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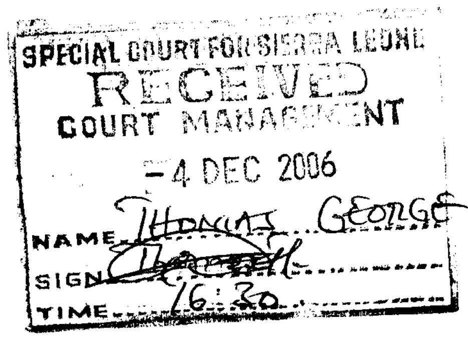
SCSL-04-15-T
(25537-25544)
25537

THE SPECIAL COURT FOR SIERRA LEONE

BEFORE:

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



Registrar: **Mr. Lovemore Green Munlo, SC**

Date filed: **4th December 2006**

The Prosecutor

-v-

Issa Hassan Sesay

Case No: SCSL – 04 – 15 – T

PUBLIC

APPLICATION FOR LEAVE TO APPEAL THE DECISION (30th November 2006) ON SESAY DEFENCE MOTION FOR IMMEDIATE PROTECTIVE MEASURES FOR WITNESSES AND VICTIMS AND FOR NON-PUBLIC DISCLOSURE

Office of the Prosecutor

James Johnson
Peter Harrison

Defence
Wayne Jordash
Sareta Ashraph

Defence Counsel for Kallon; Shekou Touray and Charles Taku
Defence Counsel for Gbao; Andreas O'Shea and John Came

1. The Defence submit that the Decision (30th November 2006) on Defence Motion ("The Motion") for Immediate Protective Measures for Witnesses and Victims and for Non- Disclosure undermines the Accused's rights to a fair trial pursuant to Article 17 of the Statute of the Special Court for Sierra Leone ("The Statute").

Ground 1 - Error alleged

2. It is submitted that the Trial Chamber has erred in law by concluding that, "no *prima facie* showing has been made by the Defence for the issuing of protective measures in respect of potential witnesses resident outside West Africa"[1] It is submitted that there was no proper basis for this conclusion, given that the Trial Chamber granted the Prosecution application for the same relief[2] on "essentially the same evidentiary material".[3] The Trial Chamber erred by assessing the same evidentiary material differently thus inconsistently and unfairly requiring more of the Defence than the Prosecution.

3. The Trial Chamber's reliance on the case of *Rukundo*[4] as further support for this finding further illustrates that the Trial Chamber's assessment of the same evidentiary material is inconsistent and unfair. The Defence did not call "upon the Chamber to engage in judicial speculation about the security situation of these witnesses"[5] nor could it be properly or fairly said that the Defence had failed to "provide the Chamber with all the material necessary for it to make a reasoned

[1] Prosecutor v. Sesay, Case No. SCSL – 04-15- T (25524 – 25536), Decision on Sesay Defence Motion for Immediate Protective Measures for Witnesses and Victims and for Non – Public Disclosure, 30th November 2006 ("The Decision"), Para. 24 (ii). There is a degree of ambiguity concerning this aspect of the Decision. The finding contained in paragraph 24 (ii) that "no *prima facie* showing has been made by the Defence for the issuing of protective measures in respect of potential witnesses resident outside West Africa" appears to contradict the finding in paragraph 24(i). In the event that 24(i) and the finding that the Defence has established a *prima facie* case for the issuing of proposed protective measures (a), (b), (i), (j), (k), (l) and the first part of the (f) inter alia for witnesses "living outside West Africa" is correctly expressed the Defence hereby abandon this aspect of the proposed appeal.
[2] Prosecutor v. Sesay, Case No. SCSL – 2003-05-PT-IP-038 (855-867), Decision on the Prosecutor's Motion for Immediate Protective Measures for Witnesses and Victims and For Non-Public Disclosure, 23rd May 2003 and Case No. SCSL-2004-15-T (6758 – 6774), Decision on Prosecution Motion for Modification of Protective Measures for Witnesses, 5th July 2004, Para. 21.
[3] The Decision, Para. 21.
[4] Case No. ICTR-2001-70-T, Decision on Prosecutor's Motion for Protective Measures CCF, BLC, BLS, and BLJ, 29 November 2006, Para. 4- 7.
[5] *Ibid* Para. 5.

decision" [6] given that the Trial Chamber had previously considered the same evidentiary material as more than sufficient. The same evidentiary material, particularly the affidavit of Morie Lengor dated 5th March 2003 and the Declaration of Dr. Alan W. White dated 7th April 2003, was previously sufficient to allow the Trial Chamber to conclude "within the bounds of reasonable foreseeability and not absolute certainty, the delicate and complex nature of the security situation in the country and the level of threat from several quarters of the ex-combatant population that participated in the conflict to witnesses and potential witnesses" and moreover to give rise to an "irresistible inference... that such threats may well pose serious problems to such witnesses and the effectiveness of the Court in the faithful discharge of its international mandate".[7] In the absence of a finding that the security situation has changed the irresistible inference remains.

Ground II – Error alleged

4. The Trial Chamber erred by failing to order the following: that "the Prosecution make a written request to the Trial Chamber or Judge thereof, for permission to contact any protected witnesses or any relative of such person and that such request be timely served on the Sesay Defence. At the direction of the Trial Chamber or a Judge thereof, the Sesay Defence shall contact the protected person and ask his or her consent or the parents or guardian of that person if that person is under the age of 19 to an interview by the Prosecution or the Kallon or Gbao Defence and shall undertake the necessary arrangements to facilitate such contact".[8] The Trial Chamber's ruling is logically and legally inconsistent with the approach taken upon application, by the Prosecution.[9] It is noteworthy that the moving party's request

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[6] *Ibid* Para. 6

[7] Prosecutor v. Sesay, Case No. SCSL – 2003-05-PT-IP-038 (855-867), Decision on the Prosecutor's Motion for Immediate Protective Measures for Witnesses and Victims and For Non-Public Disclosure, 23rd May 2003 and Case No. SCSL-2004-15-T (6758 – 6774), at Para. 10.

[8] Prosecutor v. Sesay, Case No. SCSL-04-15-T (24190 – 24203), 5 July 2005, Defence Motion for Immediate Protective Measures for Witnesses and Victims and For Non – Public Disclosure, 15th July 2006 at page 10: Order Para. 23(m).

[9] Prosecutor v. Sesay, Case No. SCSL–2003-05-PT-IP-038 (855-867), Decision on the Prosecutor's Motion for Immediate Protective Measures for Witnesses and Victims and For Non-Public Disclosure, 23rd May 2003 and Case No. SCSL-2004-15-T (6758 – 6774), pp. 16: Disposition: Order o.

(and the underlying evidentiary material) was the same yet the conclusion reached was different.

5. Moreover the ruling is wholly inconsistent with the approach taken in the Norman Case[10]. In the Norman Case the Trial Chamber noted that, in granting the same measure to the Prosecution, it had taken into account the "existence of a legitimate fear on the side of the Prosecution witnesses" and it would have placed the same restrictions upon the Prosecution (as sought by the Defence in this case) as regards contacting the Defence witnesses *through the Trial Chamber only* if the "Defence had made the necessary applications before The Chamber, and asserted that Defence witnesses expressed fear that "by placing their names on the defence witness list, they would expose themselves to harassment by agents of the Prosecution".[11] The Trial Chamber has ignored the very real fears expressed by the Defence witnesses and has erred thus by refusing to provide them with the same level of protection as enjoyed by the Prosecution witnesses.

The Applicable Law

Application for Leave

6. The applicable law has been outlined in a number of decisions. The subject of leave for interlocutory appeal is governed by Rule 73(B) which states as follows:

   Decisions rendered on such motions are without interlocutory appeal. However, in exceptional circumstances and to avoid irreparable prejudice to a party, the Trial Chamber may give leave to appeal. Such appeal should be sought within 3 days of the decision and shall not operate as a stay of proceedings unless the Trial Chamber so orders"

[10] Prosecutor v. Norman et al, Case No. SCSL – 04-14-T (18588 – 18597), Decision on Joint Defence Motion regarding the Propriety of Contacting Defence Witnesses, 20th June 2006.
[11] *Ibid* Para. 18.

7. As emphasised by Trial Chamber I Rule 73(B) is restrictive and "the applicant's case must reach a level of exceptional circumstances and irreparable prejudice" to satisfy the conjunctive requirement provided by the Rule"[12]

8. Trial Chamber I has also indicated that, "Exceptional circumstances" may exist depending upon the particular facts and circumstances, where for instance the question in relation to which leave to appeal is sought is one of general principle to be decided for the first time, or is a question of public international law importance upon which further argument or decision at the Appellate level would be conclusive to the interests of justice, or where the cause of justice might be interfered with, or is one that raises serious issues of fundamental legal importance to the Special Court for Sierra Leone in particular, or international criminal law, in general, or some novel and substantial aspect of international criminal law for which no guidance can be derived from national criminal law systems"[13]

Merits – Application for Leave

"Exceptional Circumstances" and "Irreparable Prejudice"

9. Article 17 of the Statute, paragraph (2) provides that:

> The accused shall be entitled to a fair and public hearing, subject to measures ordered by the Special Court for the protection of victims and witnesses

10. Article 17 of the Statue, paragraph (1) provides that:

> All accused shall be equal before the Special Court

11. Article 17 of the Statute, paragraph (4)(e) provides that:

> In the determination of any charge against the accused pursuant to the present Statue, he or she shall be entitled to the following minimum guarantees, in full equality:

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[12] Decision on Application for Leave to Appeal the Ruling (2nd May 2005) on Sesay-Motion Seeking Disclosure of the Relationship between Governmental Agencies of the United States of America and the Office of the Prosecutor (15th June 2005)(12112-12119) at Para. 14 and 15.

[13] *Ibid* Para. 16.

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

12. Rule 75(A) and (B) provide the implementing rules which govern the implementation of "appropriate measures to safeguard the privacy and security of victims and witnesses, provided that the measures are consistent with the rights of the accused".[14] It follows that the Trial Chamber cannot arbitrarily or without reason implement protective measures that fail to guarantee equality between the Defence and the Prosecution and between the Accused before the Special Court. The proposed Appeal is based upon *prima facie* evidence of unequal treatment of Mr Sesay and his proposed witnesses on the one side and the Prosecution and the Accused from the CDF on the other.

Exceptional Circumstances

13. The Proposed Appeal raised issues of general principle to be decided for the first time and a decision at the Appellate level would be conclusive to the interests of justice. The Defence had applied for relief that had, without query or question, been previously granted to the Prosecution and guaranteed to other Accused. There is nothing to distinguish the application made or the evidence relied upon in support. The only distinction that can be reasonably discerned is that the relief would have benefited the RUF accused and not the Prosecution or the CDF Accused. The fact that the witnesses for the Defence and Mr Sesay will not benefit from the same level of protection thought necessary for other witnesses could interfere with his defence to such an extent that the cause of justice might be wholly undermined.

Irreparable Prejudice

14. The Trial Chamber's ruling deprives the Sesay witnesses of the same level of protection previously thought absolutely essential to secure the safety and privacy

[14] Rule 75 (A) of the Rules of Procedure and Evidence of the Special Court.

of witnesses for the Prosecution. The potential consequences could not be more grave or far reaching. At a minimum the Decision may deprive the Defence of important witnesses who may be unwilling to give evidence without the protective measures and without a reassurance that the Trial Chamber will consider their claims for protection in *exactly* the same way as those for the Prosecution and/or the CDF.

15. In circumstances where the RUF have been demonised by national and international commentators the Trial Chamber's *prima facie* differential in treatment of the RUF accused is significant and its effects substantial. Its greatest impact will be upon the very many civilians who have indicated their willingness to give evidence for Mr. Sesay. These witnesses are hugely vulnerable to threats and intimidation. These witnesses are the ones who most fear the machinery of the Sierra Leone State and the Prosecution's reach.

16. The Decision deprives the Defence of the ability to be able to reassure the witness that no contact will be made with them *unless* the Trial gives their consent. This reassurance is irreplaceable and hugely important. It provides uneducated fearful witnesses with a symbolic and meaningful reassurance that *whatever* their concerns about the Prosecution, the Government of Sierra Leone or even the Witness and Victims Unit[15], they can rest assured that their rights will be respected.

17. All witnesses, but especially the civilians, have been reluctant to give evidence due to their anxiety about the consequences to them if it becomes known that they intend to give evidence for Mr. Sesay. The establishment of personal relationships over months and often years (since 2003) lies at the heart of the reassurance. The witnesses, many of them who are uneducated and wholly unfamiliar with the organs of the court or the mechanics of the Witness and Victim's Unit, reasonably expect that known persons in the Defence would approach them to explain to them their

[15] Witnesses have already expressed a fear about some of the individuals who work in the Witness and Victims Unit as some of them are known in the communities where the witnesses live.

right to refuse to be interviewed and to make sure that a proper consent for an interview was obtained. The witnesses often have a nebulous but nevertheless keenly felt fear of any organ of the court. Therefore the Witness and Victim's Unit, who may have known a witness for no more than days or weeks and notwithstanding their undoubted professionalism, may not thus be in a position to offer the same level of reassurance or explanation as can a known representative of the Defence.

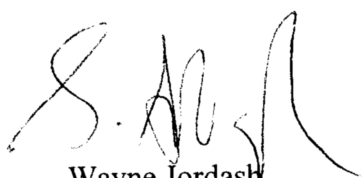
18. The Decision also deprives witnesses from outside West Africa of the same level of protection as that granted to the Prosecution. The lack of availability of protective measures will equally impact on their willingness to give evidence for the Defence.

19. The Defence therefore submits that the proposed application readily satisfies the criteria for Appeal.

Request

20. The Defence thus request Leave to Appeal the Decision pursuant to Rule 73(B).

Dated 4th December 2006



Wayne Jordash
Sareta Ashraph