SCSS-2004-15-PT

(6632-6637)

160

6632

THE SPECIAL COURT FOR SIERRA LEONE

BEFORE:

Judge Benjamin Itoe
Judge Bankole Thompson
Judge Pierre Boutet

Registrar: Mr. Robin Vincent

Date filed: 14th June 2004

The Prosecutor

-v-

Issa Hassan Sesay

Case No: SCSL – 2004 – 15 – PT

Defence reply to Prosecution's response to Defence Motion for disclosure pursuant to Rule 66 and Rule 68

Office of the Prosecutor

Luc Cote
Robert Petit

Defence

Tim Clayson
Wayne Jordash
Serry Kamal
Sareta Ashraph

REPLY

1. In paragraph 4 of the Response the Prosecution suggest that the defence are responsible for the making of "immoderate comments" and unfair insinuations in the Defence Motion of the 28th May 2004. In footnote 1 the Prosecution list supposed examples of this "inappropriate" language. The defence submit that the points raised in their Motion were (and are) valid criticisms of the approach of the Prosecution to disclosure. They are not made to score personal points but to highlight the very real dangers, which the defence believe, arise from the approach the Prosecution have taken to disclosure.

2. It is noteworthy that the Prosecution do not dispute (except in regard to the issue of whether they made a commitment to give the defence access to the evidence which it had in its possession and which pursuant to Rule 66(A) (ii) it did not seek to rely upon) the critique of the defence nor do they seek to clarify the reasons for their approach. They do not suggest that the defence criticisms in paragraphs 7(i) to (iii) of the defence Motion are untrue nor offer explanations as to why the anxiety of the defence (based as it is upon these criticisms) is unwarranted. The Prosecution's complaint therefore that the defence comments are immoderate or in some ways unfair should therefore be seen in this light.

3. Additionally there are more aspects of the Prosecution approach to disclosure which can properly be criticised and which as a whole forms the motivation for the Defence Motion. It is, for example, a fact that on the 26th April 2004 (just slightly over two months before trial) the Prosecution served 4092 pages of new evidence (see Annex A of the Defence Motion dated 28th May 2004) on the defence. It is the case that within this disclosure the Prosecution were purporting to serve the full statements (equating to half or one or two page summaries of evidence which were had been previously served). See for example TFI – 151 served as a half page summary in 2003 and then served on the 26th April 2004 in their original form as seven interviews totalling 703 pages – the last of those

interviews being on the 13th January 2003. The Prosecution offer to no explanation for the reasoning behind why these interviews had to be served as such limited summaries in the first place nor why the full statements had to be served so late in the proceedings but instead now complain when such disclosure gives rise to the anxiety the Defence expressed in the Motion of 28th May 2004.

4. The Prosecution in paragraph 33 of their response suggest that the defence are (by seeking a schedule of the evidence they possess but do not seek to rely upon) attempting to "impose a disproportionate and inequitable burden on the Prosecution" and "the same is a clear ploy by the Defence to delay the commencement of the proceedings". The defence can think of no better way to impose a burden of this type on a party than to wait until 2 months before trial before serving this amount of evidence (which is tantamount to new evidence) and which requires literally hundreds of legal hours to analyse. Conversely it is disclosure of this nature which risks delaying proceedings not legitimate requests of the defence made in an attempt to safeguard the accused's right to a fair trial.

5. The Prosecution do however suggest, in one regard, that the defence are wrong in their criticism. They suggest that they did not give a clear commitment to allow the defence access to the evidence in its possession. The defence submit however that the comments of the Prosecution at the Pre – trial conference were clear and do amount to a clear commitment. At the Pre- trial conference the Prosecution[1] stated:

"The third part of it is there is also provision for the defence to ask to inspect our documents and everything in our possession following Rule 66(A) which I think provided for – if they look at things that they want there, then they would have to

[1] Mindful of the Prosecution allegation that the defence were seeking to personalise the debate (see paragraph 5 of their Response) the defence do not name the Prosecutor. However the defence believe that in certain instances the use of names may assist the Trial Chamber in identifying the occasion and evidence which is the basis for the discussion. It may also be useful to assist in demonstrating that the Prosecution has not always been "one and indivisible" (see 7(i) of the Defence Motion and paragraph 5 of the Prosecution Response).

come and show good cause why we should need – why we should be ordered to give them a copy" (pp.61. 33 – 37).

6. The Prosecution's interpretation of the above remark lacks credibility[2]. In the first place it was made in the context of a discussion about Rule 66(A) (ii). In the second the only subsection of Rule 66 which obliges the defence to show good cause is Rule 66(A) (ii). In the third the Prosecution did not object to the defence interpretation at the Pre – conference (see pp 62 para 3 -5 and para 9 – 11of the transcript of the hearing) which is the same as that now urged upon the Trial Chamber by the defence.

7. Finally the Prosecution do not now suggest that the defence should be allowed to "inspect (their) documents and everything in (their) possession pursuant to Rule 66(A) (iii). The defence therefore repeat its request that the Trial Chamber order the Prosecution to remain true to their clear commitment and allow the type of unhindered access suggested by the Prosecution during the Pre – trial conference.

8. In the alternative if the Trial Chamber accepts that the Prosecution were referring to Rule 66(A) (iii) the Defence would seek access to inspect their documents and everything in their possession as guaranteed by the Prosecution during the Pre – trial conference.

9. The defence recognise that an order that the Prosecution list all of their evidence might involve a great deal of work. It is for this reason that the defence seek to have access to the material them selves. This would involve little or no work by the Prosecution. The defence can see no legitimate objection to this suggested course. The Prosecution should have nothing to fear from the defence having access to the material that they do not seek to rely upon. It will assist in ensuring

[2] See paragraph 7 – 13 of the Prosecution Response.

the rights of the accused to a fair trial are protected - an aim which ought to be a concern to the Prosecution as well as to the defence.

RULE 66(A) (iii)

10. The defence can not identify documents, photographs and tangible objects which it would wish to obtain if the Prosecution maintain their current position and refuse to state what they have in their possession.[3]

RULE 68

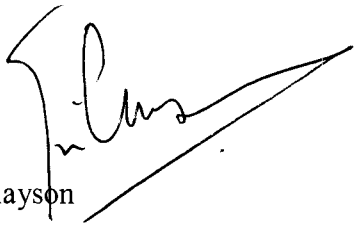
11. The defence are not seeking a "sanctions approach" to non – compliance as alleged by the Prosecution in paragraph 32 of their Response. However the defence are concerned that there have been clear violations by the Prosecution. These concerns arise from the conduct of the Prosecution towards the issue of disclosure [4] as well as the matters raised specifically in relation to Rule 68.[5]

12. Moreover the defence concerns have not been allayed by the contents of the Prosecution Response. In paragraph 16 of the defence Motion the defence list a number of requests for material which it submits would be exculpatory. It is clear that the material in paragraph 16 must exist and would fall within Rule 68; for example it is clear that the material in paragraph 16(i) naturally arises from a reliance on witnesses who were previously members of the rebel groups. It is clear that their cooperation has been sought and obtained. The nature of that cooperation and the means by which it was obtained is material which "may

[3] The same applies to showing "good cause" pursuant to Rule 66(A) (ii) which implicitly requires knowledge of the item sought.
[4] As detailed in paragraph 7 of the defence Motion (and not disputed by the Prosecution).
[5] See paragraph 11 – 17 of the defence Motion.

affect the credibility of prosecution evidence" pursuant to Rule 68. This evidence (and the remainder listed in paragraph 16) has not been served upon the defence.[6]

13. It is telling that the Prosecution do not address the specifics of these requests. They do not confirm or deny whether this material has been disclosed to the defence. The defence simply want the Prosecution to engage with the requests and commit them selves to answering whether they have served this material and if not, why not. In the absence of this level of specificity, even with the assumption that the Prosecution are acting in good faith, the defence believe it has no other recourse but to seek an order from the Trial Chamber (see paragraph 14 of the defence motion) which would effectively compel the Prosecution to engage with the defence requests for disclosure of Rule 68 material.



Tim Clayson
Wayne Jordash
Serry Kamal
Sareta Ashraph

Dated the 14th day of June 2004

[6] In fact the only material served pursuant to Rule 68 is witness testimony which exculpates the accused. It is submitted that it is clear that Rule 68 material is much wider in its scope and includes disclosure of evidence which "in any way tends to suggest the innocence or mitigate the guilt of the accused or may affect the credibility of prosecution evidence".