IN THE SPECIAL COURT FOR SIERRA LEONE

THE TRIAL CHAMBER

Before: The Trial Chamber
Judge Benjamin Itoe, presiding
Judge Bankole Thompson
Judge Pierre Boutet

Registrar: Mr Robin Vincent

Date filed: 21st February 2005

Case No. SCSL 2004 – 15 – T

In the matter of:

THE PROSECUTOR

Against

ISSA SESAY
MORRIS KALLON
AUGUSTINE BAO

BAO REPLY TO PROSECUTION RESPONSE TO APPLICATION FOR LEAVE TO APPEAL DECISION ON WITNESS 141

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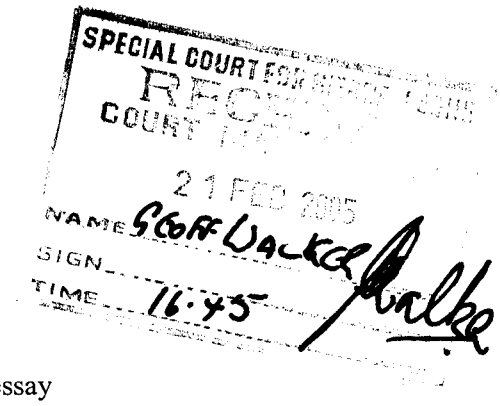

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Shekou Touray and Melron Nicol-Wilson for Morris Kallon

THE SPECIAL COURT FOR SIERRA LEONE

THE PROSECUTOR

V

AUGUSTINE BAO

And others

DEFENCE REPLY TO PROSECUTION'S RESPONSE TO APPLICATION FOR LEAVE TO APPEAL RULING OF 3.2.05 FOLLOWING ORAL APPLICATION FOR EXCLUSION OF STATEMENTS OF TFI-141 DATED 9.10.04 AND 10.1.05

REPLY

The Prosecution's Response to the Defence Application appears to avoid the issues raised by the Defence which we say run to the heart of fair disclosure and the Defendant's ability to meet his case on the one hand and proper and efficient conduct of the trial on the other.

It appears to advocate a flimsy interpretation of Rule 66 to enable it to be breached with apparent impunity. It appears to advocate late disclosure not only of new evidence from current witnesses but also – in Bao's case – late disclosure of new witnesses many months after the time limits set by the Rule. This is contrary to the spirit and intention of the Rule and is antithetical to notions of fairness of proceedings as laid down in Article 17 of the Statute.

The Prosecution have failed to distinguish between the positions of Bao and Sesay in their Reply and have failed to observe that the prejudice suffered by Bao is all the greater given, in effect, the disclosure of a new witness at such a late stage.

The Prosecution's bland assertion that 'the 3rd February ruling does nothing more than allow the prosecution to attempt to call evidence of one witness that is germane to the Counts' may state the obvious but fails utterly to acknowledge the fundamental implications that this entails both in terms of fairness in allowing the Defendant to meet his case and the inevitable protraction of the trial.

Taking the Prosecution arguments in turn:

A. The test for granting Leave to Appeal

i) We accept the test within Rule 73(B), citing exceptional circumstances and to avoid irreparable prejudice to a party, and that this inevitably carries a high threshold.

ii) We accept, and indeed rely upon, the dicta cited from *Norman*, that in granting leave the Chamber must be very sensitive to proceedings that may unduly protract the ongoing trials.

iii) The Prosecution claim at para. 8 that there is no irreparable prejudice is wholly presumptious and speculative. The mere possibility that a witness may not come up to proof has never, and can never, justify by itself late inclusion of *new and probative evidence* and we challenge the Prosecution to cite any jurisdiction where this may be so. To claim that the only way the Defendant may suffer prejudice is if he were to waive his right of appeal betrays a complacent lack of insight into the true effect of introducing probative evidence at such a late stage. Indeed, the Prosecution

has failed to respond to the individual aspects of prejudice that admission of the two offending statements will cause Bao. We repeat these as follows:

a) Whilst unmentioned in 5 statements between January and April 2003, Bao is named in a statement dated 9.10.04 in connection with Diamonds, SBU's, Violence to civilians and Abduction. This statement took one by surprise coming 3 months after the start of the trial *and 5 months after the Trial Chamber's order for Disclosure.* The Defence argue we should not suffer as a result of the Prosecution's failure to show due diligence in preparation of their witness's proposed evidence.

b) Further, this statement places Bao within the Kailahun Crime Base. Whilst we of course acknowledge the Prosecution's case that Bao was active in that area there is no justification to effectively withhold disclosure from this witness regarding that allegation until so late.

c) The Prosecution fail to see the impact of the 10.1.05 disclosure that Bao was a G5. Restating our position in para.8 of the Leave Application, this at once widens the ambit of Bao's alleged role within the RUF from Security Chief (arguably a lateral position to the Leadership and outside traditional chain of command) to a role specifically delineated within RUF Command Structure. This is of enormous significance, and we simply do not accept that the Prosecution are not alive to the seismic shift in their case against Bao that this represents in terms of Command Structure and thus Joint Criminal Enterprise. We repeat our assertion that to disclose this only a

week before the Prosecution intended to call the witness amounts, intentionally or not, to an ambush. For the Prosecution now to effectively retreat to a position whereby they claim any unfairness will be assuaged now that the Defence have 3 months to react to this proposed evidence is, in the instant circumstances, quite disingenuous.

iv) The Prosecution claim that 'exceptional circumstances' cannot be found in the Defence Application. We refute this. The evidence concerning Bao's conduct with SBU's and G5 alone open new fronts in the case against him. We challenge the Prosecution to indicate specific reference to Bao's involvement with these organizations anywhere within either the Amended Consolidated Indictment or in the Witness Summaries. We assert that 'exceptional circumstances' demonstrably apply on the facts.

v) Further, we wholly reject the Prosecution's assertion that the threshold for granting leave would be lowered should the Chamber grant the Application. The matter is of *fundamental importance, not only in the circumstances of this witness's testimony but in principle* for future fair conduct of the trial.

vi) Finally, it is easy to see how repeated attempts to have apparently new and probative evidence admitted 'by the back door' by way of late disclosure will inevitably extend the trial (which is already months behind schedule), through added testimony and requests for adjournments. We rely on the dicta of the *Norman* case helpfully cited by the Prosecution which counsels sensitivity to undue protraction of trials.

B. The Defence failed to show a breach of Rule 66

i) The Defence reassert that the Prosecution are, with respect to the 9.10.04 and 10.1.05 statements, in wholesale breach of Rule 66. Whilst the Prosecution make the naïve, if not remarkable claim at para.13 that it was 'simply complying with its ongoing obligation to disclose' they blatantly ignore the overwhelmingly prejudicial effect of certain late disclosure. They also appear to confuse their own duty to continually disclose exculpatory material with their discretion to serve, at a late stage, material apparently probative to the Prosecution.

This, we assert, demonstrates a disingenuous invocation of Rule 66. Furthermore, whilst emphasising at para10 that the threshold for Leave to Appeal should be observed stringently, the Prosecution appear to side-step the provisions of Rule 66 altogether by glib reliance on Rule 66(A)(ii)'s obligation of continuous disclosure of additional statements of all additional witnesses. They make no attempt to reconcile this stance with the requirement to 'show good cause'.

ii) The inevitable consequence of admission of evidence without showing necessary good cause is to render Rule 66 obselete. The reason for this is clear: if the Prosecution are to be allowed to take advantage of this Ruling by continuous disclosure *not only* of corroborative details *but also* of new witnesses (as in Bao's case here) then the Rule is circumvented by virtue of the Defence being deprived of knowing the case it must meet and the attendant breaches of Article 17.

iii) We accept the two-pronged test of *Bagosora* whereby the test for what amounts to additional details in a statement depends on whether the evidence is new and, if so, what period of notice the Defence would require to prepare.

It is unclear whether the Prosecution accept the evidence in the two offending statements regarding Bao is new or not. We to suggest that to assert the details are not new in his case would be an affront to common sense.

iv) In para17 the Prosecution appear to place greater reliance on the fact that 'there is no compelling fairness issue because the Applicants will have had many months to review the statements before the witness is called'. This, we suggest, misses the point of principle that, unless the Prosecution show good cause, the Defence are entitled to receive all evidence within the Rule 66 time limits. Failure to properly proof a witness over a 22 month period cannot, surely, amount to good cause.

v) Furthermore, we remind the Prosecution of two salient points with specific regard to TFI-141. Firstly, they planned to call the witness *only 7 days following the final 10th January statement.* Secondly, Prosecution counsel himself *offered not to adduce the contents of that statement* immediately after the Defence orally raised its objection in the Chamber. We assume he recognised the fairness issue then; we would expect therefore the Prosecution will recognise the same issue now and honour the concession regarding the 10.1.05 statement they offered previously.

vi) The fact that the Prosecution continue to rely on the Principle of Orality comes as a surprise. We naturally accept the dicta cited by the Prosecution at para19 from the *Norman* case in relation to witnesses inevitably expanding on their witness statements in oral testimony. However, this observation has no relevant application here for the simple reason that TFI-141 has not given oral evidence. To draw a correlation between Orality and Will Say statements is a false and irrelevant exercise. The logical extension of such a comparison would, again, serve to render Rule 66's provisions entirely obsolete.

vii) The Prosecution (at para24) refer to Bao specifically. Therein, they fail utterly to acknowledge the **real** impact of TFI-141, namely that a Defendant is liable, should the evidence be admitted, to be assailed not only by new evidence **from a new**

witness but also by **a shift in the Prosecution case.** (By virtue of the unexpected reference to G5.)

viii) Furthermore, the Prosecution's justification of their position by glib and non-specific reference to the Pre-Trial Brief and indictment as a kind of catch-all merely emphasises their inability – even at a point 7 months into the trial – to specify exactly what allegations Bao faces or may yet face.

ix) Finally, we accept that Bao's own peculiar position is of his own making and does not deserve preferential treatment. However, the Prosecution perhaps misunderstand the point. The time limits designated by Rule 66, in the absence of good cause, are set down for a reason. They are to – as far as possible- banish the possibility of prejudice being imported into the trial as a result of late service. Such prejudice may arise in countless ways; one cannot be expected to anticipate them all.

Above all, whether a Defendant wishes to partake or not he has the right to know the extent of the Prosecution case in advance. There may well be occasions when it may be deemed fair for exceptions to be made following good cause. But, in this case, the Prosecution have known since July of Bao's stance. Their failure to fully proof TFI-141 until January 2005 is not his fault and we suggest falls outside what is required for 'good cause'.

We reassert there has been a blatant breach of Rule 66 and that in their Response the Prosecution have failed to properly address the specific matters complained of.

C. The Defence failed to show breach of Article 17

The Prosecution fail to observe the principle inherent in the Defence's Appeal, namely that habitual admission of statements fundamentally adding to the

Prosecution case late in the day is contrary to Rule 66, Article 17 and natural justice.

It is not the Prosecution's province to determine whether or not the Defendant will be a) denied the right to be informed promptly and in detail of the nature and cause of the charge against him b) the presumption of innocence c) the right to adequate time and facilities and d) the right to be tried without delay.

The only true safeguard against diminution of these rights can be found in the provisions of Rule 66 which, in the absence of good cause, must be as stringently applied as the Prosecution suggest the rules governing interlocutory appeals should be.

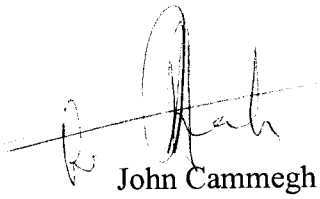
CONCLUSION

The Defence reassert its respectful submission that the proposed evidence of TFI-141 is, with respect to Bao, entirely new and amounts to the addition of a new witness at an unreasonably late stage. Had the proposed evidence been made available earlier, following due diligence, the Defence may well have been in a position to adequately prepare.

Moreover, the position expounded by the Prosecution logically means that the Defence will no longer be able to place confidence in Rule 66's provisions regarding late disclosure and good cause. In an environment where, following recent decisions upon oral argument, the Prosecution have been reminded of the need to act bona fides at all times (see rulings in TFI-015, 195) we seek to be able to rely upon the rules concerning disclosure. In the absence of strict adherence to well-founded rules such as Rule 66, how can the Defence confidently know the full extent of the case it has to meet?

The Defence respectfully request leave to appeal the ruling.

Dated this 21st day of February



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