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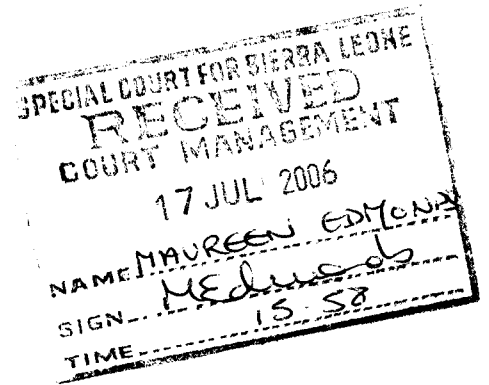
THE SPECIAL COURT FOR SIERRA LEONE

BEFORE:

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

Registrar: Mr. Lovemore Green Munlo, SC

Date filed: 17th July 2006



The Prosecutor

-v-

**Issa Hassan Sesay
Morris Kallon
Augustine Gbao**

Case No: SCSL - 04 - 15 - T

PUBLIC

**DEFENCE REPLY TO THE PROSECUTION RESPONSE TO SESAY MOTION
FOR A RULING THAT THE DEFENCE HAVE BEEN DENIED
CROSS EXAMINATION OPPORTUNITIES**

Office of the Prosecutor
Christopher Staker
Peter Harrison
Shyamala Alegendra

Defence Counsel
Wayne Jordash
Sareta Ashraph

Defence Counsel for Kallon; Shekou Touray, Charles Taku and Melron Nichol-Wilson
Defence Counsel for Gbao; Andreas O'Shea and John Cammegh

1. The Defence on behalf of Issa Sesay (the “Defence”) reject the Prosecution assertion that the relief requested in the “Motion for a Ruling that the Defence has been Denied Cross – Examination Opportunities”,¹ filed on behalf of the First Accused on 29th June 2006, is “abstract and hypothetical, and... broad and general” thus not establishing a “proper basis for granting any relief”.² The Prosecution assertion appears, without reason, to suggest that a party is not entitled to seek clarification from the Trial Chamber concerning previous rulings, when such request is designed to assist the efficacious progress of the trial and to effect the efficient use of a party’s limited resources.

2. The Prosecution’s stance is particularly audacious given that the lack of clarity on the issue of notice has been, in large part, caused by the Prosecution’s continuous and intentional failure to specifically and comprehensively engage with issues pertaining to lack of notice and/or to confront in any meaningful way Defence allegations of prosecutorial impropriety. In particular the Prosecution, during the course of the trial:
 - i. have ignored or refused to meaningfully address (with any degree of specificity) Defence allegations concerning the prejudice to the Accused’s Article 17(4)(a) and (b) rights³ arising from the Prosecution’s rolling disclosure program;

¹ SCSL-04-15-T-588 (the “Motion”).

² Paragraph 3 of the Prosecution Response to Sesay Motion for a Ruling that the Defence has been denied Cross-Examination Opportunities, 10th July 2006, SCSL-04-15-T- 593 (the “Response”).

³ See for example Sesay Defence Motion Requesting the Exclusion of Evidence (As indicated in Annex A arising from the Additional Information Provided by Witness TF1-113, TF1-108, TF1-330, TF1-041 and TF1-288) (17387 – 17411), SCSL-04-15-T-475, 10th February 2006, para. 5, 11, 12, & 15 and the Prosecution’s failure to address the allegations in their Prosecution Response To Defence Motion Requesting the Exclusion of Evidence (As indicated in Annex A arising from the Additional Information Provided by Witness TF1-113, TF1-108, TF1-330, TF1-041 and TF1-288), 17th February 2006 (17971 – 17994) SCSL-04-15-T-483 at Para. 11, 12, 13 & 14 and the Defence Reply to Prosecution Response To Defence Motion Requesting the Exclusion of Evidence (As indicated in Annex A arising from the Additional Information Provided by Witness TF1-113, TF1-108, TF1-330, TF1-041 and TF1-288), 22nd February 2006 (18091-18111) SCSL-04-15-T-493 at Para. 7, 8, and 9 (a)-(d) in which the Defence outline the Prosecution’s ongoing obfuscation.

- ii. have refused to deny or admit whether they have taken advantage of the degree of notice (or alleged lack thereof) provided by their rolling disclosure process, to enable them to manipulate the trial process and mould their evidence to fit the case according to how it unfolds;⁴ and
 - iii. have repeatedly insisted (until now) that the Defence had comprehensive notice of all factual allegations or alternatively that the only remedy for any lack of notice was the grant of an adjournment to provide the Defence with adequate time to prepare its case and investigate.⁵
3. Until the current “Response” the Prosecution have repeatedly and without qualification claimed that,

“The real issue (concerning the evidence contained in their so-called proofing notes) ...is whether evidence which has been newly disclosed in relation to existing witnesses is relevant to the material facts pleaded in the indictment. If irrelevant, raising entirely new allegations, it should be excluded. If relevant, but more than detail supplementing the earlier evidence of a particular witness, or extensive, or highly incriminating, or evidence of specific, distinct and new events remote from incidents about which the Defence has had specific notice by the indictment, pre-trial briefs or other disclosed materials, then the question becomes one of

⁴ See 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, 3rd May 2006 (18557 – 18562), SCSL-0-4-15-T-541 and the abject failure to deal with the allegations therein: see Prosecution’s Response to First Accused’s Motion Dated 3rd May 2006, 15th May 2006 (18918 – 18932), SCSL-04-15-T-553.

⁵ See Prosecution Response to Sesay Defence Application for the Exclusion of Statements of Witness TF1-361 and Witness TF1-122, 4th April 2005 (11121-11134), SCSL-04-15-T-338, para. 11; Prosecution Response to Defence Motion Requesting the Exclusion of Paragraphs 1, 2, 3, 11 and 14 of the Additional Information Provided by Witness TF1-117, Dated 25th, 26th, 27th and 28th October 2005, SCSL-04-15-T-466 at para. 20; Prosecution Response To Defence Motion Requesting the Exclusion of Evidence (As indicated in Annex A arising from the Additional Information Provided by Witness TF1-113, TF1-108, TF1-330, TF1-041 and TF1-288), 17th February 2006 (17971 – 17994) SCSL-04-15-T-483, para. 15, 17 & 24 and Prosecution Response to Defence Motion Requesting the Exclusion of Evidence arising from the Additional Information provided by Witness TF1-168, TF1-165 and TF1-041, 28th February 2006 (18184-18195), SCSL-04-15-T-499, para. 8, 14, 15, 18 and 23.

timeliness of disclosure: what period of notice is required to give the Defence time to prepare”⁶ and

“It is the Prosecution’s submission that the information in the additional statements is not new evidence and there is no question of the Accused being asked to prepare his case without *full* knowledge of all the charges”⁷ and (Emphasis added)

“The defence have had ample time to investigate the information and the law is settled on this point as a result of ... prior decisions in this trial ...”⁸

4. On the eve of the close of their case the Prosecution appear to have shifted their position in relation to the *potential* impact of their rolling disclosure of supplemental statements (containing hundreds of additional factual allegations). It would no longer appear to be the Prosecution’s unqualified view that the Defence have sufficient notice of all the charges. The Prosecution appear to have abandoned their unequivocal position that the only question which could conceivably arise from their rolling disclosure program is whether the late disclosure had deprived the Defence of adequate time to prepare and investigate.⁹
5. This gargantuan shift is clear from the Prosecution’s latest “Response”, in which they now state,

⁶ Prosecution Response to Sesay Defence Application for the Exclusion of Statements of Witness TF1-361 and Witness TF1-122, 4th April 2005, (11121-11134), SCSL-04-15-T-338, at Para. 11; Brackets added.

⁷ Prosecution Response to Sesay Defence Motion Requesting the Exclusion of Evidence (As indicated in Annex A arising from the Additional Information Provided by Witness TF1-113, TF1-108, TF1-330, TF1-041 and TF1-288) (17971 – 17994), SCSL-04-15-T-483 at Para. 15.

⁸ Prosecution Response to Defence Motion Requesting the Exclusion of Paragraphs 1, 2, 3, 11 and 14 of the Additional Information Provided by Witness TF1-117 dated 25th, 26th, 27th and 28th October 2005, 23rd January 2006, (17159-17168) SCSL-04-15-T-466 at Para. 20.

⁹ The Defence note that the Prosecution’s previous position was apparently so keenly felt that they were repeatedly constrained to seek to label Defence submissions to the contrary as “frivolous” and to continuously seek a remedy under Rule 46(C) of the Rules of Procedure and Evidence of the Special Court for Sierra Leone: for example Prosecution Response to Defence Motion Requesting the Exclusion of Evidence Arising from the Additional Information Provided by Witness TF1-168, TF1-165 and TF1-041, 28th February 2006 (18184-18195), SCSL-04-15-T-499 Para. 23.

“The present Motion is concerned with the circumstance where the Prosecution has disclosed to the Defence, after a witness has testified, a supplemental statement of another witness containing facts that the Defence would have liked to have put to the earlier witness in cross examination. The fact that such a circumstance pertains may be relevant in determining whether there is good cause for permitting the Defence to recall the witness”.¹⁰

6. The Prosecution’s ‘principled’ position appears thus to have been abandoned in pursuit of prosecutorial advantage. It would now appear to be the Prosecution’s new position that if the Defence identify the specific prejudice caused by the Prosecution’s ongoing disclosure program then the Prosecution is now (and at last) willing to engage with this potential prejudice. It is instructive that this astonishing *volte face* has only transpired after the Prosecution have been permitted to reinvestigate their whole case (throughout the course of the trial) and after they have produced and relied upon several hundred additional factual allegations. It is wholly unfair to have gained this advantage by advancing arguments (that no prejudice except for the loss of time to investigate/prepare could result from the rolling disclosure) only to abandon that position on the wing of expediency.

7. In the circumstances it is therefore unsurprising that the Defence are unclear about whether the Trial Chamber’s rulings, stating that (i) the supplemental statements do not enhance the incriminating quality of the evidence, and (ii) the Defence had sufficient notice that the witness would testify in respect of the allegations contained therein are absolute insofar as they appear to dismiss all suggestions of wider prejudice. This has been the proposition advanced by the Prosecution until now and the apparent rulings of the Trial Chamber throughout the proceedings. The present Motion seeks clarification of whether these decisions, founded on the Prosecution’s purportedly bona fides arguments, are meant to imply that notice

¹⁰ Para. 13 of the Response.

has been sufficient and the Defence are, “estopped from asserting the contrary”¹¹ in relation to all prejudice other than time to prepare and investigate.

REQUEST

8. The Prosecution suggest that it is unclear “whether the Motion intends that the Defence would have the right, following the “ruling of principle”, to recall whichever witnesses it chooses, or whether the Motion concedes that the Defence would still have to establish good cause in relation to each of the witnesses that it seeks to have recalled” (Para. 6 of the Response). The Defence does not accept this supposed claim of lack of clarity (see Para. 18 of the Motion for a clear enunciation of the request). However, for the avoidance of doubt the Defence unequivocally reiterate:

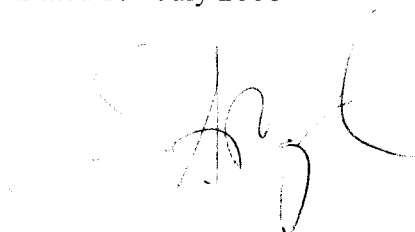
- i. The Present Motion is nothing more than a request to the Trial Chamber to clarify its rulings and determine whether they are meant to preclude the Defence from asserting that it has been prejudiced by a loss of opportunity to cross examine; and
- ii. In the event that the Trial Chamber clarifies that the Defence are not estopped from asserting that the Prosecution’s disclosure of supplemental statements has deprived the Accused of opportunities to cross examine, the Defence would then proceed to outline the lost opportunities, which would then support a subsequent application for the recall of all (or most of) the witnesses (other than those relating to the crime base).

9. It is submitted that it would be unfair to expect the Defence to expend valuable resources and scores of legal hours identifying the prejudice in relation to each witness it would seek to have recalled if it is the Trial Chamber’s clear view that the only prejudice the Defence could have suffered, by dint of the Prosecution’s ongoing disclosure program, is the loss of an opportunity to prepare or

¹¹ See Para. 2 (e) of the Motion.

investigate. If the Defence are estopped from asserting any other prejudice then it will not utilise its inadequate resources nor waste those of the Prosecution or the Trial Chamber in requesting argument and deliberation on the merits of a “Recall Motion”. It is submitted that this timely clarification would serve the interests of justice.

Dated 17th July 2006

A handwritten signature in black ink, appearing to be 'Wayne Jordash' and 'Sareta Ashraph' written together.

Wayne Jordash
Sareta Ashraph

BOOK OF AUTHORITIES

Prosecutor v. Sesay et al, Sesay Defence Motion Requesting the Exclusion of Evidence (As indicated in Annex A arising from the Additional Information Provided by Witness TF1-113, TF1-108, TF1-330, TF1-041 and TF1-288) 10th February 2006 (17387 – 17411), SCSL-04-15-T-475,

Prosecutor v. Sesay et al, Prosecution Response To Defence Motion Requesting the Exclusion of Evidence (As indicated in Annex A arising from the Additional Information Provided by Witness TF1-113, TF1-108, TF1-330, TF1-041 and TF1-288), 17th February 2006 (17971 – 17994) SCSL-04-15-T-483

Prosecutor v. Sesay et al, Defence Reply to Prosecution Response To Defence Motion Requesting the Exclusion of Evidence (As indicated in Annex A arising from the Additional Information Provided by Witness TF1-113, TF1-108, TF1-330, TF1-041 and TF1-288), 22nd February 2006 (18091-18111) SCSL-04-15-T-493

Prosecutor v. Sesay et al, 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, 3rd May 2006 (18557 – 18562), SCSL-0-4-15-T-541

Prosecutor v. Sesay et al, Prosecution's Response to First Accused's Motion Dated 3rd May 2006, 15th May 2006 (18918 – 18932), SCSL-04-15-T-553.

Prosecutor v. Sesay et al, Prosecution Response to Sesay Defence Application for the Exclusion of Statements of Witness TF1-361 and Witness TF1-122, 4th April 2005 (11121-11134), SCSL-04-15-T-338

Prosecutor v. Sesay et al, Prosecution Response to Defence Motion Requesting the Exclusion of Paragraphs 1, 2, 3, 11 and 14 of the Additional Information Provided by Witness TF1-117 dated 25th, 26th, 27th and 28th October 2005, 23rd January 2006 (17259-17168) SCSL-04-15-T-466

Prosecutor v. Sesay et al, Prosecution Response to Defence Motion Requesting the Exclusion of Evidence arising from the Additional Information provided by Witness TF1-168, TF1-165 and TF1-041, 28th February 2006 (18184-18195), SCSL-04-15-T-499