571) SCSL-04-15-T

(23837-23843) 23837

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: 5 June 2006

Case No. SCSL 2004 – 15 – T

In the matter of:

THE PROSECUTOR

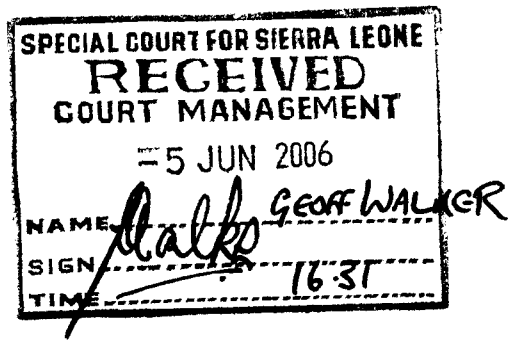
Against

ISSA SESAY
MORRIS KALLON
AUGUSTINE GBAO

PUBLIC
SESAY AND GBAO JOINT RESPONSE TO PROSECUTION NOTICE PURSUANT TO RULE 92*bis* TO ADMIT INFORMATION IN EVIDENCE

Office of the Prosecutor

Desmond de Silva QC
James Johnson
Peter Harrison



Counsel for Issa Sesay

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Andreas O'Shea
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Shekou Touray, Charles Taku and Melron Nicol-Wilson for Morris Kallon

1. By its *Notice Pursuant to Rule 92bis to Admit Information into Evidence* of 30 May 2006,[1] the prosecution seeks to admit a large amount of documentary material through Rule 92*bis*, without indicating what oral evidence if any it is meant to be in lieu of.

2. Furthermore, the prosecution relies upon rule 89(C) to admit evidence 'by post'.

3. The defence objects to the admission of the said documents at this stage on grounds of procedural irregularity or inappropriateness and/or in the alternative insufficient time to consider their admissibility.

The applicability of Rule 92*bis* and the appropriate procedure for admitting documents into evidence

4. It is submitted that Rule 92*bis* serves to permit the admission of written evidence *in lieu of* oral testimony, as expressly stated. It is not designed as a general mechanism for the admission of any kind of evidence without any connection to oral evidence. The function of Rule 92*bis* is to enable the parties and the Chamber to reduce the amount of oral testimony where possible. We therefore say that an application under this rule must connect the information sought to be admitted with identifiable witnesses who could otherwise be called.

5. This is clear from the history of this provision having regard to the equivalent provisions in the rules for the ICTR and ICTY. While the Special Court provision was amended to differ, it is submitted that if it was meant to be a general provision for the admission of any kind of documentary evidence without any connection to any oral testimony, the provision would be drafted differently, be express on this point and omit the words 'in lieu of oral testimony'.

[1] SCSL-04-15-T-564

6. This interpretation of the rule is further supported by Rule 92*bis*(B), which requires that the reliability of the information be susceptible of confirmation as opposed to actually confirmed. Normally, such confirmation of at least sufficient indicia of reliability would be through a witness at the time of the admission of the document. Where information is submitted under Rule 92*bis*, the necessity of calling a witness is foregone on the basis that the written information replaces the testimony of such witness, but it is known that there is that witness otherwise available to confirm the reliability of the information if it were to become necessary. In this sense it is known that the information is at least susceptible of confirmation, but that such confirmation will not take place now or necessarily through the witness. If there is no alternative witness testimony which the documentary evidence is replacing then it is impossible to say that the reliability of the evidence is even susceptible of confirmation.

7. As noted by this Chamber, a more flexible approach could therefore be said to have been adopted here allowing evidence to be evaluated for its *reliability* at a later stage in the light of all the evidence.[2] This is a necessary price for reducing the witness list but not desirable as a general procedure for the admission of all documentary evidence. That is not what Rule 92*bis* was designed for.

8. The *obiter dictum* of the Appeals Chamber was addressing the general distinction between Rule 92*bis* and Rule 94, and was not confronting the issue of the specific nature and parameters of Rule 92*bis* in terms of its connection to oral testimony. It does not therefore affect this issue.[3] The point is also unaffected by any prior decisions of this or the other Chamber applying Rule 92*bis* where the specific issue raised here was not raised before the Chamber by the parties. A Chamber is not bound to follow a particular legal interpretation which has not been previously argued even where it might

[2] *Prosecutor v Norman, Fofana and Kondewa*, SCSL-04-14-T-447, Decision on Prosecution's "Request to Admit into Evidence Certain Documents Pursuant to Rules 92bis and 89(C)", 14 July 2005.
[3] *Prosecutor v Norman et al*, Decision on Appeal Against "Decision on Prosecution's Motion for Judicial Notice and Admission of Evidence" of 16 May 2005 Case No SCSL-2004-14-AR73-398.

appear a pre-requisite to that earlier decision. Thus, in the English case of *In re Hetherington, Dec'd*, it was held that:

> The authorities... clearly establish that even where a decision of a point of law in a particular case was essential to an earlier decision of a superior court, but that superior court merely assumed the correctness of the law on a particular issue, a judge in a later case is not bound to hold that the law is decided in that sense.[4]

9. It is submitted that Rule 92*bis* is an inappropriate mechanism for the admission of documentary evidence per se. In so far as Rule 92*bis* could be employed to admit documentary evidence not in lieu of oral testimony but generally, it adds nothing to Rule 89(C) save that it imposes an unnecessary time limit which in certain cases can be unreasonable and prejudicial. It is therefore clearly not designed for this purpose and should not be used simply to constrain the defence ability to respond effectively.

10. Rule 89(C) permits the admission of documentary evidence per se without any link to alternative oral evidence, but does not affect the need for fairness in the procedure to be adopted for such admission. In general this should be done through witnesses, demonstrating the authenticity, relevance and probative value of such evidence. Such evidence should not be introduced on mass in a vacuum, but should be introduced through witnesses in order not only that the prosecution can demonstrate but also that the defence can realistically contest the authenticity, reliability, relevance and probative value of such material.

11. Therefore, the defence invites the Chamber to find that the Rule 92*bis* is an inappropriate tool for the admission of the material put before it in this application and to hold that while such evidence might be admitted pursuant to Rule 89(C) this should be done in an appropriate and fair manner introducing

[4] *In re Hetherington, Dec'd* [1990] Ch 1, per Sir Nicolas Browne-Wilkinson, V.C.

such evidence through witnesses able to speak to their authenticity, relevance and probative value.

Quantity of material and inadequate time

12. Further and or in the alternative, with respect to time, it defies all sense of fairness to consider that the defence can be in a position, within a 5 day time limit, to consider and argue the admissibility of the quantity of material placed before the Chamber in this application. This further illustrates the inappropriateness of Rule 92*bis* for this purpose.

13. While the material may have been previously disclosed it is only at the time when the prosecution seeks to tender evidence that the defence should be expected to analyse the material in detail for the purpose of considering its position on admissibility. In any event, if the defence is confronted with a large amount of material, previously disclosed or not, and suddenly requested to react as to its admissibility, in fairness and in the interests of justice it is respectfully submitted that it should be afforded the necessary time to deal with it.

14. Therefore, without prejudice to its argument on the non-applicability of Rule 92*bis*, the defence places its objection in compliance with the time limit set out in this rule, but requests that a reasonable period of time be granted to it by the Chamber to consider its position in relation to the admissibility of this vast quantity of material, before any final decision is made on its admission into evidence.

ACCORDINGLY it is requested that the prosecution motion be dismissed

OR in the alternative, we request that the defence be granted a specified and reasonable period of time in which to analyse the material sought to be admitted with a view to making submissions on its admissibility.

Andreas O'Shea, Court Appointed Counsel for Augustine Gbao

Wayne Jordash, Counsel for Issa Sesay

5 June 2006

Book of Authorities

Prosecutor v Norman et al, Decision on Appeal Against "Decision on Prosecution's Motion for Judicial Notice and Admission of Evidence" of 16 May 2005 Case No SCSL-2004-14-AR73-398.

Prosecutor v Norman, Fofana and Kondewa, SCSL-04-14-T-447, Decision on Prosecution's "Request to Admit into Evidence Certain Documents Pursuant to Rules 92bis and 89(C)", 14 July 2005.

In re Hetherington, Dec'd [1990] Ch 1, per Sir Nicolas Browne-Wilkinson, V.C.