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SCSL/04/15/T  
(25064-25072)

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**SPECIAL COURT FOR SIERRA LEONE**  
OFFICE OF THE PROSECUTOR  
FREETOWN – SIERRA LEONE

**TRIAL CHAMBER I**

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

Registrar: Mr. Lovemore G. Munlo SC

Date filed: 21 August 2006

**THE PROSECUTOR**

**Against**

**Issa Hassan Sesay**  
**Morris Kallon**  
**Augustine Gbao**

Case No. SCSL-04-15-T

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**PUBLIC**  
**PROSECUTION RESPONSE TO SESAY DEFENCE APPLICATION FOR LEAVE TO**  
**APPEAL THE DECISION OF 1 AUGUST 2006**

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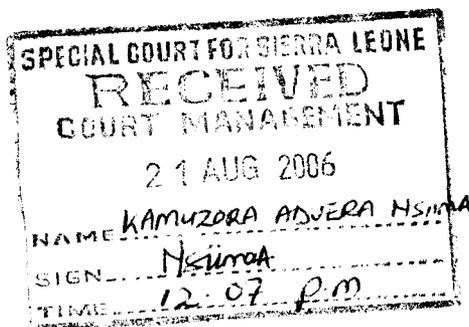
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## I. INTRODUCTION

1. On 3 May 2006, the Accused Sesay filed the “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” (“**Motion**”).<sup>1</sup> The Accused now seeks leave to appeal (“**Application for Leave to Appeal**”)<sup>2</sup> the “Decision on Defence Motion to Request the Trial Chamber to Rule that the Prosecution Moulding of Evidence is Impermissible” (“**Decision**”).<sup>3</sup>
2. The Prosecution submits that the Application for Leave to Appeal should be dismissed.

## II. TEST FOR GRANTING LEAVE TO APPEAL

3. Rule 73(B) of the Rules provides that leave to appeal may be granted in exceptional circumstances and to avoid irreparable prejudice to a party. The restrictive nature of Rule 73(B) has repeatedly been emphasized in the decisions of the Special Court and the principles of law governing the issue of granting leave to file an interlocutory appeal within the jurisdiction of the Special Court have recently been consolidated and summarised by this Trial Chamber.<sup>4</sup> The two conditions – exceptional circumstances and irreparable prejudice – are conjunctive and both must be satisfied if an application for leave to appeal is to be granted. The Appeals Chamber has held that: “The underlying rationale for permitting such appeals is that certain matters cannot be cured or resolved by final appeal against judgement.”<sup>5</sup>
4. There are no exceptional circumstances in the current case and irreparable prejudice cannot be demonstrated. Unlike the application for leave to appeal heard by Trial

<sup>1</sup> *Prosecutor v. Sesay et al.*, SCSL-04-15-T-541, “Defence Motion to Request the Trial Chamber to Rule that the Prosecution Moulding of Evidence is Impermissible and a Breach of Article 17 of the Statute of the Special Court”, (“**Motion**”), 3 May 2006.

<sup>2</sup> *Prosecutor v. Sesay et al.*, SCSL-04-15-T-625, “Application for Leave to Appeal the Decision (1<sup>st</sup> August 2006) on Defence Motion to Request the Trial Chamber to Rule that the Prosecution Moulding of Evidence is Impermissible” (“**Application For Leave to Appeal**”), 3 August 2006.

<sup>3</sup> *Prosecutor v. Sesay et al.*, SCSL-04-15-T-616, “Decision on Defence Motion to Request the Trial Chamber to Rule that the Prosecution Moulding of Evidence is Impermissible”, (“**Decision**”), 1 August 2006.

<sup>4</sup> See e.g. *Prosecutor v. Norman et al.*, SCSL-04-14-T-669, “Decision on Application by First Accused for Leave to Appeal against the Decision on their Motion for Extension of Time to Submit Documents pursuant to Rule 92bis”, 17 July 2006.

<sup>5</sup> *Prosecutor v. Norman et al.*, SCSL-04-14-T-319, “Decision on Prosecution Appeal Against the Trial Chamber Decision of August 2004 Refusing Leave to File An Interlocutory Appeal”, 17 January 2005, para. 29; see also *Prosecutor v. Sesay et al.*, SCSL-2004-15-T-357, “Decision on Defence Applications for Leave to Appeal Ruling of the 3<sup>rd</sup> February 2005 on the Exclusion of Statements of Witness TF1-141”, 28 April 2005, para. 21.

Chamber II regarding witness TF1-150,<sup>6</sup> where there was held to be an issue of great importance to the Special Court and other international criminal tribunals, the matter currently before this Trial Chamber is of a type that could, if found to contain any merit, be cured by way of a final appeal against judgment.

### III. ARGUMENT

#### Exceptional Circumstances

5. In its Decision, the Trial Chamber identified the issue as being the “Defence contention of an alleged deliberate and impermissible practice by the Prosecution of expanding the factual allegations relevant to the crimes pleaded in the Indictment through a calculated use of the legitimate practice of proofing its witnesses and disclosing any additional statements arising from such proofing sessions”.<sup>7</sup> The Trial Chamber focussed on Rules 89 and 95 and held that “any direct challenge to the integrity of the statement-taking process should be substantiated by a *prima facie* showing of foul play, either deliberate or negligent, by the Prosecution in order to justify an inquiry by the Chamber into the said process”.<sup>8</sup> The Chamber found that the Motion failed to provide evidence of any “breach by the Prosecution of its disclosure obligations or of any deliberate foul play in the presentation of its case which might at this stage suggest that the administration of justice has been brought into disrepute”<sup>9</sup> and that the Motion was merely speculative.
6. The Trial Chamber is aware of the procedural history that provides the backdrop to this Application for Leave to Appeal. In a series of motions, the Defence has in a variety of ways complained of what it perceives to be an improper practice on the part of the Prosecution in connection with the conduct of ongoing investigations, proofing of witnesses and fulfilment of disclosure obligations.
7. The Defence has acknowledged that it is acceptable for the Prosecution to investigate throughout the trial and to proof witnesses,<sup>10</sup> and the proofing of witnesses has been found

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<sup>6</sup> *Prosecutor v. Brima et al.*, SCSL-2004-16-T-390, “Prosecution Application for Leave to Appeal Decision on Oral Application for Witness TF1-150 to Testify Without Being Compelled to Answer Questions on Grounds of Confidentiality”, 20 September 2005.

<sup>7</sup> Decision, para. 16.

<sup>8</sup> Decision, para. 17.

<sup>9</sup> Decision, para. 18.

<sup>10</sup> Motion, para. 3.

by this Trial Chamber to be a “legitimate practice that serves the interests of justice”.<sup>11</sup> The Prosecution’s position on the substantive question of proofing “is that it is entitled, in proofing witnesses, to cover not only issues that are dealt with in the witness’s previous statements, but also other issues that may be within the witness’s knowledge and which are pertinent to the case.”<sup>12</sup>

8. The Defence does not seem to challenge the principles articulated in several earlier decisions of the Trial Chamber for determining the admissibility of supplemental statements obtained during proofing.<sup>13</sup> Similarly, the Defence does not argue that there has been a breach of any specific Rule governing disclosure. While extensive reference is made to the principle of equality of arms in paragraph 12 of the Application for Leave to Appeal, there is no suggestion that the disclosure regime set out in the Rules and applied by the Trial Chamber offends any principle of fairness.
9. The issue as to fairness, rather, is stated to relate to the Trial Chamber’s alleged failure to examine adequately the submissions of the Defence. The suggestion that the “Trial Chamber does not consider that it is under an obligation to conduct a proper analysis of the submissions, arguments and evidence apparent from the exchange of pleadings”<sup>14</sup> is without merit. The Trial Chamber issued a reasoned decision, identifying the core Defence argument and rejecting it with a clear explanation. There was no error amounting to exceptional circumstances, and, indeed, “the probability of an erroneous ruling by The Chamber does not, of itself, constitute ‘exceptional circumstances’ for the

<sup>11</sup> Decision, para. 13.

<sup>12</sup> *Prosecutor v Sesay et al.*, SCSL-04-15-T-553, “Prosecution Response to First Accused’s Motion dated 3 May 2006”, 15 May 2006, (“**Response**”), para. 16.

<sup>13</sup> See, for instance, *Prosecutor v. Sesay et al.*, SCSL-04-15-T-211, “Ruling on Oral Application for the Exclusion of ‘Additional’ Statements for Witnesses TF1-060”, 23 July 2004, rejecting a Defence complaint that a supplemental statement taken from a witness during proofing “cannot, in law, be considered as an addition to or clarification of, the original statement previously disclosed by the Prosecution ... but ... it is in essence a new statement from the witness alleging entirely new facts”, at para. 3; SCSL-04-15-T-314, “Ruling on Oral Application for the Exclusion of Statements of Witnesses TF1-141 Dated Respectively 9<sup>th</sup> October 2004, 19<sup>th</sup> and 20<sup>th</sup> October 2004 and 10<sup>th</sup> January 2005”, 3 February 2005, rejecting a Defence complaint that supplemental statements taken from a witnesses during proofing “could not be characterised as congruent in material respects with the original statement”, at para. 9; SCSL-04-15-T-396, “Ruling on Application for the Exclusion of Certain Supplemental Statements of Witness TF1-361 and TF1-122”, 1 June 2005, rejecting a Defence complaint that supplemental statements taken from witnesses during proofing “contain[ed] wholly new allegations against Issa Sesay which did not form part of these witnesses’ respective original statements”, at para. 3; SCSL-04-15-T-496, “Decision on the Defence Motion for the Exclusion of Evidence Arising From the Supplemental Statements of Witnesses TF1-113, TF1-108, TF1-330, TF1-041 and TF1-288”, 27 February 2006, rejecting a Defence complaint that supplemental statements taken from witnesses during proofing “ought to be characterised as new evidence”, at para. 3.

<sup>14</sup> Application for Leave to Appeal, para. 16.

purpose of a Rule 73(B) application.”<sup>15</sup> Furthermore, this Trial Chamber recently rejected an argument that an alleged abuse of discretion offending the principle of equality of arms would be sufficient to constitute exceptional circumstances.<sup>16</sup>

10. The Prosecution has noted that the terminology of “moulding of the evidence” in the context of proofing has been devised by the Defence and that the precise allegation lacks clarity. It was argued in the Prosecution’s Response to the Motion that the authorities relied upon by the Defence were irrelevant, being concerned with vaguely worded indictments and the inappropriateness of the prosecution being left free to formulate its specific case against an accused at the end of the trial in accordance with the evidence as it unfolded. The position is different where, as in this case, there is a properly worded indictment.
11. The Prosecution has previously stated its view that the “accusation that it is moulding its case as the evidence unfolds is misconceived”.<sup>17</sup> It has not been alleged that the Prosecution is in breach of a specific Rule and the accusation has always appeared as speculative and provocative. Contrary to the argument of the Defence, the Trial Chamber has not stated that “the Prosecution are under no obligation to admit or refute allegations of wrongdoing”.<sup>18</sup> The Trial Chamber in fact stated that “it is absolutely clear that no evidence shall be admissible if obtained by methods which could subsequently cast a substantial doubt on the evaluation of its reliability or if its admission could seriously damage the integrity of the proceedings”.<sup>19</sup> There are no exceptional circumstances arising from the Trial Chamber’s finding that there is no evidence to impeach the Prosecution’s integrity. The need for such evidence is all the more necessary given that the Defence itself describes its accusation as one of “serious prosecutorial misconduct”.<sup>20</sup> As the ICTY Trial Chamber has stated, “There are clear standards of professional conduct which apply to Prosecuting counsel when proofing witnesses. What has been submitted

<sup>15</sup> *Prosecutor v Norman et al.*, SCSL-04-14-T-669, “Decision on Application by First Accused for Leave to Appeal against the Decision on their Motion for Extension of Time to Submit Documents pursuant to Rule 92bis”, 17 July 2006.

<sup>16</sup> *Prosecutor v. Norman et al.*, SCSL-04-14-T-611, “Decision On Urgent Fofana Request for Leave to Appeal the 7 December 2005 Decision of Trial Chamber I,” 8 June 2006, p. 3.

<sup>17</sup> *Prosecutor v Sesay et al.*, SCSL-04-15-T-523, “Confidential Prosecution Reply to Defence Responses to Request for Leave to Call Additional Witness and for Order for Protective Measures pursuant to Rules 69 and 73bis(E), 27 March 2006, para. 16.

<sup>18</sup> Application for Leave to Appeal, para. 16.

<sup>19</sup> Decision, para. 17.

<sup>20</sup> Application for Leave to Appeal, para. 6.

does not persuade the Chamber that there are reasons to consider that these are not being observed, or that there is such a risk that they may not be, as to warrant some intervention by the Chamber”.<sup>21</sup>

12. It is inappropriate to make unsubstantiated allegations of professional misconduct against opposing counsel.<sup>22</sup> The Prosecution is under no obligation to answer to such unsubstantiated allegations and any failure to do so cannot amount to exceptional circumstances. The Response to the Motion speculated as to why the term “moulding of the evidence” had been devised by the Defence, and whether the Defence was “trying to imply that the Prosecution is seeking to ‘coach’ witnesses, or otherwise to influence their testimony”.<sup>23</sup> The Response continued on: “The Prosecution would call upon the Defence to either confirm that it is making no such suggestion, or else to make such an allegation expressly with supporting evidence.”<sup>24</sup> The Prosecution denies any allegation of improper conduct. There has been no supporting evidence put before the Trial Chamber, yet regrettably, unsubstantiated allegations of professional misconduct have been repeated. The burden of substantiating its claim rests exclusively with the Defence and the Defence should not be permitted to shift this burden. The mere repetition of unsubstantiated allegations does nothing to strengthen them. Neither does it make any more obvious the inference that the Defence asks the Trial Chamber to make, namely that the Prosecution is “seeking to conceal its improper behaviour and to then claim that there is an absence of prima facie evidence of ‘deliberate foul play’”.<sup>25</sup> The Prosecution takes great issue with the false and unfounded allegation that it is seeking to conceal improper behaviour.

<sup>21</sup> *Prosecutor v Limaj*, IT-03-66-T, “Decision on Defence Motion of Prosecution Practice of Proofing Witnesses”, Trial Chamber, 10 December 2004, p. 3.

<sup>22</sup> This is clear from the spirit of the “Code of Professional Conduct for Counsel with the Right of Audience before the Special Court for Sierra Leone”, 14 May 2005, as amended 13 May 2006. See also, for example, the *Professional Conduct Handbook* of the Law Society of British Columbia. Under Chapter 8, “Prohibited conduct”:

1. A lawyer shall not:

(e) knowingly assert something for which there is no reasonable basis in evidence, or the admissibility of which must first be established.

<sup>23</sup> Response, para. 15.

<sup>24</sup> *Ibid.*

<sup>25</sup> Application for Leave to Appeal, para. 18.

**Irreparable Prejudice**

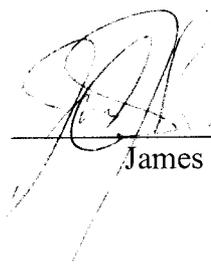
13. Since there are no exceptional circumstances to warrant the granting of the Application for Leave to Appeal, there is no need to consider the question of irreparable prejudice. However, the Prosecution submits that the Defence has failed to point to any concrete incidence of prejudice that must be cured by the Appeals Chamber. The unsubstantiated allegation that the alleged misconduct of the Prosecution may result in ongoing unfairness is insufficient to satisfy the second limb of the test under rule 73(B).

**IV. CONCLUSION**

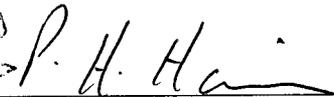
14. There are no exceptional circumstances and irreparable harm which would permit granting leave to appeal the Decision of the Trial Chamber. The application for leave to appeal should be dismissed.

Done in Freetown, 21 August 2006

For the Prosecution,



James C. Johnson



Peter Harrison

**Index of Authorities**

**A. MOTIONS AND DECISIONS**

1. *Prosecutor v. Sesay, Kallon, Gbao*, SCSL-04-15-T-541, “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”, 3 May 2006.
2. *Prosecutor v. Sesay et al.*, SCSL-04-15-T-625, “Application for Leave to Appeal the Decision (1<sup>st</sup> August 2006) on Defence Motion to Request the Trial Chamber to Rule that the Prosecution Moulding of Evidence is Impermissible”, 3 August 2006.
3. *Prosecutor v. Sesay et al.*, SCSL-04-15-T-616, “Decision On Defence Motion To Request The Trial Chamber To Rule that the Prosecution Moulding of Evidence is Impermissible”, 1 August 2006.
4. *Prosecutor v. Sesay, Kallon, Gbao*, SCSL-04-15-T-211, “Ruling on Oral Application for the Exclusion of ‘Additional’ Statements for Witnesses TF1-060”, 23 July 2004.
5. *Prosecutor v. Sesay, Kallon, Gbao*, SCSL-04-15-T-314, “Ruling on Oral Application for the Exclusion of Statements of Witnesses TF1-141 Dated Respectively 9<sup>th</sup> October 2004, 19<sup>th</sup> and 20<sup>th</sup> October 2004 and 10<sup>th</sup> January 2005”, 3 February 2005.
6. *Prosecutor v. Sesay, Kallon, Gbao*, SCSL-04-15-T-396, “Ruling on Application for the Exclusion of Certain Supplemental Statements of Witness TF1-361 and TF1-122”, 1 June 2005.
7. *Prosecutor v. Sesay, Kallon, Gbao*, SCSL-04-15-T-496, “Decision on the Defence Motion for the Exclusion of Evidence Arising From the Supplemental Statements of Witnesses TF1-113, TF1-108, TF1-330, TF1-041 and TF1-288”, 27 February 2006.
8. *Prosecutor v. Limaj*, IT-03-66-T, “Decision on Defence Motion of Prosecution Practice of Proofing Witnesses”, Trial Chamber, 10 December 2004, (attached to SCSL-04-15-T-553).
9. *Prosecutor v. Brima, Kamara, Kanu*, SCSL-04-16-T-390, “Prosecution Application for Leave to Appeal Decision on Oral Application for Witness TF1-150 to Testify Without Being Compelled to Answer Questions on Grounds of Confidentiality”, 20 September 2005.
10. *Prosecutor v. Norman, Fofana, Kondewa*, SCSL-04-14-T-611, “Decision On Urgent Fofana Request For Leave To Appeal The 7 December 2005 Decision Of Trial Chamber I,” 8 June 2006

11. See e.g. *Prosecutor v Norman et al.*, SCSL-04-14-T-669, “Decision on Application by First Accused for Leave to Appeal against the Decision on their Motion for Extension of Time to Submit Documents pursuant to Rule 92bis”, 17 July 2006.
12. *Prosecutor v. Norman et al.*, SCSL-04-14-T-319, “Decision on Prosecution Appeal Against the Trial Chamber Decision of August 2004 Refusing Leave to File An Interlocutory Appeal”, 17 January 2005.
13. *Prosecutor v. Sesay et al.*, SCSL-2004-15-T-357, “Decision on Defence Applications for Leave to Appeal Ruling of the 3<sup>rd</sup> February 2005 on the Exclusion of Statements of Witness TF1-141”, 28 April 2005.
14. *Prosecutor v Sesay et al.*, SCSL-04-15-T-553, “Prosecution Response to First Accused’s Motion dated 3 May 2006”, 15 May 2006.
15. *Prosecutor v Norman et al.*, SCSL-04-14-T-669, “Decision on Application by First Accused for Leave to Appeal against the Decision on their Motion for Extension of Time to Submit Documents pursuant to Rule 92bis”, 17 July 2006.
16. *Prosecutor v Sesay et al.*, SCSL-04-15-T-523, “Confidential Prosecution Reply to Defence Responses to Request for Leave to Call Additional Witness and for Order for Protective Measures pursuant to Rules 69 and 73bis(E), 27 March 2006.

## B. OTHER DOCUMENTS

17. Code of Professional Conduct for Counsel with the Right of Audience before the Special Court for Sierra Leone”, 14 May 2005, as amended 13 May 2006.
18. *Professional Conduct Handbook* of the Law Society of British Columbia, March 2006, [http://www.lawsociety.bc.ca/publications\\_forms/handbook/handbook\\_toc.html](http://www.lawsociety.bc.ca/publications_forms/handbook/handbook_toc.html)