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SCSL-04-15-T
(25171 - 25178)

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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: 11 September 2006

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

Case No. SCSL-04-15-T

PUBLIC

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

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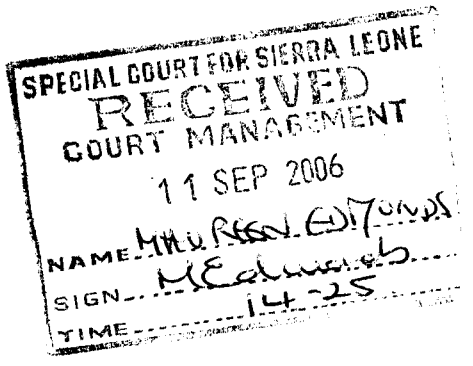

I. INTRODUCTION

1. On 21 August 2006, the Prosecution filed an application entitled "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" ("**Motion**").[1] On 4 September 2006, the Defence for the Third Accused ("**Defence**") filed a response to that Motion ("**Defence Response**").[2] The Prosecution files the present reply to the Defence Response.

II. ARGUMENT

(i) The decision to exclude evidence--"Exceptional circumstances"

2. The Defence Response argues that the probability of an erroneous ruling by the Trial Chamber does not of itself constitute exceptional circumstances (which the Motion itself concedes). The Response further argues that none of the circumstances invoked by the Prosecution in the Motion are exceptional.
3. The Prosecution position is that in determining whether there are exceptional circumstances for the purposes of Rule 73(B), it is necessary to consider all of the relevant circumstances of the particular case as a whole. Thus, even if the probability of an erroneous ruling by the Trial Chamber does not of itself constitute exceptional circumstances, this can certainly be a factor, which, together other factors, make the circumstances as a whole "exceptional" (see Motion, para. 10). The fact that one member of the Trial Chamber dissented in the decision against which leave to appeal is sought is another relevant factor that can be taken into account, even if it is not of itself sufficient (*ibid.*). The Defence Response concedes that these are both matters that may be taken into account.
4. The other matters referred to in paras. 13-19 of the Prosecution Motion should therefore not be considered in isolation. The question is not whether any one or more of these matters, of itself, would constitute exceptional circumstances. Rather, the question is

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[1] *Prosecutor v Sesay, Kallon, Gbao*, SCSL-04-15-T-636, "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", 21 August 2006 ("**Motion**").

[2] *Prosecutor v Sesay, Kallon, Gbao*, SCSL-04-15-T- 639, "Defence Reply [*sic*] to Prosecution Application for Leave to Appeal Decision on Admissibility of Portions of the Evidence of Witness TF1-371", 11 September 2006 ("**Defence Response**").

whether in all the circumstances, considering all of these matters as a whole, there are "exceptional circumstances" within the meaning of Rule 73(B).

5. The case law establishes that there are no closed categories of the matters that may be said to constitute exceptional circumstances. Exceptional circumstances may for instance exist where the issue is one of general principle to be decided for the first time, or is an issue of general importance upon which further decision or argument at the appellate level would be conducive to the interests of justice. The Prosecution submits that the fact that there is conflicting case law at the Trial Chamber level may also be a factor to be taken into account, since the desirability of such conflicts being resolved by a decision of the Appeals Chamber is evident.
6. The Prosecution submits that the issues in the proposed appeal are of a fundamental character. An overriding function of any court is the ascertainment of the truth. That is an especially important function in the case of an international criminal tribunal, such as the Special Court.[3]
7. The Prosecution submits that the exclusion of relevant and probative evidence is in principle inconsistent with the fundamental function of the criminal justice process to establish the truth. It is accepted that there are provisions in the Rules that do allow the Trial Chamber to exclude relevant and probative evidence in order to safeguard the rights of the accused. However, where a problematic issue arises in relation to a certain item of evidence, such as its alleged late disclosure to the Defence, exclusion of that evidence should not occur as a matter of course or be resorted to lightly as a convenient solution to the problem. The Prosecution submits that exclusion of relevant and probative evidence should be an exceptional remedy, for instance, where the rights of the Accused cannot be safeguarded by any other means.
8. The Defence Response argues that "Questions relating to the admissibility of evidence are common place in these proceedings and in international criminal proceedings

[3] In the case of the ICTY, it has been said that it is part of the mandate of that Tribunal, "through its judicial functions, to contribute to the settlement of the wider issues of accountability, reconciliation and establishing the truth behind the evils perpetrated in the former Yugoslavia. Discovering the truth is a cornerstone of the rule of law and a fundamental step on the way to reconciliation: for it is the truth that cleanses the ethnic and religious hatreds and begins the healing process." *Prosecutor v. Erdemović*, "Sentencing Judgement", Case No. IT-96-22-Tbis, T. Ch., 5 March 1998, para.21.

generally, and there is nothing exceptional about the issue or the ruling in this instance".[4] The Prosecution submits that this is not correct. The Majority Decision indicates that the Trial Chamber did not consider the question in this case to be one related to the admissibility of the contested evidence,[5] but rather, one related to the rights of the Accused under Article 17 of the Statute.[6]

9. The Majority Decision assumes that if the evidence in question had been admitted, with the consequence that an adjournment would have been granted to the Defence, this would have amounted to an actual violation of the rights of the Accused under Article 17 of the Statute.[7] This finding, if it is correct, would mean that the Trial Chamber in fact had no discretion to admit the evidence in the circumstances of the case, since the Trial Chamber has no power to exercise a discretion in a manner that violates the Article 17 rights of the Accused. In other words, the reasoning of the Majority Decision suggests that the Trial Chamber never addressed its mind to the question whether or not to exercise its discretion in favour of admitting the evidence, as it had found itself without any discretion in the circumstances.

10. Issues relating to the content and scope of the rights of the Accused under Article 17 are fundamental issues. The Prosecution submits that there has never previously been a decision of the Appeals Chamber on the application of Article 17 to circumstances of the kind that pertain in this case. The Majority Decision held that there would be a violation of Article 17 if the evidence were admitted, even if the Defence were granted an adjournment. The Trial Chamber so held without giving any detailed consideration to the question of how many witnesses would in fact need to be recalled by the Defence, or how long an adjournment would in fact be required. In the circumstances, this was a far-reaching decision. Furthermore, as argued in the Motion, the Majority Decision appears difficult to reconcile with earlier decisions of this Trial Chamber in this case. Thus, it is submitted that all of the matters referred to in the Prosecution Motion, considered as a whole, satisfy the "exceptional circumstances" test in Rule 73(B).

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[4] Defence Response, para. 4.
[5] Majority Decision, para. 13.
[6] Majority Decision, para. 15-16.
[7] Majority Decision, para. 31.

(ii) The decision to exclude evidence--"Irreparable prejudice"

11. The Defence argues that the Prosecution is not irreparably prejudiced by the exclusion of evidence because the function of the Prosecutor is not to secure a conviction at all costs or to take unfair advantage of the accused.

12. The Prosecution agrees that it is not its function to secure a conviction at all costs or to take unfair advantage of the accused, and rejects any suggestion that this is what it is seeking to do. Rather, the Prosecution submits that it is part of the function of the Prosecution to assist the Trial Chamber in seeking to ascertain the truth, and, as part of this function, to ensure that all relevant evidence is placed before and considered by the Trial Chamber. The Prosecution submits that it is self-evident that the Prosecution is prejudiced if evidence of the guilt of an accused is excluded in circumstances where it should not have been. The argument in the Defence Response that "it cannot possibly be in the interests of the prosecution to rely on evidence produced in a manner that is blatantly unfair"[8] is tendentious, and presumes the correctness of the Defence position, which is contested by the Prosecution.

13. The Defence also argues that the Prosecution is not "irreparably" prejudiced, as the evidence in question could be called before the Appeals Chamber at the appeals stage if the proposed appeal were successfully brought in the post-judgement phase. The Prosecution submits that the calling of additional evidence before the Appeals Chamber would not be an equivalent to the calling of evidence before the Trial Chamber. It is a general principle that witnesses should be heard, and facts should be decided, by the Trial Chamber in the first instance. Either party then has the possibility of an appeal against the Trial Chamber's findings of fact. On appeal, where the Appeals Chamber hears additional witnesses, the nature of the process is different. Unlike a Trial Chamber, the Appeals Chamber is not concerned with determining whether or not the guilt of the Accused has been proved based on all of the evidence in the case. A judgement of a Trial Chamber is presumed to be correct unless and until overturned on appeal, and where additional evidence is presented on appeal, the question to be determined by the Appeals Chamber is whether any error in the judgement of the Trial Chamber has been established by the additional evidence. Furthermore, there is no appeal against findings of fact based

[8] Defence Response, para. 10.

on such evidence, since in such circumstances any findings of fact will have been made by the Appeals Chamber at first instance. Additionally, there is always the risk that a witness who testifies before the Trial Chamber may not be available by the time of the proceedings before the Appeals Chamber. It therefore cannot be said that there is no irreparable prejudice to the Prosecution if the evidence in question is not considered and taken into account by the Trial Chamber.

(iii) The decision to expunge evidence from the record--"Exceptional circumstances"

14. The Defence argues that this is not a matter that is being decided by the Special Court since the power has been exercised by the Trial Chamber on at least two previous occasions. However, it remains the case that this question has never been the subject of a fully argued decision of either a Trial Chamber or the Appeals Chamber. In this case, the Trial Chamber has ordered a measure to be taken that would be, as far as the Prosecution understands it, irreversible by the Appeals Chamber, or even by the Trial Chamber itself if it were subsequently to reconsider its own decision. In proceedings before the Special Court, any decision of a Trial Chamber is normally subject to the possibility of subsequent correction, either by the Trial Chamber itself or the Appeals Chamber. If measures are to be taken by the Trial Chamber that are irreversible, this should not be done unless it is clear that the Trial Chamber has the power to take those measures and that the power is being exercised in accordance with the appropriate criteria. The fact that this decision involves a measure that is irreversible, and the fact that there is no clear and considered case law on the power of the Trial Chamber to take this measure or on the circumstances in which such a power should be exercised, constitutes an exceptional circumstance.

(iv) The decision to expunge evidence from the record--Irreparable prejudice

15. The Prosecution submits that it is self-evident that if evidence is expunged from the record in a way that is irreversible, the Prosecution will be irreparably prejudiced in the event that this decision is subsequently found by the Appeals Chamber to have been erroneous.

16. The Defence Response argues that it is unnecessary for the Appeals Chamber to refer to the expunged portions of the witness's testimony in order to determine the issue of whether it would have violated the rights of the Accused to admit the evidence. Even if this were correct (and the Prosecution does not concede that this is necessarily correct), the question still remains of what remedy the Appeals Chamber could grant if it decided the appeal in favour of the Prosecution and found that the expunged portions should have been admitted by the Trial Chamber. It would at that stage no longer be possible for the expunged portions to be taken into account. The prejudice in expunging these portions would be irreversible.

III. CONCLUSION

17. For the reasons given in the Motion, and in this Reply, leave to appeal should be granted.

Filed in Freetown,
11 September 2006

For the Prosecution,

Christopher Staker
Acting Prosecutor

Peter Harrison
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Prosecutor v Sesay, Kallon, Gbao, SCSL-04-15-T-636, "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", 21 August 2006.

Prosecutor v Sesay, Kallon, Gbao, SCSL-04-15-T- 639, "Defence Reply [*sic*] to Prosecution Application for Leave to Appeal Decision on Admissibility of Portions of the Evidence of Witness TF1-371", 11 September 2006.

Prosecutor v. Erdemović, "Sentencing Judgement", Case No. IT-96-22-Tbis, T. Ch., 5 March 1998, pp. 21-22.
http://www.un.org/icty/erdemovic/trialc/judgement/erd-tsj980305e.htm