671.

SCSL-04-15-T
(25547-25557)

25547

SPECIAL COURT FOR SIERRA LEONE
OFFICE OF THE PROSECUTOR
Freetown – Sierra Leone

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

Registrar: Mr. Lovemore G. Munlo SC

Date filed: 14 December 2006

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

Case No. SCSL-04-15-T

PUBLIC
PROSECUTION RESPONSE TO APPLICATION FOR LEAVE TO APPEAL THE DECISION ON SESAY DEFENCE MOTION FOR PROTECTIVE MEASURES

Office of the Prosecutor:
Mr. James C. Johnson
Mr. Peter Harrison
Mr. Mohamed A. Bangura
Ms. Nina Jørgensen
Mr. Urs Wiedemann

Defense Counsel for Issa Hassan Sesay
Mr. Wayne Jordash
Ms. Sareta Ashraph

Defense Counsel for Morris Kallon
Mr. Shekou Touray
Mr. Charles Taku

Defense Counsel for Augustine Gbao
Mr. Andreas O'Shea
Mr. John Cammegh

SPECIAL COURT FOR SIERRA LEONE
RECEIVED
COURT MANAGEMENT
14 DEC 2006
NAME Advera Nsiima K.
SIGN Nsiimak
TIME 11:15

I. INTRODUCTION

1. On 26 July 2006, the Defence for the Accused Sesay ("**Defence**") filed a motion entitled "Sesay Defence Motion for Immediate Protective Measures for Witnesses and Victims and for Non-Public Disclosure" ("**Motion**")[1]. On 30 November 2006, the Trial Chamber issued its decision ("**Decision**")[2], partly granting and partly dismissing the motion. On 4 December 2006, the Defence filed an application for leave to appeal against the Decision ("**Application for Leave to Appeal**")[3] on the ground that the Decision undermined the Accused's right to a fair trial pursuant to Article 17 of the Statute of the Special Court for Sierra Leone ("Statute"). The Prosecution now files this response to the Application for Leave to Appeal.
2. The Prosecution submits that the Application for Leave to Appeal should be dismissed on the basis that the requirements of Rule 73 (B) of the Rules of Procedure and Evidence ("Rules") have not been met.

II. TEST FOR GRANTING LEAVE TO APPEAL

3. 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 summarized by this Trial Chamber[4]. The two conditions – exceptional circumstances and irreparable prejudice – are conjunctive and both must be satisfied if an application for leave to appeal is to be granted. The Appeals Chamber has held that "the underlying

---

[1] *Prosecutor v. Sesay et al.*, SCSL-04-15-T-608, "Sesay Defence Motion for Immediate Protective Measures for Witnesses and Victims and for Non-Public Disclosure" ("**Motion**"), 25 July 2006.
[2] *Prosecutor v. Sesay et al.*, SCSL-04-15-T-668, "Decision on Sesay Defence Motion for Immediate Protective Measures for Witnesses and Victims and for Non-Public Disclosure", ("**Decision**"), 30 November 2006.
[3] *Prosecutor v. Sesay et.al.*, SCSL-04-15-T-669, "Application for Leave to Appeal the Decision (30 November 2006) on Sesay Defence Motion for Immediate Protective Measures for Witnesses and Victims and for Non-Public Disclosure", ("**Application for Leave to Appeal**"), 4 December 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.

rationale for permitting such appeals is that certain materials cannot be cured or resolved by final appeal against judgment."[5]

4. There are no exceptional circumstances in the current case and irreparable prejudice has not been demonstrated.

III. ARGUMENT

Background

5. The Defence sought protection for 3 categories of potential Defence witnesses as well as for those witnesses who had already indicated their willingness to testify.
6. The 3 categories of potential witness were:
   a. witnesses who reside in-country and have not affirmatively waived their right to protective measures,
   b. witnesses who reside outside Sierra Leone either in other countries in West-Africa or who have relatives in Sierra Leone who have not affirmatively waived their right to protective measures, and
   c. witnesses residing outside West Africa who have not affirmatively waived their right to protective measures.[6]
7. Additionally, the Defence sought an order that "the Prosecution make a written request to the Trial Chamber or Judge thereof, for permission to contact any protected witness or any relative of such person and that such request shall 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 for his or her consent (…) to an interview by Prosecution or the Kallon or Gbao Defence and shall undertake the necessary arrangements to facilitate such contact." [7]
8. The Trial Chamber opined that the main issue for determination was whether the Defence had established a *prima facie* basis for protective measures for its witnesses.[8] No such showing was found to have been made with respect to *potential* witnesses

---

[5] *Prosecutor v. Norman et al.*, SCSL-04-14-T-319, "Decision on Prosecution Appeal against the Trial Chamber's Decision of 2 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] Motion, para 20.
[7] Motion, para 23 (m).
[8] Decision, para 21 (under chapter Deliberation).

residing outside West-Africa[9]. Consequently, the Chamber denied protective measures for that category of witness, but granted them for all other categories of witness, including those residing outside West-Africa who had already indicated their willingness to testify.[10]

9. The Trial Chamber furthermore denied the request that Prosecution should seek authorization from the Trial Chamber before contacting any Defence witness. The Trial Chamber ruled that the WVS, rather than the Defence or the Prosecution, was in the best position to determine how to contact a protected witness.[11]

Grounds for Seeking Leave to Appeal

10. The Defence applies for leave to appeal the Decision with respect to these two issues. With respect to the refusal to grant protective measures to potential witnesses residing outside West-Africa (ground I), the Defence argues that there was no proper basis for the conclusion that no *prima facie* showing of the need for protective measures had been made by the Defence, given that the Trial Chamber granted the Prosecution application for the same relief on the basis of essentially the same evidentiary material. It is argued that "Trial Chamber erred by assessing the same evidentiary material differently thus inconsistently and unfairly requiring more of the Defence than the Prosecution."[12]

11. With respect to the ruling that the WVS was in the best position to determine how to contact a protected witness (ground II), the Defence argues that the Trial Chamber's decision is "logically and legally inconsistent with the approach taken upon application by the Prosecution, since the moving party's request was the same yet the conclusion reached was different."[13]

12. Thus, the Defence essentially submits in both grounds that the Trial Chamber came to a different conclusion than it did when it ruled on similar Prosecution motions that were supported by the same evidentiary material.

---

[9] Decision, para 24 (ii).
[10] Decision, para 24 (i).
[11] Decision, para 24 (viii).
[12] Application for Leave to Appeal, para 2.
[13] Application for Leave to Appeal, para 4.

Exceptional Circumstances

13. The Defence is correct in stating that Rule 73 (B) is restrictive and that in order to grant leave to appeal "the applicant's case must reach a level of exceptional circumstances and irreparable prejudice to satisfy the conjunctive requirement provided by the Rule."[14] However, the Prosecution submits that a mere erroneous ruling does not in itself constitute "exceptional circumstances."[15] The Prosecution submits further that the ruling is neither an abuse of judicial discretion nor is it otherwise erroneous.

Ground One (No protection to potential witnesses living outside West Africa)

14. The Defence relied upon the declarations of Mr. Morie Lengor, Special Court Investigator, dated 5th March 2003 and Dr. Alain White, former Chief of Investigations, declared on 7th April 2003.[16] Mr. Lengor refers to the fact that the fears expressed by witnesses are genuine and well founded, *especially considering that that many of the potential witnesses live in remote areas without any police presence or other semblance of security.*[17] Dr. Alain White states that he deems the security situation in Sierra Leone and neighboring countries volatile. He concluded that "therefore, *witnesses living in Sierra Leone, and also those living in other countries in West Africa,* are directly affected by this situation and feel threatened."[18]

15. These were declarations that the Prosecution used to provide an evidentiary basis for its assertion that the volatile security situation in Sierra Leone necessitated the granting of protective measures.[19] Based on these declarations, in 2003, Judge Bankole Thompson, Designated Judge, granted protective measures for all Prosecution witnesses in the Sesay case (Pre-Joinder), including all Prosecution witnesses living outside West-Africa.[20]

---

[14] Application for Leave to Appeal, para 7.

[15] *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.

[16] Decision, para 22.

[17] Decision, para 22, subpara 9, emphasis added.

[18] Decision, para 23, emphasis added.

[19] *Prosecution v. Sesay*, SCSL-2003-05-PT-015, "Prosecution Motion for Immediate Protective Measures for Witnesses and Victims and for Non-Public Disclosure", 7 April 2003.

[20] *Prosecution v. Sesay*, SCSL-2003-05-PT-038, "Decision on the Prosecutor's Motion for Immediate Protective Measures for Witnesses and Victims and for Non-Public Disclosure", 23 May 2003.

16. However, three years later, the Trial Chamber has expressed the need to apply a stricter approach with respect to witnesses residing outside the jurisdiction of the Special Court. Following a discussion during trial in which the Trial Chamber expressed the view that it was possible that the security situation may have changed over the years[21], the Trial Chamber issued an "Order to Review Current Protective Measures[22]", in which it ordered the Prosecution to "review its Updated Witness List with a view to determine the necessity for the continuous application of all the protective measures that have been previously granted to its Group I witnesses, and in particular *to witnesses within this Group currently residing outside the jurisdiction of the Special Court* (...) [emphasis added]."
17. This ruling, of which the Defence was aware before filing its Motion, is indicative of the Trial Chamber's apparently more stringent approach to the granting of protective measures for witnesses residing outside the jurisdiction of the Special Court. This means that the Trial Chamber may assess the security situation for witnesses living outside the jurisdiction differently than it did in 2003, or, in other words, it applied the law to different facts (the fact that the situation for potential witnesses living outside West Africa is more secure than 3 years ago and does not derive from the security situation in Sierra Leone and therefore does not require blanket protection). No exceptional circumstances arise from this decision.
18. In paragraph 3 of the Application for Leave to Appeal, the Defence submits that the Trial Chamber's reliance on the case of *Rukondo*[23] provides further support for the Defence contention that the Trial Chamber's different assessment of the same evidentiary material is inconsistent and unfair. This decision refused the granting of protective measures for witnesses living outside Rwanda and the region stating that "the material annexed to the Prosecution motion relates to insecurity and threats faced by witnesses and victims in Rwanda and the Great Lakes region. It does not address the situation of witnesses living outside those areas." The Prosecution submits that this is

[21] *Prosecutor v. Sesay et al.*, Trial Transcript, 28 March 2006, p. 110-126, specially p. 119, where the Presiding Judge stated that "we are quite advanced in the trial and this is clear evidence that the conditions that may have existed have changed over the years and facts and conditions that might have existed (...) might not be there anymore."
[22] *Prosecutor v. Sesay et al.*, SCSL-04-15-T-528, "Order to Review Current Protective Measures", 29 March 2006.
[23] *Prosecutor v Rukundo*, ICTR-201-70-T, "Decision on Prosecutor's motion for Protective Measures for Witnesses CCF, CCJ, BLC, BLS and BLJ", 29 November 2006.

exactly the situation in this case and there was nothing to preclude the Trial Chamber from relying on recent jurisprudence. It was within the Trial Chamber's discretion to assess the security situation of potential witnesses living outside West Africa differently than it did 3 years ago, even if it granted the bulk of the protective measures based on the same evidentiary material.

19. In paragraph 13, the Defence argues that "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". The Prosecution submits that the "cause of justice" does not depend on the "same level of protection thought necessary for other witnesses" but on adequate protection that is responsive to the objective security situation of the witness. The Trial Chamber, by refusing to grant protective measures for potential witnesses living outside West-Africa, did not in general refuse to grant protective measures, but did refuse to grant a blanket protection. There are no "exceptional circumstances" arising from this ruling.

Ground Two (Contact with Defence Witnesses)

20. The Prosecution submits that the Trial Chamber's ruling that it is the WVS, rather than the Defence or the Prosecution, that is in the best position to determine how to contact a protected witness, who may otherwise feel intimidated, to explain to a witness his or her right to refuse to be interviewed and to make sure that a proper consent for an interview was obtained from the witness[24], is neither an abuse of discretion nor otherwise erroneous.

21. In paragraph 4, the Defence argues that this ruling is "logically and legally inconsistent with the approach taken upon application by the Prosecution." The Prosecution submits that it is within the Trial Chamber's discretion to reach different conclusions on the same requests, as long as this discretion does not amount to an abuse of discretion. The Defence has failed to substantiate how the Trial Chamber abused its discretion. The fact that the Chamber ruled that it was the WVS that was best placed to channel requests to contact Defence witnesses, is not an abuse of discretion.

---

[24] Decision, para 24 (viii).

22. In paragraph 5, the Defence argues that the ruling is "wholly inconsistent with the approach taken in the Norman Case."[25] In that case, the Trial Chamber ruled – regarding the question whether the Prosecution may contact unprotected Defence witnesses without prior consent of the Defence - "we do not see that it is against the principle of equality of arms for the Prosecution to contact Defence witnesses directly when the Defence was precluded from doing so in relation to the Prosecution witnesses due to protective measures being in place. The Chamber emphasizes that in granting those protective measures to the Prosecution witnesses, The Chamber took into account the existence of a legitimate fear on the side of the Prosecution witnesses. 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', then the procedure that applied to the Prosecution witnesses would have applied in a **similar** way to the Defence witnesses."[26]
23. In this same decision, the Trial Chamber set in place the following procedure[27]: "Should the Prosecution wish to proceed to interview a witness listed as a witness for the Defence (...), the following procedure shall be followed:
    a. OTP shall inform the WVS of their intention to interview a witness,
    b. WVS shall contact the witness and inform him/her of the OTP's intention and of his/her right not to consent,
    c. WVS shall inform OTP of the witness's decision to give an interview,
    d. If the witness agrees to give the interview, WVS shall inform OTP as to the location of the interview."
24. The Prosecution submits that the approach taken by the Trial Chamber in the impugned Decision corresponds with the approach ordered in the Norman decision. There are no exceptional circumstances arising from this procedure which recognizes WVS's role as guardian of the needs of witnesses and protects the right of a witness to refuse an interview with the Prosecution.

[25] *Prosecutor v. Norman et al.*, SCSL-04-14-T-629, "Decision on Joint Defence Motion Regarding the Propriety of Contacting Defence Witnesses", 20 June 2006.
[26] Ibid, para 18.
[27] Ibid, para 26.

Irreparable Prejudice

25. 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 out how exactly irreparable prejudice would be suffered.
26. The Defence argues in paragraph 14 that "the Decision may deprive the Defence of important witnesses who may be unwilling to give evidence without the protective measures and without reassurance that the Trial Chamber will consider their claims for protection in *exactly* the same way as those for the Prosecution."
27. The Prosecution submits that the question is not whether Defence witnesses enjoy the same protection as Prosecution witnesses, but whether they enjoy adequate protection that is responsive to their specific security situation. Furthermore, the Defence has not been denied protective measures for potential witnesses living outside West Africa. The Defence has only been denied *blanket* protection for *potential* witnesses living outside West Africa on an "en bloc" basis, meaning for all the witnesses that may potentially be available as witnesses for the Defence but are as yet unknown to the Defence or not yet willing to testify. This means that the road is still open for the Defence to file a motion for protective measures to be granted for each specific witness on a case-by-case-basis. Should the Defence make a *prima facie* showing that a specific witness or group of witnesses is vulnerable to threats and intimidation, there is no reason to believe the Trial Chamber would not grant such witnesses the full protection of the law. Therefore, there is no potential for "irreparable prejudice".
28. In paragraph 16, the Defence argues that 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 [Chamber] gives their consent."
29. Firstly, it is difficult to fathom how the consent of the Trial Chamber could be "irreplaceable and hugely important" for the witness. What is important is that the entity that takes into best consideration the concerns of all witnesses establishes contact with a witness and asks for his/her consent to be interviewed by the Prosecution (or the Gbao or Kallon Defence). It is also inconceivable why the WVS, which the Trial Chamber has put in charge for establishing contact, and which is a separate, neutral

entity not aligned with either the Prosecution or the Defence and whose sole and statutory purpose is to best protect the interests of the witnesses of the Court, should not be able to best reassure the witness that no contact will be made without their consent and that their rights be respected. It is equally inconceivable how this procedure constitutes "irreparable prejudice".

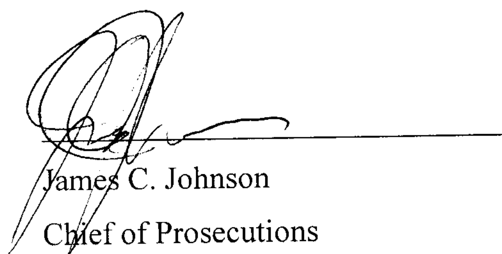
30. In paragraph 17, the Defence argues that "the witnesses, many of them uneducated and wholly unfamiliar with the organs of the court, would reasonably expect that known persons from the Defence would approach them to explain to them their right to refuse to be interviewed and to make sure that proper consent for an interview was obtained." It is again inconceivable how the WVS, established exactly to render such services, should not be in a position to do so, especially taking into consideration the WVS' undoubted professionalism. The Defence fails to demonstrate how this decision would result in to irreparable prejudice.

IV. CONCLUSION

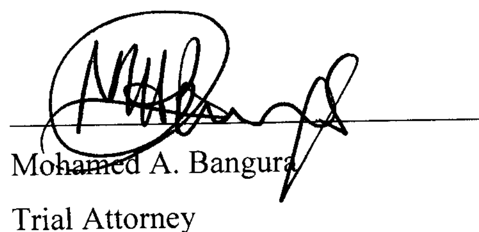
31. There are no exceptional circumstances and irreparable prejudice which would permit granting leave to appeal the Decision of the Trial Chamber. The application for leave to appeal should be dismissed.

Filed in Freetown,
14 December 2006

For the Prosecution,



James C. Johnson
Chief of Prosecutions



Mohamed A. Bangura
Trial Attorney

25557

Index of Authorities

1. *Prosecutor v. Sesay et al.*, SCSL-04-15-T-608, "Sesay Defence Motion for Immediate Protective Measures for Witnesses and Victims and for Non-Public Disclosure", 25 July 2006.

2. *Prosecutor v. Sesay et al.*, SCSL-04-15-T-668, "Decision on Sesay Defence Motion for Immediate Protective Measures for Witnesses and Victims and for Non-Public Disclosure", 30 November 2006.

3. *Prosecutor v. Sesay et al.*, SCSL-04-15-T-669, "Application for Leave to Appeal the Decision (30 November 2006) on Sesay Defence Motion for Immediate Protective Measures for Witnesses and Victims and for Non-Public Disclosure", 4 December 2006.

4. *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.

5. *Prosecutor v. Norman et al.,* SCSL-04-14-T-319, "Decision on Prosecution Appeal against the Trial Chamber's Decision of 2 August 2004 Refusing Leave to File an Interlocutory Appeal", 17 January 2005.

6. *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.

7. *Prosecution v. Sesay*, SCSL-2003-05-PT-015, "Prosecution Motion for Immediate Protective Measures for Witnesses and Victims and for Non-Public Disclosure", 7 April 2003.

8. *Prosecution v. Sesay*, SCSL-2003-05-PT-038, "Decision on the Prosecutor's Motion for Immediate Protective Measures for Witnesses and Victims and for Non-Public Disclosure", 23 May 2003.

9. *Prosecutor v. Sesay et al.*, SCSL-04-15-T-528, "Order to Review Current Protective Measures", 29 March 2006.

10. *Prosecutor v Rukundo*, ICTR-201-70-T, "Decision on Prosecutor's motion for Protective Measures for Witnesses CCF, CCJ, BLC, BLS and BLJ", 29 November 2006. (*http://69.94.11.53/ENGLISH/cases/Rukundo/decisions/291106b.pdf*)

11. *Prosecutor v. Norman et al.*, SCSL-04-14-T-629, "Decision on Joint Defence Motion Regarding the Propriety of Contacting Defence Witnesses", 20 June 2006.