574)

SCSL-04-15-T
(23851-23858)

23851

IN THE SPECIAL COURT FOR SIERRA LEONE

THE TRIAL CHAMBER

Before: The Trial Chamber

Judge Pierre Boutet, presiding
Judge Bankole Thompson
Judge Benjamin Itoe

Registrar: Mr Lovemore G Munro SC

Date filed: Monday 12 June 2006

Case No. SCSL 2004 – 15 – T

In the matter of:

THE PROSECUTOR

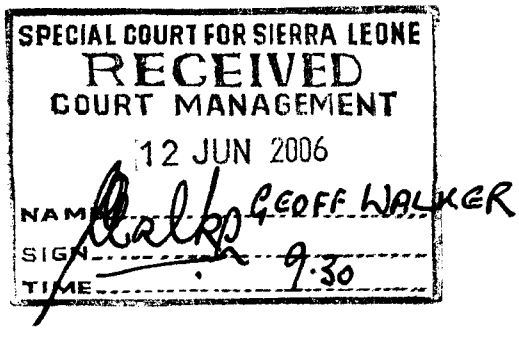
Against

ISSA SESAY
MORRIS KALLON
AUGUSTINE GBAO

PUBLIC
GBAO RESPONSE TO PROSECUTION NOTICE UNDER RULES 92*bis* AND 89 TO ADMIT THE STATEMENT OF TF1-150

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 Sesay

Shekou Touray, Charles Taku and Melron Nicol-Wilson for Morris Kallon

A. Introduction

1. On 5 June 2005 the prosecution filed its Notice under Rules 92bis and 89 to Admit the Statement of TF1-150.[1] They seek to admit this statement in lieu of the testimony of this witness and without the defence having any opportunity to question the witness. The defence opposes this course of action.

B. Nature of the statement sought to be admitted

2. This is the statement of a witness which is produced in the form of a report covering a wide range of alleged human rights abuses between 1998 and 2000, being a substantial and the most significant period for the purposes of the indictment. It has obviously been prepared specifically for the purpose of these proceedings as evidenced by the title '... Certain Aspects Relevant to the RUF-AFRC Indictments at the Sierra Leone Special Court.'

3. The report contains a large amount of second hand hearsay witness testimony from unidentified persons of criminal activity covered by the scope of the indictment. It also contains a number of statements of opinion, some opinions on the facts and others opinions of mixed law and fact, in including direct references to the 'widespread' or 'systematic' nature of offences and the 'responsibility' of the RUF.

4. The author of the report is a lawyer in the Irish Legal System who has held significant legal positions in the human rights arena. Judging by his positions and publications he can also be described as a human rights activist. The introductory remarks to his report clearly convey that he purports to have expertise for the purpose of the report that he has produced for these proceedings.

[1] SCSL-04-15-T-570.

C. Submissions

5. The basic principle in criminal proceedings is that the accused has the right to hear witnesses against him in person and to cross-examine those witnesses. This right is enshrined in the Statute of the Court and can be clarified but not overridden by the Rules of Procedure and Evidence. It is further confirmed by Rule 90 (A) of the Rules of Procedure and Evidence.

1 Application of the right to examine witnesses under the Statute

6. By virtue of the provisions of Article 17 (3) (e), the accused has the right:

> To examine or have examined the witnesses against him or her and to obtain the attendance and examination of witnesses on his or her behalf under the same conditions as witnesses against him or her.

This provision contains two elements. The first of these elements is the principle that the treatment of witnesses should be the same for both parties. However, this provision is not merely one of equality of arms, but also addresses the inherent right to examine witnesses giving evidence against the accused. If it were to be read otherwise the provision need not have been so narrowly drafted with such direct reference to the right to examine witnesses. It would have stated for example that the rights of the accused with regard to the witnesses in his favour shall be the same as the manner in which witness testimony is given against him or her' without any direct reference to the concept of 'examination' of witnesses. The impact of the alternative narrower interpretation would be that where witnesses are not examined the equality principle under Article 17 (3) (e) is inapplicable.

7. That the proper interpretation of Article 17 (3) (e) involves the principle of the right to examine witnesses against the accused and not merely a statement of equality of arms is supported by international human rights jurisprudence.

Article 17(3) (e) is copied verbatim from Article 14 (3) (e) of the International Covenant on Civil and Political Rights and Article 6 (3) (d) of the European Convention on Human Rights and Fundamental Freedoms. For instance, the European Court of Human Rights found a violation of that provision, quite independently of the question of equality of arms, as a result of failure to have prosecution witnesses against the accused examined in the case of *Hulki Gunes v. Turkey.*[2]

8. Therefore, it is submitted that Rule 92bis must be read and interpreted in the light of and consistently with the right of the accused to examine witnesses against him as enshrined in Article 17 (3) (e). To the extent that it is not consistent with the Statute it is not valid and must not be followed. However, it is submitted that it can be interpreted consistently with this right.

9. Key as to whether a witness can give evidence without being examined at all is the question whether that witness is a witness 'against' the accused. There may be witnesses which are non-controversial or merely providing background information. Such witnesses could in appropriate circumstances, although rarely, in our submission be the subject of an order depriving the right to cross-examination by the accused.

10. It is submitted that this witness does not fall within that category. Neither are their extenuating circumstances which could alleviate a strict application of the right to examine witnesses, such as the death of the witness. In this case, we are dealing with matters of convenience to the prosecution. The prosecution wishes to close its case this session and the witness finds the dates inconvenient for him. This is not sufficient reason to justify departure from one of the basic principles of a fair trial.

11. The evidence this witness will gives is not merely background information or non-controversial but goes directly to the commission of crimes and the legal elements of certain crimes set out in the indictment. Thus the 'widespread' or

[2] *Hulki Gunes v. Turkey,* No 28940/95 (Chamber Judgment), 19 June 2003, ECHR.

'systematic' nature of the commission of an offence is an essential legal element to crimes against humanity. Where this is not proved beyond all reasonable doubt the accused can be found guilty of other offences but not crimes against humanity.

12. Not only does this witness give evidence relating to these elements of crimes against humanity, but he further gives his own opinion on whether the notions of widespread or systematic apply since he employs those specific words in a number of places in his report.[3]

13. In addition, he gives his opinion on the responsibility of the RUF and the AFRC which the prosecution alleges was in a joint criminal enterprise with the RUF. Given the use of the concepts of joint criminal enterprise and command responsibility, evidence of the responsibility of the RUF, and arguably the AFRC, is evidence probative of the responsibility of the accused.

14. This is therefore in no uncertain terms a witness 'against the accused' the purpose of the interpretation of Article 17 and the application of Rule 92*bis*. In such circumstances, it is submitted that it is impermissible or in the alternative, it is inappropriate, to apply Rule 92*bis*.

2 The manner in which a witness may give evidence

15. It is submitted that Rule 92bis does not apply to a situation where the prosecution is not so much seeking to admit 'information' in lieu of evidence, but is rather seeking to allow the witness to testify in writing. Rule 90(A) sets the limits on how a witness may give testimony and in order to give evidence in writing the witness testimony must comply with Rule 71. Rule 90 (A) provides:

[3] At paragraphs 20, 25, 27, 53, 57 and 87.

> Witnesses may give evidence directly, or as described in Rules 71 and 85 (D).

It is submitted that the effect of acceding to the prosecution request in this case would be to allow the witness to give evidence indirectly, not under Rules 71 or 85(D) and therefore in contravention of Rule 90 (A). It is submitted that interpreting Rule 92bis consistently with Rule 90(A) and Article 17(3)(e) implies that Rule 92bis cannot be applied to this situation where the prosecution essentially seeks to get the witnesses testimony evading the requirements of the Rules and the Statute, through an extensive and impermissible interpretation of Rule 92*bis*.

3 The nature of the evidence militates against its admission

16. In the alternative, this statement contains a fair amount of opinion evidence akin to that of an expert which is inadmissible in the absence of this witness being declared an expert witness and subject to the applicable provisions for expert witnesses.

17. This is not a case in our submission where prejudice needs to be demonstrated. However, as to the prejudice caused to the accused it is submitted that much of the factual and opinion evidence contained in the said statement is based on research, other unidentified witnesses and notes which the defence is entitled to explore to test the reliability and value of the findings in that report.

18. Furthermore, the accused right to have witnesses testify in person is particularly poignant here where it is suggested that the accused should be deprived not only of the right to examine the original makers of the statements leading to the findings in the report but also the maker of the report who has heard or gathered information from such statements.

19. In line with but distinct from this argument is the fact that much of the information contained in this report is by its very nature second or third hand

hearsay. While the Court has adopted the principle that it will admit hearsay evidence this has been justified on the basis that the accused may cross-examine the witness and this guards against prejudice. Thus, it was noted by the Appeals Chamber in the case of *Akeyesu* that:

> The main safeguard applicable is through the preservation of the right to cross-examine the witness on the hearsay evidence, which has been called into question.[4]

20. Therefore, it is submitted that where hearsay evidence is not to be subject to the protection provided by the right to cross-examine the Chamber should exercise its discretion against its admission.

ACCORDINGLY we submit that the prosecution application under Rule 92bis should not be sustained.

Andreas O'Shea

Court Appointed Counsel for Augustine Gbao.

[4] See *Prosecutor v Akeyesu*, ICTR AC judgment, 1 June 2001, at par 287.

Book of Authorities

International Covenant on Civil and Political Rights of 1966

European Convention on Human Rights and Fundamental Freedoms of 1950

Prosecutor v Akeyesu, ICTR AC judgment, 1 June 2001, at par 287

Hulki Gunes v. Turkey, No 28940/95 (Chamber Judgment), 19 June 2003, ECHR