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SCSL-04-14-T
(18326 - 18335)

18326

SPECIAL COURT FOR SIERRA LEONE

The Trial Chamber 1

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

Registrar: Mr. Lovermore G. Munlo, SC

Date: 6th June, 2006

PROSECUTOR **Against** **Sam Hinga Norman**
Moinina Fofana
Allieu Kondewa

Case No. SCSL-04-14-T
PUBLIC

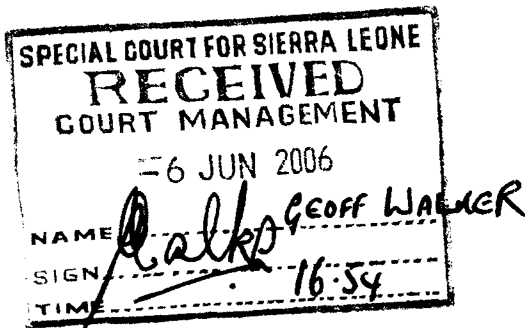
NORMAN MOTION TO DEFER FURTHER EVIDENCE AND CLOSING OF HIS CASE TO SEPTEMBER-DECEMBER TRIAL SESSION

Office of the Prosecutor
Desmond de Silva, QC
James C. Johnson
James Kamara

Court AppointedCounsel for Sam Hinga Norman
Dr. Bu-Buakei Jabbi
John Wesley Hall Jr.
Alusine Sani Sesay

Court Appointed Counsel for Moinina Fofana
Michiel Pestman
Arrow J. Bokarie
Victor Koppe

Court Appointed Counsel for Allieu Kondewa
Charles Margai
Yada Williams
Ansu Lansana
Susan Wright.



INTRODUCTION

Reliefs Being Sought.

1. By this application pursuant to Rules 54, 73(A) and (B), and 73 ter (E) of the Rules of Procedure and Evidence of the Special Court for Sierra Leone ("the Rules"), the 1st Accused herein seeks the leave of Trial Chamber 1 ("the Court") to proceed as follows in respect of further presentation and closing of evidence on his behalf and in respect of him, to wit:

   a). to defer the calling of further witnesses in his defence to the September-December 2006 Trial Session, especially witnesses Nos. 1, 21 and 26 on the Norman Further Filing, SCSL-04-14-T-587, RP 15161 – 18196, dated 7 April 2006:
      (i). H. E. President Alhaji Dr. Ahmad Tejan Kabbah,
      (ii). Maj-Gen Abdul One Mohamed,
      (iii). Mr. J. A. Carpenter, Clerk of the Parliament of Sierra Leone;
   and that their identifying information and detailed summaries of their respective witness statements be filed not later than 14 days before each witness gives his own testimony;

   (b). to call two more witnesses in the said next trial session, one in respect of the so-called Moyamba Crime Base and another in respect of the activities in exile of President Alhaji Dr. Ahmad Tejan Kabbah concerning the conduct and control of kamajors and ECOMOG between May 1997 and March 1998, whether from either of the lists of the Norman Further Filing of 7/04/06 aforesaid or from elsewhere outside of them, if need be, and the identifying information and detailed summary of the relevant witness statement of each of them to be filed at least 21 days following the grant of the present order;

   c). to file any and all Rule 92 bis information or evidence in respect of his case not later than 21 days after his cross-examination, if any, of all witnesses to be called on behalf of the other co-accused persons herein;

   d). to close his case after presentation of all the evidence in his defence, including any cross-examination on his behalf of any witnesses to be called on behalf of the other co-accused persons herein, any rejoinder evidence by or in respect of all co-accused persons herein, and any evidence ordered by the Court itself.

2. It is accordingly hereby submitted that, in all the circumstances of the current state of evolution of the testimonial defence evidence, the foregoing rulings or reliefs are appropriate and necessary for the conduct of the defence of the 1st Accused; and are also in the interests of fairness and justice on the whole, without being a source of undue delay in the trial of any of the co-accused persons herein.

Present Testimonial State of Play.

3. In the two trial sessions so far since the opening of the defence case, witnesses have testified so far only on behalf of the 1st Accused. The Norman Further Filing of 7/04/06 aforesaid, submitted two lists of further witnesses to be calledon his behalf, A Core List of 27 names and a Back-Up List of 43 names, with summaries of their respective witness statements. As at 2 June 2006, in addition to 8 witnesses who had already testified in defence of the 1st Accused in the preceding trial session, another 20 witnesses have testified from these two lists during the present trial session, amounting in all to 28 witnesses, whose combined evidence covers virtually all the counts in the indictment and almost all the major alleged crime bases, with the exception of one or two areas within the so-called Moyamba Crime Base.

4. However, certain factors which have not proved to be entirely within the control of the Norman Defence Team have tended to militate against the realisation of a relatively complete haul of testimonial evidence on behalf of the 1st Accused as at the present time. **Firstly**, notwithstanding diligent witness tracing by the Team and fairly effective logistical support from the Special Court system generally over the past several months, a few witnesses considered to be crucial to the Norman defence have remained elusive and ultimately untraceable, thereby leaving some gaping lacunae in the state of the evidence adduced so far, and which ought to be filled out in the interest of justice to the 1st Accused and, indeed, of his other two co-accused. A few weeks after the closing of the present trial session would be enough to finally uncover such witnesses so as to select from among them the one who will clinch the present gaps in the evidence.

5. **Secondly,** an absolutely crucial and indispensable witness No. 21 on the Core List, Maj-Gen. Abdul One Mohamed, lives in Nigeria and has done so outside the territorial jurisdiction of the Special Court since the commencement of the Civil Defence Forces (CDF) trial proceedings. A legal assistant of the Norman Defence Team has had to travel twice to Nigeria within the last few months in order to secure the availability of this would-be witness and some extremely valuable evidentiary material that is known to be in his custody; and he returned from the second visit over the past week-end. The said witness is now reported to have indicated that, because of reasons of health and a pending treatment outside of Africa, he is unable to avail himself for testifying in the current trial session; but that he will be available in September 2006, so long as it is on behalf of the 1st Accused primarily that he will be required to testify. There is a high probability that he may not be keen or disposed to avail himself if he will not be testifying directly in the defence of the 1st Accused.

6. **Thirdly,** the availability of by far the most crucial prospective witness for the 1st Accused, other than himself, of course, has had to be subjected to a subpoena application within the Rules. The Court's decision thereon remains outstanding as at now; but it is already clear that the said witness, His Excellency the President of Sierra Leone, Alhaji Dr. Ahmad Tejan Kabbah, who was President and Minister of Defence throughout the period of the temporal jurisdiction of the Special Court, will no longer be available to testify during the current trial session, irrespective of when the subpoena decision is now delivered by the Court. As the testimony of this witness is considered to be most crucial and indispensable for the effective defence of his Deputy Minister of Defence during the relevant period, without

which evidence justice could well remain elusive for the latter, it is ardently hoped that the witness will be available to testify early in the September-December 2006 trial session, with the current trial session due to close down on 16June 2006.

7. It should also be noted that as both the 2nd and 3rd Accused herein will not begin to call witnesses in their respective defences until the September-December 2006 trial session, the cross-examination of those witnesses by or on behalf of the 1st Accused cannot be done until then. And the case of the 1st Accused will necessarily be partly made through those cross-examinations, just as the said other co-accused have sedulously sought to elicit some of their own respective defences through their cross-examination of witnesses who have testified so far on behalf of the 1st Accused. Those cross-examinations are being eagerly awaited by Court Appointed Counsel for the 1st Accused.

SUBMISSIONS

Closing of Case by 1st Accused?

8. It is understandable that, as at the opening of the case of the 1st Accused at the beginning of the last trial session, it would have been anticipated that he might have been able to close his case before the current trial session would draw to a close. Accordingly, the Court has on occasion put the Norman Defence Team on notice in that regard. More recently, for instance, during the proceedings of 29 May 2006, the Presiding Judge pointedly raised the issue from page 19 line 21 to page 21 line 24 inclusive of the Transcript. He said, among other things, "we have systematically told you that we clearly intend to have you to close your case in this session. Not next session, this session" (page 20, lines 12 -14). With that in view, the Court was contemplating, with respect to the Nigerian General as a defence witness, that the 1st Accused could forego calling him directly in his defence but leave him to be directly called in September by the 2nd Accused and opt instead to use the General only for the purposes of cross-examination. As the Presiding Judge emphatically put it:

> "Obviously if this witness is not available now, and the second accused have clearly indicated that this witness is on their witness list, ... Then this witness will come in September if he says he is available to come and then you can cross-examine him for your own purposes then. That is certainly an option that is available to you.... I would suggest that you look at it very seriously as an option" (p. 20. lines 18 – 24).

In response thereto, Counsel for the 1st Accused merely chose at the time to draw the Court's attention to some relevant Rules:

> "I would like to draw attention of the Court to the following Rules in respect of the timing of the closing of the evidence of the first accused. The said rules are as follows: Rule 82(A), Rule 85(A) and Rule 86(A)..... Yes, indeed, My Lord. But when I will be required to talk about both the option in respect of General One, and the general question of the closing of the evidence of the first accused, I want to begin with those rules I have just cited, My Lord, among others" (page 21, lines 12 – 23).

Applicable Provisions.

9. On the issue of when a co-accused in a joint trial upon a consolidated indictment may close his/her case or evidence, the following material provisions of the Statute of the Special Court ("the Statute") and of the Rules are pre-eminently relevant:

a). Article 17(1) & (2); 17(4)(b),(c) & (e) of the Statute

"1. All accused shall be equal before the Special Court.

"2. The accused shall be entitled to a fair and public hearing ....

(......)

"4. 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:

(.....)

(b). To have adequate time and facilities for the preparation of his or her defence .....;

(c). To be tried without undue delay;

(.....)

(e). To examine, or have examined, the witnesses against him or her and to obtain the attendance and examination of witnesses on his or her behalf under the same conditions as witnesses against him or her"

b). Rule 2(B)

"In the Rules, the masculine shall include the feminine and the singular the plural, and vice-versa".

c). Rule 26 bis

"The Trial Camber and the Appeals Chamber shall ensure that a trial is fair and expeditious and that proceedings before the Special Court are conducted in accordance with the Agreement, the Statute and the Rules, with full respect for the rights of the accused ...."

d). Rule 48(A)

"Persons accused of the same or different crimes committed in the course of the same transaction may be jointly indicted and tried".

e). Rule 49

"Two or more crimes may be joined in one indictment if the series of acts committed together form the same transaction, and the said crimes were committed by the same accused".

f). Rule 82(A)

"In joint trials, each accused shall be accorded the same rights as if he were being tried separately".

g). Rule 85(A) & (B)

"(A). Each party is entitled to call witnesses and present evidence. Unless otherwise directed by the Trial Chamber in the interests of justice, evidence at the trial shall be presented in the following sequence:
(i). Evidence for the prosecution;
(ii). Evidence for the defence;
(iii). Prosecution evidence in rebuttal, with leave of the Trial Chamber
(iv). Evidence ordered by the trial Chamber.

"(B). Examination-in-chief, cross-examination and re-examination shall be allowed in each case….."

h). Rule 86(A)
"After the presentation of all the evidence, the Prosecutor shall and the defence may present a closing argument."

i). Rule 87(A)
"After presentation of closing arguments, the Presiding Judge shall declare the hearing closed, and the Trial Chamber shall deliberate in private……."

j). Rule 89(C)
"A Chamber may admit any relevant evidence."

k). Rule 92 bis
"(A). A Chamber may admit as evidence, in whole or in part, information in lieu of oral testimony.
"(B). The information submitted may be received in evidence if, in the view of the Trial Chamber, it is relevant to the purpose for which it is submitted and if its reliability is susceptible of confirmation.
"(C). A party wishing to submit information as evidence shall give 10 days notice to the opposing party. Objections, if any, must be submitted within 5 days."

Applications

10. The joint nature of the CDF trial is perhaps the most basic factor for the application of the foregoing provisions in present circumstances. The three co-accused are not merely being jointly tried and jointly indicted in terms of Rule 48(A); they are also jointly charged in each of the counts in the indictment, thereby greatly heightening the cohesivity, interdependence and virtual indivisibility of the evidence both to be adduced against them and also to be adduced in their respective defences. This evokes the provisions on the equality of the co-accused before the Court and the entitlement of each to the same treatment meted or to be meted out to the other co-accused as incidents of the trial process: see Article 17(1) and (4) of the Statute and Rules 82(A) and 85(A) & (B). So also their entitlement to call witnesses each in their own defence and to cross-examination not only of prosecution witnesses but also of each other's defence witnesses as part of the presentation of their respective defences: see Article 17(4)(b) & (e) and Rules 2(B), 26 bis, 82(A), and 85(A) & (B), for instance. Now, if the 3rd Accused, for instance, is entitled to cross-examine the witnesses of the 2nd Accused before he even opens his defence (let alone before he closes it),

there would seem to be a prejudicial inequality of treatment and of benefiting from the relevant rights if either the 1st or 2nd Accused are made to close their respective cases before either may cross-examine the witnesses of the 3rd Accused. And there is the definitive Rule 86(A) that closing arguments come "After the presentation of **all** the evidence" (Emphasis added). Is this not suggesting that the different modes and stages of presentation of evidence in Rule 85(A), for instance, including even rebuttal and rejoinder evidence and any evidence ordered by the Trial Chamber, should al be garnered in before any party may close his case?

11. The main points of an ICTY Trial Chamber decision in *Prosecutor v. Delalic, Mucic & Landzo*[1], entitled "Decision on the Motion by Defendant Delalic Requesting Procedures for Final Determination of the Charges Against Him" and dated 1 July 1998, as set out in paragraphs 39 – 42 thereof, are most instructive in the application of the various rules involved here:

> "39. It is relevant to point out that the purport of Sub-rule 82(A) is to vest in the accused in a joint trial all the rights of a single accused on trial before a Trial Chamber. **Accordingly, the accused jointly tried does not lose any of the protection under Articles 20 and 21 of the Statute, or his rights under Rules 83, 84, 85, 86 and 87 of the Rules.**
>
> "40. .... The order for presentation of evidence remains the same as in Rule 85, as with the closing arguments after the presentation of all the evidence (Rule 86).
>
> "41. It is in Rule 86 that a seeming difficulty arises with respect to the meaning of the joint trial of accused persons. But this difficulty disappears when subjected to the definition of Sub-rule 2(B) applicable to all the Rules, which says that 'In the Rules, the masculine shall include the feminine and the singular the plural, and vice-versa.' **If so construed an accused person in a joint trial, though vested individually with all the rights of an accused person in a single trial, is subject to the collective rights of the group in the overall interests of justice for ensuring an expeditious and fair trial.**
>
> "42. Accordingly, an accused in a joint trial will make his opening statements before the presentation of evidence and his closing arguments after the presentation of all the evidence (Rule 86). **The presentation of all the evidence in Rule 86 in a joint trial means all evidence on the part of the prosecution and the Defence of each accused, as a whole. It is not confined to all the evidence of each accused person in the Defence. When Rule 87 refers to both parties completing their presentation of the case, it means the Prosecution and all the accused persons as a Defence in a joint accused trial.** The Presiding Judge shall declare the hearing closed and the Trial Chamber shall deliberate in private. **It is not intended in a multiple accused trial to close the case for each accused person by**

[1] P. v. Delalic, Mucic & Landzo: Decision on the Motion by the Defendant Delalic Requesting Procedures for Final Determination of the Charges Against Him, 1 July, 1998

conducting a separate closing address for this purpose (Rule 87)" (Emphases added).

12. It is accordingly submitted here that, in view of the matters recited in paragraphs 4 to 7 inclusive hereof, it is premature for the the case of the 1st Accused to be closed at this stage, with some of the most crucial pieces of evidence still outstanding.

13. Furthermore, it is submitted that it would be prejudicial for the Back-up List in the Norman Further Filing aforesaid to be over-restrictively applied to the effect that resort may only be made to it for the purpose of replacing a witness on the Core List who deals only and precisely with the same set of facts or alleged crime base. It is, indeed, further submitted, that in the interests of overall justice and especially justice to the accused, even evidence uncovered rather late in witness list preparations may be admitted so long as it does not arise from clear negligence or wilful delay or a subversion of the other accused persons' right to a fair and expeditious trial. It is hereby reported in this regard that material discovered for the first time on the Norman Legal Assistant's recent visit to Nigeria is so relevant and crucial for the defence of the 1st Accused that application is herein made to call its hitherto unrevealed (because hitherto undiscovered) maker as witness in the next session. It is also being sought hereby to retain No. 26 on the Norman Core Witness List as a potential witness until material still being obtained from Parliament through him and still being analysed reach a satisfactory Rule 92 bis status for it to be unnecessary to call the said witness.

Conclusion.

14. In view of the forgoing analysis and submission, the Court is humbly requested to grant the following reliefs in the nature of leave to the 1st Accused to do the following:

a). to defer the calling of further witnesses in his defence to the September-December 2006 Trial Session, especially witnesses Nos. 1, 21 and 26 on the Norman Further Filing, SCSL-04-14-T-587, RP 15161 – 18196, dated 7 April 2006:

(i). H. E. President Alhaji Dr. Ahmad Tejan Kabbah,
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and that their identifying information and detailed summaries of their respective witness statements be filed not later than 14 days before each witness gives his own testimony;

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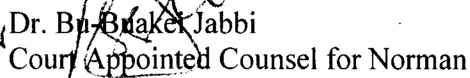
of the relevant witness statement of each of them to be filed at least 21 days following the grant of the present order;

c). to file any and all Rule 92 bis information or evidence in respect of his case not later than 21 days after his cross-examination, if any, of all witnesses to be called on behalf of the other co-accused persons herein;

d). to close his case after presentation of all the evidence in his defence, including any cross-examination on his behalf of any witnesses to be called on behalf of the other co-accused persons herein, any rejoinder evidence by or in respect of all co-accused persons herein, and any evidence ordered by the Court itself.



Dr. Bu-Buakei Jabbi
Court Appointed Counsel for Norman

DEFENCE LIST OF AUTHORITIES

P. v.. Delalic, Mucic, & Landzo, "Decision on the Motion by Defendant Delalic Requesting Procedures for Final Determination of the Charges Against Him", 1 July 1998.