SCSL-2004-15-PT 5963

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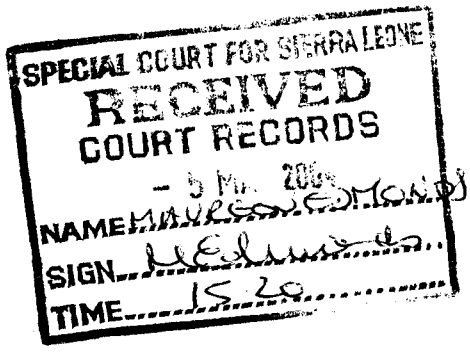
SPECIAL COURT FOR SIERRA LEONE

IN THE TRIAL CHAMBER

Before: Judge Bankole Thompson
Judge Pierre Boutet
Judge Benjamin Mutanga Itoe



Registrar: Mr. Robin Vincent

Date Filed: 5th May 2004

PROSECUTOR against

MORRIS KALLON
(Case SCSL-2004-15-PT)

DEFENCE RESPONSE TO PROSECUTION MOTION FOR CONCURRENT HEARING OF EVIDENCE COMMON TO CASES SCSL-2004-15-PT AND SCSL 2004 – 16 -PT

Office of the Prosecutor:

Luc Cote, Chief of Prosecutions
Robert Petit, Senior Trial Attorney

Defence:

Shekou Touray
Raymond Brown
Wanda Akin
Melron Nicol-Wilson
Wilfred Bola Carrol

Prosecution v. Sesay, Kallon and Gbao (SCSL –2004-15-PT)

INTRODUCTION

1. The Defence files this Response in Opposition to the Prosecution "Motion for Concurrent Hearing of Evidence Common to Cases SCSL –2004-15-PT and SCSL-2004-16-PT filed on 30th April 2004 ("Motion").

PROCEDURAL BACKGROUND

2. The Motion is based essentially on an amendment to Rule 48 of the Rules of Procedure and Evidence of the Special Court for Sierra Leone adopted by a Plenary session of the Judges of the Special Court on 11th – 14th March 2004 ("the Rules") by the addition of a new Sub-Rule 48 (C) which provides that "a Trial Chamber may Order the concurrent hearing of evidence common to the trial of persons separately indicted or joined in separate trials and who are accused of the same or different crimes committed in the course of the same transaction. Such a hearing may be granted with leave of a Trial Chamber pursuant to Rule 73".

3. In due consideration of the request of the Prosecution for the Motion to be dealt with expeditiously, the Trial Chamber on the 30th April 2004 issued an "Order for expedited Filing" stipulating inter alia that " any response to the Motion shall be filed on or before Wednesday, 5 May 2004 before 4.00 pm".

4. The Motion comes up a day after the conclusion of a Pre-Trial Conference held on the 29th April 2004 in respect of the case of the Prosecution v. Sesay, Kallon, and Gbao (SCSL –2004-15-PT) where the Prosecution as if to steal a match on the Defence never raised the need for concurrent hearing of evidence common to that case and the case SCSL-2004-16-PT.

5. Before the amendment to Rule 48 of the Rules on 11th –14th March 2004, the Prosecution had in October 2003 on "Motions for Joinder" argued that there should be two trials – one for the alleged members of the Civil Defence Forces (CDF) (Norman, Fofana, Kondewa)

and the other for the alleged members of the Armed Forces Revolutionary Council (AFRC) (Brima, Kamara and Kanu) and the Revolutionary United Front (RUF) (Sesay, Kallon and Gbao).

6. The Trial Chamber by its "Decision and Order on the Prosecution Motions for Joinder" made on 27th January 2004 found that joint trials would be more efficient, that they would allow for a more consistent and detailed presentation of evidence, that they would offer better protection for victims and witnesses and that they would be in the interest of justice. In order however to protect the rights of the accused, the Chamber ordered that the accused persons must be tried in three groups of three accused persons each representing the alleged members of the CDF, the AFRC and the RUF. The Chamber on that basis consequentially ordered the Prosecution to file Consolidated Indictments for each of the groups in separate joint trials.[1]

7. The Prosecution thereafter filed an "Application for Leave to File an Interlocutory Appeal against the Decision of the Trial Chamber" on 3rd February 2004. Leave was refused by a "Decision of the Trial Chamber" on 13th February 2004.

8. The case against the alleged members of the RUF (Sesay, Kallon and Gbao) was consolidated as Case SCSL-2004-15-PT and that against the alleged members of the AFRC (Brima, Kamara and Kanu) as Case SCSL-2004-16-PT.

THE LEGAL ISSUES IN THE PROSECUTION MOTION

9. The Prosecution on the eve of a major trial requests pursuant to the new Sub-Rule 48 (C) and 54 and 73 of the Rules for the concurrent hearing of evidence common to both cases, SCSL-2004-15-PT (Prosecutor v. Sesay, Kallon and Gbao) and SCSL-2004-16-PT (Prosecutor v. Brima, Kamara and Kanu) involving as it is alleged the sum total of 56%of the the witnesses for the Prosecution. The Defence submits that in practical terms,

[1] *Prosecutor V. Sesay et al,* Case No. SCSL-2003-05-PT, Decision and Order on Prosecution Motions for Joinder, 27 January 2004
Prosecutor v. Norman et al, Case No. SCSL-2003-08-PT, Decision and Order on Prosecution Motions for Joinder, 27 January 2004

the Prosecution is requesting that more than half of the witnesses it intends to call in each separate joint trial of both cases be heard in a " joint- session trial".

10. The Prosecution grounds its request in part on the argument that the interest of the Accused persons under Article 17 of the Statute of the Court will be thereby promoted. It again reiterates grounds previously canvassed in support of its Motions for Joinder, that is the interest of justice, enhancing judicial economy, consistency in jurisprudence and the conduct of the judicial process.

11. The Prosecution offers assurances that the alleged Common Witnesses it intends to call at the joint-sessions will not "directly" implicate the "individual Accused."[2] The Prosecution further offers assurances that if granted its request, the Defence will still have the opportunity before and during trial to apply for severance after receiving from the Prosecution, witnesses Statements 42 days before each witness appears.[3]

ARGUMENTS

12. The Defence submits that the Prosecution Motion is essentially an attempt to raise for the second time in a disguised form a matter already ruled upon by the Trial Chamber when it gave its Decision and Order on the Prosecution Motions for Joinder. What the Prosecution seeks to achieve by this Motion is a joint Trial of RUF and AFRC under the guise of a joint or simultaneous session - a matter already denied the Prosecution by the Trial Chamber in order to protect the rights of the Accused under the Statute of the Court and the Rules. The Defence finds such veiled attempt objectionable and in flagrant disregard of the common principle of issue estoppel.

13. The Defence further submits that the grounds canvassed by the Prosecution in support of its Motion – the interest of justice, enhancing judicial economy, consistency in Jurisprudence and in the conduct of the judicial process have not been substantiated for the following reasons: -

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[2] Concurrent Evidence Motion Paragraphs 16,17 and 20
[3] Concurrent Evidence Motion Paragraph 21.oti

i. Out of seven Common Expert Witnesses listed in Annexure 5 to the Motion, only the statement of one has been disclosed so far to the Defence.

ii. The Prosecution in Paragraph 21 of its Motion concedes that it still has to satisfy the requirements of Rule 73 *bis* of the Rules to furnish the Defence with the summary of facts and the points in the Indictment on which each witness will testify and further concedes that full statements of the Prosecution witnesses and their identities are yet to be furnished the Defence.

iii. A brief study and analysis of Annexure 5, the Witness List and summaries of Evidence, does not support the Prosecution's assertion that all the witnesses on the list are in fact common witnesses. The Defence finds that only about 32 of the witnesses actually refer to the distinct group of "AFRC/RUF" the specific group covered in all the Counts charged in the Consolidated Indictment. That group it is submitted is by reference to Paragraphs 11, 7 and 10 of the Consolidated Indictment defined and distinguished from either the "AFRC" as a group or the "RUF". The Defence further finds that out of the 32 or so witnesses the summaries of their evidence would confirm that quite a good number are exact repetitions of the same incident, to wit the alleged Kenema Crime Base Witnesses. The same scenario is broadly true of the Crime base Common witnesses in some of the other Districts on the list.

iv. The Defence also finds that the rest of the witnesses on the list either specifically refer to "rebels" meaning "RUF" as defined in Paragraph 7 of the Consolidated Indictment or to "Soldiers", "SLA" meaning "AFRC" as defined in Paragraph 10; in some cases the witnesses could not say and so made reference to "armed men".

v. The Prosecution concedes in Paragraph 8 of its Motion that the List of the Common Witnesses annexed is tentative. It is therefore possible that at the end of the day when the list becomes definite, the Prosecution's assertion of 56% Common Witnesses may not be well-founded and could be misleading as the number might even increase.

14. The Defence accordingly submits that the Prosecution Motion is premature and incompetent in the absence of full disclosure. Further it leaves the Chamber to speculate on the actual number of Common Witnesses the Prosecution intends to call. It is submitted that the Chamber ought not to be put into speculation on a matter of such crucial importance for its Ruling on the Motion.

15. The Defence submits that it is only after full disclosure of the unredacted Statements of the alleged Common Witnesses together with their identities and a definitive list is in existence will the Defence be in a position to ascertain the assertions of the Prosecution particularly those in Paragraphs 16, 17, 19 and 20 of the Motion to the effect that the Witnesses Statements are more of a general nature and would not directly implicate the individual accused persons.

16. Judicial economy it is submitted can best be enhanced by a drastic cut of repetitive witnesses or by a method whereby some could be lined up for either one or the other Group of Accused, and by discarding witnesses whose evidence bear no relevance to the Counts as actually laid; but certainly not by the holding of joint-sessions trials.

17. Prosecution in Paragraph 21 of the Motion that an Accused person who finds himself prejudicially affected if the Motion were granted might well apply for severance after receiving the Statements of the Witness 42 days before he is called upon to testify is an open invitation to constantly re-litigate the same issue over and over and thereby undermine the very judicial economy canvassed in support of the Motion.

18. The Defence therefore submits that concurrent hearing of evidence in a joint-sessions trial will cause unreasonable delay in the proceedings. There is no guarantee that the concurrent hearing of evidence will shorten the proceedings. It may well actually lengthen it, since any adjournment of the trial requested and granted in respect of any one of the Accused persons in the proceedings at any given time would result in an adjournment of the trial as a whole for both groups of accused persons.

19. On the issue of judicial consistency and enhancing the conduct of the judicial process, it is submitted that these may well be threatened rather than enhanced in the very unlikely event that the Chamber is minded to depart from its previous stance on the Joinder Motions and if, when the suggested applications for severance were to be made by the Defence different decisions were given on a case by case approach.

20. An examination of the Summaries annexed to the Motion dramatically demonstrates the real likelihood of conflict and mutual recriminations between the RUF and AFRC accused persons. Some allege that misconduct was engaged in by AFRC and RUF personnel, others allege misconduct by "AFRC", "SLA" "EX-SLA" or "RUF", while still others only identify the alleged wrong doers as "rebel". "armed men", "soldiers". It is submitted that in each of these circumstances the prospects of conflict and running cut-throat defences in a joint-sessions trial becomes potent and which will prove inimical to the guaranteed rights of the Accused to a fair trial under the Statute of Court and the Rules.

INTERNATIONAL JURISPRUDENCE

21. Rule 48 (C) of the Rules offers no guidelines to the Chamber for its application and provides no tests an Applicant must fulfill in order to be entitled to relief such as the usual "upon good cause shown" found in some Rules.

22. The Defence submits that the chamber has discretion in this matter, which must be judiciously exercised and not based on caprice. Such discretion cannot be fettered by the application of rigid rules. It is however submitted that the overriding guiding factor ought to be what would best serve the interest of justice and protect the rights of the

Accused persons. These are factors, which should be jealously guarded by the Chamber and protected from being flagrantly or obliquely trampled upon under the guise of enhancing judicial economy and an expeditious trial.

23. The Prosecution it is submitted has cited no single authority in International jurisprudence that lends support to its Motion. The *Kovacevic* decision rejected a "Motion for Joinder and Concurrent Hearing". The brief decision in *Brdanin* rejected concurrent hearings concerning "Evidence in both cases relating to the same events that have taken place in the municipality of Prijdor".

CONCLUSION

1. The Defence considering the foregoing and the particular circumstances of this case submits that the Application should be dismissed as it is premature, devoid of merits, ill-founded in law, unsupported by the relevant Case law and bound to undermine judicial consistency, economy and the conduct of the judicial process.

2. The Chamber should therefore dismiss the Prosecution Motion in its entirety in the interest of justice and for the purposes of protecting the rights of the Accused persons to a fair trial as provided for under the Statute and the Rules of Court.

5th May 2004

Shekou Touray, Lead Counsel
Raymond M. Brown, Co-Counsel
Melron Nicol-Wilson, Co-Counsel