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SCSL -04-15-T
(26068 - 26079)

26068

SPECIAL COURT FOR SIERRA LEONE
TRIAL CHAMBER I

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

Registrar: Mr. Herman Von Hebel

Date filed: 21st May 2008.

THE PROSECUTOR **against** **ISSA HASSAN SESAY**
MORRIS KALLON
AUGUSTINE GBAO

Case No. SCSL -2004-15-T

PUBLIC

KALLON RESPONSE TO GBAO REQUEST FOR LEAVE TO ADD TWO DOCUMENTS TO ITS EXHIBIT LIST AND TO ADMIT THEM AS EVIDENCE

Office of the Prosecutor:

Peter Harrison
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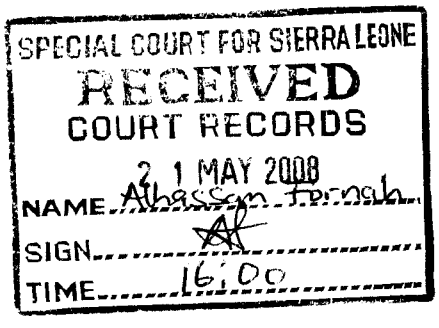

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Counsel for Morris Kallon:

Charles Taku
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Court-Appointed Counsel for Augustine Gbao:

John Cammegh
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INTRODUCTION

1. On 16 May 2008, counsel for the Third Accused applied to the Chamber for the late admission into evidence of the Second Proposed Exhibit as well as an "unredacted" version of Prosecution Exhibit 190, ("the First Proposed Exhibit" and, collectively, "the Proposed Exhibits").[1]

2. On 20 May 2008, the Chamber issued an order for expedited filing in relation to pleadings ensuing from the Motion.[2] The Kallon Defence hereby renews it opposition to the introduction of the Second Proposed Exhibit, opposes the admission of the First Proposed Exhibit and, as such, objects to the Motion and submits that it be dismissed in its entirety, ("the Response").

PROCEDURAL BACKGROUND

3. Attempts have previously been made in the proceedings to admit both documents with limited success. The first attempt was through a Prosecution Motion dated 11th July 2006 to admit the Board of Inquiry Report.[3]

4. Significantly, the basis for the Prosecution Motion was that during the cross-examination of Major Jaganathan, questions were put to him by Counsel for the accused Gbao regarding the Board of Inquiry Report and that the Report was not shown to the witness or the Trial Chamber. Prosecution argued that to ensure that the Trial Chamber was provided with a complete understanding of the issues and evidence referred to, it was necessary to admit into evidence, the Report.[4]

5. In a joint response by all the three accused[5], the Defence opposed the Prosecution Motion arguing inter alia that Rule 89 (C) ought to be applied in the context of the overall fairness to the accused[6], that the Protection of the fundamental fairness of the trial requires the Chamber to have regard to the manner in which and the time at which this evidence is being tendered, as well as the opportunities to cross-examine on such evidence[7].

6. The three Defence teams further raised the issue of prejudice contending that all

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[1] *P v. Sesay et al.*, SCSL-04-15-T-1126, Gbao Request for Leave to Add Two Documents to its Exhibit List and to Admit Them as Evidence, With Confidential Annexes, 15 May 08, ("the Motion"). The First Proposed Exhibit is at Confidential Annex A.

[2] *P v. Sesay et al.*, SCSL-04-15-T-1129, Order for Expedited Filing, 20 May 08.

[3] *Prosecutor v. Sesay, Kallon and Gbao, SCSL-2004-15-T-594 Public Prosecution Motion to admit into evidence a document referred to in cross-examination. 11th July 2006*

[4] ibid para.1

[5] *Prosecutor v. Sesay, Kallon and Gbao, SCSL-2004-15-T-607* Defence Joint Response to Prosecution Motion to admit into Evidence a document referred to in cross-examination. 21st July 2006

[6] ibid para 6

[7] ibid para7

witnesses which were envisioned to give live evidence as to those events had passed and gone without the Prosecution making any attempt to review this document with them or admit it into evidence hence depriving the defence the opportunity to test the contents of the document with those witnesses[8].

7. The Defence noted further that the report made extensive reference to the views and observations of one Ngondi, who had given evidence without the Prosecution seeking to admit the report through the witness[9].

8. The Chamber in its decision of 2nd August 2006, admitted the document into evidence for the sole purpose of understanding the full context of the Defence cross-examination but ordered that paragraphs 13 and 14 which made specific reference to the accused Morris Kallon be redacted[10].

9. In making the order for redaction of the name of the accused, the trial chamber clearly addressed the issue of Prejudice to the accused raised in the joint Defence Response to the Prosecution Motion.

10. Moreover, the Chamber, stressed that the document was being admitted for the limited purpose of placing in proper context, cross-examination by the 3rd accused on the document.

2nd ATTEMPT

11. The 2nd attempt, ironically, was made by the 3rd accused during their cross-examination of the accused Kallon. Counsel Mr. Cammegh then sought to introduce the statement of Major Ganese - TF1-042[11].

12. After elaborate arguments, the 3rd accused's oral application was dismissed by the Chamber. The Chamber inter-alia noted that Mr. Kallon was not the right person through whom to tender the document[12].

13. In the course of the oral arguments, the court took issue with the fact that the statement was being tendered long after Mr. Ganese had testified with no attempt by

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[8] ibid para 12
[9] ibid para 13
[10] *Prosecutor v. Sesay, Kallon and Gbao, SCSL-2004-15-T-620 Decision on Prosecution Motion to admit into evidence a document referred to in cross-examination. 2nd August 2006*
[11] *Prosecutor v. Sesay, Kallon and Gbao, SCSL-2004-15-T* Transcript of 17th April 2008, pg. 66, lines 9-29
[12] *Prosecutor v. Sesay, Kallon and Gbao, SCSL-2004-15-T* Transcript of 17th April 2008, pg 86, lines 13-24.

the Gbao defence to confront the witness with that statement[13].

SUBMISSIONS

14. As a preliminary point, the Kallon Defence takes the position that the issue of the admission of these 2 documents has sufficiently been addressed by the Chamber and the present attempt to revive the matter is vexatious, superfluous and an abuse of the court process.

15. At the heart of this Motion is the attempt to perpetuate the persistent effort by the 3rd accused to hurt the rights and interests of the accused as protected by the Statute of the Special Court and clearly elaborated by Rule 82 (A) of the Rules of Procedure and Evidence.[14]

16. The court has on many occasions in the past emphasised the need to protect the rights of each accused in this joint trial. During the cross-examination of Prosecution witness TF1-366 for instance, the Chamber made the following observations:

> I think the question to be asked at this stage is whether each counsel representing the accused persons, each of the accused persons should, to the extent that the trials even though they are joint have to cater for the defences of each accused person, one should want to really caution his mind as to whether any defence team can adduce evidence or carry out his cross-examination in a manner that prejudices the interests of the co-accused person. Because here, although they are being tried jointly, they are really being also tried separately, because in the context of the joint trial the interests of each accused person are protected by its defence team. Unless the Court so permits, I do not think that a defence team can lead evidence that prejudices the interests of a colleague's client, if indeed Mr Cammegh's question were to be seen in this perspective.[15]

17. And during the testimony of the accused Kallon the Chamber expressed its concern regarding the incriminating nature of testimony that the 3rd accused was trying to elicit through the second accused. The Honourable Presiding Judge then stated:

> ....Well, let me tell you why I'm saying this because I don't think that the second accused at any time really incriminated your client in the course of his evidence and

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[13] *See for instance the remarks of the Honourable Justice Boutet, 17h April 2008, pg.75: 13-29, pg77: 15-20. The remarks of the Honourable Justice Thompson, 17th April 2008, pg 79: 20-24*

[14] *Rule 82 (a) provides In joint trials, each accused shall be accorded the same rights as if he were being tried separately and even gives the power to the Trial Chamber to order that persons accused jointly under Rule 48 be tried separately if it considers it necessary in order to avoid a conflict of interests that might cause serious prejudice to an accused, or to protect the interests of justice.*

[15] *See Transcript of 7th November 2005, pg. 23, lines: 2-26*

that's why I'm intrigued by the nature of the question which are being asked, and which I ordinarily should expect from Prosecution. You know, this is why I'm intrigued.....[16]

18. On yet another occasion during the accused Kallon's testimony the Honourable Justice Thompson expressed similar views as follows:

I take the view that its not as simple as just challenging one's credibility. I think the court – the Tribunal in accordance with the doctrine of fundamental fairness has a duty to ensure that whilst these accused persons are being tried jointly, they are also afforded the judicial guarantees that would, in fact, apply if they were being tried separately. If that is not kept in the forefront of our judicial perspective all the time, then it means that kind of thinking or that kind of principle is merely empty. In other words, we're merely paying lip service to it. I'm very sensitive to the fact that when we made the orders for joinders and separate trials and all that, one of the rational behind our rulings was that notwithstanding the fact that they are being tried jointly, each of them would be guaranteed some of the protections – or the protections that accused persons who are tried separately had guaranteed and I take it very seriously. I don't think it just simply credibility alone. It's a question of the effect of allowing these questions to be put and the answers elicited upon the accused persons in terms of the --- their role --- alleged role that is, in fact, crucial for me,...[17]

THE FIRST PROPOSED EXHIBIT

19. The First Proposed Exhibit constitutes a removal of a redaction to Prosecution Exhibit 190.[18] The document was admitted pursuant to a decision of the Chamber which contained therein a consequential order that the admission be effected subject to a redaction in order to remove specific reference to Mr Kallon.[19] The Motion now seeks to remove that redaction.

20. The Kallon Defence notes the comments of counsel for Gbao during the testimony of Mr Kallon. Referring to Prosecution Exhibit 190, counsel for Gbao stated: "It contains a redaction. I don't seek to go behind that whatsoever."[20]

21. The aforementioned decision, of 2 August 2006, was rendered pursuant to a Prosecution motion and in consideration of a *joint* defence response filed thereto, which opposed the admission of the document into evidence and requested,[21] in the

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[16] *See Transcript of 17th April 2008, pg 51, lines 27-29 and pg.52, lines 1-4*
[17] *See Transcript of 13th May 2008, pg. 50, lines: 3-22*
[18] The Motion, at para 3.
[19] *P v. Sesay et al.*,SCSL-04-15-T-620, Decision on Prosecution Motion to Admit into Evidence a Document Referred to in Cross-Examination, 2 Aug. 06.
[20] T. 17/04/08, pg 63, line 17-18.
[21] *P v. Sesay et al.*, SCSL-04-15-T-607, Defence Joint Response to Prosecution Motion to Admit into Evidence

alternative, that only those parts referred to in the cross-examination of TFI 042 be admitted, citing by way of reason that "these specific parts *do not prejudice the accused*".[22] Counsel for Gbao's signature is attached. In the decision of 2 August 2006, the Chamber ordered the redaction of elements of the document which were of an incriminatory nature to the accused and, to that extent, adopted the alternative argument proffered in the joint defence reply. The 3rd accused cannot now be permitted to go behind that Decision rendered on the basis of submissions to which he was signatory.

22. In effect, the Motion seeks to reintroduce into controversy a matter which is *res judicata*. This doctrine prevails in this instant. The Motion does not advance any legal basis for reconsideration of the Chamber's previous decision.

23. In the alternative the Kallon Defence submits that no sufficient grounds have been advanced for the admission of the proposed Board of Inquiry Report at this stage of the proceedings when the accused Kallon is deprived of the opportunity to test the contents of the documents through relevant Prosecution witnesses. Any reliance on the contents of the documents beyond the scope delimited by the Chamber when it admitted exhibit 190 would cause irreparable prejudice to the accused Kallon.

24. In light of the foregoing it is submitted that the Motion in this respect be dismissed.

THE SECOND PROPOSED EXHIBIT

Applicable Law

25. The law governing the admission of witness statements into evidence is provided in Rule 92*bis* and Rule 92*ter*. Strict conditions must be satisfied before such statements are admitted.

26. Rule 92*bis* states, *inter alia*:

> "(A) In addition to the provisions of Rule 92*ter*, a Chamber may, in lieu of oral testimony, admit as evidence in whole or in part, information including written statements and transcripts, that do not go to proof of the acts and conduct of the accused.
>
> "(B) The information submitted may be received in evidence if, in the

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a Document Referred to in Cross-Examination, 21 July 06.

[22] *Id.*, at para 2.

view of the Trial Chamber, it is relevant to the purpose for which it is submitted and if its reliability is susceptible of confirmation."[23]

27. Thus, written statements may only be admitted into evidence on satisfaction of the following cumulative pre-conditions, *inter alia*:
    a. it does not go to proof of the acts and conduct of the Accused; and
    b. it's reliability is susceptible of confirmation.
28. Rule 92*ter* provides a further framework for the admission of witness statements, *inter alia*. It also requires the satisfaction of strict conditions, one of which is the agreement of the parties.[24]
29. Where a moving party fails to identify the proper legal basis for a motion to admit a written statement into evidence, the motion should be dismissed. In the *Butare* case, the ICTR[25] held that the "[a]dmission of evidence in the form of written statements...is specifically governed by Rule 92*bis*[26] with certain factors and conditions to be satisfied."[27] In that case, the moving party did not invoke Rule 92*bis* and the Trial Chamber consequently dismissed the application for lack of legal basis.[28] The Chamber in that case did not intervene to substitute Rule 92*bis, propio motu*. Therefore, it is submitted that the burden is on the moving party to identify the correct legal basis.
30. The Motion is analogous to a Prosecution motion under Rule 92*bis*. Rule 92*bis* is an instrument for the admission of written statements which is available to all parties. When the Prosecution file motion under Rule 92*bis*, the Chamber enquires into the manner in which the proposed evidence will incriminate one or more accused and, therefore, mindful of the rights of that accused, whether it is just to allow the

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[23] Rule 92*bis* of the Rules of Procedure and Evidence of the Special Court for Sierra Leone, ("the Rules of the Special Court").
[24] See Rule 93*ter*.
[25] Prosecutor v Nyiramasuhuko, *infra*
[26] Rule 92bis of the Rules of Procedure and Evidence of the ICTR, ("the Rules of the ICTR").
[27] *P v Nyiramasuhuko et al*, ICTR-98-42-T, Decision on Prosecution Motion for Verification of the Authenticity of Evidence Obtained Out of Court, Namely the Alleged Diary of Pauline Nyiramasuhuko, 1 Oct. 04, at para 26. Although Rule *92bis* of the Rules of the ICTR differs form Rule *92bis* of Rules of the Special Court, this case is instructive here. In that case, the Prosecution moved the Chamber to introduce written statements under Rule 89(C). The rule of law invoked by the Trial Chamber in that case turns on the relationship between Rule 89(C) and Rule 92*bis*. In the Rules of the Special Court and the Rules of the ICTR, the relationship between Rule 89(C), which provides the general standard for admission of evidence, and Rule 92*bis*, which provides specific additional criteria that must be fulfilled for the admission of written statement, is identical. Therefore, it is submitted that the Chamber is guided by the principle.
[28] *Id.*

admission of evidence in the form of a written statement, in lieu of oral testimony. Therefore, to that extent, Rule 92*bis* serves to protect the accused against the unfair admission of incriminating evidence. As such, in a cases where a motion is made by one accused to admit a written statement into evidence which tends to incriminate a co-accused, the enquiry before the Chamber is whether the written statement goes to proof of the acts and conduct of the (potentially) incriminated, non-movant, co-accused.[29]

31. The reliability of the written statement must be "susceptible of confirmation". This Trial Chamber has interpreted the requirements of Rule 92*bis* to prevent the admission of evidence which might "prejudice unfairly the Defence", *inter alia*.[30] It held that in cases where documents are admitted into evidence which speak to the acts and conduct of an accused, cross-examination of the maker of the statement is necessary to avert such prejudice. The Chamber held as follows:

> "the Chamber has repeatedly stated that one example of a situation where the admission of evidence pursuant to Rule 92*bis* might prejudice unfairly the Defence is when *documents pertaining to the acts and conduct of the Accused* are admitted into evidence without giving the Defence the opportunity of cross-examination".[31]

Submissions

32. The Second Proposed Exhibit is a written statement. The Motion seeks its admission under Rule 89(C). As explained, *supra*, written statements can only be admitted within the framework of Rule 92*bis* or Rule 92*ter*. Therefore, it is submitted that the application to admit the Second Proposed Exhibit be dismissed for lack of legal basis.
33. The objection recorded herein to the admission of the Second Proposed Exhibit precludes admission under Rule 92*ter*, which requires the agreement of the parties.
34. Additionally and/or in the alternative, the Second Proposed Exhibit goes to "proof of the acts and conduct" of both the Second Accused and the Third Accused and,

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[29] Whether the Chamber may also concern itself with the relationship of the evidence to the movant is not the concern of the Response.
[30] *P v. Sesay et al.*, SCSL-04-15-T-605, Decision on Prosecution Notice Under Rule 92*bis* and 89 to Admit the Statement of TFI 150, 20 July 06, at para 17.
[31] *Ibid.* at para 22, (emphasis added).

therefore, cannot be admitted under Rule 92*bis*. In this case, Rule 92*bis* is in place to protect the fair trial rights of the Second Accused and, in so doing, is concerned with whether the Second Proposed Exhibit goes to "proof of the acts and conduct" of the Second Accused.

35. In addition, the maker of the statement, TFI 042, testified before the Chamber on 20 and 21 June 2006. The Motion acknowledges that the Second Proposed Exhibit was disclosed to the Defence before that time and, as such, could have been tendered at that time.[32] Had Mr Gbao done so, Mr Kallon would have had the opportunity to test the veracity of this statement. The Second Proposed Exhibit is highly incriminatory towards to the Second Accused and, owing to the timing of the Motion, the opportunity to specifically test its veracity on cross-examination has been lost. Admitting the document into evidence under such circumstances, would cause the deepest prejudice to the Defence of the Second Accused, who has proceeded on the basis that it would not form part of the case against him.

36. The Chamber has already denied an oral application by counsel for Gbao to the admission of this document during the testimony of Mr Kallon. In so doing, the Chamber remarked several times that the proper time to introduce the document would have been during the testimony of TFI 042. His Honour Justice Boutet indicated the Chamber's preference for affirming the meaning of a statement during the testimony of its maker. He commented as follows:

> "That's why I say this is the difficulty now, after the fact, you come with a document like this when the witness is not here, a witness who testified for a long period of time, when all this was available, it could have been put to the witness and it was not. So now, after the fact, we are asked to accept this as evidence and then left to speculate as to what the meaning is or not."[33]

37. Rule 92*bis* requires confirmation of the truth of a written statement admitted into evidence. However, the state of the evidence in the record indicates to the contrary. Indeed, counsel for Gbao stated that his application to admit the document was

[32] The Motion, at para 17.
[33] T. 17/04/08, pg 75, line 25 – pg 76, line 2; see also pg 68, line 1-10; and, for the comments of His Honour Justice Itoe, pg 74, line 5-13.

premised upon a motivation to demonstrate inconsistencies between the witness' statement and his oral testimony.[34] The Motion also observes the inconsistencies.[35] Therefore, the Kallon Defence rejects the argument that the Board of Inquiry Report, of which the Second Proposed Exhibit is an annex, is "of high reliability" because it is "an official [document], originating from the UNAMSIL itself."[36] On the contrary, it is submitted that unsettled credibility issues surround the Second Proposed Exhibit which were not cleared up on cross-examination of the witness who authored the document, and that, short of recalling the witness, its reliability is not susceptible of confirmation.

38. The Second Proposed Exhibit is hearsay of a highly incriminatory nature to Mr Kallon. It goes to proof of the acts and conduct of Mr Kallon and is inconsistent with the oral testimony of its maker and, therefore, unreliable and highly prejudicial.

39. In light of the foregoing it is submitted that the Motion be dismissed in relation to the Second Proposed Exhibit.

CONCLUSION

40. The Kallon Defence prays the Chamber to dismiss the Motion in its entirety.

DONE in Freetown on this..... day of....., 2008.

For Defendant **KALLON,**

Chief Charles A. Taku

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[34] T. 17/04/08, pg 66, line 12-18.
[35] The Motion, at para 14-16.
[36] The Motion, at para 29.

LIST OF AUTHORITIES

Legislation

Statute of the Special Court for Sierra Leone

Rules of Procedure and Evidence of the Special Court for Sierra Leone

Rules of Procedure and Evidence of the International Criminal Tribunal for Rwanda

Filings

P v. Sesay et al., SCSL-04-15-T-1129, Order for Expedited Filing, 20 May 08.

P v. Sesay et al., SCSL-04-15-T-1127, Decision on Gbao Request for Leave to Call Four Additional Witnesses and For Order For Protective Measures, With Annex A, 19 May 08.

P v. Sesay et al., SCSL-04-15-T-1126, Gbao Request for Leave to Add Two Documents to its Exhibit List and to Admit Them as Evidence, With Confidential Annexes, 16 May 08.

P v. Sesay et al.,SCSL-04-15-T-620, Decision on Prosecution Motion to Admit into Evidence a Document Referred to in Cross-Examination, 2 Aug. 06.

P v. Sesay et al., SCSL-04-15-T-605, Decision on Prosecution Notice Under Rule 92*bis* and 89 to Admit the Statement of TFI 150, 20 July 06

P v. Sesay et al., SCSL-04-15-T-607, Defence Joint Response to Prosecution Motion to Admit into Evidence a Document Referred to in Cross-Examination, 21 July 06.

P v. Sesay et al., SCSL-04-15-T-320, Decision on Prosecution Request for Leave to Call Additional Witnesses and Disclose Additional Witness Statements, 11 Feb. 05.

P v Nyiramasuhuko et al, ICTR-98-42-T, Decision on Prosecution Motion for Verification of

the Authenticity of Evidence Obtained Out of Court, Namely the Alleged Diary of Pauline Nyiramasuhuko, 1 Oct. 04

RUF Trial Transcripts

T. 17/04/08

T. 31/03/06

T. 20/06/06

T. 27/06/06

T. 02/08/06