459.

SCSL-04-15-T
(17115 – 17122)

SPECIAL COURT FOR SIERRA LEONE
OFFICE OF THE PROSECUTOR
Freetown – Sierra Leone

Before: Justice Pierre Boutet, Presiding
Justice Bankole Thompson
Justice Benjamin Itoe

Interim Registrar: Mr. Lovemore G. Munlo

Date filed: 15 December 2005

THE PROSECUTOR **Against** **Issa Hassan Sesay**
Morris Kallon
Augustine Gbao

Case No. SCSL-04-15-T

PROSECUTION RESPONSE TO "NOTICE OF MORRIS KALLON PURSUANT TO RULES 54 AND 66(2) OF THE RULES OF PROCEDURE AND EVIDENCE OF THE SPECIAL COURT FOR SIERRA LEONE FOR AN ORDER DIRECTING THE PROSECUTOR TO EFFECT REASONABLY CONSISTENT DISCLOSURES"

Office of the Prosecutor:
James C. Johnson
Marco Bundi
Peter Harrison

Defence Counsel for Issa Hassan Sesay
Wayne Jordash
Sareta Ashraph

Defence Counsel for Morris Kallon
Shekou Touray
Charles Taku
Melron Nicol-Wilson

Defence Counsel for Augustine Gbao
Andreas O'Shea
John Cammegh

SPECIAL COURT FOR SIERRA LEONE
RECEIVED
COURT MANAGEMENT
15 DEC 2005
NAME Neil Gibson
SIGN [signature]
TIME 15:58

I. Introduction

1. The Second Accused filed a motion on 12 December 2005 (the "Motion"), seeking an order that the Prosecutor "henceforth effects reasonably consistent disclosures to the Defence within a reasonable time frame to enable the Defence to Prepare for the trial."[1] The title to the Motion (although no reference is made in the body of the document) refers to Rules 54 and 66(2). Rule 66(2) does not exist and we assume the Motion meant to refer to Rule 66(A)(ii).

2. It is not clear to the prosecution what specific relief is sought, however, the Motion is misconceived and should be dismissed.

3. Witness TF1-045 has already testified and at no point did any of the accused object to the witness giving evidence, nor did any of the accused ask that the witness be adjourned to a later time to allow them to consider the disclosure. The Second Accused did object to late disclosure with regard to the first witness called in the 6th Trial Session, TF1-314. The Prosecution offered to stand down TF1-314 and call the next witness on the list but counsel for the Second Accused rejected the offer.[2] The Court then told counsel for the Second Accused that it would accede to a request for an adjournment of the witness. Counsel for the Second Accused refused the adjournment.[3]

4. TF1-045 began giving evidence on 18 November 2005. On 22 November 2005, during cross-examination by the First Accused, counsel for the Second Accused complained of "lack of fair notice".[4] Prior to commencing his cross-examination on 24 November 2005 the Second Accused was invited to state his objection. He informed the Court that a motion would be filed in future on "how disclosure in this matter should be

---

[1] *Prosecutor v. Sesay, Kallon, Gbao*, SCSL-04015-T-46, "Notice of Motion by Morris Kallon Pursuant to Rules 54 and 66(2) of the Rules of Procedure and Evidence of the Special Court for Sierra Leone for an Order Directing the Prosecutor to Effect Reasonably Consistent Disclosures", 12 December 2005.
[2] *Prosecutor v. Sesay et al,* Transcript 2 November 2005, pp. 18 (l. 28-29), 19 (l. 1-11).
[3] *Prosecutor v. Sesay et al,* Transcript 2 November 2005, p. 21 (l. 5-28)
[4] *Prosecutor v. Sesay et al,* Transcript 22 November 2005, p. 22 (l. 22-24)

done."[5]

II. Prosecution Disclosure Obligations

5. This Trial Chamber has rendered several decisions on the Prosecution's disclosure obligations. We do not propose to revisit them here.[6] However, in addition to the obligation created by Rule 66, the Prosecution has an obligation to disclose information under Rule 68. That obligation is also a "... continuing obligation to disclose any such exculpatory material."[7]

6. Witness TF1-045 was "proofed" on 13-15, 21, 24, 25 October, 2005. This was one month before the Second Accused began his cross-examination. As described in para. 7, proofing is where lawyers (it applies to the defence as well as the prosecution) talk to witnesses about their likely testimony in court. Some of the information disclosed from the proofing notes was clearly exculpatory. The prosecution had to disclose it. Similarly, the prosecution has "an obligation to continuously disclose witness statements in accordance with Rule 66 of the Rules."[8]

7. This Trial Chamber described proofing as a "legitimate practice that serves the interests of justice."[9] This Trial Chamber went on to state that:

> 30. It is instructive to note that the Trial Chamber of the ICTY examined the practice of Prosecution proofing sessions in the case of *Prosecutor v. Limaj*. It observed that there was a widespread practice of proofing witnesses by both the Prosecution and the Defence in adversary systems. The Chamber then identified a number of advantages that the practice of proofing has for the judicial process in these terms:[10]

---

[5] *Prosecutor v. Sesay et al,* Transcript 24 November 2005, pp. 81-83.
[6] The most recent decision is *Prosecutor v. Sesay et al,* Case No. SCSL-04-15T-436, "Decision on the Gbao and Sesay Joint Application for the Exclusion of the Testimony of Witness TF1-141", 26 October 2005.
[7] Rule 68(B) of the *Rules of Procedure and Evidence* of the Special Court for Sierra Leone.
[8] *Prosecutor v. Sesay et al,* Case No. SCSL-04-15T-436, "Decision on the Gbao and Sesay Joint Application for the Exclusion of the Testimony of Witness TF1-141", 26 October 2005, para. 19.
[9] *Prosecutor v. Sesay et al,* Case No. SCSL-04-15T-436, "Decision on the Gbao and Sesay Joint Application for the Exclusion of the Testimony of Witness TF1-141", 26 October 2005, para. 33.
[10] *Prosecutor v. Sesay et al,* Case No. SCSL-04-15T-436, "Decision on the Gbao and Sesay Joint

> It must be remembered that when a witness is proofed this is directed to identifying fully the facts known to the witness that are relevant to the charges in the actual Indictment....
>
> ... The process of human recollection is likely to be assisted, in these circumstances, by a detailed canvassing during the pre-trial proofing of the relevant recollection of a witness. Proofing will also properly extend to a detailed examination of deficiencies and differences in recollection when compared with each earlier statement of the witness. In particular, such proofing is likely to enable the more accurate, complete, orderly and efficient presentation of the evidence of a witness in the trial.
>
> Very importantly, proofing enables differences in recollection, especially additional recollections, to be identified and notice of them to be given to the Defence, before the evidence is given, thereby reducing the prospect of the Defence being taken entirely by surprise.

8. In a somewhat elliptical manner the present Motion raises the question of whether a court can order a party not to talk to its witnesses prior to testifying. We are not aware of any authority in support of that position. Frankly, lawyers need to speak to witnesses. Focused evidence that is relevant to the issues before the court is essential to the efficient running of any trial. Rambling and disjointed evidence does not further a court's fact-finding function. Should new information be communicated to the prosecution during a proofing session, then it must be disclosed. That is the effect of Rules 66 and 68.

9. Absent evidence of improper conduct, a Court should exercise restraint and circumspection before telling a party when or how the party can talk to its witnesses. To obtain a remedy under Rule 66 the applicant must present *prima facie* evidence of a breach of Rule 66. No *prima facie* evidence has been presented and absent such evidence no remedy can be granted.

Application for the Exclusion of the Testimony of Witness TF1-141", 26 October 2005, para. 30, quoting *Prosecutor v. Limaj, Bala and Musliu*, IT-03-66-T, "Decision on Defence Motion on Prosecution Practice of 'Proofing' Witnesses", 10 December 2004, p. 2.

III. Prejudice to the Accused

10. The Second Accused says that "eliciting new evidence after the witness has already testified before a Trial Chamber about the subject matter of his testimony before this Trial Chamber is highly prejudicial to Mr. Morris Kallon..." because the witness changes the focus of their evidence, Kallon is not put on fair notice, and it denies the defence of adequate time to prepare.[11]

11. The prosecution expects witnesses to testify about the accused persons in the trial. It is a *non sequitur* to expect the prosecution to lead the same evidence in the RUF trial as was lead in the AFRC trial. The AFRC and RUF trials are different, most of the witnesses are different, and the witnesses who testify in both trial are not being asked identical questions (the same applies for witnesses who have testified in the CDF and RUF trials). Testimony is supposed to be focused on the issues to be proved in the trial.

12. However, counsel for the Second Accused now says that with respect to witness TF1-045, the accused was "not put on fair notice to confront his accuser..." and that late disclosure "deprives the Trial Chamber and the Defence the opportunity of having adequate time and notice to prepare for the trial."[12] Counsel before the Special Court must act with honesty and integrity.[13]

13. Counsel for the Second Accused complained of late disclosure for the first

[11] Motion, para. 17.
[12] Motion, para. 17.
[13] See Article 5 of the *Code of Professional Conduct for Counsel with the Right of Audience Before the Special Court of Sierra Leone*, adopted 14 May 2005:

.Article 5 – Competence, Independence and Integrity

Counsel shall act with:

(i) competence, honesty, skill, professionalism and with the preparation reasonably necessary for the case;

(ii) independence in the performance of his functions, and shall not accept nor seek instructions from a Government or any other source, nor engage in any activity which compromises his independence or which reasonably creates the appearance of such compromise; and

(iii) integrity to ensure that his actions do not bring the administration of justice into disrepute.

witness in the 6th Trial Session, TF1-314, but refused the offer of an adjournment. When TF1-045, the third witness in the session, was called to testify there was no complaint of late disclosure. During his third day of testimony counsel for the Second Accused complained of "a problem of fair notice to the accused."[14] We do not know why the matter was not brought up before the witness began giving evidence, and when asked by the Court if objection would be taken by the Second Accused to the evidence of TF1-045 the answer was affirmative.[15] The Trial Chamber asked counsel for the Second Accused to take some time before doing so, but invited counsel to set out their objection in the afternoon or the next day. Given the opportunity to do so two days later, when counsel for the Second Accused was to commence cross-examination, counsel chose not to take any objection to the evidence of TF1-045.[16]

14. There is no prejudice to the Second Accused. All of the information, including that which was exculpatory, was disclosed and the Court made it abundantly clear to the Second Accused that if they felt there was late disclosure an application to adjourn the witness would be considered. Complaining of "lack of fair notice", without seeking to adjourn the testimony of witnesses, and then later complaining of prejudice to the accused, may sound less than compelling.

15. The prosecution proofs witnesses before they testify. Most of these witnesses were first interviewed one or two years ago, and at times it is very difficult to re-establish contact with witnesses either because they have moved or they may be afraid to testify. If supplemental information is conveyed in the proofing the prosecution must disclose it, and it is preferable that it be disclosed to the defence before the witness utters the information in court.

---

[14] *Prosecutor v. Sesay et al,* Transcript 22 November 2005, p. 21.
[15] *Prosecutor v. Sesay et al,* Transcript 22 November 2005, pp. 26-27.
[16] *Prosecutor v. Sesay et al,* Transcript 24 November 2005, pp. 82-83.

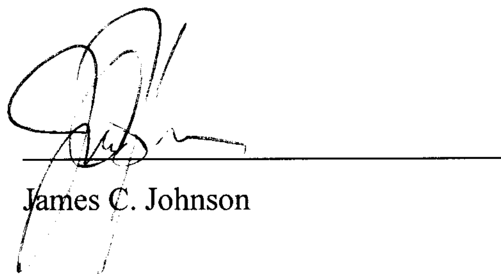
IV. Conclusion

16. The application is without merit. The prosecution has not breached any Rule of this Court and the motion should be dismissed.

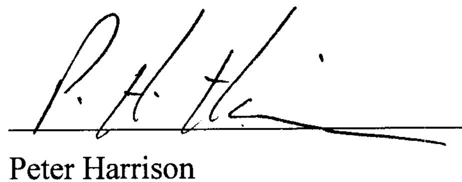
Filed in Freetown,

15 December 2005

For the Prosecution,



James C. Johnson



Peter Harrison

INDEX OF AUTHORITIES

A. ORDERS, DECISIONS, JUDGMENTS AND MOTIONS

1. *Prosecutor v. Sesay et al,* SCSL-04-15-T-456, "Notice of Motion by Morris Kallon Pursuant to Rules 54 and 66 (2) of the Rules of Procedure and Evidence of the Special Court for Sierra Leone for an Order Directing the Prosecutor to Effect Reasonably Consistent Disclosures", 12 December 2005.

2. *Prosecutor v. Sesay et al,* Case No. SCSL-04-15T-436, "Decision on the Gbao and Sesay Joint Application for the Exclusion of the Testimony of Witness TF1-141", 26 October 2005.

3. *Prosecutor v. Limaj, Bala and Musliu,* IT-03-66-T, "Decision on Defence Motion on Prosecution Practice of 'Proofing' Witnesses", 10 December 2004.

B. RULES OF PROCEDURE AND EVIDENCE AND CODE OF PROFESSIONAL CONDUCT

1. Rules of Procedure and Evidence of the Special Court, Rule 73(B) Amended 14 May 2005.
2. Code of Professional Conduct for Counsel with the Right of Audience Before the Special Court of Sierra Leone, adopted 14 May 2005

C. TRANSCRIPTS

1. *Prosecutor v. Sesay et al,* Transcript 2 November 2005, pp. 18 (l. 28-29), 19 (l. 1-11), 21 (l. 5-28)

2. *Prosecutor v. Sesay et al,* Transcript 22 November 2005, p. 21, 22 (l. 22-24), 26-27.

3. *Prosecutor v. Sesay et al,* Transcript 24 November 2005, pp. 81-83.