence draws an analogy between the present case and the ICTY case of *Prosecutor v. Kupreskic et al.* [8] We do not think that that case assists the Defence. In *Kupreskic*, the person who spoke to the witness after commencement of the witness's testimony was one of the parties; it was not a case of witnesses speaking together. We do not agree with the reasoning of the Defence that the risk of two closely-related witnesses influencing each other's testimony is a more serious risk than the risk

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[1] Transcript 25 July 2005, page 61, lines 2 to 5, lines 20 to 23.
[2] Transcript 26 July 2005, page 53, lines 13 to 17, lines18 to 27.
[3] Transcript 26 July 2005, page 54, lines 4 to 6.
[4] Transcript 26 July 2005, page 60, lines 8 to 15.
[5] Transcript 26 July 2005, page 83, lines 1 to 4.
[6] Transcript 26 July 2005, page 83, lines 22 to 27.
[7] *Prosecutor v. Tadic*, Case No. IT-94-I-T Opinion and Judgment, 7 May 1997, para.541.
[8] *Prosecutor v. Kupreskic et al.*, Case No. IT-95-16-T, Decision on Communications Between the Parties and Their Witnesses, Decision of 21 September 1998.

of a witness being influenced by a party. Unlike a witness, a party has a definite cause to pursue and therefore a motive to influence the testimony of a witness. That, in our view, is a risk of much more intensity than any which may arise from two witnesses communicating. Even then, the court in *Kupreskic* did not hold that the evidence of the witness in question ought to be excluded.

18. There is nothing in the Statute or Rules which expressly addresses the issue in the present case. Rule 89 (B) provides:

> "*In cases not otherwise provided for in this Section, a Chamber shall apply rules of evidence which will best favour a fair determination of the matter before it and are consonant with the spirit of the Statute and the general principles of law.*"

19. In the absence of express provisions, the spirit of the Rules in regard to witnesses who hear the testimony of other witnesses can be ascertained from Rule 90(D), which states:

> "*A witness, other than an expert, who has not yet testified may not be present without leave of the Trial Chamber when the testimony of another witness is given. However, a witness who has heard the testimony of another witness shall not for that reason alone be disqualified from testifying.*"

Under Rule 90(D) a witness who has heard the testimony of another witness by sitting in court while that other witness gives evidence cannot thereby be disqualified from testifying. It seems to us to be wrong and grossly inconsistent with the spirit of this provision to say that the testimony of a witness who may or may not have heard the evidence of another witness, not from sitting in court, but from the other witness himself, should attract the draconian measure of exclusion or preclusion in its entirety.

20. It is trite law that the way to test the credibility of witnesses is by cross-examination, which can be used to determine whether witnesses have colluded or exchanged information on their testimony.[9] The Defence has not referred us to any authority which would support the proposition that exclusion of evidence is the appropriate remedy in circumstances such as those in this case. In fact, although the Defence relies on *Jones & Powles* in support of its argument on the "potential contamination of evidence", we note that the learned authors themselves endorse cross-examination as the correct remedy to determine whether witnesses have spoken to each other about their testimony.[10] Moreover, in the *Prosecutor v. Nyiramasuhuko*[11], the Trial Chamber held that where a number of witnesses are transferred at the same time to the Detention Unit, the right to cross-examine on credibility provides sufficient protection against the possibility of communication between those witnesses. Nevertheless, a Trial Chamber should take all reasonable measures to ensure that such communication does not take place.[12]

21. It is the practice of this Trial Chamber to caution every witness not to discuss either the case or his or her evidence with any person during the trial. The Trial Chamber also ensures that every witness understands the meaning of this caution. This was done with respect to Witness TF1-157

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[9] See Jones & Powles, *International Criminal Practice*, Oxford University Press, 3rd Edition, paras.8.5.698, 8.5.713.

[10] See Jones & Powles, *International Criminal Practice*, Oxford University Press, 3rd. Edition, paras. 8.5.698, 8.5.713.

[11] *Prosecutor v. Nyiramasuhuko et al.*, Case No. ICTR-99-21-T, Decision on the Prosecutor's Motions for Leave to Call Additional Witnesses and For the Transfer of Detained Witnesses, 24 July 2001.

[12] Jones & Powles, *International Criminal Practice*, Oxford University Press, 3rd Edition, para. 8.5.698.

when the case was adjourned on 25 July 2005 with his cross-examination incomplete. Not only was he given the usual caution, but it was in even stronger terms.[13]In addition, when he was allowed to go home later that day, the Witness's Unit was requested by the Prosecution to reinforce the caution given by the Trial Chamber.[14] We consider that those were reasonable measures and that, in the circumstances, additional measures were neither practical nor necessary. Moreover, the testimonies of the two witnesses were not identical and there was no indication that the caution had been contravened.

22. We find the evidence of Witness TFI-157 and Witness TFI-158 to be admissible. Accordingly, we hold that the Defence has not met its burden in that:

(i) it has failed to establish that the evidence of the two witnesses should be disallowed under Rule 95;

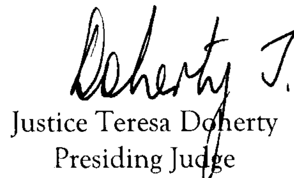
(ii) it has failed to show how the rights of the Accused have been violated under Article 17(2) and Article 17(4) of the Statute.

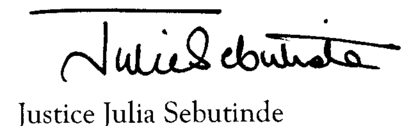
FOR THE ABOVE REASONS,

THE TRIAL CHAMBER DISMISSES the Motion.

Done at Freetown this 10th day of October, 2005.

Justice Richard Lussick


Justice Teresa Doherty
Presiding Judge


Justice Julia Sebutinde

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[13] Transcript 25 July 2005, page 76, lines 22, 23, page 77, lines 10 to 18, page 78, lines 2 to 4.
[14] Transcript 26 July 2005, page 99, lines 19 to 23.