(636.) SCSL-04-15-T (25073 - 25085) 25074

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: 21 August 2006

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

Case No. SCSL-04-15-T

PUBLIC

PROSECUTION APPLICATION FOR LEAVE TO APPEAL MAJORITY DECISION ON ORAL OBJECTION TAKEN BY COUNSEL FOR THE THIRD ACCUSED TO THE ADMISSIBILITY OF PORTIONS OF THE EVIDENCE OF WITNESS TF1-371

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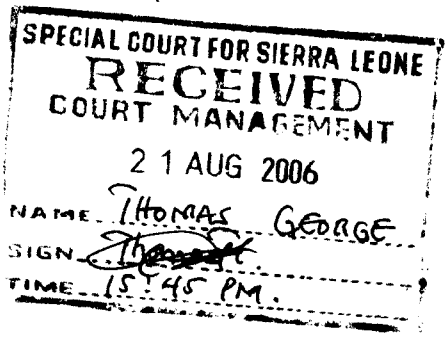

I. INTRODUCTION

1. Pursuant to Rule 73(B) of the Rules of Procedure and Evidence ("**Rules**"), the Prosecution hereby applies for leave to appeal the Trial Chamber's Majority Decision ("**Majority Decision**") of 2 August 2006[1] to expunge and delete from the records certain portions of the evidence of TF1-371 which directly or inferentially state that the Third Accused, Augustine Gbao, had knowledge of the alleged unlawful killings in Kono District.
2. This application consists of two distinct parts, and the Prosecution submits that if the Trial Chamber were to reject the application on the first basis, it could nonetheless grant it on the second basis. The two cumulative, but severable, bases for the application are:
   (i) that the Majority erred in its decision to exclude the relevant portions of the testimony of TF1-371, an error which gives rise to exceptional circumstances and irreparable prejudice to the Prosecution;
   (ii) that the Majority was not entitled in law to "expunge" material from the record and that its decision to do so gives rise to exceptional circumstances and irreparable prejudice.

II. BACKGROUND

3. On 10 March 2006, the Prosecution applied to have TF1-371 added to the Prosecution witness list.[2] Attached to that motion were two annexes filed on an *ex parte* basis: a Declaration from the Chief of Investigations and excerpts from statements by the witness. The Trial Chamber granted the motion on 6 April 2006, ordering the Prosecution to disclose immediately the redacted statements of TF1-371, and ordering that TF1-371 be called at the end of the Prosecution case, unless otherwise agreed to by the Defence.[3] A comprehensive written decision was issued on 15 June 2006.[4]

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[1] *Prosecutor v. Sesay, Kallon and Gbao,* SCSL-04-15-T-623, "Majority Decision on Oral Objection taken by Counsel for the Third Accused, Augustine Gbao, to the Admissibility of Portions of Evidence of Witness TF1-371," 2 August 2006 ("**Majority Decision**").
[2] *Prosecutor v. Sesay, Kallon and Gbao,* SCSL-04-15-T-513, "Confidential, with Ex Parte Under Seal Annex, Prosecution Request for Leave to Call Additional Witness and for Order for Protective Measures Pursuant to Rules 69 and 73bis(E)", 10 March 2006.
[3] *Prosecutor v. Sesay, Kallon and Gbao,* SCSL-04-15-T-537, "Decision on Prosecution Request for Leave to Call Additional Witness TF1-371 and for Order for Protective Measures", 6 April 2006.
[4] *Prosecutor v. Sesay, Kallon and Gbao,* SCSL-04-15-T-579, "Written Reasons for the Decision on Prosecution Request for Leave to Call Additional Witness TF1-371 and for Order for Protective Measures," 15 June 2006.

4. The redacted statements were disclosed on 11 April 2006, and the unredacted statements were disclosed on 8 May 2006. A later statement was taken on 2, 3 and 5 July 2006 (the "proofing notes") which was disclosed in unredacted form on 10 July 2006.
5. On 21 July and on 24 July 2006, during the testimony of TF1-371, counsel for Gbao objected to the admission of evidence to the effect that the Third Accused knew about the alleged killings in Kono District. The objection was based on the grounds that this evidence was being adduced for the very first time through this witness, at the verge of the close of the prosecution case, and when the Defence had opted not to cross-examine the Kono crime base witnesses in previous proceedings.
6. On 24 July 2006, an oral ruling of the Majority in the Trial Chamber (Justice Boutet dissenting) was delivered, allowing the Defence objection.[5]
7. In its written Majority Decision, the Trial Chamber reasoned that: (i) in the circumstances, the doctrine of fundamental fairness would oblige the Chamber to grant an adjournment to the Defence for further investigations on the alleged killings in Kono and to recall Prosecution witnesses that had already testified for further cross-examination; (ii) by granting an adjournment, the Chamber could be seen to be in violation of Article 17 of the Statute and Rule 26*bis* of the Rules as it would occasion an undue delay to the proceedings and put on hold the Prosecution's decision to close its case in that session. As a result, the Chamber ordered that evidence on record emanating from Witness TF1-371 which suggested that Augustine Gbao had knowledge of the alleged unlawful killings in Kono District be expunged and deleted from the records.
8. Justice Thompson issued a Separate Concurring Opinion ("**Separate Concurring Opinion**")[6] focussing on the inability of a witness to draw inferences on the issue of the Third Accused's knowledge as this is a task falling within the adjudicatory function of the Court.

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[5] Trial Transcript, 24 July 2006, pp. 34 and 47.
[6] *Prosecutor v. Sesay, Kallon and Gbao*, SCSL-04-15-T-623, "Separate and Concurring Written Reasons of Hon, Justice Bankole Thompson on Majority Decision on Oral Objection taken by Counsel for the Third Accused, Augustine Gbao, to the Admissibility of Portions of Evidence of Witness TF1-371," 2 August 2006 ("**Separate Concurring Opinion**").

9. Justice Boutet issued a Dissenting Opinion ("**Dissenting Opinion**"),[7] being of the view that the Defence objection should have been overruled on the basis that the evidence in question was relevant and therefore admissible, and the Defence had sufficient notice of the nature of the evidence in question in order to prepare for its case.

III. TEST FOR GRANTING LEAVE TO APPEAL

10. 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 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."[8] 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.[9] 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. Notably, the Trial Chamber has stated that the probability of an erroneous ruling does not *of itself* constitute exceptional circumstances, and similarly, the fact of judicial dissent does not *of itself* constitute an exceptional circumstance, "although the nature and significance of the matters sought to be appealed, in conjunction with the fact of dissent, might be considered as factors relevant to this determination".[10]

11. However, this Trial Chamber has also stated that it "has studiously refrained from embarking on any comprehensive or exhaustive definition of 'exceptional circumstances' primarily because the notion is one that does not lend itself to a fixed

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[7] *Prosecutor v. Sesay, Kallon and Gbao,* SCSL-04-15-T-623 "Dissenting Written Reasons of Hon. Justice Pierre Boutet on Majority Decision on Oral Objection taken by Counsel for the Third Accused, Augustine Gbao, to the Admissibility of Portions of Evidence of Witness TF1-371," 2 August 2006 ("**Dissenting Opinion**").

[8] *Prosecutor v. Norman, Fofana and Kondewa,* 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, Kallon and Gbao,* 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.

[9] See e.g. *Prosecutor v Norman, Fofana and Kondewa,* 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.

[10] Ibid.

meaning. Nor can it be plausibly maintained that the categories of 'exceptional circumstances' are closed or fixed...what constitutes 'exceptional circumstances' must necessarily depend on, and vary with, the circumstances of each case."[11] Furthermore:

> "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 conducive to the interests of justice, or where the course 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".[12]

IV. ARGUMENT

A. Decision to Exclude Evidence

Exceptional Circumstances

12. The Prosecution submits that the Majority made a series of interlinked errors in its determination to exclude the disputed portions of the testimony of TF1-371, which together give rise to exceptional circumstances.

13. In the first instance, the Majority erred in the exercise of its discretionary power under Rule 89(C) to admit any relevant evidence and to exclude evidence that is not relevant. As pointed out in the Dissenting Opinion, "the Appeals Chamber has noted that the Rules favour a flexible approach to the issue of admissibility of evidence, leaving the issue of weight to be determined when assessing probative value of the totality of the evidence".[13] The Majority expressly refused to consider the relevance of the disputed evidence for the mental element of responsibility under the doctrine of joint criminal enterprise and superior responsibility on the incorrect basis that this would require an examination and determination of the "substantive and core issue of criminal responsibility".[14] Furthermore, if the evidence was, ultimately, considered to relate to inferences drawn by the witness as opposed to facts, as found in the Separate

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[11] See *Prosecutor v. Sesay, Kallon and Gbao,* SCSL-04-15-T-357, "Decision on Defence Application for Leave to Appeal Ruling of the 3rd of February, 2005 on the Exclusion of Statement of Witness TF1-141", 28 April 2005, para 25;
[12] Ibid., para 26.
[13] Dissenting Opinion, para. 5.
[14] Majority Decision, para. 14.

Concurring Opinion, then this would be a matter of the weight to be accorded to it. In addition, the Majority failed to consider the relationship between Rule 95 and Rule 89(C) in the context of its decision to exclude the evidence.

14. Secondly, the Majority Decision is inconsistent with the Trial Chamber's decision to allow TF1-371 to be called as an additional witness in which arguments as to the need for the Defence to test his evidence by the cross-examination of previous witnesses were debated. As noted in the Dissenting Opinion, these arguments were of essentially the same nature as the current objection.[15]

15. Thirdly, the Majority failed to consider the effect of its previous jurisprudence related to disclosure obligations, according to which in most circumstances the judicially preferred remedy for any breach is an extension of time to enable the Defence to prepare rather than the exclusion of otherwise relevant evidence. The Chamber did not find disclosure to be the issue while the timeliness and extent of Prosecution disclosure should have factored into its assessment.

16. The Indictment alleges that the Third Accused was the Overall Security Commander of the RUF. Several witnesses, including TF1-071 and TF1-036, gave evidence of the Third Accused's position and that the Overall Security Commander was responsible for security matters and the conduct of RUF members. The Prosecution submits that it has always been an issue that the Third Accused, at a minimum, should have known what was taking place in Kono and failed to exercise the means available to him as the Overall Security Commander of the RUF to learn of the offences in Kono District. As noted in the Dissenting Opinion, "the Defence had sufficient notice from the Prosecution application to add Witness TF1-371 to the Witness List and from the written statements of this Witness of allegations concerning unlawful killings in the Kono District and involving the Third Accused".[16]

17. Fourthly, having decided that the disputed evidence was relevant, the Chamber should have gone on to consider as the main issue whether the Defence had satisfied it that a lengthy adjournment would be necessary. The Trial Chamber did not require the Defence to substantiate its submission that many Prosecution witnesses would need to be recalled. Indeed, it is not self-evident that previous witnesses, who did not

[15] Dissenting Opinion, para. 8.
[16] Dissenting Opinion, para. 15.

incriminate the Third Accused, would need to be recalled. It was open for Counsel in cross-examination of TF1-371 to discredit his evidence, in view of the evidence of other witnesses, who in Counsel's view, may not have incriminated the Third Accused. The issue of the necessity for an adjournment would have been considered in the light of all the circumstances, including the need to avoid undue delay to the proceedings.

18. Finally, the Majority appeared to be guided too strongly by a desire to facilitate the closing of the Prosecution case as scheduled. Thus, it failed to strike a reasonable balance between the potential for delay and the need to consider relevant evidence as part of its truth finding function. In these circumstances there was an over-emphasis on an unsubstantiated fear of a lengthy adjournment at the expense of consistency with previous practice and related fair trial considerations.
19. While the possibility of an erroneous ruling may not of itself give rise to exceptional circumstances, the Prosecution submits that the combination of important issues raised in this application, related to the interaction between rules concerning relevance and admissibility of evidence at a late stage in a party's case, disclosure, and the yardstick of fundamental fairness, together result in the first limb of the test being satisfied.

Irreparable Prejudice

20. The Prosecution submits that it necessarily suffers prejudice if relevant evidence is excluded. TF1-371 was the only insider witness to be in possession of the contested piece of evidence which could potentially mean the difference between a verdict of guilt or innocence on a particular incident. The prejudice is irreparable as the Trial Chamber is best placed to hear all the evidence in the case and the recall of relevant witnesses at the appeals stage may be impracticable or impossible.

B. Decision to Expunge the Evidence from the Record

Exceptional Circumstances

21. The Prosecution submits that the order made by the Trial Chamber in this instance, to expunge the evidence, was impermissible in law. The question of the power of a Trial Chamber to expunge evidence is one of general principle to be decided for the first time before the Special Court. Expunging evidence could potentially interfere with the

course of justice and the issue should be decided by the Appeals Chamber as a matter of urgency so as to provide guidance on the scope of the Trial Chamber's powers. For these reasons, the matter gives rise to exceptional circumstances.

22. Rule 75(B)(i)(a) of the Rules provides in relation to measures for the protection of victims and witnesses that a judge may take measures to prevent disclosure to the public or the media of the identity of a witness by such means as "Expunging names and identifying information from the Special Court's public records". It is only with respect to witness protection that the measure known as "expunging" is provided for under the Rules. While the Chamber may find that it has the inherent power to take such measures in other circumstances, it is difficult to conceive of a situation where this would be appropriate, beyond situations related to confidentiality or security concerns, or other situations of particular sensitivity.[17]

23. This position is supported in the jurisprudence. In the ICTR case of *Ntagerura et al.*, the Trial Chamber held:

> During the course of a trial, it may happen that irrelevant information is included in the record. Such information may be directly solicited by a party or may be contained in an unexpected answer from a witness. It is only after the closing arguments and during the deliberations that such evidence is evaluated. If, at that stage, a Chamber finds that certain evidence is irrelevant, it simply will not take it into account. There is no legal basis to expunge already admitted evidence from the record for reasons of relevancy during the trial. Moreover, the issue of relevance may arise during future appeal proceedings and an appeal decision on contested evidence might be impossible where the disputed parts were expunged from the record.[18]

24. While the Trial Chamber in that case was not dealing with evidence that was contested immediately and excluded, it alluded to a previous challenge that was brought at the appropriate time when the evidence was adduced. Even in those circumstances the impugned testimony was not actually expunged from the trial record.

25. There is no issue of witness protection or particular sensitivity in the current situation. The Majority should have found that the disputed portions of the testimony were inadmissible and excluded them from consideration. As professional judges there could

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[17] See *Prosecutor v Delalic et al.*, IT-96-21-T, "Decision on the Prosecution's Motion for the Redaction of the Public Record", 5 June 1997, para. 60, in which the Trial Chamber considered that it had an inherent power to order that information be expunged from the records and ordered the redaction of references in the witness's testimony to an abortion that she had had on the grounds that it was irrelevant and "hurts the sensibility of a person".

[18] *Prosecutor v Ntagerura et al.*, ICTR-99-46-T, "Decision on Defence Motion to Exclude Evidence", 25 March 2002. See also *Prosecutor v Tadic*, IT-94-1, Appeals Chamber, "Order for Protection of Sensitive Information", 15 March 1999.

be no risk that their judgement would be tainted by the continued existence of the excluded portions on the record. Where the relevance of the contested evidence has the potential to become an issue on appeal, it is vital for the record to be complete. Indeed, in seeking to have the evidence expunged, Counsel for the Third Accused did not cite any authority and observed: "The third remedy which, given the overall circumstances we are labouring with, is in my respectful submission, extraordinary though it may be, unusually though it may be implemented, is for the evidence to be expunged from the record because it has offended against the doctrine of fundamental fairness..."[19].

26. The Prosecution therefore submits that the action of expunging and deleting the contested evidence of TF1-371 from the trial record by a Trial Chamber gives rise to exceptional circumstances.

Irreparable Prejudice

27. The Prosecution further submits that the expunging and deleting of portions of the evidence of TF1-371 from the trial record is likely to cause irreparable prejudice to the Prosecution in that any matter arising from it cannot be cured or resolved by a final appeal against judgement. This is because some of the evidence the appellate court would need in its re-evaluation of the evidence, in order to resolve the matter, would be missing from the trial record.

V. CONCLUSION

28. The Prosecution submits that it has satisfied the requirements under Rule 73(B) for leave to appeal to be granted. Should the Trial Chamber reject the first basis for the application, the Prosecution submits that leave to appeal should nevertheless be granted on the second basis.

[19] Transcript of 24 July 2006, page 23, lines 24 – 29.

Done in Freetown,

21 August 2006

For the Prosecution,

James C. Johnson

Peter Harrison

Index of Authorities

A. Orders, Decisions and Judgments

1. *Prosecutor v. Sesay, Kallon and Gbao,* SCSL-04-15-T-623, " Majority Decision on Oral Objection Taken By Counsel for the Third Accused, Augustine Gbao, to the Admissibility of Portions of Evidence of Witness TF1-371," 2 August 2006.

2. *Prosecutor v. Sesay, Kallon and Gbao,* SCSL-04-15-T-513, " Confidential, with Ex Parte Under Seal Annex Prosecution Request for Leave to Call Additional Witness and for Order for Protective Measures Pursuant to Rules 69 and 73bis(E)", 10 March 2006.

3. *Prosecutor v. Sesay, Kallon and Gbao,* SCSL-04-15-T-537, "Decision On Prosecution Request for Leave to Call Additional Witness TF1-371 and for Order for Protective Measures", 6 April 2006.

4. *Prosecutor v. Sesay, Kallon and Gbao,* SCSL-04-15-T-579, "Written Reasons for the Decision on Prosecution Request for Leave to Call Additional Witness TF1-371 and for Order for Protective Measures," 15 June 2006.

5. *Prosecutor v. Sesay, Kallon and Gbao,* SCSL-04-15-T-623, "Separate and Concurring Written Reasons of Hon, Justice Bankole Thompson on Majority Decision on Oral Objection Taken By Counsel for the Third accused, Augustine Gbao, to the Admissibility of Portions of Evidence of Witness TF1-371," 2 August 2006.

6. *Prosecutor v. Sesay, Kallon and Gbao,* SCSL-04-15-T-623, "Dissenting Written Reasons of Hon. Justice Pierre Boutet on Majority Decision on Oral Objection Taken By Counsel for the Third accused, Augustine Gbao, to the Admissibility of Portions of Evidence of Witness TF1-371," 2 August 2006.

7. *Prosecutor v. Norman, Fofana and Kondewa,* 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.

8. *Prosecutor v. Sesay, Kallon and Gbao,* 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.

9. *Prosecutor v Norman, Fofana and Kondewa*, 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.

10. *Prosecutor v. Sesay, Kallon and Gbao,* SCSL-04-15-PT-357, "Decision on Defence application for Leave to appeal ruling of the 3rd of February, 2005 on the exclusion of Statement of Witness TF1-141", 28 April 2005.

11. See *Prosecutor v Delalic et al.,* IT-96-21-T, "Decision on the Prosecution's Motion for the Redaction of the Public Record", 5 June 1997. http://www.un.org/icty/celebici/trialc2/decision-e/60605MS2.htm

12. *Prosecutor v Ntagerura*, ICTR-99-46-T, "Decision on Defence Motion to Exclude Evidence", 25 March 2002. http://69.94.11.53/ENGLISH/cases/Ntagerura/decisions/250302.htm

13. *Prosecutor v Tadic*, IT-94-1, "Order for Protection of Sensitive Information", 15 March 1999. http://www.un.org/icty/tadic/appeal/order-e/90315PM36163.htm

B. STATUTE AND RULES

1. Statute of the Special Court, Article 17.
2. Rules of Procedure and Evidence of the Special Court, Rules 26bis, 73(B), 89(B)