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SCSL-04-15-T
(23859 - 23869)

23859

THE SPECIAL COURT FOR SIERRA LEONE

BEFORE:

Justice Pierre Boutet, Presiding
Justice Bankole Thompson
Justice Benjamin Itoe

Registrar: Mr. Lovemore G. Munlo SC

Date filed: 12th June 2006

The Prosecutor

-v-

Issa Hassan Sesay

Case No: SCSL – 2004 – 15 – T

PUBLIC

**SESAY DEFENCE REPLY TO PROSECUTION NOTICE UNDER RULE 92bis
AND 89 TO ADMIT THE STATEMENT OF TF1-150**

Office of the Prosecutor

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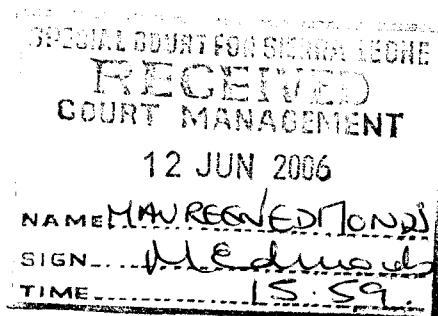
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INTRODUCTION

1. On 5th June 2006, the Prosecution filed its “Prosecution Notice under Rule 92*bis* and 89 to Admit the Statement of TF1-150” (the “Application”)¹ in which it seeks to admit the statement of TF1-150² without direct examination or cross-examination of the witness.
2. The Defence on behalf of Mr. Sesay (the ‘Defence’) vigorously opposes this Application on the grounds that to admit such evidence under Rule 92*bis* and 89 while denying the Defence the opportunity to cross-examine would prejudice the Accused to such an extent that a fair trial would effectively be denied to him.

SUBMISSIONS

3. The Defence accepts that the Rule 89(C) provides that any relevant evidence is admissible and that the Special Court employs a doctrine of ‘flexible admissibility’, recognising that the trials are adjudicated upon by professional Judges.
4. The Defence further accepts that Rule 92*bis* of the Rule of the Procedure and Evidence of the Special Court departs from that of the ICTR and ICTY in that it does not specify that evidence as to the acts and conduct of the Accused is a bar to the admission of a statement or information. In any event, it is accepted that the statement as lodged with Court Management does not go towards the acts and conduct of the First Accused.
5. It is the submission of the Defence, therefore, that the issue to be addressed by the Trial Chamber is not whether admission of the relevant statement meets the formal requirements of Rules 92*bis* and 89(C), but rather whether the admission of the statement into evidence without the benefit of cross-examination by the

¹ SCSL-04-15-T-570 (23829-023834)

² That is to say, pages 21070- 21140 of Court Folio 567

Defence is at odds with the overriding obligation of the Trial Chamber to ensure a fair trial.

6. The law relating to the discretionary power³ of the Trial Chamber to decide to order that a witness appear for cross-examination, where that witness's statement or previous testimony fulfils the formal requirement of Rule 92bis has been explored in the jurisprudence of international tribunals.
7. In Prosecutor v. Sikirica⁴, the ICTY Trial Chamber held

“the principal criterion for determining whether, pursuant to Rule 92bis (E), a witness should be required to appear for cross-examination is the overriding obligation of a Chamber to ensure a fair trial under Articles 20 and 21 of the Statute. In that regard, among the matters for consideration are whether the transcript goes to proof of a critical element against the accused and whether cross-examination of the witness in other proceedings dealt adequately with the issues relevant to the defence in the current proceedings”.⁵
8. The Sikirica case involved a Prosecution Application to admit the transcript testimony of six witnesses. It was accepted that the formal requirements of the ICTY's Rule 92bis was met by all six witnesses; that is to say, no witness gave evidence relating to the acts or conduct of any accused. In relation to two witnesses (Mr. Selak and Dr. Greve) the transcripts of previous testimony were admitted without the witness being required to attend as the Trial Chamber held

³ Please note that His Honour Judge Robinson in his Separate Opinion to the Decision on Prosecution's Request to have Written Statements Admitted under Rule 92bis, Prosecutor v. Milosevic, 21st March 2002 (the 'Separate Opinion' to the 'Milosevic Decision') held that the Trial Chamber was under an obligation to grant cross-examination to the Defence where the evidence sought to be admitted through Rule 92bis exposed the accused to liability under ICTY Article 7(3). However the Trial Chamber in the Milosevic Decision suggested that the power was a discretionary one. That the power is a discretionary one also finds favour in ICTR jurisprudence: Prosecutor v. Karemera, Decision on Admission of Transcript of Prior Testimony of Antonius Maria Lucassen, 15th November 2005, paragraph 4.

⁴ Decision on Prosecution's Application to Admit Transcripts Under Rule 92bis, 23 May 2001, (the 'Sikirica case')

⁵ Ibid. Para 4

that the evidence did not relate to a central issue and all issues of concern had been adequately covered by the previous cross-examination. The transcript of a third witness (Mr. Garibovic) was admitted where no objections from the Defence were received on the grounds that the witness's evidence either related to a central issue in the case or that the previous cross-examination was inadequate.

9. In relation to the evidence of Mr. Vulliamy and Mr. Gutic, the Chamber held that while the evidence did not implicate the acts and conduct of the three Accused, it went to a means of proof of an element of the genocide charge faced by one Accused and in the circumstances "the accused must be given an opportunity to cross-examine the witness" on the relevant limited issue.⁶ The Trial Chamber went on to state that issues of credibility and bias had already been properly canvassed by the previous cross-examination with the consequence that the remaining two Accused would not be allowed to conduct cross-examination of the witness.
10. The Trial Chamber ordered that the final witness, Mr. Sejmenovic, be required to attend for cross-examination as "in the Trial Chamber's opinion, the evidence of this witness, while not related to the acts or conduct of any of the three accused, bears upon, this case in such a significant and direct way that all three accused should be given an opportunity to cross-examine the witness".⁷
11. The Trial Chamber in its 'Decision Regarding Prosecutor's Notice of Intent to Offer Transcripts under Rule 92bis D', Prosecutor v. Naletelic⁸ cited the jurisprudence of the Sikirica case⁹. The Chamber noted that the requirement of an international armed conflict is a 'general pre-requisite or contextual element and does not, of itself constitute criminal conduct'. The Naletelic Decision goes on, however, to note

⁶ Ibid. Para 11 and 21

⁷ Ibid. Para 35

⁸ Dated 9th July 2001 (the 'Naletelic Decision')

⁹ See para 9 and 10 of the Naletelic Decision

“the element of a widespread and systematic attack, required to prove crimes against humanity, is more difficult to categorise. Although it can be considered a contextual element of Article 5, it is linked to the conduct of the accused because, in order to be convicted of a crime against humanity, the accused must have knowledge that there is an attack on the civilian population and that his or her act is part of the attack”.¹⁰

12. In the Naletelic Decision, the Trial Chamber did not decide the point as the witness had been subject to previous cross-examination, which formed part of the transcript sought to be admitted through Rule 92bis, by persons having a similar interest to the accused in contesting the existence of a widespread and systematic attack and so was not prepared to recall the witness for further cross-examination.

13. In its Decision on Prosecution’s Request to have Written Statements Admitted under Rule 92bis, Prosecutor v. Milosevic, the Trial Chamber referred once more to the jurisprudence of the Sikirica Decision. The Trial Chamber held that the statements sought to be admitted under Rule 92bis met the formal requirements of the relevant Rule and “the fact that conduct is that of co-perpetrators or subordinates is relevant to whether cross-examination should be allowed and not to whether a statement should be admitted”.¹¹

14. The statements related to alleged attacks by Serb forces on Kosovo municipalities and the resulting deportations and killings. The accused had put this evidence into issue and it was, therefore, “an important issue for the Trial Chamber to try”. The Chamber held that the evidence related to a critical element of the Prosecution’s case and stated

“in these circumstances, in the view of the Trial Chamber the requirements of a fair trial demand that the accused be given the right to cross-examine

¹⁰ Para 11 of the Naletelic Decision

¹¹ Paras 21 and 21 of the Milosevic Decision

the witnesses in order to fully test the Prosecution's case, This course will also address any concerns about the reliability of the evidence and any hearsay".¹²

15. His Honour Judge Robinson issued a Separate Opinion to the Milosevic Decision which concurred with the Decision but arrived at it through a different process. Noting that "Cross-examination is a fundamental right of an accused person both under the International Covenant on Civil and Political Rights and the Statute of the Tribunal", Judge Robinson, in accepting that Rule 92*bis* of the ICTY only excluded evidence related to the acts and conduct of the accused and not his subordinates, held "...since the statements expose the accused to liability in relation to a critical element of the Prosecution's case, cross-examination is not at the discretion of the Trial Chamber; it is the right of the accused".¹³

16. The Defence therefore submit that the Trial Chamber in deciding whether to exercise its power to require the witness to attend for cross-examination or not should address itself to the following:

- (a) Do the differences in Rules 92*bis* and 89 between the Special Court and the other international tribunals affect the Trial Chamber's discretionary power to order a witness to present her/himself for cross examination; if not,
- (b) Does the evidence of the witness sought to be admitted go to a central issue in the Prosecution's case against the accused; and
- (c) Has there been previous adequate cross-examination on that central issue as well as on other relevant issues such as the witness's credibility or methodology or adequate testing of any hearsay evidence?

¹² Para 25 of the Milosevic Decision

¹³ Para 10 of the Judge Robinson's Separate Opinion to the Milosevic Decision

The effect of the differences between the ICTR/ICTY Rules and those of SCSL

17. As noted by the Prosecution in paragraph 10 of its Application, the Appeals Chamber of the Special Court recognised “a need to amend ICTR Rule 92bis in order to simplify this provision for a court operating in what was hoped would be a short time-span in the country where the crimes had been committed”.¹⁴ Nevertheless the grounding principle remained the same: to facilitate a fair, efficient and expeditious trial.¹⁵
18. The changes in the Rule 92bis and 89 applied to the formal requirements of those rules of evidence in recognition of the peculiar circumstances of the Special Court as compared to the other ad hoc tribunals. The changes in the Rules did not –and the Defence suggest would not- direct them to re-defining the balance between an accused’s right to a fair trial and an expeditious trial.
19. The observations made by His Honour Judge Robinson in paragraph 2 of his Separate Opinion to the Milosevic Decision hold true in relation to the Rules of the Special Court: “The importance... [attached] to cross-examination is illustrated by the care that is taken in protecting the accused’s right to cross-examination where regimes are established in which evidence may be admitted without cross-examination”. His Honour cites Rules 71(C) and 94bis (C) of the ICTY in support of his statements. The relevant Rules of the Special Court are identical.
20. As the Trial Chamber will be aware, Article 17(3)(d) states that the accused “has the right to be examined against him or her”¹⁶. Under Article 89(B), the Trial Chamber “shall apply rules of evidence which best favour a fair determination of

¹⁴ *Prosecutor v. Norman et al*, ‘Fofana – Decision on Appeal Against Decision on Prosecution’s Motion for Judicial Notice and Admission of Evidence’, 16th May 2006 and the Separate Opinion of Justice Robertson, paras 13 and 14.

¹⁵ See para 10 of the Application.

¹⁶ This echoes 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.

the matter before it and are consonant with the spirit of the Statute and the general principles of law”.

21. The Defence submit that the differences between Rules 92*bis* and 89 of the SCSL and those of other Tribunals were based on the peculiarities of the Special Court’s situation and do not direct themselves towards the discretionary power of the Court to order the attendance of a witness for cross-examination. The Defence further submit, that where that a witness’s evidence goes to a central issue of the case against the accused and/or where previous cross-examination has not been conducted or is inadequate, that witness should be required to submit him or herself to cross-examination if the accused’s right to a fair trial is to be given any meaning.

Does the relevant statement of TF1-150 go to a central issue in the case?

21. TF1-150’s statement takes the form of a report which covers a large range of human rights violations between May 1998 and January 2000. The evidence relates to Counts 1-14 on the Indictment The Defence asks the Trial Chamber to note to following issues raised in the statement which are central to the Prosecution case against the accused

- (i) killings and mutilations of civilians in ‘rebel attacks’ in the districts of Port Loko, Bombali, Koinadugu, the Western area and to a lesser extent, Kenema and Bo¹⁷;
- (ii) incidences of sexual violence including multiple rape and sexual slavery related to these rebel attacks in the above districts as well as Kailahun¹⁸
- (iii) the abduction of children and the use of child combatants in the above districts¹⁹
- (iv) the use of civilians as forced labour²⁰
- (v) the looting or destruction of civilian property²¹

¹⁷ Paras 16-26, 31-37, 40-49, 60-65, 67, 71, 73-74, 79, 83, 85-88 of TF1-150’s Statement

¹⁸ Paras 27,34, 50-52, 55, 61-62, 68, 72, 75, 81, 83, 87-88 of TF1-150’s Statement

¹⁹ Paras 28, 38, 42, 53-55, 61, 77 of TF1-150’s Statement

²⁰ Paras 34, 55, 57, 80 of TF1-150’s Statement

22. TF1-150's statements also makes comments on the 'widespread and systematic nature of the attacks' and the responsibility carried by the RUF: "I noted that the rebels were responsible for systematic and widespread perpetration of multiple forms of human rights abuse against the civilian population"²² and "the RUF were responsible for serious assaults on civilians in this period"²³.

23. This evidence is a means of proof the elements of offences set out in Counts 1-14 of the Indictment against Mr. Sesay.

24. The statement includes a significant amount of hearsay evidence together with opinion evidence. Moreover in paragraphs 1-14, TF1-150 seems to suggest his expertise for the purpose of the report produced. The same paragraphs give an outline of the methodology employed in creating the report.

Was there previous adequate cross-examination on the central issue or other relevant issues such as credibility and the testing of hearsay evidence?

25. The Prosecution is not seeking to have previous transcripts admitted under Rule 92bis with the consequence that, if admitted, there will be no record of any cross-examination before the Trial Chamber.

26. There will therefore be no record of any challenges to the critical issues to the Defence set out above at paragraphs 21-22 nor has there been any challenge to the credibility of the witness or any exploration of the reliability of any hearsay evidence or the methodology by which the witness's statement was compiled.

²¹ Paras 29, 36, 40, 57, 68, 83-85, 90 of TF1-150's Statement

²² Para 25 of TF1-150's Statement

²³ Para 84 of TF1-150's Statement; the time period referred to is August – December 1999.

CONCLUSION

27. The Defence submit the requirements of a fair trial demand that the accused be given the right to cross-examine the witness in order to fully test the Prosecution's case.

28. The Defence therefore request that the statement of TF1-150 be admitted under Rule 92*bis*

(i) on the condition that the witness present himself for cross-examination by the Defence; and

(ii) in the event that the witness does not so appear, the relevant statement not be admitted into evidence.

Dated 12th June 2006


 WAYNE JORDASH
SARETA ASHRAPH

Book of Authorities

Prosecutor v. Sesay et al, SCSL-04-15-T-570, “Prosecution Notice Under Rules 92bis and 89 to Admit the Statement of TF1-150,” 5th June 2006 (23829-23836)

Prosecutor v Milosovic, IT-02-54, “Separate Opinion of Judge Patrick Robinson” to the “Decision on Prosecution’s Request to Have Written Statements Admitted Under Rule 92bis,” 21st March 2002 (available on ICTY website).

Prosecutor v. Karemera et al., ICTR-98-44, “Decision on Admission of Transcript of Prior Testimony of Antonius Maria Lucassen,” 15th November 2005 (available on ICTR website).

Prosecutor v Sikirica et al., IT-95-8, “Decision on Prosecution’s Application to Admit Transcripts Under Rule 92bis,” 23 May 2001 (available on ICTY website).

Prosecutor v Naletilic et al., IT-98-34, “Decision Regarding Prosecutor’s Notice of Intent to Offer Transcripts Under Rule 92bis D,” 9 July 2001 (available on ICTY website).

Prosecutor v. Norman et al, SCSL-04-14-T-398, “Fofana – Decision on Appeal Against ‘Decision on Prosecution’s Motion for Judicial Notice and Admission of Evidence’”, 16th May 2005

International Covenant on Civil and Political Rights, Article 14(3)(e)
(www.unhchr.ch/html/menu3/b/a_ccpr.htm)