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SCSL-04-15-T
(26192-26700)

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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: 23 May 2008

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

Case No. SCSL-2004-15-T

PUBLIC

GBAO REPLY TO PROSECUTION AND KALLON RESPONSES TO GBAO REQUEST FOR LEAVE TO ADD TWO EXHIBITS TO ITS EXHIBIT LIST AND TO HAVE THEM ADMITTED AS EVIDENCE

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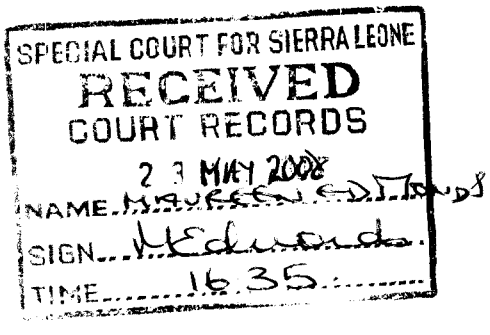

I. Introduction

1. On 16 May 2008, the Third Accused requested that two documents be added to its exhibit list-a partially unredacted version of paragraph 14 of Prosecution Exhibit 190 and the statement of Major Jaganathan Ganese.[1] On 21 May, the Second Accused opposed the introduction of these documents.[2] On the same day, the Prosecution opposed the introduction of the two documents in the manner in which the Third Accused proposes.[3]

2. It must be noted at the outset that counsel for the Third Accused does not seek the introduction of the Board of Inquiry Report into evidence in the manner in which the Prosecution proposes in its motion; indeed, if the Court does not allow the partial 'unredaction' of paragraph 14, and only paragraph 14, for the express limited purpose of exonerating the Third Accused, it withdraws its request regarding this document.[4]

II. Submissions

A. Kallon Submissions[5]

i. Preliminary Remarks

3. Counsel for Morris Kallon suggest in its Response that the filing of this request is "vexatious, superfluous and an abuse of the court's process".[6] The ostensible "abuse" of the court's process, however, is nothing more than an anticipated step contemplated and announced in court on 17 April 2008, as the Second Accused is surely aware. On that day, the Court

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[1] *Prosecutor v. Sesay et al.*, SCSL-2004-15-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 2008 ("Gbao Request").
[2] *Prosecutor v. Sesay et al.*, SCSL-2004-15-T-1135, Kallon Response to Gbao Request for Leave to Add Two Documents to its Exhibit List and to Admit Them as Evidence, 21 May 2008 ("Kallon Response").
[3] *Prosecutor v. Sesay et al.*, SCSL-2004-15-T-1133, Prosecution Response to Gbao Request for Leave to Add Two Documents to its Exhibit List and to Admit Them as Evidence, 21 May 2008 ("Prosecution Response").
[4] Admittedly, there are certain paragraphs in the request that are ambiguous. However, the overall purpose for adding it to the exhibit list was to partially 'unredact' one sentence of paragraph 14.
[5] The Sesay Defence team did not file a response to the request to add these two exhibits.
[6] Kallon Response, para. 14.

rejected the tendering of TF1-042's statement, the document that the Third Accused now seeks to add to its exhibit list and have it admitted as evidence. However, Justice Boutet suggested that "[i]n due course when you carry on your case *you may seek to have this document admitted as an exhibit* and notify the parties and we'll deal with it at that time".[7] The Third Accused is now following that suggestion.

ii. Unclear Position Taken by Kallon Defence Team Considering Past Practices

4. The recent position taken by the Second Accused breaks with its past practices in the case. Indeed, in the past the Second Accused seemed to have no compunction against implicating the Third Accused in an effort to exonerate himself. On 17 November 2005, for example, counsel for the Second Accused, in a presumed attempt to substantiate its alibi defence, read and submitted into evidence a previous witness statement of TF1-366. After spending the greater part of seven minutes reading TF1-366's statement onto the record, it was exhibited as part of the trial (presumably to demonstrate that Morris Kallon was not mentioned as being present at the Makump DDR camp).[8] The statement made various allegations against Gbao (that were not even part of the Prosecution's case) including statements from the witness such as "Gbao and his men [were] firing their weapons inside the UNAMSIL compound. Augustine Gbao had driven into the compound and I saw him ordering his men to arrest four white soldiers. I saw Augustine Gbao firing into the ground in close proximity to where the white men were standing".[9]

5. Two weeks earlier, the Kallon team had read witness statements into the record containing other serious allegations against the co-Accused Gbao. Presumably this was done to exonerate their client. Counsel for the Second Accused asked TF1-314, *inter alia*, "[d]o you recall saying that it was Superman and Gbao that...kidnapped the UNAMSIL personnel at

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[7] *Prosecutor v. Sesay et al.*, Transcript 17 April 2008, p.89 (emphasis added).
[8] RUF Exhibit 56b.
[9] *Prosecutor v. Sesay et al.*, Transcript of 17 November 2005, p.17-19.

Makoth[?]".[10] Also, he asked whether "Augustine Gbao and Superman had a meeting where they planned an ambush of UNAMSIL trucks, they led a group to Makoth and laid the ambush".[11] Further, "[h]ow do you know that Augustine Gbao and Morris Kallon called for a meeting to attack UNAMSIL?".[12]

6. It is unclear how to reconcile these seemingly contradictory positions put forth by the Kallon team, and speculative to conclude whether taking these divergent positions was part of an intentional strategy or not. It is clear that the Kallon team was working to exonerate their client by introducing evidence that calls into question the Prosecution's case against the Second Accused. If so, however, it would only be fair to allow the Gbao team the same ability to defend its case, especially considering that the Kallon team might have had knowledge of its team's past practices. Paragraph 15 in the Kallon response cites Honourable Justice Itoe's personal hesitation in 2005 to allow questions that potentially implicate co-accused.[13] This statement was prompted by an objection at the time from the Kallon team regarding a certain line of questioning pursued by the Third Accused. Included in the lines cited by the Kallon defence in its response is a comment made by Mr Cammegh for the Third Accused, who stated that the "objection is ironic given the concentration Mr Touray [counsel for Kallon] put on repeating Gbao's name over and [over in his cross-examination three days before]". Thus, the Kallon team seem to have had notice of its predecessors' case strategy. It is surely incumbent upon the Kallon team to explain their dual positions.

ii. Questions about Kallon's Presence at the DDR Camp Have Already Been Asked by Gbao Defence Team Without Objection

7. It must be emphasised that, no matter the position of the Kallon defence team today, questions relating to Kallon's presence at the Makump DDR camp—the only question that was asked against the Accused's interests by the Gbao team—has been part of the Gbao case

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[10] RUF Transcript of 4 November 2005, p.75; *also see Id.* at p.76.
[11] *Id.* at p.77
[12] *Id.* at p.79
[13] Kallon Response, para. 16. Note that this comment came during the cross-examination of TF1-314, not TF1-366.

for years. In 2006, during the cross-examination of TF1-165, on at least three different occasions counsel for the Gbao defence suggested to the witness that Morris Kallon was at the DDR camp on 1 May 2000.[14] There was no objection by the Kallon defence team at that time.

iii. Conflicts Inherent in a Joint Trial have Already been Answered by the Court

8. In 2005 the Kallon team objected when the Gbao team adopted a disagreeable line of questioning that related to their client. At that time, Presiding Judge Boutet asked "[y]ou mean to say that the counsel for the Third Accused cannot cross-examine for the purpose of trying to clarify the position of his client[?]"[15] He continued: "[w]e do clearly remember that we said wherever evidence comes in, because it is a joint trial, we have to be careful how it is done. But *we never said that it cannot be done*...it does not mean that he cannot cross-examine to the extent they need for their purposes".[16] Honourable Justice Thompson seemed to agree with Judge Boutet. He stated that "we have advised ourselves that here is a delicate line of cross-examination and we will do the best we can to be as vigilant in terms of what evidence would be admissible against which particular accused person or not".[17]

iii. Conclusion

9. Counsel for the Third Accused is working to exonerate Augustine Gbao for reasons stated in its initial request. It has no intention and can find no relevance in seeking to make any accusations against the Second Accused, and it remains willing to meet with counsel for Kallon at any time to discuss redactions that would suit both parties.

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[14] RUF Transcript of 31 March 2006, p.27.
[15] RUF Transcript of 26 July 2005, p.87.
[16] *Id.* at p.88.
[17] *Id.*

10. For the reasons listed above and pursuant to the rights accorded each Accused under Rule 82(a), these two documents should be placed onto the Third Accused's exhibit list.

B. Prosecution Submissions

i. Preliminary Remarks

11. On 17 April 2008, Counsel for the Third Accused spent several hours debating in Court whether Major Ganese's statement could be tendered as evidence in the case. The Prosecution did not intervene in support of the principles it now relies upon in its opposition brief.

12. The Third Accused takes exception to the suggestion that it seeks to exonerate itself by implicating the Second Accused in certain crimes. As was argued indefatigably in court on 17 April and 13 May 2008, the Third Accused is working to exonerate himself from crimes *he did not commit*. Speculating that the Third Accused harbours some sinister and covert intention to attack the Second Accused is an unfortunate and unnecessary position for the Prosecution to take—the Third Accused's sole interest is in addressing his innocence, *not* in passing the blame onto the Second Accused. It was in this spirit that counsel for the Third Accused applied to introduce these documents onto the exhibit list.

13. The Third Accused argues that 'unredacting' part of paragraph 14[18] would exonerate him, as would introducing the statement of Major Ganese [19] The Prosecution take the position that the documents do not exonerate the Accused (but not without irony, as these materials were originally served on the Third Accused pursuant to Rule 68). While the Third Accused could further expound upon why these documents are relevant to exonerate himself—beyond the demands of demonstrating their relevance—he is under no duty to explain his case strategy in defending the Prosecution's allegations. Similarly, the Third Accused does not feel

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[18] It was never requested to unredact paragraph 13. *See* Gbao Request, para. 11.

[19] The Prosecution submits that Ganese's statement does not exonerate because the questions were not put to the witness and the preeminence of the principle of orality over documentary evidence. While these are relevant arguments in other contexts, they are irrelevant and wholly misplaced when arguing whether a document exonerates an Accused or not.

compelled to explain the law underpinning the charges made in the indictment that necessitate taking the various positions it has in this request.

ii. Questions in the Motion Should have been Put to TF1-042

14. The Third Accused reiterates the position taken in his request as to whether TF1-042's statement should have been put to the witness.[20] The Prosecution seems to adopt one of the Third Accused's arguments in paragraph 17 of its Response, when it states that "[a] party is entitled to change its position about any document".

iii. Prior Inconsistent Statements

15. The Prosecution argues that prior inconsistent statements "*must* be put to the witness".[21] It cites the *Norman* decision as guidance for the Court, arguing that the enunciated principles cannot be contravened.[22] What it fails to note is that each principle it outlines in its argument uses permissive phrasing ('may' and 'should') rather than mandatory language.[23] Defence for the Third Accused agrees that, under most circumstances, it *should* put contradictions to the witness. Indeed, Counsel has frequently cited such practice with approval in the courtroom. However, within the context of this long and multifarious trial, it is argued that this should not be a rule without exception.

iv. Lex Specialis Should Not Solely Guide the Court in this Case

16. Arguing that 92*bis* is *lex specialis* to Rule 89, and that 92*bis* is the only method to submit documentary evidence evinces a misunderstanding of the rules of procedure in the Special Court. Firstly, one need only review the hundreds of documents already in evidence to see

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[20] Gbao Request, paras. 18 and 20.
[21] Prosecution's Response, para. 21 (emphasis added).
[22] *Ibid.*
[23] Where it uses the more mandatory 'must' (in principle (ii) and (iv)), it references specifically actions that must be taken after a permissive step is first taken.

that there is more than one method to introduce a document into evidence. Secondly, while *lex specialis* is often useful as a good 'common sense' argument, one must look at the necessary implication-utilising *lex specialis* in this case would have the effect of rendering valueless the generous standard of Rule 89 for documentary evidence. This violates other textual canons of interpretation, including the "whole act" rule, which discourages courts to read individual rules in a way that would derogate or create an inconsistency with provisions of the same statute.

III. Conclusion

17. Defence Counsel requests leave from the Trial Chamber to add the partially unredacted version of paragraph 14 to the UNAMSIL Board of Inquiry Report 00/19 of 20 September 2000, and the statement of Major Ganase contained in Annex Q of the Board of Inquiry Report to its exhibit list and to have them admitted as evidence pursuant to Rule 89. If the Court does not seek the introduction of the Board of Inquiry for the limited purpose clarified in this reply, it wishes to withdraw its request regarding the document.
18. Counsel for the Third Accused apologises that it is 15-20 minutes late in filing its reply brief. Just before the time of filing, the network at the Special Court was not functioning, leaving it unable to finalise its reply.

Done at Freetown, Friday 23 May 2008.

Defence Counsel for Augustine Gbao
John Cammegh, Scott Martin

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List of Authorities

RUF Case (*Prosecutor against Issa Hassan Sesay, Morris Kallon, Augustine Gbao, Case No. SCSL -2004-15-T)*

1. Decisions

Doc. No. SCSL-2004-15-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 2008. Paragraphs 11, 18 and 20.

Doc. No. SCSL-2004-15-T-1133, Prosecution Response to Gbao Request for Leave to Add Two Documents to its Exhibit List and to Admit Them as Evidence, 21 May 2008. Paragraph 21.

Doc. No. SCSL-2004-15-T-1135, Kallon Response to Gbao Request for Leave to Add Two Documents to its Exhibit List and to Admit Them as Evidence, 21 May 2008
Paragraphs 14 and 16.

2. Transcripts

RUF Transcript of 26 July 2005. Pages 87 and 88.

RUF Transcript of 4 November 2005. Pages 75, 76, 77 and 79.

RUF Transcript of 17 November 2005. Page 18.

RUF Transcript of 31 March 2006. Pages 27 and 32.

RUF Transcript of 20 June 2006. Page 24.

RUF Transcript of 17 April 2008. Page 89.

3. Other Documents

RUF Exhibit 56b.