SCSL-04-15-T
(25366 – 25375)

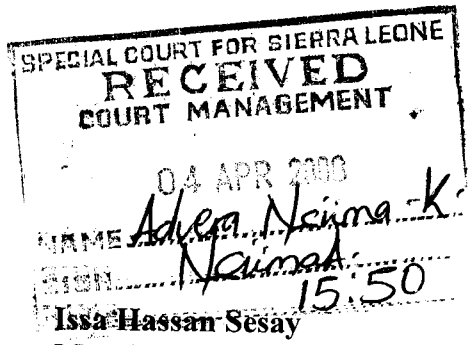
1071)

25366

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

THE TRIAL CHAMBER I

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



Registrar: Herman Von Hebel

Date filed: 4 April 2008

THE PROSECUTOR **Against**

~~**Issa Hassan Sesay**~~
Morris Kallon
Augustine Gbao

Case No. SCSL-04-15-T

PUBLIC
PROSECUTION RESPONSE TO KALLON REQUEST FOR LEAVE TO VARY WITNESS LIST AND FOR RESPECTIVE PROTECTIVE MEASURES AND CONFIDENTIAL ANNEX A

Office of the Prosecutor:
Vincent Wagona
Reginald Fynn
Amira Hudroge

Defence Counsel for Issa Hassan Sesay
Wayne Jordash
Sareta Ashraph

Defence Counsel for Morris Kallon
Charles Taku
Kennedy Ogeto
Lansana Dumbuya
Tanoo Mylvaganam

Court Appointed Counsel for Augustine Gbao
John Cammegh
Scott Martin

25367

I. INTRODUCTION

1. On 25th March 2008, the Kallon defence filed its "Kallon Request for Leave to Vary Witness List and for Respective Protective Measures and Confidential Annex A (the "Motion")[1] and on 31st March 2008 the "Confidential Disclosure of Witness Identifying Information- Pursuant to Para 22 of the March 25 2008 Motion to Vary Witness List".[2]
2. The Trial Chamber in its order of 30th October 2006 detailed the materials the Defence was to file by 16th February 2006.[3] This included among other things a core and back-up witness list. The Accused Kallon now seeks leave to add witnesses (the "Proposed Witnesses"). The Motion does not show good cause why the Proposed Witnesses should be added to the Kallon witness list, nor does the Motion demonstrate that calling the Proposed Witnesses will be in the interest of justice.
3. In the event the Proposed Witnesses are added to the Kallon witness list, there has been no showing that protective measures are warranted for these witnesses, in particular, the Accused Kallon has not discharged his burden of demonstrating that the privacy or security of the Proposed Witnesses requires protective measures.[4]

II ARGUMENT

a) Request for Order to Call Additional Witnesses

4. Rule 73ter (e) of the Rules makes provision for the variation of Defence witness lists as follows:

> After the commencement of the defence case, the defence may, if it considers it to be in the interest of justice, move the trial chamber for leave

---

[1] *Prosecutor v Sesay et al*, SCSL-04-15-T-1064, "Public Kallon Request For Leave to Vary Witness List and For Respective Protective Measures And Confidential Annexe A," 25 March 2008.
[2] *Prosecutor v Sesay et al*, SCSL-04-15-T-1065, "Confidential Disclosure of Witness Identifying Information – Pursuant to Para 22 of the March 25 2008 Motion For Leave to Vary Witness List and For Respective Protective Measures," 31 March 2008.
[3] *Prosecutor v Sesay et al*, SCSL-04-15-T-659, "Scheduling Order Concerning the Preparation and the Commencement of the Defence Case," 30 October 2006, para. 1.
[4] Rule 75A of the Rules of Procedure and Evidence of the Special Court for Sierra Leone, the **"Rules"**.

to reinstate the list of witnesses or to vary its decision as to which witnesses are to be called.

5. This rule has been interpreted by this Chamber to mean that the requesting party must show "good cause"[5] on the one hand and on the other that the variation requested must be "in the interest of justice."[6] The Chamber has also cited with approval the ICTR position that when considering a request of this nature the Chamber will examine:

> inter alia the materiality of the testimony, the complexity of the case, the probative value of the proposed testimory in relation to existing witnesses and allegations in the indictment, the ability of the opposition to make an effective cross-examination of the proposed testimony and the justification offered for the additional witness."[7]

6. The Motion argues that due diligence was exercised but it was not possible to include these witnesses in the witness list before now [8] The Prosecution submits that each of the Proposed Witnesses, by virtue of their respective employments, are relatively easy to contact and that any efforts to do so by the Kallon defence at an earlier occasion would have established their willingness or otherwise to testify in this trial. There is no evidence that prior to this time the Kallon defence had taken any steps to contact and secure the approval of these witnesses to testify on the Accused's behalf. There is no evidence that these witnesses were unavailable nor is there any evidence that the Defence had made reasonable though futile efforts to contact them. The Kallon defence was not diligent in seeking these witnesses.

7. The Motion alleges that the Defence is responsive to the prosecution case and that there was a "lack of pre-trial notice provided by the indictment and the pre-trial briefs in this case."[9] This allegation is made even though the Chamber has ruled repeatedly

---

[5] Prosecutor v. Sesay, Kallon and Gbao "Decision on Prosecution Request for Leave to Call Additional Witnesses"30.7.08 para 11.
[6] *Ibid.*
[7] *Prosecutor v Sesay et al*, SCSL-04-15-T-935, "Decision on Gbao Request for Leave to Call Two Additional Witnesses And for Order for Protective Measures", 10 January 2008, para 12. See also *Prosecutor v. Nahimana, Ngeze and Barayagwiza*, ICTR-99-52-I, "Decision on the Prosecutor's Oral Motion for Leave to Amend the List of Selected Witnesses," 26 June 2001, para.20.
[8] *Motion*, para. 25
[9] *Ibid*, para. 21.

on objections to the form of the indictment and expressed a view that it would prefer to address such matters at a latter stage.[10]

8. Even if the Trial Chamber had not ruled on this issue as stated, the Prosecution submits that the Kallon defence was sufficiently put on notice of the case against the Accused Kallon not only by way of the indictment, pre-trial brief, supplemental pre-trial brief, opening statement, additional information, but also by the testimony led by the Prosecution in the presentation of the prosecution case. The Prosecution closed its case on the 2nd August 2006 and the Sesay Defence commenced its case on 3rd May 2007. Long before the close of the prosecution case the Accused Kallon had notice of the case against him, but in any event, there can be no answer to the observation that since the close of the prosecution case, over 18 months ago, the Kallon defence had heard the relevant evidence against the Accused Kallon and should have fully investigated its case and applied to add witnesses long before now.

9. There is a complete absence of evidence in the Motion which could demonstrate the exercise of due diligence by the Accused Kallon. The Motion itself recognizes that an applicant who wishes to add witnesses must act with due diligence and not delay in bringing on such an application.[11] This was required of the Prosecution when it applied to add TF1-371.[12]

10. The Prosecution submits further that even if the allegations against Kallon had come to his notice only during the prosecution case, the Prosecution did close its case on 2nd August 2006. The Kallon defence have since had no less than eighteen months to organise its case and decide on its witnesses. These witnesses with due diligence could have been added to the list earlier.

11. Adding the Proposed Witnesses would not serve the interests of justice as the Proposed Witnesses will testify on matters which other witnesses on the existing list of witnesses including those who the Kallon defence now intend to drop, will and can

---

[10] *Prosecutor v Sesay et al*, SCSL-15-T-1033, "Decision on Kallon Motion on Challenges to the Form of The Indictment and for Reconsideration of Order Rejecting the Filing and Imposing Sanctions", dated 6 March 2008; *Prosecutor v Sesay et al*, SCSL-15-944, "Decision on Gbao Request for Leave to Raise Objections to the Form of the Indictment," 17 January 2008.

[11] *Motion*, para. 16 (d).

[12] *Prosecutor v Sesay et al*, SCSL-04-15-T-579, "Written Reasons for the Decision on Prosecution Request for Leave to Call Additional Witness TF1-371 And for Order for Protective Measures," 15 June 2006.

testify to. It is clear that the witnesses whom the Kallon defence propose to call are repetitive of themselves and of other witnesses on the Kallon defence list.

12. From the briefs provided it is evident that the Proposed Witnesses DMK 400, DMK, 488, DMK 550 and DMK 660 are ECOMOG commanders who will all testify to the same issues: "Kallon was important to the peace process" and "Kallon was not a person readily identifiable as relevant within the RUF structure." The other proposed witnesses DMK 700, DMK 444, DMK 770 are all former UNAMSIL personnel. They, together with DMK 600 and DMK 422, intend to give evidence on the same issues: the Lomé and Abidjan Peace Accords and Kallon's role in the peace process.
13. The Kallon defence core list already has witnesses whose disclosed summaries suggest that they will be testifying to the issues the Proposed Witnesses are expected to testify about i.e. "Kallon was important to the peace process" and "Kallon was not a person readily identifiable as relevant within the RUF structure". The Kallon witness summaries disclose that DMK 067 will testify that "Kallon lectured on disarmament, he helped dismantle check points". DMK 129 will testify that "Kallon was cooperative and discussed ceasefire terms with witness". DMK 147 (a senior UNAMSIL Commander) has testified that he "never knew Kallon, knows of no involvement of Kallon." DMK144 (A Senior UNAMSIL Officer), will testify that "Kallon supported peace process, no complainants against Kallon". DMK 082 will testify that "Kallon supported disarmament". It is apparent that the Proposed Witnesses will repeat the testimony of the witnesses referred to in this paragraph, whom, it should be noted are all retained witnesses.
14. The Chamber has repeatedly expressed its dissatisfaction with duplication of evidence[13] and repetitive testimony and has urged that evidence need not be overly corroborated stressing all the time that it is the quality of the evidence that matters more than the quantity.[14] Evidence which is merely cumulative or corroborative need not be called. The Proposed Witnesses will repeat the evidence of one and other and the evidence of other witnesses on the Kallon witness list. Kallon can drop the

[13] *Prosecutor v Sesay et al*, SCSL-04-15-T-1031, "Written Decision on Sesay Defence Application for a Week's Adjournment – Insufficient Resources in Violation of Article 17 (4) (b) of the Statute of the Special Court," 5 March 2008, para 42.
[14] *Ibid*, para 45, 47, 49.

witnesses he proposes to drop and will still have witnesses who will testify to the issues the Proposed Witnesses intend to adduce evidence on.

b) Request for Protective Measures

15. The Motion states that all the witnesses "reside outside Sierra Leone" and that "they are all busy personalities engaged in various activities in their respective countries."[15] Residing outside Sierra Leone and being busy are not the legal basis on which the Chamber grants protective measures to witnesses. The Motion fails to justify a genuine need for protective measures should these witnesses be allowed to testify.
16. There is an expectation that the Chamber will conduct its business as far as possible in the full view of the public. This expectation is balanced with a need to protect the identity of those witnesses and victims whom if they were not so protected would suffer some threat to their security or privacy. The Prosecution submits that protective measures are not granted on every bare request even though Rule 75 of the Rules empowers the Trial Chamber on its own volition or at the request of a party to "order appropriate measures to safeguard the privacy and security of victims and witnesses provided that the measures are consistent with the rights of the accused."
17. The party requesting protective measures must show that circumstances exist which would warrant the ordering of protective measures. The requesting party must not merely ask for the measures but must provide the Chamber with objectively verifiable evidence that justify the granting of an order for protective measures. The Prosecution submits that the Motion has not provided evidence from sources other than the witnesses themselves to assist the court with "an objective basis for assessing whether a threat to the witnesses' security"[16] and or privacy exists.
18. To be in a position to grant an order for protective measures it has been held that "the subjective feelings of the witnesses are not the only factor to be taken into account

[15] *Motion*, para. 37.
[16] *Prosecutor v Sesay et al*, SCSL-04-15-T-935, "Decision on Gbao Request for Leave to Call Two Additional Witnesses And for Order for Protective Measures", 10 January 2008.

and that the subjective fears of witnesses are not decisive of the issue whether protective measures should be granted"[17]

19. It has been held further that "a party seeking protective measures is required to provide evidence from sources other than its witnesses indicating an objective basis for assessing whether a threat to the witnesses' security exists."[18] The Motion does not offer any evidence not even from its own witness let alone from independent sources to show that the Proposed Witnesses are deserving of protective measures. The Prosecution submits that there is not enough evidence before the Chamber on which the Chamber could properly grant protective measures as requested for the Proposed Witnesses.
20. **DMK 550 and DMK 880** – Though the above submissions generally include these two witnesses, the Prosecution is prevented from making relevant submissions regarding these witnesses as their identities have not been disclosed. Until disclosure takes place, and the Prosecution has been afforded the opportunity to respond, no protective measures should be issued for these witnesses.

III. CONCLUSION

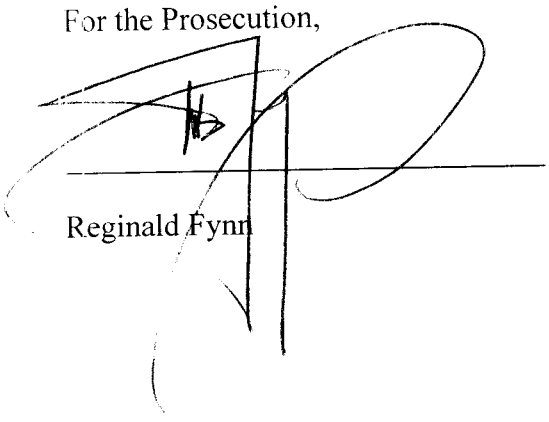
21. The Motion has failed to provide evidence that the interests of justice will be served by calling these additional witnesses. There has been no showing that the Accused Kallon acted with due diligence, and it would appear that no showing could be made given that the Motion was filed over 18 months after the close of the prosecution case. In addition, the evidence of the Proposed Witnesses is repetitive of other witnesses on the existing witness list, and the Proposed Witnesses repeat evidence of other witnesses. Finally, there is no evidence before the Trial Chamber to justify granting protective measures for the Proposed Witnesses.
22. On the basis of the above submissions, the Motion should be dismissed.

---

[17] *Prosecutor v Norman, Fofana and Kondewa*, SCSL-04-14-T-167, "Decision on Prosecution Request for Leave to Call Additional Witnesses," 29 July 2004.
[18] *Prosecutor v Sesay et al*, SCSL-04-15-T-716, "Decision on Gbao Defence Motion for Immediate Protective Measures and Confidential Motion for Delayed Disclosure and Related Measures for Witnesses" 1 March 2007.

Filed at Freetown, on 4 April 2008

For the Prosecution,



Reginald Fynn

25374

Index of Authorities

A. Motions and Decisions

1. *Prosecutor v Norman, Fofana and Kondewa*, SCSL-04-14-T-167, "Decision on Prosecution Request for Leave to Call Additional Witnesses," 29 July 2004.

2. *Prosecutor v Sesay et al*, SCSL-04-15-T-579, "Written Reasons for the Decision on Prosecution Request for Leave to Call Additional Witness TF1-371 And for Order for Protective Measures," 15 June 2006.

3. *Prosecutor v Sesay et al*, SCSL-04-15-T-659, "Scheduling Order Concerning the Preparation and the Commencement of the Defence Case," 30 October 2006.

4. *Prosecutor v Sesay et al*, SCSL-04-15-T-716, "Decision on Gbao Defence Motion for Immediate Protective Measures and Confidential Motion for Delayed Disclosure and Related Measures for Witnesses" 1 March 2007.

5. *Prosecutor v Sesay et al*, SCSL-04-15-T-935, "Decision on Gbao Request for Leave to Call Two Additional Witnesses And for Order for Protective Measures", 10 January 2008.

6. *Prosecutor v Sesay et al*, SCSL-15-944, "Decision on Gbao Request for Leave to Raise Objections to the Form of the Indictment," 17 January 2008.

7. *Prosecutor v Sesay et al*, SCSL-04-15-T-1031, "Written Decision on Sesay Defence Application for a Week's Adjournment – Insufficient Resources in Violation of Article 17 (4) (b) of the Statute of the Special Court," 5 March 2008.

8. *Prosecutor v Sesay et al*, SCSL-15-T-1033, "Decision on Kallon Motion on Challenges to the Form of The Indictment and for Reconsideration of Order Rejecting the Filing and Imposing Sanctions", dated 6 March 2008.

9. *Prosecutor v Sesay et al*, SCSL-04-15-T-1064, "Public Kallon Request For Leave to Vary Witness List and For Respective Protective Measures And Confidential Annexe A," 25 March 2008.

10. *Prosecutor v Sesay et al*, SCSL-04-15-T-1065, "Confidential Disclosure of Witness Identifying Information – Pursuant to Para 22 of the March 25 2008 Motion For Leave to Vary Witness List and For Respective Protective Measures," 31 March 2008.

11. *Prosecutor v. Nahimana, Ngeze and Barayagwiza*, ICTR-99-52-I, "Decision on the Prosecutor's Oral Motion for Leave to Amend the List of Selected Witnesses," 26 June 2001.

B. Rules

1 Rule 75A, 73 ter (e), of the Rules of Procedure and Evidence of the Special Court for Sierra Leone, the **"Rules"** as amended 19 November 2007.