821)

SCSL-04-15-T
(30595 — 30598)

THE SPECIAL COURT FOR SIERRA LEONE

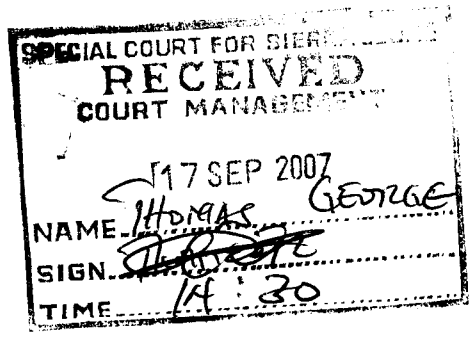
30595

BEFORE:

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

Registrar: **Mr. Herman Von Hebel**

Date filed: **17th September 2007**



The Prosecutor

-v-

Issa Hassan Sesay

Case No: SCSL-04-15-T

Public

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

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Introduction

1. On 4th September 2007, the Accused Sesay filed a "Defence Application for Disclosure Pursuant to Rules 89(B) and/or 66(A)(ii) ("The Motion").[1] On 14th September 2007 the Prosecution filed its "Response to Sesay Defence Application for Disclosure Pursuant to Rules 89(B) and/or 66(A)(ii) ("The Response").[2] Herewith the Defence files its reply.

Reply

2. The issue is not – as the Prosecution claims – reducible to a technical discussion concerning "whether a procedural obligation exists compelling the Prosecution to disclose copies of statements of persons who are now claimed to be Defence witnesses"[3] but whether the Trial Chamber ought to exercise its discretion and intervene to prevent unfairness, to ensure that the administration of justice is not brought into disrepute by the unreasonable stance of a party, and to ensure that the Rules of Procedure and Evidence ("The Rules") are interpreted to provide practical solutions to practical problems.

3. There exists no rational, logical or fair reason to support the position adopted by the Prosecution. In these circumstances the Prosecution's seven page Response – replete with procedural technicality but lacking any inkling of fairness or old-fashioned pragmatism – ought to be rejected in its totality. The "reasons" proffered by the Prosecution are neither procedural bars to the grant of the Defence requests nor do they identify a single iota of prejudice which would arise if the Motion was granted.

4. The arguments advanced by the Prosecution (e.g., that the phrase "be made available" contained within Rule 66(A)(ii) cannot be interpreted to allow Trial Chamber I the discretion to order disclosure (as well as inspection);[4] that the service of the statements would be an unacceptable "incursion into" a defence witness' life;[5] and that a witness would be fearful of having his statement served on the Defence but not inspected[6]) are so clearly devoid of merit that they require no answer.

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[1] *Prosecutor* v. *Sesay et al.*, SCSL-04-15-815, "Sesay Defence Application for Disclosure Pursuant to Rules 89(B) and/or 66(A)(ii)".
[2] *Prosecutor* v. *Sesay et al.*, SCSL-04-15-819, "Prosecution Response to Sesay Defence Application for Disclosure Pursuant to Rules 89(B) and/or 66(A)(ii)".
[3] Prosecution Response, paras. 8 and 9.
[4] Ibid., para. 15.
[5] Ibid., para. 17.
[6] Ibid., para. 17.

Relief Sought

5. Pursuant to Rules 89(B) and/or 66(A)(ii), the Defence seeks an order that the Prosecution disclose (copy and serve) all the statements in their possession (now and from henceforth) which are the result of interviews with defence witnesses.

6. In the alternative, the Defence requests the following:
   (i) that the Defence be permitted to copy by hand the statement being inspected; or
   (ii) that the Accused be permitted to attend the inspection appointments to be able to provide instructions on the totality of the witness statement;
   (iii) that the witness be permitted to attend a separate inspection of his/her witness statement to allow the Defence an opportunity to "proof" the witness on its contents;[7] and
   (iv) that the Prosecution be prohibited from entering the inspection during (ii) and (iii).

Dated 17th September 2007

Wayne Jordash
Sareta Ashraph

[7] As the Prosecution have oft stated "The permissibility of proofing witnesses has been accepted by this Trial Chamber, by Trial Chambers of the International Criminal Tribunal for the Former Yugoslavia ("ICTY") and the International Criminal Tribunal for Rwanda ("ICTR").... [The] case law of this Trial Chamber, the ICTY and the ICTR indicates that the proofing of witnesses before they testify is not only permissible, but may also be desirable". (*Prosecutor* v. *Sesay et al.*, SCSL-04-15-775, "Prosecution Response to Defence Motion Seeking a Stay of the Indictment and Dismissal of all Supplemental Charges (Prosecution's Abuse of Process and/or Failure to Investigate Diligently)", 1st May 2007, para. 7; internal citations omitted)
Moreover the Prosecution has previously held the view that a party is "**entitled**, in proofing witnesses, to cover ... issues that are dealt with in the witness's **previous** statements...." (*Prosecutor* v. *Sesay et al.*, SCSL-04-15-553, "Prosecution Response to Defence Motion to Request the Trial Chamber to Rule that the Prosecution's Moulding of the Evidence is Impermissible and a Breach of Article 17 of the Statute of the Special Court", 15th May 2006, para. 16; emphasis added)
The inspection procedure, as presently practiced, thus deprives the Defence of its entitlement and its ability to prepare effectively. It should also be noted that the argument advanced by the Prosecution at para. 9 of the Response (to the effect that *the Prosecution* was obliged to inspect the proposed defence exhibits and therefore the Defence should be obliged to inspect the previous statements of its own witnesses) fails thus to appreciate that the Defence complaint is not limited to the unnecessary loss of time but is predicated upon the fact that the inspection procedure, as presently constituted, does not allow for *effective* preparation, including instruction taking, discussion with the witness, and consultation with the Accused. The exhibit inspection procedure was for the limited purpose of checking the exhibits authenticity – a task which the Prosecution could and did purport to complete – in the time available. Proofing self evidently cannot be completed within the inspection procedure – however long the appointment – without the presence of the witness and consultation with the Accused. Furthermore, the attempt to draw comparisons with the defence exhibit inspection procedure fails to acknowledge that the Defence is obliged to **disclose** any exhibits prior to its use in court. This provides the Prosecution with exactly what the Defence is requesting in this Motion: an opportunity to effectively prepare.

Book of Authorities

Motions

Prosecutor v. *Sesay et al.*, SCSL-04-15-815, "Sesay Defence Application for Disclosure Pursuant to Rules 89(B) and/or 66(A)(ii)", 4th September 2007.

Prosecutor v. *Sesay et al.*, SCSL-04-15-819, "Prosecution Response to Sesay Defence Application for Disclosure Pursuant to Rules 89(B) and/or 66(A)(ii)", 14th September 2007.

Prosecutor v. *Sesay et al.*, SCSL-04-15-775, "Prosecution Response to Defence Motion Seeking a Stay of the Indictment and Dismissal of all Supplemental Charges (Prosecution's Abuse of Process and/or Failure to Investigate Diligently)", 1st May 2007.

Prosecutor v. *Sesay et al.*, SCSL-04-15-553, "Prosecution Response to Defence Motion to Request the Trial Chamber to Rule that the Prosecution's Moulding of the Evidence is Impermissible and a Breach of Article 17 of the Statute of the Special Court", 15th May 2006.