

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

Before: Judge Benjamin Mutanga Itoe, Presiding Judge
Judge Bankole Thompson
Judge Pierre Boutet

Registrar: Mr. Robin Vincent

Date filed: 25 October 2004

THE PROSECUTOR

Against

**SAM HINGA NORMAN
MOININA FOFANA
ALLIEU KONDEWA**

Case No. SCSL – 2004 – 14 – T

**MOTION FOR THE IMMEDIATE CESSATION OF VIOLATIONS OF THE
ORDERS ON PROTECTIVE MEASURES FOR WITNESSES AND FOR
CONTEMPT**

Office of the Prosecutor:

Luc Côté
James C. Johnson
Bianca E. Suciu

Defence Counsel for Sam Hinga Norman

Bu-Buakei Jabbi
John Wesley Hall
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Defence Counsel for Moinina Fofana

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Defence Counsel for Allieu Kondewa

Charles Margai
Yada Williams

I. BACKGROUND

1. On 1 April 2004, the Trial Chamber issued the “Order to the Prosecution to File Disclosure Materials and Other Materials in Preparation for the Commencement of Trial” (“the Order”). On 26 April 2004, pursuant to the Order, the Prosecution filed a “Witness List”, which included a summary of the expected testimony of each witness.
2. On 5 May 2004, the Prosecution filed a “Modified Witness List”, which included a summary of the expected testimony of each witness.
3. On 7 October 2004, the Prosecution filed a Revised Witness List containing a list of core witness that Prosecution intends to call at trial and a list of back-up witnesses that the Prosecution will only call if it deems it necessary.
4. On 19 October 2004, the Prosecution received a letter dated 13 October 2004 (the “Letter”) (see confidential annex A), drafted by the first Accused Samuel Hinga Norman and addressed to an individual who the first Accused identifies and characterizes as being a “prosecution agent” and a “member of the Prosecution team”(the “Individual”).
5. The Letter was also copied to different officers of the Special Court as well as to members of the public including, former members of the Kamajor society and the press.
6. Protective measures for witnesses and victims were granted by the Trial Chamber in this case in its Decision on Prosecution Motion for Immediate Protective Measures for Witnesses (the “Decision on Protective Measures”) dated 8 June 2004.

II. PROSECUTOR’S MOTION

7. The Prosecution brings this motion under Rules 54 and 77 of the Rules of Procedure and Evidence of the Special Court (the “Rules”) to pray the Trial Chamber to order the first Accused to cease any violation of the Decision on

Protective Measures; to order any necessary measures to prevent the first Accused from committing such violations in the future; and finally if it so finds, to declare the first Accused in contempt for intimidation of a potential witness or make any appropriate ruling under Rule 77 (C).

III. PROSECUTOR'S SUBMISSIONS

A. The first Accused has acted in violation of the Decision on Protective Measures

8. The Prosecution submits that the Letter dated 13 October 2004 drafted and transmitted by the first Accused to different members of the public including the press amounts to a violation of the Decision on Protective Measures.
9. The Decision on Protective Measures granted by the Trial Chamber in this case, imposes a series of strict obligations on the Defence concerning the protection of Prosecution witnesses.
10. As it has been repeatedly stated by our sister tribunals, accused persons are personally subject to the terms of decisions on protective measures and any violation thereof is a serious matter.¹
11. Order c) of the Decision on Protective Measures clearly stipulates that "the defence shall not make an independent determination of the identity of any protected witness or encourage or otherwise aid any person to attempt to determine the identity of any such persons".
12. The Prosecution submits that the Letter written by the first Accused represents a clear attempt to independently and publicly identify a Prosecution witness. In his Letter the first Accused publicly qualifies the addressee of the Letter as being an "agent" or a "member" of the Prosecution team. The terms of the Letter unequivocally attest that the first Accused has actively engaged, via a third person, in monitoring the movements of the respective person. The Letter goes as far as identifying the specific car and registration number in which the

¹ See *Prosecutor v Gatete*, "Decision on Prosecution Request for Protection of Witnesses", ICTR-2000-61-I, 11 February 2004, para 8; *Prosecutor v Aleksovski*, "Judgment on Appeal by Anto Nobile against Finding of Contempt", 30 May 2001, para 20.

Individual is alleged to have travelled on one particular occasion.

13. The Prosecution expresses grave concerns and denounces the first Accused' involvement in trying to identify Prosecution witnesses and asserts that this conduct is a flagrant and direct breach of order c) of the Decision on protective Measures.
14. Furthermore, the Prosecution stresses that disclosure to the public and the media of the identity of a person who the first Accused believes to be a potential Prosecution witness is tantamount to circumventing the protection granted by order e) of the Decision on Protective Measures. Pursuant to order e) the Defence shall not disclose the identity of Prosecution witnesses and victims to the public and the media.
15. The Prosecution submits that whether the first Accused's subjective determination of a Prosecution witness is indeed correct or not in the present case, is irrelevant. In light of the recognized sensitivity of the CDF trial and given the serious security threats that exist against Prosecution witnesses or potential Prosecution witnesses, the public disclosure by the first Accused of the identity of a person he believes to be a Prosecution witness and identifies as being a Prosecution witness amounts to evading the scope and objective of the Decision on Protective Measures.²
16. The Prosecution submits that the first Accused acted with reckless indifference towards an order of the Trial Chamber which prohibits the public disclosure of the identity of witnesses.³
17. As the Court in *Aleksovich* stated "[a] decision of the Trial Chambers relating to the protection of witnesses [...] is of the utmost importance not only for the lives of the witnesses but also for the operations of the Tribunal"⁴. A violation

² The terms of the Letter, particularly the use of the words "agent" of the Prosecution and "member of the Prosecution team" is a substantial indication of the Accused' belief that the addressee of the Letter is a Prosecution witness or a potential Prosecution witness.

³ See *Prosecutor v Nahimana*, "Order concerning Prosecution witness GO's complaint regarding contact by the Defence team for Ferdinand Nahimana", 11 June 2001. In this case the Defence made investigations at a "safe house" where a protected witness was staying. The trial Chamber ordered the Defence to refrain in the future from engaging in any such activity which would endanger the safety of a protected witness. The Trial Chamber expressed that Defence's conduct was inappropriate and stated that the Defence should have asked the Trial Chamber, the Prosecutor, or the Witness and Victim's unit for assistance and direction.

⁴ See *Prosecutor v Aleksovski*, *Supra* note 1.

of a Court order “whether intentional or not, cannot be tolerated by the Chamber.”⁵

18. The Prosecution asserts that deciding otherwise would render the protection mechanism it implements ineffective. It would translate into allowing an accused person to make independent assessments of who potentially is a Prosecution witness and expose such individuals publicly without being able to sanction such a conduct under the Decision on Protective Measures.

B. The first Accused is engaging in a conduct that is aimed to intimidate potential witnesses

19. Rule 77 the Rules of Procedure and Evidence governs contempt of the tribunal and reads as follows:

“(A) The Special Court, in the exercise of its inherent power, may punish for contempt any person who knowingly and wilfully interferes with its administration of justice, including any person who:

[...]

(iv) threatens, intimidates, causes any injury or offers a bribe to, or otherwise interferes with, a witness who is giving, has given, or is about to give evidence in proceedings before a Chamber, or a potential witness;

(B) Any incitement or attempt to commit any of the acts punishable under Sub-Rule (A) is punishable as contempt of the Special Court with the same penalties.

[...]

20. The Prosecution submits that the Letter drafted by the first Accused constitutes clear *prima facie* evidence of intimidation and interference or attempted intimidation or interference with a person the first Accused clearly believes is a potential Prosecution witness.

21. As the Letter attests, the first Accused knew or had reasons to believe or suspect

⁵ *Prosecutor v Kajelijeli*, “Decision on Kajelijeli’s Motion to hold Members of the Office of the Prosecutor in Contempt of the Tribunal (Rule 77(C))”, 15 November 2002, para 14.

that the addressee of the Letter is a potential Prosecution witness. The Prosecution submits that the first Accused nonetheless knowingly and wilfully engaged in interfering with and intimidating such person, as the language of the Letter clearly establishes:

"[...] I am aware of the fact that you are paying constant visits to the detention centre as an Agent of the (Prosecutor?) or (Prosecution?) like one day some time in Sept; 2004 when you arrived at the Detention Centre in a Maroon Jeep- Reg. No.[omitted]"

"Therefore, even inspite (sic) of your being a Prosecution AGENT, you are requested to please be in readiness to be available at any time the CDF Defence Team considers your suitability to testify in court [...]"

" [...] your son became a member of the RUF with your consent (he is still a member of the RUF) and your son carried out lootings in Bo Town and environs and stored those looted properties in your house; some of the loots are still suspected to be in your possession. (I hope that on receipt of this letter, you may not be tempted to dispense with all of them). "

"You [omitted] should not be a paid Agent for the Prosecution and I hope the Prosecution is not paying you for service(s) rendered."

22. The Prosecution submits that the first Accused' intention to intimidate or interfere with someone he believes to be a potential Prosecution witness is further ascertained by the first Accused' dissemination of the Letter to the public, former members of the Kamajor society and the press.
23. There is a widely recognized opposition by former Kamajors and loyal supporters of the Kamajor society to the trials of the former CDF leaders. The Trial Chamber of this Court has also repeatedly highlighted the volatile security

situation of Prosecution witnesses in this case and acknowledged that “the CDF holds a structure actively organized within the country and still capable of substantial intimidations of witnesses”.⁶

24. In such a context, the disclosure by the first Accused of the identity of a potential Prosecution witness to the press and former Kamajors members can only demonstrate his intention to intimidate, interfere with, frighten, deter a potential witness from testifying or expose him to serious security risks. The Prosecution submits that an act of intimidation may be expressed or implied by the circumstances and the test is an objective one based upon what a reasonable person would perceive.⁷
25. Based on the above arguments, the Prosecution submits that it has made a prima facie showing that the first Accused has wilfully attempted to obstruct justice by committing the offence created in Rule 77 (A) (iv).

PRAYER

26. Based on the forgoing, the Prosecution prays the Court to:
 - a) issue an order requesting the first Accused to immediately cease any violation of the Decision on Protective Measures;
 - b) to order any necessary measures to prevent the first Accused from committing such violations in the future;
 - c) if it so finds, to declare the first Accused in contempt for intimidation of a potential witness or make any appropriate ruling under Rule 77.

⁶ See Decision on Protective Measures, para 34.

⁷ Given the silence of the international jurisprudence as to the specific test that shall apply in the case of content for intimidation of a potential witness, the Prosecution therefore refers for guidance to cases from national common law jurisdictions. See *R v McCraw*, Supreme Court of Canada, 4 June 1991, [1991] 3R.C.R. 72 para, 27; *R v DaSilva*, British Columbia Provincial Court, 21 May 2002, 2002 Carswell BC 1154, para 49,50, 84; and *R v Patrascu*, Court of Appeal (Criminal Division), 14 October 2004, [2004] EWCA CRIM 2417, para . 18.

Done in Freetown, 25 October 2004.

For the Prosecution,



Luc Côté, Chief of Prosecutions

James C. Johnson, Senior Trial Counsel

LIST OF ANNEXES**Annex A:**

Letter dated 13 October 2004 (filed confidential separate cover).

Annex B:

Prosecution's index of authorities.

Annex B

PROSECUTION'S INDEX OF AUTHORITIES

- 1) *Prosecutor v Gatete*, “Decision on Prosecution Request for Protection of Witnesses”, ICTR-2000-61-I, 11 February 2004;
- 2) *Prosecutor v Aleksovki*, “ Judgment on Appeal by Anto Nobile against Finding of Contempt”, 30 May 2001;
- 3) *Prosecutor v Nahimana*, “Order concerning Prosecution witness GO’s complaint regarding contact by the Defence team for Ferdinand Nahimana”, 11 June 2001;
- 4) *Prosecutor v Kajelijeli*, “Decision on Kajelijeli’s Motion to hold Members of the Office of the Prosecutor in Contempt of the Tribunal (Rule 77(C))”, 15 November 2002;
- 5) *R v McCraw*, Supreme Court of Canada , 4 June 1991, [1991] 3R.C.R. 72 para, 27; *R v DaSilva*, British Columbia Provincial Court, 21 May 2002, 2002 Carswell BC 1154.

These authorities may be found on the following website: www.westlaw.com.

- 6) *R v Patrascu*, Court of Appeal (Criminal Division), 14 October 2004, [2004] EWCA CRIM 2417.

This authority may be found on the following website: www.lexis.com.



SPECIAL COURT FOR SIERRA LEONE
JOMO KENYATTA ROAD • FREETOWN • SIERRA LEONE

Court Management Section – Court Records

CONFIDENTIAL DOCUMENT CERTIFICATE

Pursuant to article _____ of the Directive for the Registry, Court Management Section, this certificate replaces the following confidential document which has been filed in the *Confidential File*.

Case Name: The Prosecutor vs. **NORMAN, FOFANA + KONDEWA**
Case Number: SCSL- **04 - 14 - T**
Document Index Number: **234**

Document's Date: **25.10.04**
Filing Date: **25.10.04**
Number of Pages: **3** (9821 - 9823)

Document Type:

- ☐ Affidavit
☐ Decision
☐ Order
☐ Indictment
☐ Motion
☐ Correspondence: To:
From:

☒ Other **ANNEX A: LETTER DATED 13TH OCTOBER 2004**

Document Particulars:

Name of Officer: **N. GIBSON**
Signature: 