638.) SCSL-04-15-T (25155-25164) 25155

SPECIAL COURT FOR SIERRA LEONE
OFFICE OF THE PROSECUTOR
FREETOWN – SIERRA LEONE

TRIAL CHAMBER I

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

Registrar: Mr. Lovemore G. Munlo SC

Date filed: 1 September 2006

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

Case No. SCSL-04-15-T

PUBLIC
PROSECUTION RESPONSE TO SESAY DEFENCE APPLICATION FOR LEAVE TO APPEAL THE DECISION OF 3 AUGUST 2006

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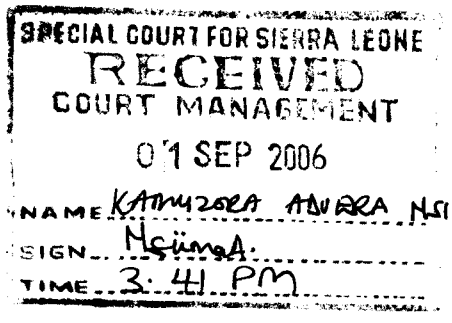

I. INTRODUCTION

1. On 29 June 2006, Defence for the Accused Sesay ("**Defence**") filed a motion entitled "Motion for a Ruling that the Defence has been Denied Cross-Examination Opportunities" ("**Motion**").[1] On 3 August 2006, the Trial Chamber issued a decision on the Motion ("**Decision**"),[2] dismissing the Motion in its entirety as lacking merit. On 22 August 2006, the Defence filed an application for leave to appeal against the Decision ("**Application for Leave to Appeal**").[3] The Prosecution now files this response to the Application for Leave to Appeal.
2. The Prosecution notes that the Application for Leave to Appeal was filed out of time, being due on 21 August 2006. In the absence of guidance from the Registry or the Trial Chamber on this late filing, the Prosecution has proceeded to respond. However, the Prosecution submits that the Application for Leave to Appeal should be rejected on the basis that it was filed outside the time frame envisaged by Rule 73(B) of the Rules of Procedure and Evidence.
3. In the alternative, the Prosecution submits that the Application for Leave to Appeal should be dismissed on the ground that the requirements of Rule 73(B) have not been met.

II. TEST FOR GRANTING LEAVE TO APPEAL

4. Rule 73(B) of the Rules provides that leave to appeal may be granted in exceptional circumstances and to avoid irreparable prejudice to a party. The restrictive nature of Rule 73(B) has repeatedly been emphasized in the decisions of the Special Court and the principles of law governing the issue of granting leave to file an interlocutory appeal within the jurisdiction of the Special Court have recently been consolidated and summarised by this Trial Chamber.[4] The two conditions – exceptional circumstances and irreparable prejudice – are conjunctive and both must be satisfied if an application for

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[1] *Prosecutor v. Sesay et al.*, SCSL-04-15-T-588, "Motion for a Ruling that the Defence has been Denied Cross-Examination Opportunities", ("**Motion**"), 29 June 2006.
[2] *Prosecutor v. Sesay et al.*, SCSL-04-15-T-624, "Decision on Defence Motion for Clarification and for a Ruling that the Defence has been denied Cross-Examination Opportunities", ("**Decision**"), 3 August 2006.
[3] *Prosecutor v. Sesay et al.*, SCSL-04-15-T-637, "Application for Leave to Appeal the Decision (3rd August 2006) on Defence Motion for Clarification and for a Ruling that the Defence has been denied Cross-Examination Opportunities " ("**Application For Leave to Appeal**"), 22 August 2006.
[4] See e.g. *Prosecutor v Norman et al.*, SCSL-04-14-T-669, "Decision on Application by First Accused for Leave to Appeal against the Decision on their Motion for Extension of Time to Submit Documents pursuant to Rule 92bis", 17 July 2006.

leave to appeal is to be granted. The Appeals Chamber has held that: "The underlying rationale for permitting such appeals is that certain matters cannot be cured or resolved by final appeal against judgement."[5]

5. There are no exceptional circumstances in the current case and irreparable prejudice cannot be demonstrated.

III. ARGUMENT

Background

6. The background to the Motion is as follows. The Defence for Sesay had on numerous previous occasions filed motions seeking the exclusion of certain supplementary statements obtained from Prosecution witnesses during proofing, on the ground that they contain material going beyond their original witness statements. The decisions of the Trial Chamber on these Defence motions articulated and applied principles for determining the admissibility of supplementary statements of Prosecution witnesses obtained during proofing. The relevant principles applied by the Trial Chamber are set out, for instance, in paragraph 9 of the Trial Chamber's decision of 27 February 2006.[6] In application of these principles, the Trial Chamber has on various occasions rejected Defence motions seeking the exclusion of material contained in such supplemental statements of witnesses on the ground that such material constituted new evidence.[7] It is

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[5] *Prosecutor v. Norman et al.*, SCSL-04-14-T-319, "Decision on Prosecution Appeal Against the Trial Chamber Decision of August 2004 Refusing Leave to File An Interlocutory Appeal", 17 January 2005, para. 29; see also *Prosecutor v. Sesay et al.*, SCSL-2004-15-T-357, "Decision on Defence Applications for Leave to Appeal Ruling of the 3rd February 2005 on the Exclusion of Statements of Witness TF1-141", 28 April 2005, para. 21.

[6] *Prosecutor v. Norman et al.*, SCSL-04-14-T-319, "Decision on the Defence Motion for the Exclusion of Evidence Arising from the Supplemental Statements of Witnesses TF1-113, TF1-108, TF1-330, TF1-041 and TF1-288", 27 February 2006, para. 9.

[7] See, for instance, *Prosecutor v. Sesay, Kallon, Gbao*, SCSL-04-15-T-211, "Ruling on Oral Application for the Exclusion of 'Additional' Statements for Witnesses TF1-060", 23 July 2004 ("**23 July 2004 Decision**"), rejecting a Defence complaint that a supplemental statement taken from a witness during proofing "cannot, in law, be considered as an addition to or clarification of, the original statement previously disclosed by the Prosecution ... but ... it is in essence a new statement from the witness alleging entirely new facts", at para. 3; SCSL-04-15-T-314, "Ruling on Oral Application for the Exclusion of Statements of Witnesses TF1-141 Dated Respectively 9th October 2004, 19th and 20th October 2004 and 10th January 2005", 3 February 2005 ("**3 February 2005 Decision**"), rejecting a Defence complaint that a supplemental statements taken from a witnesses during proofing "could not be characterised as congruent in material respects with the original statement", at para. 9; SCSL-04-15-T-396, "Ruling on Application for the Exclusion of Certain Supplemental Statements of Witness TF1-361 and TF1-122", 1 June 2005 ("**1 June 2005 Decision**"), rejecting a Defence complaint that supplemental statements taken from witnesses during proofing "contain[ed] wholly new allegations against Issa Sesay which did not form part of these witnesses' respective original statements", at para. 3; SCSL-04-15-T-496, "Decision on the Defence Motion for the Exclusion of Evidence Arising From the Supplemental Statements of Witnesses TF1-113, TF1-108, TF1-330, TF1-041 and

not the case, as the Application for Leave to Appeal might be read as suggesting, that these earlier decisions of the Trial Chamber held that the Accused has sufficient notice of all factual allegations embodied in all supplemental witness statements provided by the Prosecution.[8]

7. The Application for Leave to Appeal states that it can be "reasonably inferred" from these earlier rulings of the Trial Chamber that the Defence is estopped from applying to recall Prosecution witnesses who have already testified in order to cross-examine them on supplemental factual allegations that arose from supplemental witness statements provided by the Prosecution after the witnesses in question testified.[9] The Prosecution submits that no such inference can be drawn from the previous decisions of the Trial Chamber, since those previous decisions never addressed this question at all. Indeed, the Application for Leave to Appeal itself concedes that the earlier rulings of the Trial Chamber did not address this issue, or at least that they did not clearly decide this question, since the Application for Leave to Appeal argues that the Decision should have provided an "unambiguous indication" in relation to this question.[10]

8. The Motion was expressed to be a motion for "clarification" of the earlier rulings of the Trial Chamber. It sought a general ruling of principle as to whether the Defence is entitled to recall Prosecution witnesses who have already testified so that they may be cross-examined with respect to factual allegations that were disclosed subsequent to their testimony. However, given that this was an issue that was never argued by the parties or in any way considered by the Trial Chamber in its earlier rulings, it was a motion for "clarification" in name only. In reality, the Motion requested a ruling from the Trial Chamber on a new issue. In its response to the Motion, the Prosecution argued that the Motion should be rejected on the ground that the relief it requested was abstract and hypothetical. The Prosecution response further argued that a motion to recall a witness must establish good cause, and the question whether good cause has been established can only be determined on a case-by-case basis, in relation to each individual witness, based on all of the circumstances pertaining to that witness.

TF1-288", 27 February 2006, ("**27 February 2006 Decision**"), rejecting a Defence complaint that supplemental statements taken from witnesses during proofing "ought to be characterised as new evidence", at para. 3.

[8] Application for Leave to Appeal, paras. 2-3.

[9] Ibid.

[10] Ibid.

9. The Prosecution submits that the Trial Chamber's Decision rejecting the Motion was based on these considerations. The Trial Chamber found that the Motion did "not directly specify any issue or relief concerning possible prejudice suffered by the Defence in relation to any particular factual allegation or any particular witness who testified before this court and does not cite any relevant authority in support". In other words, the Motion did not seek any specific relief but merely sought a ruling in the abstract. In the Decision, the Trial Chamber also affirmed that "the recall of a witness for cross-examination remains a discretionary matter for the Court". This ruling leaves open the possibility that if the Defence were to file a properly argued and substantiated motion to recall a witness, the Trial Chamber would consider it on its merits. This statement does not "contradict the logic" of the earlier decisions of the Trial Chamber,[11] but rather leaves the door open for a properly formulated and supported application to recall a witness.[12]
10. Thus, it is submitted that the Decision merely refused to decide an abstract issue.

Exceptional circumstances

11. The Application for Leave to Appeal argues, essentially, that the Trial Chamber erred in refusing to decide this abstract issue. To succeed on appeal, the Defence would need to establish that the Trial Chamber was under a ***positive duty*** to rule on the abstract issue as posed in the Motion. The Prosecution submits that this is an argument that would have no prospect of success on appeal. It was within the Trial Chamber's discretion to find that in the specific case, clarification was not needed because the Motion requested a ruling was in the abstract and did not specify any issue concerning possible prejudice suffered by the Defence in relation to a particular factual allegation or witness, and because its relevant jurisprudence was already sufficiently clear. In any event, "the probability of an erroneous ruling by The Chamber does not, of itself, constitute 'exceptional circumstances' for the purpose of a Rule 73(B) application."[13]

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[11] Application for Leave to Appeal, para. 15.
[12] The Prosecution notes, in response to paragraph 7 of the Application for Leave to Appeal, that there has been no inconsistency or "admission" in the Prosecution's submissions as to the possibility of prejudice. There is a distinction in terms of discernible prejudice between an application to exclude evidence and an application to recall a witness for re-cross-examination on material that has been admitted subsequently.
[13] *Prosecutor v Norman et al.*, SCSL-04-14-T-669, "Decision on Application by First Accused for Leave to Appeal against the Decision on their Motion for Extension of Time to Submit Documents pursuant to Rule 92bis", 17 July 2006.

12. The Prosecution also submits that the refusal of a Trial Chamber to decide an abstract issue itself cannot amount to an exceptional circumstance for the purposes of Rule 73(B). Indeed, it is submitted that it is the norm for courts to decline to decide abstract questions.
13. Paragraph 2 of the Application for Leave to Appeal argues that "The administration of justice would have been facilitated" by a ruling of the Trial Chamber on this abstract issue. However, the question whether it is appropriate to rule on an abstract issue is a matter for the Trial Chamber to decide in the exercise of its discretion. Its decision not to do so, which as noted above is the norm, can not constitute an exceptional circumstance.
14. Paragraph 5 of the Application for Leave to Appeal argues that the proposed appeal "relates directly to the ability of the Defence to avail itself of discretionary remedies". The Prosecution notes that this is true only to the extent that the Trial Chamber declined to decide in the abstract whether the Defence was entitled to a discretionary remedy. Nothing in the Decision would prevent the Defence from filing at any time a properly argued and substantiated motion seeking a discretionary remedy in relation to a specific matter.
15. The Application for Leave to Appeal argues that the failure to decide this issue in the abstract places an "unfair burden" on the Defence, and denies the Defence "procedural fairness" and equality of arms.[14] However, the Application for Leave to Appeal does not explain how this is so, other than to suggest that the Decision "arguably creates further confusion".[15] Paragraph 16 of the Application for Leave to Appeal sets out various quotes from the Decision which, in the submission of the Defence, fail to give a clear answer to the question posed by the Defence.[16] Paragraph 17 of the Application for Leave to Appeal then suggests that the fair trial rights of the Accused require the Trial Chamber to "provide a proper explanation" of its previous rulings in order to enable the Defence to understand them and comply with their terms.

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[14] Application for Leave to Appeal, para. 5.
[15] Application for Leave to Appeal, para. 15.
[16] However, there is nothing to support the Defence contention, set out in paragraph 16(i) of the Application for Leave to Appeal, that these individual decisions have given rise to a prohibition of general application, simply because the Defence applications have consistently been denied. It is similarly difficult to follow the Defence argument in paragraph 16(ii) that because the Trial Chamber was mindful of the principle that the Indictment has served notice on the Accused of the material facts alleged in the charges against him, the Trial Chamber was asserting a prohibition on all discretionary applications relating to supplemental evidence. The comments in paragraph 16(iii) of the Application for Leave to Appeal suggest that the Defence is attempting to read into the statements made in the background to the Trial Chamber's decision, conclusions which simply are not there.

16. The Prosecution submits that there is no lack of clarity that could affect the fair trial rights of the Accused. Contrary to what the Application for Leave to Appeal argues, the Trial Chamber has not held that the Defence is under any form of "prohibition". The previous rulings of the Trial Chamber merely held, in the application of certain principles articulated by the Trial Chamber, that certain material contained in certain supplemental statements of witnesses did not need to be excluded on the ground that such material constituted new evidence. There is nothing to support the Defence contention that these individual decisions have somehow given rise to a "prohibition" of general application, simply because the Defence applications have been denied.[17] These previous ruling in no way ever addressed issues pertaining to the recall of witnesses.[18] The law pertaining to the recall of witnesses is relatively well-established. In any event, the principles of equality of arms and fair trial rights do not require a Trial Chamber to determine abstract principles of law at the request of the Defence.

Irreparable Prejudice

17. Since there are no exceptional circumstances to warrant the granting of the Application for Leave to Appeal, there is no need to consider the question of irreparable prejudice. However, the Prosecution submits that the Defence has failed to point to any concrete incidence of prejudice that must be cured by the Appeals Chamber. The Defence has not been denied the opportunity to file a motion to recall one or more witnesses and is not being placed in an impossible situation. The references to the possibility of a breach of a "stated prohibition" or the absence of "well informed access to a discretionary remedy" are misconceived. There is no potential for irreparable prejudice.
18. For the reasons given above, the Application for Leave to Appeal does not establish how the Accused's right to a fair trial or the principle of equality of arms have been affected. The Trial Chamber explicitly stated that the recall of a witness for cross-examination remains a discretionary matter for the court, which clearly means that any future Defence motion to recall a specific witness for specific purposes would be considered by the Trial

[17] Application for Leave to Appeal, para. 16.
[18] The Defence itself points out that the apparent prohibition was put in place in the context of applications to exclude evidence, and not in the context of applications to recall witnesses. Even with respect to the former type of application, the Trial Chamber did not close the door on any possible exercise of its discretion to grant an adjournment to enable the Defence to examine its options concerning supplemental statements (see Decision, p. 2).

Chamber on its merits, based on all of the circumstances pertaining to that specific witness.

19. The Prosecution notes, in addition, that the Trial Chamber has always borne in mind the possibility of potential prejudice to the Defence in its rulings on the admissibility of supplementary statements disclosed during the Prosecution's case. For example, the Trial Chamber in one of its rulings denied the application for exclusion of the supplemental evidence, "on the understanding however, that the Defence reserves its right to cross examine this witness on all issues raised including those in the supplemental statement". [19]

IV. CONCLUSION

20. There are no exceptional circumstances and irreparable prejudice which would permit granting leave to appeal the Decision of the Trial Chamber. The application for leave to appeal should be dismissed.

Done in Freetown

1 September 2006

For the Prosecution,

James C. Johnson

Per: Peter Harrison

[19] *Prosecutor v Sesay et al.*, "Ruling on Oral Application for the Exclusion of 'Additional' Statement for Witness TF1-060, 23rd July 2004. Defence referred to this ruling in footnote 1 of its application., para. 17.

Index of Authorities

A. Orders, Decisions and Judgments

1. *Prosecutor v. Issa Hassan Sesay et al.*, SCSL-04-15-T-588, "Motion for a Ruling that the Defence has been Denied Cross-Examination Opportunities", 29 June 2006.

2. *Prosecutor v. Issa Hassan et al.*, SCSL-04-15-T-624, "Decision on Defence Motion for Clarification and for a Ruling that the Defence has been denied Cross-Examination Opportunities", 3 August 2006.

3. *Prosecutor v. Issa Hassan Sesay et al.*, SCSL-04-15-T-637, "Application for Leave to Appeal the Decision on Defence Motion for Clarification and for a Ruling that the Defence has been denied Cross-Examination Opportunities ", 22 August 2006.

4. *Prosecutor v. Issa Hassan Sesay et al.*, SCSL-2004-15-T-357, "Decision on Defence Applications for Leave to Appeal Ruling of the 3rd February 2005 on the Exclusion of Statements of Witness TF1-141", 28 April 2005.

5. *Prosecutor v. Issa Hassan Sesay et al.*, SCSL-04-15-T-211, "Ruling on Oral Application for the Exclusion of 'Additional' Statements for Witnesses TF1-060", 23 July 2004.

6. *Prosecutor v. Issa Hassan Sesay et al.*, SCSL-04-15-T-314, "Ruling on Oral Application for the Exclusion of Statements of Witnesses TF1-141 Dated Respectively 9th October 2004, 19th and 20th October 2004 and 10th January 2005", 3 February 2005.

7. *Prosecutor v. Issa Hassan Sesay et al.*, SCSL-04-15-T-396, "Ruling on Application for the Exclusion of Certain Supplemental Statements of Witness TF1-361 and TF1-122", 1 June 2005.

8. *Prosecutor v. Issa Hassan Sesay et al.*, SCSL-04-15-T-496, "Decision on the Defence Motion for the Exclusion of Evidence Arising From the Supplemental Statements of Witnesses TF1-113, TF1-108, TF1-330, TF1-041 and TF1-288", 27 February 2006.

9. *Prosecutor v Issa Hassan Sesay et al.*, "Ruling on Oral Application for the Exclusion of 'Additional' Statement for Witness TF1-060, 23 July 2004.

10. *Prosecutor v Norman et al.*, SCSL-04-14-T-669, "Decision on Application by First Accused for Leave to Appeal against the Decision on their Motion for Extension of Time to Submit Documents pursuant to Rule 92bis", 17 July 2006.

11. *Prosecutor v. Norman et al.*, SCSL-04-14-T-319, "Decision on Prosecution Appeal Against the Trial Chamber Decision of August 2004 Refusing Leave to File An Interlocutory Appeal", 17 January 2005.

12. *Prosecutor v. Norman et al.*, SCSL-04-14-T-319, "Decision on the Defence Motion for the Exclusion of Evidence Arising from the Supplemental Statements of Witnesses TF1-113, TF1-108, TF1-330, TF1-041 and TF1-288", 27 February 2006.

13. *Prosecutor v Norman et al.*, SCSL-04-14-T-669, "Decision on Application by First Accused for Leave to Appeal against the Decision on their Motion for Extension of Time to Submit Documents pursuant to Rule 92bis", 17 July 2006.