(533.) SCSL-04-16-T (18760-18789) 18760

SPECIAL COURT FOR SIERRA LEONE

Case No. SCSL-2004-16-T

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

Registrar: Lovemore G. Munlo, SC

Date filed: 21 August 2006

THE PROSECUTOR

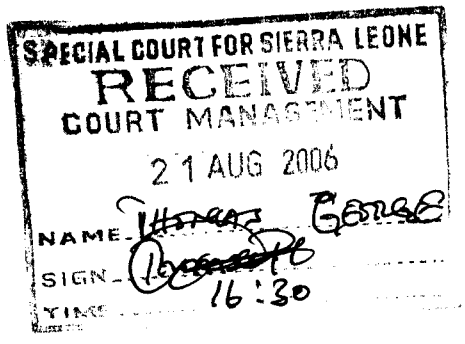
against

ALEX TAMBA BRIMA

BRIMA BAZZY KAMARA

and

SANTIGIE BORBOR KANU



PUBLIC JOINT DEFENCE RESPONSE TO PROSECUTION MOTION FOR AN ORDER RESTRICTING CONTACTS BETWEEN THE ACCUSED AND DEFENCE WITNESSES AND REQUIRING DISCLOSURE OF SUCH CONTACTS

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I INTRODUCTION

1. At the status conference of 25 July 2006 the Defence Counsel for the First Accused notified the honourable Trial Chamber of planned meetings between common defence witnesses who had not yet testified in court, and the three Accused.[1] As a response the Prosecution indicated that it "wasn't comfortable with this idea of the group of Freetown witnesses (...) agreeing in a group fashion to perhaps meet the accused".[2] The honourable Presiding Judge of this Trial Chamber pointed out to the Prosecution that he was "not sure what you [the Prosecution] can do about that, it is the Defence case, but it is certainly good cross-examination material (...)."[3]

2. However, on 27 July 2005 the Prosecution filed its "Public Urgent Prosecution Motion for an Order Restricting Contacts between the Accused and Defence Witnesses and Requiring Disclosure of Such Contacts" ("Prosecution Motion"), in which the Prosecution seeks an order prohibiting contacts between all three Accused and Defence witnesses without prior authorisation of the honourable Trial Chamber, and a further order requiring the Registrar to inform the Trial Chamber and the parties of the details of visits between defence witnesses and the Accused prior to the order.[4]

3. The Defence herewith files its response to this Prosecution Motion ("Defence Response").

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[1] *Prosecutor v. Brima, Kamara and Kanu*, Status Conference, Transcript 25 July 2006, p.4-8.
[2] *Prosecutor v. Brima, Kamara and Kanu*, Status Conference, Transcript 25 July 2006, p.13.
[3] *Prosecutor v. Brima, Kamara and Kanu*, Status Conference, Transcript 25 July 2006, p.13; explanation between brackets added by Defence.
[4] *Prosecutor v. Brima, Kamara and Kanu*, Public Urgent Prosecution Motion for an Order Restricting Contact between the Accused and Defence Witnesses and Requiring Disclosure of such Contacts, 27 July 2006, SCSL-04-16-T-522.

II PRELIMINARY: PROSECUTION MOTION ONLY APPLIES TO FACTUAL WITNESSES

4. As a preliminary note it is relevant to observe that the Prosecution Motion only refers to contact between the three Accused and the factual witnesses the Defence intends to call, and not to (prospective) contacts between the three Accused and defence expert witnesses. Therefore, this last subject falls clearly outside the Prosecution's relief sought in its motion.

III VIOLATION OF FAIR TRIAL RIGHTS OF THE ACCUSED

5. As to the substance of the motion, it is by way of first counter-argument, important to observe that restricting the contacts between the Accused and defence witnesses infringes the fair trial rights of the Accused, especially those enshrined by article 17(4)(B) of the Statute which states that "In the determination of any charge against the accused pursuant to the present Statute, he or she shall be entitled to the following minimum guarantees, in full equality (...): to have adequate time and facilities for the preparation of his or her defence." It is this right that is also laid down in article 6(3)(b) of the European Convention on Human Rights (ECHR) and article 14(3)(d) of the International Covenant on Civil and Political Rights (ICCPR).

6. A pertinent and fundamental element of the mentioned "facilities for the preparation of his or her defence" of the Accused is to have the possibility to meet potential witnesses in preparation of his defence case, to assess the value and credibility of these witnesses, and make a selection of these witness for his witness list. In the Defence view, the selection of witnesses by the Accused is part and parcel of the fair trial rights of the Accused him or herself, and not (only) ascribed to the competence of Defence counsel under article 17(4)(B) of the Statute, article 6(3)(b) ECHR and article 14(3)(d) ICCPR.

7. Furthermore, the notion that the selection of witness constitutes an important element of the right to self-representation of the Accused was extensively affirmed by the ICTY in the case of the *Prosecutor v. Milosevic*. In that case, the ICTY Appeals Chamber held that "the Trial Chamber should craft a working regime that minimizes the practical impact of the formal assignment of counsel" and that "when he is physically capable of doing so, Milosevic will take the lead in presenting his case" including "choosing which witnesses to present, questioning those witnesses before Assigned Counsel has an opportunity to do so (...), and making the basic strategic decisions about the presentation of his defence."[5] Although the Milosevic case differs from the instant case in that Milosevic sought to represent himself and the Trial Chamber imposed a defence counsel on the Accused, the ruling by the Appeals Chamber in the Milosevic case is relevant to the assessment of the underlying matter. The reason therefore is that the Appeals Chamber in the Milosevic case ascertained that a derivative of the Accused's right to self-representation is exactly the right of the Accused to choose which witnesses to present in court, thereby confirming the Defence view that the selection of defence witnesses is an inherent right of the Accused him or herself.[6]

8. As a result, granting the Prosecution Motion and thus restricting the contacts between the Accused and their (potential) defence witnesses, leads to a violation of the fair trial rights of the Accused, especially the right to prepare his or her defence and the right to choose which witnesses to present.

IV ABSENCE OF LEGAL BASIS AND UNJUST HYBRIDIZATION OF POSITION DEFENSE COUNSEL AND THAT OF THE ACCUSED VIS-À-VIS WITNESS PREPARATION

9. A second argument for dismissal of the motion originates from the following reasoning. All English and North-American case law relied upon by the

[5] ICTY Appeals Chamber, *Prosecutor v. Milosevic*, Decision on Interlocutory Appeal of the Trial Chamber's Decision on the Assignment of Defence Counsel, 1 November 2004, Case No. IT-02-54-AR73.7, par. 19.
[6] Ibidem.

Prosecution in paragraphs 7-13 of the Prosecution Motion, which cases are meant to support their request to restrict contact between defence witnesses and the Accused, only apply to the situation dealing with restrictions and prohibitions with regard to contacts in-between witnesses. Without any doubt, this concerns a situation totally different from the one raised by the Prosecution in the instant case. Furthermore, the Prosecution seems to ignore the fact that the RPE of the Special Court are only familiar with one a specific form of contact between witnesses, i.e. Rule 90(D) stating that "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."[7] In other words, in the absence of a legal basis for the request of the Prosecution in either the Statute or the RPE, the motion should be dismissed.

10. Notably, even the Prosecution recognizes the distinction and, in fact non-relevance, between the case law they present. However, it submits that "the same dangers and considerations that apply in relation to contacts between witnesses apply also in relation to contacts between an accused and Defence witnesses. If an accused discusses a case with a Defence witness, there is the danger that, consciously or unconsciously, the Defence witness may be inadvertently contaminated (...)".[8] Although this observation might be true in some instants, the Prosecution negates the differences in the position of the Accused facing trial and defending him/herself against war crime charges on the one hand and that of witnesses on the other hand, especially in view of the fair trial rights of the Accused (see further previous section on this subject).

11. Additionally, the value of the English and North-American case law relied upon by the Prosecution Motion for the case at hand is attenuated in that it was rendered in the common law context of jury trials and relatively strict rules on the

[7] The same rule is applicable before the ICTY, see Rule 90(C) of the ICTY Rules of Procedure and Evidence.
[8] Prosecution Motion, par. 14.

admission of evidence, a context considerably distinct from the nature of the trial proceedings before the Special Court composed of professional judges who "may admit any relevant evidence" (Rule 89(C) RPE).[9] The Prosecution submits in paragraph 17 of its Motion that the Trial Chamber of the Special Court is faced with similar situations as a judge who is instructing a jury with regard to the issue of witnesses that have discussed their evidence with each other. This comparison, however, is mood, as a judge instructing a jury is facing the dichotomous choice whether the evidence can be properly brought before a jury (which is clearly a matter of admission), whilst the professional judges of an international or internationalized criminal tribunal such as the Special Court for Sierra Leone is empowered to admit any relevant evidence. The emphasis in the latter proceedings is thus on the weight of the evidence to be given by a witness in view of the credibility of that same witness, a much more nuanced balancing that does not inhere and require strict standards on the admissibility of evidence.

12. Furthermore, the view presented by the Prosecution that "it is preferable for the Trial Chamber to take steps to prevent the contamination of evidence, than to take steps to deal with the consequences of possible contamination after the event"[10] is in contravention to the jurisprudence developed by and the stance taken by the Trial Chambers of the Special Court as to shifting the matter of admissibility of evidence to the ultimate stage of assessing the weight of the evidence.

13. Finally, in its Motion the Prosecution advocates a distinction between contact between defence witnesses and *Defence counsel* on the one hand, and contact between defence witnesses and the *Accused* on the other. This stance is envisioned by paragraph 2 of its motion wherein it is stated that "this motion does not seek to limit contacts between Defence witnesses and Defence counsel."[11] The position of Defence counsel can not be abstracted from that of the Accused. If one

[9] See for example the discussion in paragraph 10 of the Prosecution Motion on the admission of witness evidence after contact between potential witnesses.
[10] Prosecution Motion, par. 19.
[11] The remainder of par. 2 of the Prosecution Motion seems to bear no relevance for the order sought by Prosecution, and the Defence will therefore ignore these remarks in its Response.

accepts the right to self-representation within international criminal proceedings, as set forth by the ICTY Appeals Chamber ruling in Prosecutor v. Milosevic,[12] the same procedural powers which apply to defence counsel should also apply to the accused him or herself. Furthermore, acceptance of such a distinction in procedural position between defence counsel and the accused could ultimately lead to the consequence that defence counsel, unlike the accused, has direct access to information when it concerns witness-selection, and thus to more material than the accused. As a result, this may also affect the lawyer-client relation which is based on equity in that the accused should have the same information as the lawyer in order to defend the case.

14. In conclusion, it may be said that as the Prosecution in its Motion unjustly intertwines the position of the Defence counsel and that of the Accused vis-à-vis witness preparation, the motion should be dismissed. Additionally, no legal basis can be detected for the relief sought.

V LACK OF FOUNDATION FOR ALLEGATIONS AND POSSIBILITY TO TEST DEFENCE WITNESSES THROUGH CROSS-EXAMINATION

15. A third argument for dismissal of the motion arises from the observation that the Prosecution arguments lack factual foundation. It can be observed that no proof is provided or indications whatsoever by the Prosecution of any risk that the testimony of defence witnesses will be influenced due to contacts between prospective witnesses and the Accused. The Prosecution relies here only on the remark from the Defence counsel for the first Accused provided at the Status Conference of 25 July 2006.[13] However, this remark should be seen in light of the explanation given by this counsel the day after this Status Conference namely

[12] ICTY Appeals Chamber, *Prosecutor v. Milosevic*, Decision on interlocutory Appeal of the Trial Chamber's Decision on the Assignment of Defense Counsel, 1 November 2004, Case No. IT-02-54-AR73.7; acknowledging that defendants have a presumptive right to represent themselves before the tribunal, which decision indicates that the right to self-representation is an indispensable cornerstone of justice.

[13] *Prosecutor v. Brima, Kamara and Kanu*, Status Conference, 25 July 2006, p.4-8, and Prosecution Motion, par. 4.

that "the idea behind visiting the accused persons is, one, to explain their fate, their predicament, and, two, a summons of confidence posting. It was not to get their stories to coincide."[14]

16. Therefore, there is no objective reason to assume that such contacts are meant or could be seen as endorsing a change in the prospective testimony in court, or that the Accused will train defence witness for trial, a suggestion that is indirectly made by the Prosecution in quoting English case law on the prohibition of witness-training for criminal trials.[15] Clearly, it is far fetching to rely on the latter subject. As a matter of fact, the manner in which the Prosecution are preparing their witnesses can easily be perceived in the same way.

17. Secondly, attention should be drawn to the words of the honourable Presiding Judge of the Trial Chamber as cited in the introduction of this Defence Response Motion, Justice Lussick indicated to the Prosecution that meetings between (potential) defence witnesses and the Accused fall within the defence discretion as to their case strategy, and that Prosecution can test the defence witnesses with respect to potential meetings with the Accused through cross-examination.[16] In addition, it should be noted that there is no basis, let alone necessity, for the Defence, or even the Registrar as requested by the Prosecution, to provide the Prosecution with details as to the exact contacts between (potential) defence witnesses and the Accused. The Prosecution has the possibility to retrieve this information through cross-examination of defence witnesses,[17] since this is one of the purposes of cross-examination.

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[14] *Prosecutor v. Brima, Kamara and Kanu*, Transcript 26 July 2006, p.3. See also Prosecution Motion, par. 6 and footnote 6, which contains however a typological mistake (25 July 2006 instead of (the correct) 26 July 2006).

[15] Prosecution Motion, par. 7-8.

[16] See further par. 1 of this Defence Motion, and *Prosecutor v. Brima, Kamara and Kanu*, Status Conference, 25 July 2006, p.13.

[17] See Prosecution Motion, par. 21 and 22 for the relief sought by Prosecution in its Motion. The disclosure by the Registrar of details regarding the visits between defence witnesses and the Accused is only requested by the Prosecution regarding visits which already took place, as Prosecution seeks an order prohibiting further contacts between the Accused and any defence witness without prior authorisation of the Trial

18. In conclusion, it is the Defence view that the Prosecution Motion should be denied because of a lack of foundation and/or the Prosecution can deal with the matter through the cross-examination of the defence witnesses.

VI PRAYER

19. On the basis of the above arguments, the Defence respectfully prays the honourable Trial Chamber to dismiss the Prosecution Motion in its entirety, including the request to obtain details and an overview of any contact between the Accused and (prospective) Defence witnesses..

Respectfully submitted,
on 21 August 2006,

Geert-Jan Alexander Knoops | Kojo Graham | Andrew Daniels

Chamber. The Defence however wishes to stress that according to their view Prosecution does not need to be informed about both previous and future contacts between the Accused and any defence witness.

TABLE OF AUTHORITIES

- *Prosecutor v. Brima, Kamara and Kanu*, Public Urgent Prosecution Motion for an Order Restricting Contact between the Accused and Defence Witnesses and Requiring Disclosure of such Contacts, 27 July 2006, SCSL-04-16-T-522.
- ICTY Appeals Chamber, *Prosecutor v. Milosevic*, Decision on Interlocutory Appeal of the Trial Chamber's Decision on the Assignment of Defence Counsel, 1 November 2004, Case No. IT-02-54-AR73.7.
- *Prosecutor v. Brima, Kamara and Kanu*, Status Conference, Transcript 25 July 2006.
- *Prosecutor v. Brima, Kamara and Kanu*, Transcript 26 July 2006.