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SCSL-04-15-T
(30182 - 30191)

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

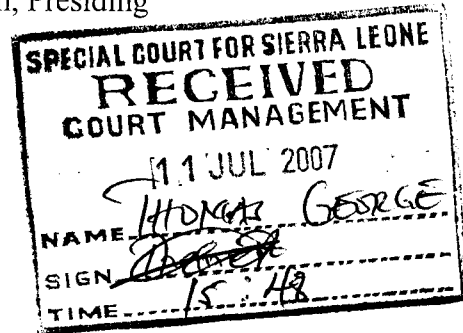
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TRIAL CHAMBER I

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

Acting Registrar: Mr. Herman von Hebel

Date filed: 11 July 2007



THE PROSECUTOR

Against

Issa Hassan Sesay
Morris Kallon
Augustine Gbao

Case No. SCSL-04-15-T

PUBLIC

**PROSECUTION RESPONSE TO GBAO REQUEST FOR LEAVE TO CALL ADDITIONAL
WITNESSES AND FOR ORDER FOR PROTECTIVE MEASURES, WITH ANNEX A AND EX
PARTE ANNEX B**

Office of the Prosecutor:
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I. INTRODUCTION

1. On 4 July 2007, the Accused Gbao filed a “Request for Leave to Call Additional Witnesses and for Order for Protective Measures, with Annex A and Ex Parte Annex B” (“Leave Application”).¹ The Leave Application should be dismissed.

II. THE APPLICABLE LAW

2. Rule 73 *ter* states that:

(E) After the commencement of the defence case, the defence may, if it considers it to be in the interests of justice, move the Trial Chamber for leave to reinstate the list of witnesses or to vary its decision as to which witnesses are to be called.

3. This Trial Chamber in its “Scheduling Order Concerning the Preparation and the Commencement of the Defence Case,” made the following order:

1. That each of Defence Team files the following materials, no later than Friday, the 16th of February 2007 at 4 p.m.

- (a) A “core” and “back-up” witness list of all the witnesses that each Defence Team intends to call

Should the Defence seek to add any witnesses or to modify this list after 16th February 2007 it may be permitted to do so only upon good cause being shown.²

4. The “good cause” standard was considered in four Prosecution applications to add witnesses to the Prosecution witness list in this trial.^{3, 4} Rule 73 *bis* (E), which

¹ *Prosecutor v. Sesay et al*, SCSL-04-15-T-806, “Gbao – Request for Leave to Call Additional Witnesses and for Order for Protective Measures, with Annex A and Ex Parte Annex B,” 4 July 2007.

² *Prosecutor v. Sesay et al*, SCSL-04-15-T-659, “Scheduling Order Concerning the Preparation and the Commencement of the Defence Case,” 30 October 2006, pp. 1-2. The Trial Chamber later adjourned the filing date of Defence witness lists to 5 March 2007.

³ *Prosecutor v. Sesay et al*, SCSL-04-15-T-221, “Decision on Prosecution Request for Leave to Call Additional Witnesses,” 29 July 2004 (“First Prosecution Leave Decision”), *Prosecutor v. Sesay et al*, SCSL-04-15-T-320, “Decision on Prosecution Request for Leave to Call Additional Witnesses and Disclose Additional Witness Statements,” 11 February 2005 (“Second Prosecution Leave Decision”), *Prosecutor v. Sesay et al*, SCSL-04-15-T-534, “Decision on Prosecution Request for Leave to Call An Additional Witness and Notice to Admit Witness’ Solemn Declaration Pursuant to Rules 73 *bis*(E) and 92 *bis*,” 5 April 2006 (“Third Prosecution Leave Decision”), and *Prosecutor v. Sesay et al*, 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 (“Fourth Prosecution Leave Decision”).

⁴ The Third Prosecution Leave Decision was different from the others, there the Prosecution sought to add a witness so that his solemn declaration could be admitted under Rule 92*bis*, and during a Status Conference the First Accused indicated that he did not oppose the motion and none of the Accused filed responses to the motion.

governs Prosecution applications is in all material respects the same as Rule 73 *ter* (E).

5. In its prior decisions this Trial Chamber has cited the following proposition from the *Nahimana* case:

In assessing the “interests of justice” and “good cause” Chambers have taken into account such considerations as the materiality of the testimony, the complexity of the case, prejudice to the Defence, including elements of surprise, on-going investigations, replacements and corroboration of evidence. The Prosecution’s duty under the Statute to present the best available evidence to prove its case has to be balanced against the right of the Accused to have adequate time and facilities to prepare his Defence and his right to be tried without undue delay.⁵

6. The test developed by this Trial Chamber for showing “good cause” was stated in the Fourth Prosecution Leave Application decision:

9. As regards the requirement of good cause being shown, the operative principle is that the Prosecution must advance credible reasons for failing to fulfill, within the time limits imposed by Rule 66(A)(ii), the obligation of disclosing to the Defence the existence of these witnesses and, in particular, must satisfy the Chamber that it has met these stipulated criteria:

- i) That the circumstances surrounding these reasons as advanced by the Prosecution are directly related, and are material to the facts in issue;
- ii) That the facts to be provided by these witnesses in their statements and eventually in their testimony, are relevant to determining the issues at stake and would contribute to serving and fostering the overall interest of the law and justice;
- iii) That granting leave to call new witnesses and the disclosure of new statements, will not unfairly prejudice the right of the accused to a fair and expeditious trial as guaranteed by Article 17(4)(a) and 17(4)(b) of the Statute as well as by the provisions of Rules 26bis of the Rules;
- iv) That the evidence the Prosecution is now seeking to call, could not have been discovered or made available at a point earlier in time notwithstanding the exercise of due diligence on their part.⁶ [underlining added]

7. The Leave Application advances as an argument for re-writing the above test: that because Gbao refused to recognize the court or cooperate with Defence counsel, so

⁵ *Prosecutor v. Nahimana et al*, Case No. ICTR-99-52-1, “Decision on the Prosecutor’s Oral Motion for Leave to Amend the List of Selected Witnesses,” 26 June 2001, para. 20.

⁶ Fourth Prosecution Leave Decision

that investigations of witnesses did not start until the spring of 2006, he should be excused from having to exercise due diligence.⁷ This is wrong in principle.

III. NO EVIDENCE

8. There is scant if any evidence to show the steps that were taken to identify, locate and interview the proposed witnesses after May 2006, and no evidence of the steps taken to locate and interview witnesses before May 2006. If Gbao gave instructions to counsel not to carry out investigations that may be a factor for the court to consider, if he was silent on the matter and counsel made a strategic decision not to carry out investigations that too may be a factor for the court to consider. Without such evidence the Trial Chamber cannot assess whether the Defence met its obligation to act with due diligence. In the Fourth Prosecution Leave application, attached to the application was a declaration affirming all of the steps that had been taken to locate and question the witness, while the application itself referred to some of the steps that had been taken to locate the witness.⁸
9. Paragraph 18 of the Leave Application advises that a statement was taken from DAG 084 on 17 February 2007. The Trial Chamber adjourned the filing date of defence witness lists to 5 March 2007.⁹ No explanation is offered as to why DAG 084 was not included in the witness list filed on 5 March. Nor is any explanation offered as to why almost 6 months passed from the time the statement was taken to the time when the application was made to add DAG 084 to the witness list. DAG 084 could have, and should have, been included in the Gbao witness list filed on 5 March 2007.
10. The Leave Application states that DAG 103 “has not given a statement yet, because he was unavailable at the time the investigator met him. The investigator is going to meet him before the middle of July and a summary of his statement will be

⁷ Leave Application, paras. 15, 16 and 38.

⁸ *Prosecutor v. Sesay et al*, SCSL-04-15-T-221, “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 73 bis (E)”, 10 March 2006, paras. 10 and 11.

⁹ *Prosecutor v. Sesay et al*, SCSL-04-15-T-705, “Decision and Order on Defence Applications for an Adjournment of the 16th of February Deadline for Filing of Defence Materials,” 7 February 2007, p. 4.

provided to the Court shortly thereafter.”¹⁰ Similarly, the Leave Application advises that DAG 103 told the Gbao investigator that DAG 104 “is willing to testify. The investigator will meet him to get a statement before the middle of July 2007 and a summary will be provided to the Court shortly thereafter.”¹¹

11. The application to add these two witnesses is at best premature. The Trial Chamber’s assessment of the relevance of a proposed witness’ evidence can only be done after a statement is taken from the witness and the substance of the statement is put before the court. The Prosecution files this Response without knowing the content of the *ex parte* annex, or to whom it relates. DAG 103 has not given a statement and the Leave Application does not indicate how the information attributed to DAG 103 in the Leave Application was conveyed to the defence. DAG 104 is a step even further removed. All that is asserted is that DAG 103 advised the defence that DAG 104 is willing to testify. The defence has not spoken to DAG 104, and the statement in the Leave Application that “DAG 104 would be able to give very precise and direct evidence regarding the killing of the alleged 65 Kamajors in the Kailahun as he was there,”¹² is unfounded and unreliable. It may well be the sort of evidence that DAG 103, or some other person, would give, but the Trial Chamber has no information before it to suggest that this would be the evidence of DAG 104.
12. The test applied by this Trial Chamber, and by others, starts from an assessment of whether or not the evidence of the proposed witness is relevant to the issues before the court. To make this assessment the Trial Chamber has to be apprised of the actual evidence the proposed witness could offer. Until statements are taken from DAG 103 and DAG 104 and the evidence put before the Trial Chamber, it is impossible to assess the relevance of the evidence.
13. The request to add DAG 084 is made almost 6 months after the statement was taken, and no evidence has been offered to justify the delay. This witness could have been included in the original witness list. No statements of DAG 103 and DAG 104 are before the Trial Chamber and the Chamber cannot determine the

¹⁰ Leave Application, para. 22.

¹¹ Leave Application, para. 23.

¹² Leave Application, para. 30.

relevance of their statements or whether their proposed testimony would be “relevant to determining the issues at stake and would contribute to serving and fostering the overall interest of the law and justice.” The Leave Application for these three witnesses should be dismissed.

IV. LACK OF DUE DILIGENCE

14. The test established by this Trial Chamber incorporates the exercise of due diligence in identifying and interviewing a proposed additional witness as a pre-requisite to adding the witness to the witness list of the moving party. The logic of the pre-requisite is self-evident. The mischief that could be hoisted upon a trial by a party who does nothing, and then late in the day applies to add witnesses, is significant. This is what Gbao is now doing. He is seeking to take advantage of his calculated and considered decision to reject the court and its process as an excuse to persuade the Trial Chamber to grant him additional time to put forward witnesses. Gbao wishes to play his own disdain for the court into an advantage.

15. Due diligence is imposed upon litigants because it is essential to fairness. The ICTY Appeals Chamber in *Tadic* observed that:

47. Due diligence is a necessary quality of counsel who defend accused persons before the International Tribunal. The unavailability of additional evidence must not result from the lack of due diligence on the part of the counsel who undertook the defence of the accused. As stated above, the requirement of due diligence includes the appropriate use of all mechanisms of protection and compulsion available under the Statute and the Rules of the International Tribunal to bring evidence on behalf of an accused before the Trial Chamber.

48. Thus, due diligence is both a matter of criminal procedure regarding admissibility of evidence, and a matter of professional conduct of lawyers. In the context of the Statute and the Rules, unless gross negligence is shown to exist in the conduct of either Prosecution or Defence counsel, due diligence will be presumed.

....

50. The Appeals Chamber considers it right to add that no counsel can be criticised for lack of due diligence in exhausting all available courses of action, if that counsel makes a reasoned determination that the material in question is irrelevant to the matter in hand, even if that determination turns out to be incorrect. Counsel may have chosen not to present the evidence at trial because of his litigation strategy or because of the view taken by him of the probative value of the evidence. The

determination which the Chamber has to make, except in cases where there is evidence of gross negligence, is whether the evidence was available at the time of trial. Subject to that exception, counsel's decision not to call evidence at trial does not serve to make it unavailable.¹³

16. There can be no suggestion that the late addition of witnesses was caused by anything other than Gbao's rejection of the court's authority. The test to be applied is whether the evidence in question was available at the time the witness list was filed. Clearly the answer is yes, and it was simply Gbao's choice to ignore the court and refuse to seek out the evidence. His attempt to now benefit from that disdain for the court should be dismissed. Only parties who invoke the court's procedures are entitled to say that they exercised due diligence. In *Krstic*, the ICTY Appeals Chamber, held that

... before additional evidence will be admitted pursuant to Rule 115, the defence is obliged to demonstrate not only that the evidence was not available at trial but also that the evidence could not have been discovered through the exercise of due diligence, which means that the defence must show (*inter alia*) that it made use of –

[...] all mechanisms of protection and compulsion available under the Statute and the Rules of the International Tribunal to bring evidence on behalf of an accused before the Trial Chamber,

and that it had brought any difficulties in relation to obtaining evidence on behalf of the accused, including those arising from intimidation or inability to locate witnesses, to the attention of the Trial Chamber. This obligation of due diligence is therefore directly relevant to the procedures of the Tribunal (in particular, Rule 54) both before and during trial, as well as on appeal.¹⁴

17. Gbao was regularly attending the trial as of March 2006. The Prosecution has no knowledge of the extent of his communications with counsel either before or after that date. However, from March 2006 Gbao had a full year to locate and list those witnesses he wished to call. Gbao had a very significant advantage in that he

¹³ *Prosecutor v. Dusko Tadic*, Case No. IT-94-1-A, "Decision on the Appellant's Motion for the Extension of the Time Limit and Admission of Additional Evidence," 15 October 1998, paras. 47, 48, and 50.

¹⁴ *Prosecutor v. Krstic*, Case No. IT-98-33-A, "Decision on Application for Subpoenas," 1 July 2003, para. 5.

retained a former senior commander of the IDU as his investigator.¹⁵ Few persons would have been better placed to know of significant RUF insider witnesses, such as DAG 099, DAG 101, DAG 103 and DAG 104.¹⁶

18. An accused such as Gbao cannot flaunt the court process for over two years, and then say that he has acted with due diligence in securing witnesses. None of the proposed six witnesses should be added to the Gbao witness list.

V. CONCLUSION

19. For the above reasons the Leave Application should be dismissed.

Done in Freetown, 11 July 2007

For the Prosecution,



Pete Harrison

¹⁵ Transcript 6 July 2007, p. 29, l. 23-29, p. 30, l. 1-27.

¹⁶ Leave Application, para. 30.

INDEX OF AUTHORITIES

A. Decisions and Motions

Prosecutor v. Sesay et al, SCSL-04-15-T-806, “Gbao – Request for Leave to Call Additional Witnesses and for Order for Protective Measures, with Annex A and Ex Parte Annex B,” 4 July 2007.

Prosecutor v. Sesay et al, SCSL-04-15-T-659, “Scheduling Order Concerning the Preparation and the Commencement of the Defence Case,” 30 October 2006

Prosecutor v. Sesay et al, SCSL-04-15-T-221, “Decision on Prosecution Request for Leave to Call Additional Witnesses,” 29 July 2004

Prosecutor v. Sesay et al, SCSL-04-15-T-320, “Decision on Prosecution Request for Leave to Call Additional Witnesses and Disclose Additional Witness Statements,” 11 February 2005

Prosecutor v. Sesay et al, SCSL-04-15-T-534, “Decision on Prosecution Request for Leave to Call An Additional Witness and Notice to Admit Witness’ Solemn Declaration Pursuant to Rules 73 *bis*(E) and 92 *bis*,” 5 April 2006

Prosecutor v. Sesay et al, 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

Prosecutor v. Sesay et al, SCSL-04-15-T-221, “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 73 *bis* (E)”, 10 March 2006

Prosecutor v. Sesay et al, SCSL-04-15-T-705, “Decision and Order on Defence Applications for an Adjournment of the 16th of February Deadline for Filing of Defence Materials,” 7 February 2007

Prosecutor v. Dusko Tadic, Case No. IT-94-1-A, “Decision on the Appellant’s Motion for the Extension of the Time Limit and Admission of Additional Evidence,” 15 October 1998
<http://www.un.org/icty/tadic/appeal/decision-e/81015EV36285.htm>

Prosecutor v. Krstic, Case No. IT-98-33-A, “Decision on Application for Subpoenas,” 1 July 2003
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Prosecutor v. Nahimana et al, Case No. ICTR-99-52-1, “Decision on the Prosecutor’s Oral Motion for Leave to Amend the List of Selected Witnesses, “ 26 June 2001
<http://69.94.111.53/ENGLISH/cases/Nahimana/decisions/260601.htm>

B. Other Documents

Prosecutor v. Sesay et al, SCSL-04-15-T, Transcript 6 July 2007, p. 29, l. 23-29, p. 30, l. 1-27.

C. Statutes and Rules of Procedure and Evidence

Rules 73 *bis* and 73 *ter* of the Rules of Procedure and Evidence of the Special Court.