570

SCSL-04-14-T-570
(15006 - 15012)

15006

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

Before:	Hon. Justice Pierre Boutet, Presiding Judge Hon. Justice Bankole Thompson Hon. Justice Benjamin Mutanga Itoe
Registrar:	Mr. Lovemore Munlo SC
Date filed:	6 March 2006

THE PROSECUTOR **Against** **Samuel Hinga Norman**
Moinina Fofana
Allieu Kondewa

Case No. SCSL-04-14-T

PUBLIC

PROSECUTION RESPONSE TO THIRD ACCUSED'S REQUEST FOR LEAVE TO RAISE EVIDENTIARY OBJECTIONS DURING PROSECUTION'S CROSS EXAMINATION OF WITNESSES NOT CALLED BY HIM

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I. INTRODUCTION

1. The Prosecution files this consolidated response to the "Third Accused's Request for Leave to be at Liberty to Raise Evidentiary Objections During Prosecution's Cross Examination of Witnesses Not Called by Him," filed on 24 February 2006 (the "**Kondewa Motion**")[1] and to the "Fofana Request for Leave to Raise Evidentiary Objections," filed on 27 February 2006 (the **"Fofana Motion")**.[2] These two motions are referred to below collectively as the "**Defence Motions**".
2. The Kondewa Motion seeks the leave of the Trial Chamber for the Kondewa Defence to raise evidentiary objections during the Prosecution's cross-examination of witnesses not called by Kondewa. The Fofana Motion states merely that the Fofana Defence "associates itself with the submissions contained in" the Kondewa Motion. The Prosecution understands the Fofana Motion to mean that the Fofana Defence is similarly seeking leave to raise evidentiary objections during the Prosecution's cross-examination of witnesses not called by Fofana.
3. For the reasons given below, the Prosecution does not oppose the Defence Motions.

II. ARGUMENTS

4. In a joint trial the testimony of any witness, and the production of any exhibit, may impact on any or all of the accused. That is to say, all of the evidence adduced throughout the trial can be applied in relation to each of the accused. This is consistent with the principle that once a witness has taken the solemn declaration pursuant to Rule 90, that witness becomes a witness of truth before the court and is not strictly a witness for either the Prosecution, or for one Accused or another.[3] Regardless of which particular party calls a witness, the testimony of that witness is evidence that the Trial Chamber will take into account in determining the truth in the case generally. For example, in *Prosecutor v*

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[1] *Prosecutor v. Norman, Fofana, Kondewa*, SCSL-2004-14-T-564, "Third Accused's Request for Leave to be at Liberty to Raise Evidentiary Objections During Prosecution's Cross Examination of Witnesses Not Called by Him", 24 February 2006.

[2] *Prosecutor v. Norman, Fofana, Kondewa*, SCSL-2004-14-T-565, "Fofana Request for Leave to Raise Evidentiary Objections", 24 February 2006.

[3] See *Prosecutor v. Kordić and Čerkez*, "Decision on Prosecutor's Motion on Trial Procedure", Case No. IT-95-14/2-PT, T. Ch. III, 19 March 1999; *Prosecutor v. Kupreškić et al.*, "Decision on Communication Between the Parties and their Witnesses", Case No. IT-95-16-T, T. Ch. II, 21 September 1998.

Delalić et al.,[4] one accused in a joint trial asked for the judgment against him to be rendered at the close of his defence case, before the Trial Chamber proceeded to hear the defence case of his co-accused. In rejecting the application, the ICTY Trial Chamber noted that "in a joint trial, evidence at the trial concerns all the co-accused and evaluation of such evidence is not necessarily restricted to the evidence of the one accused whose evidence is in issue".[5] The Trial Chamber further explained in that case:

> There are reasons of undoubted public interest why joint offences should be tried jointly. Savings in expense and time are a factor of importance. It is also desirable, and in the interests of transparent justice, that the same verdict and the same treatment should be returned against all the persons jointly tried with respect to the offences committed in the same transaction. It is also to avoid the discrepancies and inconsistencies inevitable from the separate trial of joint offenders. Hence, the principles of administration of criminal justice have always accepted the practice of trying joint offenders jointly irrespective of the attendant inevitable minimum prejudices.[6]
> [...]
> A joint trial avoids or at least ameliorates the discrepancies and inconsistencies inevitable from the separate trial of joint offenders.[7]

5. As another Trial Chamber of the ICTY has similarly explained:

> The Trial Chamber considers that it would be contrary to the interests of justice were only half of the whole picture to be exposed in each trial if separate trials are ordered. Should, for example, Brđanin attempt to blame Talić ... it is in the interests of justice that Talić should be able to give evidence refuting that attempt. Similarly, it is in the interests of justice that Brđanin should be able to give evidence refuting any attempt by Talić to place the blame on Brđanin. Again, the Trial Chamber will be very alive to the "personal interest" which each of the accused has in the matter.

[4] *Prosecutor v Delalć et al.*, IT-96-21-T, "Decision on the Motion by Defendant Delalić Requesting Procedures for Final Determination of the Charges Against Him", T. Ch, 1 July 1998, para. 46.
[5] Ibid, para. 46. Similarly, in *Prosecutor v Simić et al.*, IT-95-9-T, Transcript, 7 April 2003, the T. Ch. stated: "As this is a joint trial, the evidence on record would be considered with respect to all the accused". See also *R. v. Vander-Beek* [1971] S.C.R. 260 at para. 5 where Hall J. states: "In such a situation where two or more accused are jointly indicted, the case is not concluded until all the evidence is in. All the testimony heard throughout the trial is evidence for or against each accused." See also: Justice David Watt in *Watt's Manual of Criminal Evidence*, The Examination of Witnesses, Preliminary Matters § 18.04: "Any evidence adduced in defence by *any* accused will be considered in relation to all at the end of the case."
[6] Ibid., para. 35, 49.
[7] Ibid., para. 49.

> ... There is, moreover, a fundamental and essential public interest in ensuring consistency in verdicts. Nothing could be more destructive of the pursuit of justice than to have inconsistent results in separate trials based upon the same facts. The only sure way of achieving such consistency is to have both accused tried before the same Trial Chamber and on the same evidence – unless (as Rule 82(B) requires) there is a conflict of interests which might cause serious prejudice to an accused, or separate trials are otherwise necessary to protect the interests of justice. Neither matter has been established by Talić in this case.[8]

6. In other words, one of the principal reasons for having a joint trial of several accused, rather than separate trials, is to ensure consistency of verdicts, by enabling all of the evidence in the case to be considered in relation to each of the accused, to the extent that the evidence is relevant to each of the accused. This rationale has also been recognised by the Appeals Chamber of the ICTY in a recent decision.[9]
7. Given that all of the evidence in the case can be taken into account in relation to each accused, it follows that each accused should in principle have the right to raise relevant evidentiary objections during the Prosecution's cross-examination of Defence witnesses, regardless of which particular Accused called the witness in question. It would be for the Trial Chamber to rule upon any such objection in the normal way.
8. The Prosecution notes that in a joint trial, evidence may be elicited on behalf of one accused that would be inadmissible if tendered by the Prosecution in a proceeding where only one person was on trial. For example, in a case where two accused each accuse the other of being responsible for the offence for which they are charged, one accused may adduce evidence of propensity, extrinsic misconduct, or general bad character of the other accused to enhance the probability that the other accused is more likely to have committed the subject offence.[10] One accused, therefore, should be permitted to object to evidence either led by another accused or elicited in the cross-examination of a co-accused's witness by the Prosecution, if it affects that accused's rights, subject to the usual constraints.

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[8] *Prosecutor v Brđjanin and Talić*, IT-99-36-PT, "Decision on Motions by Momir Talić for a Separate Trial and for Leave to File a Reply", T. Ch, 9 March 2000, paras. 30-31.

[9] *Prosecutor v Pandurević and Trbić*, IT-05-86-AR73.1, "Decision on Vinko Pandurević's Interlocutory Appeal Against the Trial Chamber's Decision on Joinder of the Accused", App. Ch, 24 January 2006, para. 23.

[10] See *R v. Randall* [2003] UKHL 69 (United Kingdom (England and Wales): House of Lords). Note the Canadian and Australian cases cited in that case at paragraph 34; *R. v. Suzack*, 2000 CanLII 560 (Ontario Court of Appeal).

III. CONCLUSION

9. The Prosecution does not oppose each of the Accused being granted leave to raise evidentiary objections during the Prosecution's cross-examination of Defence witnesses, even where the witness in question was not called by the Accused making the objection. Any objection so raised by any of the Accused would be ruled upon by the Trial Chamber in the usual way.

Filed in Freetown,

6 March 2006

For the Prosecution,

James C. Johnson
Chief of Prosecutions

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Trial Attorney

INDEX OF AUTHORITIES

A. MOTIONS, ORDERS, DECISIONS AND JUDGMENTS

1. *Prosecutor v. Norman, Fofana, Kondewa*, SCSL-2004-14-T-564, "Third Accused's Request for Leave to be at Liberty to Raise Evidentiary Objections During Prosecution's Cross Examination of Witnesses Not Called by Him" 24 February 2006.

2. *Prosecutor v. Norman, Fofana, Kondewa*, SCSL-2004-14-T-565, "Fofana Request for Leave to Raise Evidentiary Objections" 24 February 2006.

3. *Prosecutor v. Kordić and Čerkez,* "Decision on Prosecutor's Motion on Trial Procedure", Case No. IT-95-14/2-PT, T. Ch. III, 19 March 1999.

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4. *Prosecutor v. Kupreškić et al.*, "Decision on Communication Between the Parties and their Witnesses", Case No. IT-95-16-T, T. Ch. II, 21 September 1998.

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5. *Prosecutor v Delalic et al.*, IT-96-21-T, "Decision on the Motion by Defendant Delalic Requesting Procedures for Final Determination of the Charges Against Him", Trial Chamber, 1 July 1998.

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6. *Prosecutor v Simic et al.*, IT-95-9-T, Transcript, 7 April 2003.

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7. *R. v. Vander-Beek* [1971] S.C.R. 260.

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8. *Prosecutor v Brđjanin and Talić*, IT-99-36-PT, "Decision on Motions by Momir Talić for a Separate Trial and for Leave to File a Reply", Trial Chamber, 9 March 2000.

   http://www.un.org/icty/brdjanin/trialc/decision-e/00309ST212150.htm

9. *Prosecutor v Pandurević and Trbić*, IT-05-86-AR73.1, "Decision on Vinko Pandurević's Interlocutory Appeal Against the Trial Chamber's Decision on Joinder of the Accused", Appeals Chamber, 24 January 2006.

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10. *R v. Randall* [2003] UKHL 69 (United Kingdom (England and Wales): House of Lords).

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11. *R. v. Suzack*, 2000 CanLII 560 (Ontario Court of Appeal).

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B. OTHER:

12. Justice David Watt, *Watt's Manual of Criminal Evidence*, The Examination of Witnesses, Preliminary Matters § 18.04.

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