884.)

SCSL-04-15-T
(31967 - 31977)

THE SPECIAL COURT FOR SIERRA LEONE

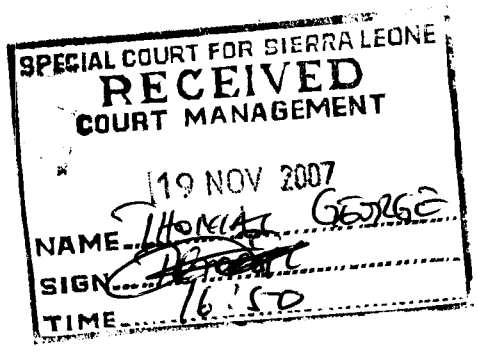
31967

BEFORE:

Hon. Justice Benjamin Itoe, Presiding
Hon. Justice Bankole Thompson
Hon. Justice Pierre Boutet

Registrar: **Mr. Herman Von Hebel**

Date filed: **19th November 2007**



The Prosecutor

-v-

Issa Hassan Sesay

Case No: SCSL-04-15-T

PUBLIC

SESAY DEFENCE RESPONSE TO PROSECUTION APPLICATION FOR LEAVE TO APPEAL DECISION ON THE SESAY DEFENCE MOTION REQUESTING THE LIFTING OF PROTECTIVE MEASURES IN RESPECT OF CERTAIN PROSECUTION WITNESSES

Office of the Prosecutor
Peter Harrison
Charles Hardaway
Vincent Wagona
Reginald Fynn

Defence
Wayne Jordash
Sareta Ashraph

INTRODUCTION

1. On the Rule 73(B) of the Rule of Procedure and Evidence (the "Rules"), the Prosecution applied (the "Application") for leave to appeal the Trial Chamber's Decision of 9th November 2007 (the "Decision")[1] which ordered the Prosecution to disclose to the Defence the unredacted statements of the witnesses listed in the Sesay Defence Motion[2] (as supplemented by the Sesay Defence addendum)[3]. Herewith the Defence files its Response.

Summary of Arguments

2. The Trial Chamber correctly concluded that it was in the interests of justice that the identity and unredacted portions of the exculpatory statements are inextricably linked to the "substance of the statement given" and therefore ought to be disclosed to the Defence[4] and that contact should be made with the witnesses through the Witness and Victim Section (WVS) and not the Prosecution. It is the WVS and its experts who are in the best position to determine how to contact a protected witness – who may otherwise feel intimidated – to explain to him/her the right to refuse to be interviewed and to make sure that a proper consent for an interview is obtained from the witness.[5]

TEST FOR GRANTING LEAVE TO APPEAL

3. Rule 73(B) of the Rules reads *inter alia* as follows:

> Decisions rendered on such motions are without interlocutory appeal. However, in exceptional circumstances and to avoid irreparable prejudice to a party, the Trial Chamber may give leave to appeal

4. Trial Chamber I, in *Prosecutor* v. *Sesay et al.*, has previously considered Rule 73(B) and held that:

> As a general rule, interlocutory decisions are not appealable and consistent with a clear and unambiguous legislative intent, this rule involves a high threshold that must be met before this Chamber can exercise its discretion to grant leave to appeal. The two limbs of the test are clearly conjunctive and not disjunctive; in other words they must both be satisfied.[6]

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[1] *Prosecution* v. *Sesay et al.*, SCSL-04-15-873, "Decision on the Sesay Motion Requesting the Lifting of Protective Measures in Respect of Certain Prosecution witnesses", 9th November 2007.
[2] *Prosecution* v. *Sesay et al.*, SCSL-04-15-687, "Confidential Sesay Motion Requesting the Lifting of Protective Measures in respect of Certain Prosecution witnesses", 19th January 2007.
[3] *Prosecution* v. *Sesay et al.*, SCSL-04-15-824, "Addendum to Sesay Defence Motion Requesting the Lifting of Protective Measures in respect of Certain Prosecution witnesses", 25th September 2007.
[4] *Decision* at paras. 26, 27, 29, 33, 35.
[5] *Id.*, para. 37.
[6] *Prosecution* v. *Sesay et al.*, SCSL-04-15-PT-14, "Decision on Prosecution's Application for Leave to File an Interlocutory Appeal Against the Decision on the Prosecution Motion for Joinder", 13th February 2004, at para. 10.

5. According to previous Prosecution pleadings "logic and commonsense dictate that [the test] must be applied stringently".[7]

Exceptional

6. The Trial Chamber previously noted that "exceptional circumstances" may exist where the question in relation to which leave to appeal is sought is one of general principal to be decided for the first time; the question is a question of public international law importance upon which further argument or decision at the appellate level would be conducive to the interests of justice; or where the cause of justice might be interfered with; the question is one that raises serious issues of fundamental legal importance to the Special Court for Sierra Leone, in particular, or international criminal law, in general, or some novel and substantial aspect of international criminal law for which no guidance can be derived from national criminal law systems".[8]

Irreparable prejudice

7. The Trial Chamber observed that the criteria would be satisfied only in the event that the alleged error of law "cannot be cured or resolved by final appeal against judgement".[9]

REPLY ON THE MERITS

8. The Prosecution Application is meretricious. The Defence submits that there are no exceptional circumstances, nor any errors of law in the Trial Chamber's Decision, and the Prosecution would not suffer irreparable prejudice if the Application were denied.

Exceptional Circumstances

9. The Trial Chamber correctly opines that that there exists a "clearly established principle" that "notwithstanding any protective measures, unredacted statements must be disclosed by the Prosecution under Rule 68 where "the identity [of the witness who made the statement] is inextricably connected with the substance of the statements".[10]

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[7] *Prosecution* v. *Sesay et al.*, SCSL-04-15-321, "Prosecution Consolidated Response to Defence Application for Leave to Appeal Decision of 3rd February", 16th February 2005, para. 10.
[8] *Decision*, para. 4.
[9] *Prosecution* v. *Sesay et al.*, SCSL-04-15-PT-357, "Decision on Defence Application for Leave to Appeal Ruling of the 3rd February 2005 on the Exclusion of Statements of Witness TF1-141", 28th April 2005, para. 30.
[10] *Decision*, para. 26 relying upon *Prosecutor* v. *Karemera, Ngirumpatse and Nzirorerera*, ICTR-98-44-T, "Decision on the Prosecutor's Application Pursuant to Rules 39, 68 and 75 of the Rules of Procedure and Evidence for an Order for Conditional Disclosure of Witness Statements and Other Documents Pursuant to Rule 68(A) (TC)", 4th July 2006, para. 8; *Prosecutor* v. *Karemara, Ngirumpatse Nzirorera*, ICTR-98-44-PT-AR73.6, "Decision on Joseph Nzirorera's Motion to Compel Inspection and Disclosure (TC)", 5th July 2005, para. 20; *Prosecutor* v. *Bagasora, Kabiligi, Ntabakuze and Nsengiyumva*, ICTR-98-41-T, "Decision on Disclosure of Identity of Prosecution Informant (TC)", 4th May 2006, para. 5.

10. As noted in the case of *Bagasora* at the International Criminal Tribunal for Rwanda, this is the correct approach when the identity is "inextricably connected with the substance of the statements" and when "the statement cannot be properly understood without knowing the author's ability to observe the events he describes; his possible biases or point of view; or the consistency of his account with any other statements he may have given.... Accordingly, the identity of [the] witness ... and any portions of the statement redacted to protect the witness's identity must be considered to be exculpatory within the meaning of Rule 68...."[11]

11. This is settled law and is neither exceptional, unusual, or in any way novel.[12] It is standard procedure at all International Tribunals and has been applied frequently through many years of Tribunal jurisprudence. This is the balance that has been struck between prosecutorial investigative interests and the accuseds' rights to material that might prove their innocence[13] – it is accepted as fair by prosecutors in other International Tribunals. This balancing exercise begins with Article 17 of the Statute which states that the trials are conducted with "*full respect* for the rights of the accused and *due regard* for the protection of victims and witnesses" and not – as the Prosecution suggests – with its so-called duty to "present the best available evidence to prove its case".[14]

12. There is thus a strong presumption in *favour* of this disclosure to the Defence –rather than it being unusual, novel or in any way exceptional – and the burden lies upon the Prosecution to justify any non-disclosure.[15]

13. It is now unusual for Prosecuting authorities to dispute or seek to deny or modify this disclosure obligation. The Application lacks jurisprudential support and none is cited that would even begin to justify the claim for non-disclosure. The weight of authority is clearly against the Prosecution. The Prosecution has cited no circumstances that would distinguish the instant case from this line of authority or the norm, notwithstanding the claim that the present circumstances are exceptional.

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[11] *Prosecutor* v. *Bagosora et al.*, ICTR-98-41-T, "Decision on Disclosure if Identity of Prosecution Informant", 24th May 2006, para. 5.
[12] The Application, para. 9.
[13] *See Prosecutor* v. *Milosevic*, IT-02-54-T, "Decision on Prosecution Motion for Provisional Protective Measures Pursuant to Rule 69", 19th February 2002.
[14] Application, para. 17.
[15] *Prosecutor* v. *Brdjanin and Talic*, IT-99-36-PT, "Second Decision on Motions by Radoslav Brdjanin and Momir Talic for Access to Confidential Documents", 15 November 2000. *See also, e.g.*, cases cited at para. 13 of *Prosecution* v. *Sesay et al.*, SCSL-04-15-704, "The Reply to the Prosecution's Response to Defence Motion Requesting the Lifting of Protective Measures in respect of Requested Witnesses", 5 February 2007; *Prosecutor* v. *Naletilic and Martinovic*, IT-98-34-A, "Decision on Joint Defence Motion by Enver Hadzihasanovic and Amir Kubura for access to all confidential material, filings, transcripts and exhibits in the Naletilic and Martinovic Case", 7th November 2003; and *Prosecutor* v. *Bagasora et al.*, ICTR-98-41-T, "Decision on Nzirorera request for access to protected material", 19th May 2006.

Proof of a change of circumstances

14. The Prosecution's reliance upon Trial Chamber II's decision in the Taylor case[16] is inapposite, selective, and misleading. This is not authority for the proposition that the Sesay Defence must present "independent factual evidence that the security situation facing the protected witnesses has changed and thus warrants a variation of the protective measures orders". On the contrary it is authority for the Defence proposition that a variation of protective measures can be sought and granted on the basis of proof of a change in circumstances.[17]

15. As noted by Trial Chamber II (when considering a complete removal of the 42-day disclosure rule to allow the Taylor Defence unqualified and immediate access to the identity of the Prosecution witnesses in the case) "the burden therefore falls upon the Defence of establishing that *circumstances have changed*"[18] and "*the changes in circumstances* alleged by the Defence in the Motion [did] not establish that the existing protective measures [were] no longer necessary".[19] The Prosecution suggestion that the Defence must produce "independent factual evidence that the security situation facing the protected witness"[20] has changed, is the only aspect of these issues which is exceptional and wholly without precedent.

Irreparable Prejudice

16. The "prejudice" that the Prosecution claims is nothing more than speculative insinuation lacking *any* evidential basis. It is improper and reckless for the Prosecution to allege – without making it clear that no threats or interference have emanated from the RUF Accused or the RUF Defence – that

> disclosure of full unredacted witness information to the Accused and Defence in the RUF case will have a chilling effect on the Prosecution's ability to present the best relevant evidence in separate proceedings. The subjective fears of witnesses are supported by objective threats to their security and attempts to interfere with the administration of justice.[21]

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[16] *Prosecutor* v. *Taylor*, SCSL-03-01-PT-209, "Decision on Defence Motion to Lift the Redactions of Identifying Information of Fifteen Core Witnesses", 21st March 2007.
[17] *Prosecution* v. *Sesay et al.*, SCSL-04-15-704, "Reply to Prosecution Response to Sesay Motion Requesting the Lifting of Protective Measures in respect of Certain Prosecution witnesses", 5th February 2007, para. 5, relying upon *Prosecutor* v. *Nyiramashuhuko et al.*, ICTR-97-21-T, "Decision on the Prosecutor's Motion for *inter alia* Modification of the Decision of 8th June 2001".
[18] *Prosecutor* v. *Taylor*, SCSL-03-01-PT-209, "Decision on Defence Motion to Lift the Redactions of Identifying Information of Fifteen Core Witnesses", 21st March 2007, para. 37; emphasis added.
[19] *Ibid.*, para. 38; emphasis added.
[20] Application, para. 13.
[21] Application, para. 7.

17. The Prosecution's offensive remarks concerning the "attitude of the RUF Accused and Defence to protective measures"[22] and the unpleasant insinuation that there has been "non-compliance with protective measures orders"[23] should be seen in this light. The Sesay Defence invites the Prosecution to initiate contempt proceedings or substantiate these baseless allegations. The fact that the Prosecution fling these allegations, without evidence or reason, is powerful proof of the need to approach all of the submissions in the Application with a degree of circumspection. This is not a well-founded, sensible, or proportionate application.

18. The Prosecution's suggestion that the Trial Chamber erred by failing to consider the effect of the disclosure on further or ongoing Taylor investigations[24] is unsustainable and plainly wrong in light of the unambiguous conclusion that the "variations to the protective measures requested by the Defence are minimal and ... [do] not significantly diminish the protection available to the witnesses".[25] The notion that the first Accused or the Sesay Defence have any interest but to ensure that the witnesses remain confident of their security is fanciful and a demonstration of nothing other than collective paranoia of some in the Prosecution concerning the motives of the Defence.

19. This Prosecution suspicion concerning the "attitude" of the Defence would appear to have also been cast in the direction of the professionals at work in the WVS. On the 30th November 2006 the Prosecution stated that

> It is inconceivable why the WVS, which the Trial Chamber has put in charge for establishing contact and which is a separate, neutral entity not aligned with either the Prosecution or the Defence and whose sole and statutory purpose is to best protect the interests of the witnesses of the Court, should not best reassure the witness that no contact will be made without their consent and their rights respected.[26]

In an extraordinary reversal of Prosecutorial opinion it is now suggested that the "Trial Chamber erred in ordering that prosecution witnesses be contacted by WVS and not by the Prosecution as it failed to take into account that many vulnerable Prosecution witnesses are familiar with members of the Prosecution...."[27] The Prosecution suggestion that what was once "inconceivable" is now the correct and only lawful approach should be roundly rejected as frivolous and an attempt to impede the administration of justice.

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[22] The Application, para. 7.
[23] The Application, para. 14.
[24] The Application.
[25] The Decision, para. 27.
[26] *Prosecution* v. *Sesay et al.*, SCSL-04-15-671, "Prosecution Response to Application for Leave to Appeal the Decision on Sesay Defence Motion for Protective Measures", 14th December 2006, para. 29.
[27] The Application, para. 16.

20. As noted previously, the Prosecution's approach to *their* witness security and the claim to irreparable prejudice make little sense when considering the mandate issued to the WVS pursuant to Rule 75(D).[28] This rule states:

> The Witness and Victims Section shall ensure that the witness has been informed before giving evidence that his or her testimony and his or her identity may be disclosed at a later date in another case, pursuant to Rule 75(F).

21. The Prosecution's hyperbolic claims that disclosure of "full unredacted witness information to the Accused and the Defence in the RUF case will have a chilling effect on the Prosecution's ability to present the best relevant evidence in separate proceedings",[29] and that witnesses "may refuse to cooperate further with the Prosecution in other proceedings or investigations"[30] must be seen in light of the legislative intent of Rule 75(D) and the corresponding WVS mandate. The Prosecution ought to desist from practices which run counter to the mandate of the WVS. Witnesses should be informed in the clearest of terms concerning the applicability of Rule 75(D) and be made aware that their statements may be disclosed in the interests of justice, with due regard to their security and safety.

22. The Prosecution's erroneous approach to their own witnesses cannot now be used to justify the non-disclosure of Rule 68 material. The witnesses might well have been misled into believing that their statements would not be disclosed to the Defence but that advice was negligent. The Prosecution must be able to point to some specific objective-basis for any fears allegedly expressed by witnesses[31] - other than their own negligence – to justify the restrictions they now seek to have imposed on the Accused and his right to material that might prove his innocence. In light of the Trial Chamber's finding that the variations sought by the Defence do not significantly diminish the protection available to the witnesses and the lack of any evidence to suggest any objective basis for any fears, such as wrong doing on the part of the Accused, there would appear to be no justification for the claim that irreparable prejudice would result from the Decision.

Disclosure of the whole statement

23. The Prosecution's suggestion that the Trial Chamber erred by not considering the arguments concerning prejudice to further or ongoing investigations on the basis that had "such a

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[28] *Prosecution* v. *Sesay et al.*, SCSL-04-15-704, "Reply to the Prosecution's Response to Defence Motion Requesting the Lifting of Protective Measures in respect of Certain Prosecution witnesses", 5th February 2007, para. 10.
[29] The Application, para. 7.
[30] The Application, para. 18.
[31] *Prosecutor* v. *J. Rugambarara*, ICTR-00-59-I"Decision on the Prosecutor's Motion for Protective Measures for Witnesses", 28th October 2005, paras. 6 and 7.

balancing exercise been undertaken, it would have led the Trial Chamber to consider and order less intrusive methods of permitting the Defence access … to the witnesses" such as the provision of a prosecutorial "summary of the additional" evidence [32] misses the point.

24. Once the Trial Chamber arrived at the conclusion that the "the identity [of the witness who made the statement] is inextricably connected with the substance of the statements"[33] and that the "variations to the protective measures requested by the Defence are minimal and … [do] not significantly diminish the protection available to the witnesses",[34] the *only* logical step was to order disclosure of the *whole* statement and the identity of the witness in question.

25. The Defence needs to be able to make their own assessment of the usefulness of the witness and his/her own testimony. This requires the full statement *because* the identity of the witness (who made the statement) has been found to be inextricably connected with the substance of the statement. Neither a summary nor part of the statement would therefore suffice to provide the Accused with a fair opportunity to be able to assess the evidence and thus to prepare his defence.

26. This approach will also benefit the witnesses who may well not need to be approached once the Defence can conduct the requisite analysis into the author's ability to observe the events he describes; his possible biases or point of view; or the consistency of his account with any other statements he (or others) may have given.

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[32] The Application, paras. 6, 9, and 11.
[33] *Decision*, para. 26 relying upon *Prosecutor* v. *Karemera, Ngirumpatse and Nzirorerera*, ICTR-98-44-T, "Decision on the Prosecutor's Application Pursuant to Rules 39, 68 and 75 of the Rules of Procedure and Evidence for an Order for Conditional Disclosure of Witness Statements and Other Documents Pursuant to Rule 68(A) (TC)", 4th July 2006, para. 8; *Prosecutor* v. *Karemara, Ngirumpatse Nzirorera*, ICTR-98-44-PT, "Decision on Joseph Nzirorera's Motion to Compel Inspection and Disclosure (TC)", 5th July 2005, para. 20; *Prosecutor* v. *Bagasora, Kabiligi, Ntabakuze and Nsengiyumva*, ICTR-98-41-T, "Decision on Disclosure of Identity of Prosecution Informant (TC)", 4th May 2006, para. 5.
[34] The Decision, para. 27.

RELIEF SOUGHT

27. In light of the foregoing, namely the clear and careful balancing exercise conducted by the Trial Chamber, the settled law and the lack of any prejudice whatsoever, the Defence seeks an expedited order for the dismissal of the Prosecution Application. It is wholly lacking in merits and should not have been filed.

Dated 19/11/07

Wayne Jordash
Sareta Ashraph

List of Authorities

Prosecutor v. *Karemara, Ngirumpatse Nzirorera*, ICTR-98-44-PT-AR73.6, "Decision on Joseph Nzirorera's Motion to Compel Inspection and Disclosure (TC)", 5th July 2005.

Prosecution v. *Sesay et al.*, SCSL-04-15-321, "Prosecution Consolidated Response to Defence Application for Leave to Appeal Decision of 3rd February", 16th February 2005.

Prosecution v. *Sesay et al.*, SCSL-04-15-687, "Confidential Sesay Motion Requesting the Lifting of Protective Measures in respect of Certain Prosecution witnesses", 19th January 2007.

Prosecution v. *Sesay et al.*, SCSL-04-15-704, "Reply to the Prosecution's Response to Defence Motion Requesting the Lifting of Protective Measures in respect of Certain Prosecution witnesses", 5th February 2007.

Prosecution v. *Sesay et al.*, SCSL-04-15-824, "Addendum to Sesay Defence Motion Requesting the Lifting of Protective Measures in respect of Certain Prosecution witnesses", 25th September 2007.

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Prosecution v. *Sesay et al.*, SCSL-04-15-PT-14, "Decision on Prosecution's Application for Leave to File an Interlocutory Appeal Against the Decision on the Prosecution Motion for Joinder", 13th February 2004.

Prosecution v. *Sesay et al.*, SCSL-04-15-PT-357, "Decision on Defence Application for Leave to Appeal Ruling of the 3rd February 2005 on the Exclusion of Statements of Witness TF1-141", 28th April 2005.

Prosecution v. *Sesay et al.*, SCSL-04-15-873, "Decision on the Sesay Motion Requesting the Lifting of Protective Measures in Respect of Certain Prosecution witnesses", 9th November 2007.

Prosecutor v. *Milosevic*, IT-02-54-T, "Decision on Prosecution Motion for Provisional Protective Measures Pursuant to Rule 69", 19th February 2002.

Prosecutor v. *Brdjanin and Talic*, IT-99-36-PT, "Second Decision on Motions by Radoslav Brdjanin and Momir Talic for Access to Confidential Documents", 15 November 2000.

Prosecution v. *Sesay et al.*, SCSL-04-15-704, "The Reply to the Prosecution's Response to Defence Motion Requesting the Lifting of Protective Measures in respect of Requested Witnesses", 5 February 2007.

Prosecutor v. *Naletilic and Martinovic*, IT-98-34-A, "Decision on Joint Defence Motion by Enver Hadzihasanovic and Amir Kubura for access to all confidential material, filings, transcripts and exhibits in the Naletilic and Martinovic Case", 7th November 2003.

Prosecutor v. *Bagasora et al.*, ICTR-98-41-T, "Decision on Nzirorera request for access to protected material", 19th May 2006.

Prosecutor v. *Taylor*, SCSL-03-01-PT-209, "Decision on Defence Motion to Lift the Redactions of Identifying Information of Fifteen Core Witnesses", 21st March 2007.

Prosecution v. *Sesay et al.*, SCSL-04-15-704, "Reply to Prosecution Response to Sesay Motion Requesting the Lifting of Protective Measures in respect of Certain Prosecution witnesses", 5th February 2007.

Prosecutor v. *Taylor*, SCSL-03-01-PT-209, "Decision on Defence Motion to Lift the Redactions of Identifying Information of Fifteen Core Witnesses", 21st March 2007.

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Prosecutor v. *Bagasora, Kabiligi, Ntabakuze and Nsengiyumva*, ICTR-98-41-T, "Decision on Disclosure of Identity of Prosecution Informant (TC)", 4th May 2006.