SCSL-04-15-T
(18894 - 18901)

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IN THE SPECIAL COURT FOR SIERRA LEONE

THE TRIAL CHAMBER

Before: The Trial Chamber

Justice Pierre Boutet, Presiding
Justice Bankole Thompson
Justice Benjamin Itoe

Registrar: Mr Lovemore G Munro SC

Date filed: 8 May 2006

Case No. SCSL 2004 – 15 – T

In the matter of:

THE PROSECUTOR

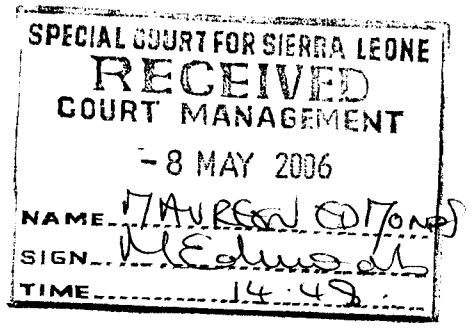
Against

ISSA SESAY
MORRIS KALLON
AUGUSTINE GBAO

PUBLIC
GBAO RESPONSE TO PROSECUTION NOTICE UNDER RULE 92bis TO ADMIT THE TRANSCRIPTS OF TESTIMONY OF TF1-256

Office of the Prosecutor

Desmond de Silva QC
James Johnson
Peter Harrison



Court Appointed Counsel for Augustine Gbao

Andreas O'Shea
John Cammegh

Counsel for co-accused

Wayne Jordash and Sareta Ashraph for Issa Sessay
Shekou Touray, Charles Taku and Melron Nicol-Wilson for Morris Kallon

Introduction

1. On 3 May 2006, the prosecution filed its Notice under Rule 92*bis* to Admit the Transcripts of Testimony of TF1-256.[1] The defence for Augustine Gbao objects to the admission of the transcripts of witness 256 in lieu of testimony. This is the first time that this defence has objected to a 92*bis* application, but on other occasions we have made our position quite clear that our non-opposition to such applications should not in any way be interpreted as our general acceptance of the liberal use of Rule 92*bis*.

2. It is respectfully submitted that given the primary right in the Statute to hear testimony on an equal footing to the prosecution[2] and the general rule that testimony should be heard in person,[3] and having regard to our willingness not to oppose such applications in appropriate circumstances, the fact that the defence objects to this application should be an important consideration in the Chamber's deliberations on this matter providing we can establish a reasonable basis for fear of prejudice. We say this because for strategic reasons the defence is unable to fully and persuasively articulate its concerns with respect to these transcripts without compromising its adversarial approach to this case. However, the defence will set out sufficient indicators of its concern such that the Chamber will hopefully grant the accused the benefit of the doubt in deciding on the legitimacy of those concerns, applying the principle of *in dubrio pro reo*.[4]

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[1] SCSL-04-15-T, 543
[2] Article 17(e) of the Statute of the Special Court for Sierra Leone
[3] Rule 90(a) of the Rules of Procedure and Evidence of the Special Court for Sierra Leone
[4] Any ambiguity or doubt should be resolved in favour of the accused; a principle applied by international criminal tribunals at various times in various contexts: see for instance *Prosecutor v Halilovic*, Judgment of 16 November 2005 (ICTY TC), at par 12; *Prosecutor v Tadic*, Decision on Appellant's Motion for the Extension of the Time Limit and Admission of Additional Evidence, 15 October 1998, par 73; *Prosecutor v Delalic et al*, Judgment, par 601; *Prosecutor v Akeyesu*, Judgment, par 319

General principles on the application of the Chamber's discretion under Rule 92*bis*

3. Rule 92bis provides that:

> **Rule 92*bis*: Alternative Proof of Facts**
>
> (A) A Chamber may admit as evidence, in whole or in part, information in lieu of oral testimony.
>
> (B) The information submitted may be received in evidence if, in the view of the Trial Chamber, it is relevant to the purpose for which it is submitted and if its reliability is susceptible of confirmation.

4. This provision does not permit or require evidence to be admitted in lieu of oral testimony as long as it is relevant and reliable. The Chamber has a discretion which is clear from the use of the word 'may', even where evidence is relevant and reliable. This discretion must be exercised judicially and in exercising that discretion Rule 92bis must be read in the light of article 17(E) of the Statute and Rule 90(A) of the Rules of Procedure and Evidence. So, the Chamber has acknowledged that transcripts would not be admitted if they unfairly prejudice the defence.[5]

5. Article 17(A) of the Statute, which cannot be modified by any rule, provides that the defence is entitled to hear witness testimony under the same conditions as the prosecution. In the case of the admission of transcripts of the evidence of a prosecution witness in another trial this is impossible to apply to the defences own witnesses in the same manner as those of the prosecution. The prosecution can call a witness and ask questions of a witness in one trial with the specific view of admitting transcripts into another trial. The defence cannot. Therefore, where the defence objects to the admission of such transcripts and there is potential prejudice to the accused through a conflict in

[5] Decision on the Prosecution Confidential Notice under 92bis to admit the Transcripts of TF1-023, TF1-104 and TF1-169, 9 November 2005, SCSL-04-15-T, 448

defence strategy, recrimination from the other trial or evidence which might arguably be probative of the elements of an offence based upon the conduct of the accused, then in our submission the transcripts ought not to be admitted.

6. Rule 90(A) requires that a witness be called in person unless the requirements of Rules 71 and 85(D) are satisfied. Therefore, in so far as an application of Rule 92*bis* would allow part or the whole (in the case of no cross-examination) of the evidence of a witness to be admitted against the spirit of that rule then it should only be where the defence does not object or where exceptional circumstances justify the admission of transcripts that this should be permitted. Transcripts do not fall in the usual category of documents for this purpose and therefore in the case of transcripts it is not sufficient to be satisfied as to relevance and probative value. Potential prejudice to the defence must also be considered and viewed liberally in the light of the basic expectation that evidence will be given in person.

7. While the provision of the Special Court rules is different from and potentially broader than the corresponding rule in the Rules of Procedure and Evidence of the ICTR and that of the ICTY, the Chamber is entitled to consider that the limitations in that rule are not without good reason and remain relevant considerations in the exercise of the discretion of the Chamber. Under the ICTR and the ICTY Rule 92*bis*, the discretion will not be applied in favour of admission where the evidence in any way goes to prove the acts and conduct of the accused. So, if it is sought to admit evidence which may be employed as proof of acts and conduct of the accused as set out in the indictment then the Chamber should be most reluctant to admit such evidence in such form, and particularly where it constitutes the evidence of a witness and the defence opposes its admission otherwise than by oral testimony. We say this evidence is arguably probative to issues of acts and omissions of the accused under the doctrines of joint criminal enterprise and command responsibility since

establishing this in relation to the RUF generally makes it more likely that it can be proved against the accused.

Nature of defence objection

8. Our objection is based upon the examination-in-chief and cross-examination by the counsel for Brima which is potentially prejudicial to the case of the accused and we rely upon this Chamber's joinder decision to emphasise that in such circumstances transcripts should not be admitted into evidence.

9. The Chamber will recall that when the prosecution applied for joinder of the RUF and AFRC accused it was the principle of 'collective responsibility that forms the doctrinal basis of the Prosecution's motions for joint trial.'[6] In considering whether joinder was in the interests of justice, the Chamber noted that:

> In our view the mere allegation that they were two distinct and separate entities ab initio, the subsequent merger of these two alleged combatant groups, a point not disputed but indeed confirmed by the Prosecution in their recitals in the indictments, raises the spectre of a potential conflict in defence strategy and the possibility of mutual recrimination derogating from the rights to which each accused is entitled in the context of separate trials.[7]

10. This same point is as applicable to the admission of the transcripts into one trial from another as it is to the joinder of trials. In its Joinder Decision this Trial Chamber went on to rule against joinder of the RUF and AFRC accused on the basis that the accused rights may be prejudiced due to this aspect of mutual recrimination and conflict of defence strategy. In that decision the Chamber held:

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[6] Decision and Order the Prosecution's motion for joinder, 27 January 2004, SCSL-2003—09-PT, 078, par 24

[7] Ibid at par 39

> If in the exercise therefore of the discretion to grant an application or applications for joinder, there is any suggestion or the Chamber is satisfied, as we are in this case, that the rights of the accused to a fair and expeditious trial could or will be jeopardised through a potential or real possibility not only of a conflict in defence strategy but also the possibility of mutual recriminations between indictees of the RUF and those of the AFRC, this Chamber must exercise its discretion against the granting the application for a joinder in the form as applied for by the Prosecution.[8]

11. It is submitted that in order to protect the integrity of this decision, likewise, if to grant a Rule 92*bis* application, there is any suggestion or the Chamber is satisfied that the rights of the accused to a fair trial could or will be jeopardised through a potential or real possibility of a conflict in defence strategy or mutual recriminations, the Chamber must exercise its discretion against the granting of the application.

12. In this case we assert that there is a conflict of defence strategy between counsel for Augustine Gbao and counsel for Brima, as manifested in the transcripts and which incidentally involves an attempt at recrimination of the RUF by counsel for the AFRC accused. We are unable to fully articulate the nature of the conflict in defence strategy but will provide sufficient indicators to satisfy the Chamber that there is a potential or real possibility of such conflict. We ask the Chamber place a degree of faith in the assertion of counsel and give the accused the benefit of the doubt.

13. In the said transcripts, counsel for the prosecution elicits from the witness a discussion he heard about a letter from one Superman to the captors of the witness, who the witness has described as 'soldiers'. It is said that the letter directed the soldiers to stop killing.[9] Counsel for Brima curiously pursues this matter and establishes that this letter led to the release of the witness 'on the order of Superman'.[10] It appears from the transcripts that the purpose of

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[8] Ibid at par 41
[9] Transcripts of 14 April 2005, *Prosecutor v Brima et al*, SCSL-2004-16-T, pp 18640-18642 (as disclosed in annexure to prosecution motion – see note 1 *supra*)
[10] Transcripts of 15 April 2005, *Prosecutor v Brima et al*, SCSL-2004-16-T, p 18651 (as disclosed in annexure to prosecution motion – see note 1 *supra*)

counsel may have been to sow doubt as to the identity of the captors of the witness in that they may have been RUF and not AFRC. However, by taking this line of cross-examination he unwittingly introduces evidence which may arguably be probative to the questions not only of joint criminal enterprise but also of command responsibility by members of the RUF for the actions of the AFRC. This might indirectly arguably have some probative value to implicating the accused into such a framework of responsibility for crimes committed by the AFRC.

14. In our submission therefore there are sufficient grounds for the Chamber not admitting the said transcripts under Rule 98 *bis*. These are the inequality of adversarial advantage created by potentially prejudicial transcripts being admitted from another trial, the desirability of witness testimony being given in person and the use that could be made of this transcript testimony to prove the participation of the accused in a joint criminal enterprise and a position of command responsibility over the AFRC. The potential prejudice to the defence arises here from the fact that there is evidence therein which the defence should be entitled to hear in person and cross-examine or not cross-examine in line with its own defence strategy and without prejudice from the prosecution or defence strategy in the AFRC case, with which it conflicts; and without the prejudice of recriminations against the RUF made in that case.

ACCORDINGLY, it is requested that the prosecution motion be dismissed.

Andreas O'Shea

Court appointed counsel for Augustine Gbao

Book of Authorities

Prosecutor v Halilovic, Judgment of 16 November 2005 (ICTY TC), at par 12

Prosecutor v Tadic, Decision on Appellant's Motion for the Extension of the Time Limit and Admission of Additional Evidence, 15 October 1998, par 73

Prosecutor v Delalic et al, Judgment, par 601

Prosecutor v Akeyesu, Judgment, par 319

Prosecutor v Sesay et al, Decision on the Prosecution Confidential Notice under 92bis to admit the Transcripts of TF1-023, TF1-104 and TF1-169, 9 November 2005, SCSL-04-15-T, 448

Prosecutor v Sesay et al, Decision and Order the Prosecution's Motion for Joinder, 27 January 2004, SCSL-2003—09-PT, 078, par 24