815

SCSL-04-15-T
(30224-30230)

30224

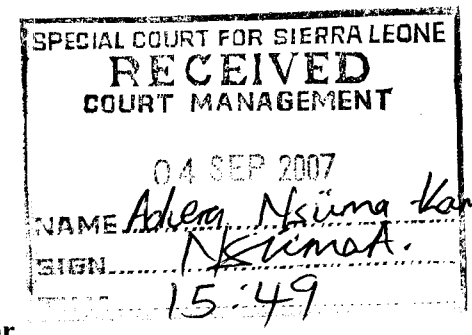
THE SPECIAL COURT FOR SIERRA LEONE

BEFORE:

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

Registrar: **Mr. Herman Von Hebel**

Date filed: **4 September 2007**



The Prosecutor

-v-

Issa Hassan Sesay

Case No: SCSL-04-15-T

Public

Defence Application for Disclosure Pursuant to Rules 89(B) and/or 66(A)(ii)

Office of the Prosecutor

Reginald Flynn
Charles Hardaway
Vincent Wagona

Defence

Wayne Jordash
Sareta Ashraph

Introduction

1. On various dates and in compliance with the Trial Chamber's 30th November 2006 Order[1], the Defence inter alia disclosed the names and identities of 10 witnesses. The Sesay Defence allocated the witnesses the following numbers: DIS-072, DIS-085, DIS-095, DIS-126, DIS-142, DIS-155, DIS-156, DIS-241, DIS-258, and DIS-294.

2. On various dates thereafter the Prosecution informed the Defence that it has interviewed and obtained witness statements from the aforementioned defence witnesses. The Prosecution has refused to disclose the statements and has indicated in lieu of disclosure that the Defence can *inspect* the statements pursuant to Rule 66(A)(iii) of the Rules of Procedure and Evidence and the Decision in the *Norman* case.[2]

3. On a number of occasions the Defence thereafter requested disclosure (physical service) of the witness statements. The inspection procedure for this *volume* of evidence does not provide an effective means by which the detail of the facts and the information can properly be assessed. In these circumstances the inspection procedure, permitting the Defence to peruse the material under the watchful eye of the Prosecutor, is impractical and offers only illusory rights to the facts and information contained therein. The Defence has unsuccessfully attempted to convey to the Prosecution the impracticality of the inspection procedure given the number and volume of the statements. The Prosecution has ignored the explanations and steadfastly refuses to discuss the issue. No explanation has been forthcoming concerning the reason for the refusal and no reasonable explanation is apparent.

4. On the 25th April 2007 the Defence wrote to the Prosecution and requested "disclosure of all statements in ... [its] ... possession relating to our intended witnesses.... [T]hese statements are material to the preparation of our defence case". The Defence requested disclosure of the statements pursuant to Rule 66(A)(ii). This provision inter alia provides, "Upon good cause being shown by the Defence, a Judge of the Trial Chamber may order that copies of the statements of additional prosecution witnesses that the Prosecutor does not intend to call be made available to the defence within a prescribed time". Once again

[1] *Prosecutor* v. *Sesay*, SCSL-04-15-668, "Decision on Sesay Defence Motion for Immediate Protective Measures for Witnesses and Victims and Non-Public Disclosure", 30th November 2006.
[2] *Prosecutor* v. *Norman*, SCSL-04-14-T-18511, "Decision on Application by the Second Accused Pursuant to Sub-Rule 66(A)(iii)", 14th June 2006.

the Prosecution refused to discuss the issue. The Prosecution has continued to provide no reasons for its refusal. The reason(s) for this refusal therefore remain unknown and unfathomable. It is submitted that no reasonable explanation exists.

5. The Defence herewith applies for disclosure of witness statements and any further witness statements in their possession relating to defence witnesses. The application is made pursuant to Rule 89(B) and/or Rule 66(A)(ii).

Rule 89(A)

6. The Defence seeks disclosure (physical service) of all the witness statements aforementioned (and any other future witness statements) in order to be able to effectively and efficiently prepare and present its case. The application is predicated upon the need to have physical possession of the statements (rather than mere inspection) in order to be able to efficiently assess the impact of this written testimony upon the defence case.

7. The procedure favoured by the Prosecution is inspection pursuant to Rule 66(A)(iii). This procedure entails the following: (i) booking a conference room for a time convenient to one member of the Prosecution and Lead Counsel for Sesay; (ii) the attendance of both representatives at the conference room; (iii) the reading of each statement under the watchful eye of the Prosecutor; and (iv) the writing of *notes* by Lead Counsel as quickly and as accurately as possible.

8. The inspection procedure favoured by the Prosecutor does not allow the Defence to copy the statement verbatim. This is prohibited by the Prosecutor. Notwithstanding, for a proper understanding of the ramifications of the evidence it is necessary for the Accused, Lead Counsel, and the defence team to be *fully* appraised of the contents of the statement. Anything less prevents the statements from being properly compared and contrasted with the statements in the possession of the Defence. Anything less would prevent the Defence from obtaining accurate instructions and explanations from the Accused and the relevant witnesses.

9. In short, nothing less than full knowledge of the entirety of the statement will suffice. This could only be achieved using the cumbersome inspection procedure if, and only if, defence counsel were permitted to copy the entirety of the statements. The more useful

and sensible course would be for the Prosecution to provide copies. This would provide the Defence with adequate notice of the contents of each statement to be able to effectively prepare its case.

10. The present inspection procedure, whereby inspecting Counsel takes notes of the contents of the statements, deprives the Defence of *some* of the detail of the statements. This prevents the Defence from being able to conduct the necessary legal and factual analysis. The inspection procedure provides an incomplete understanding of the contents of the statements, allowing some but not sufficient analysis of the ramifications of the evidence. This is not effective preparation. It is trial by guesswork. It deprives the Defence of the opportunity to discuss and analyse the details of the statement with the Accused, the witnesses concerned, and the defence team.

11. The Prosecution is in possession of at least 10 statements relating to proposed witness statements. The Prosecution's ongoing insistence that the Defence is only entitled to inspect the statements pursuant to Rule 66(A)(iii) renders the Accused's right to be informed of evidence "material to the preparation of the defence" illusory.

12. The Prosecution's approach is absurd. In the absence of a good forensic reason it must be considered obstructive and designed to hamper the Defence's preparation. It is wholly impractical to expect Lead Counsel to arrange appointments to inspect each statement, thereafter to make notes and/or memorise the minutiae of the evidence, then to report the contents to the Accused and Co-Counsel in sufficient detail to allow competent and delicate decisions to be made concerning the tactical and/or forensic advantage (or otherwise) of relying upon a particular witness in the context of a trial of this gravity, size and complexity. It ought to go without saying that a single word in a witness statement can be critical to a proper assessment of the evidence.

13. The alternative option of allowing the Defence to copy the entirety of the statement during the inspection procedure is too absurd to require any further comment.

14. In any event, even if the inspection procedure could offer a meaningful remedy with one or a few statements, it offers little, or nothing, when applied to this number of statements.

The Prosecution would suffer no prejudice by disclosing copies of the statement. There is no good forensic reason for the Prosecution's refusal.

15. It ought to be noted that the Registry in its purported application of Article 17 of the Statue of the Special Court has interpreted the doctrine of equality of arms in the RUF case to provide the Office of the Prosecutor with four trial advocates, a Case Manager and various legal assistants (not to mention a small army of administrative and investigative assistance) working around the clock to counter the Sesay Defence. This demonstrable inequality and the consequential starving of the Defence of proper resources is problematic enough in a trial of this magnitude without having time consuming procedures foisted upon the Defence when practical and common sense alternatives exist.

16. The Prosecution's stance that it will not disclose these statements is therefore impractical and unfair. Inspection in these circumstances is inconsistent with Rule 89(B) which requires that procedures governing disclosure and/or inspection of material evidence must be those which "best favour a fair determination of the matter".

17. It is anticipated that the Prosecution will assert that it is merely following the ruling in the *Norman* decision[3] which obliges nothing more than the Prosecution to permit the Defence to inspect witness statements and/or interview notes in their custody or control, of those witnesses, whom the Accused intends to call on his behalf in his defence case.[4] However it follows from any ruling that the Trial Chamber intends to create a minimum obligation. It is to be expected that a reasonable and fair prosecution would of its own volition extend these rights, without recourse to the Trial Chamber, when the circumstances and the interests of justice so demand.

Rule 66(A)(ii)

18. Rule 66(A)(ii) states inter alia:

> Upon good cause being shown by the Defence, a Judge of the Trial Chamber may order that copies of the statements of additional prosecution witnesses that the Prosecutor does not intend to call to made available to the defence within a prescribed time.

---

[3] *Prosecutor* v. *Norman*, SCSL-04-14-T-618, "Decision on Application by the Second Accused Pursuant to Sub-Rule 66(A)(iii)", 14th June 2006.
[4] *Ibid* Para. 23.

19. It is submitted that (i) a clearly stated and reasonable explanation for the stated relief [5] or (ii) a real risk of prejudice and/or injustice[6] amount to good cause pursuant to Rule 66(A)(ii). The relief sought is clear and reasonable. There exists no sound forensic reason to refuse to copy and serve the statements and none has been offered by the Prosecution. Moreover, in the circumstances of this amount of evidence, the Defence has no real prospect of being able to absorb and assimilate the detail by inspection alone to be able to make sound decisions about the merits of calling individual defence witnesses. Without being able to have adequate time to study each statement with the client and the defence team, legal analysis becomes a game of memory and guessing. This may benefit the Prosecution insofar as it makes life difficult for the Defence but it will undoubtedly cause unnecessary prejudice to the Defence and the interests of justice.

Relief Sought

20. Pursuant to Rule 89(B) and/or Rule 66(A)(ii), the Defence seeks an order that the Prosecution disclose (copy and serve) all the statements in its possession (now and from henceforth) which are the result of interviews with Defence witnesses. This would enhance the integrity of the process, save both the Prosecution and the Defence time and resources, and may well prevent lengthy and repeated requests for adjournments.

Dated 4 September 2007

Wayne Jordash
Sareta Ashraph

[5] *Prosecutor* v. *Krstic*, Case No. IT-98-33-A, "Decision Granting Leave for Supplemental Response", 29 May 2002, Para. 5.
[6] *Prosecutor* v. *Blagojevic*, Case No. IT-02-60-A, "Decision on Dragan Jokic's Supplemental Motion for Extension of Time to File Appeal Brief", 31 August 2005, Para. 7.

Book of Authorities

Decisions and Orders

Prosecutor v. *Blagojevic*, Case No. IT-02-60-A, "Decision on Dragan Jokic's Supplemental Motion for Extension of Time to File Appeal Brief", 31 August 2005.

Prosecutor v. *Krstic*, Case No. IT-98-33-A, "Decision Granting Leave for Supplemental Response", 29 May 2002.

Prosecutor v. *Norman*, SCSL-04-14-T-618, "Decision on Application by the Second Accused Pursuant to Sub-Rule 66(A)(iii)", 14th June 2006.

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