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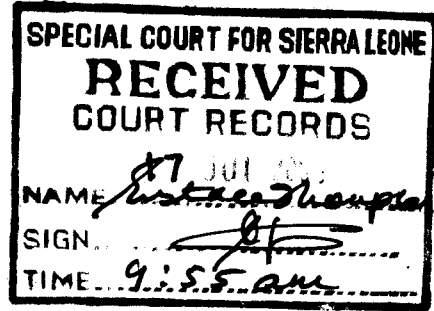
SCSL-2003-12-Pt-024

(784 - 788)

SPECIAL COURT FOR SIERRA LEONE

FREETOWN - SIERRA LEONE

Before: Designated Judge
Registrar: Robin Vincent
Date filed: 17 July 2003



THE PROSECUTOR

Against

ALLIEU KONDEWA

CASE NO. SCSL - 2003 - 12 - PD

**RESPONSE TO PROSECUTION MOTION FOR IMMEDIATE
PROTECTIVE MEASURES FOR WITNESSES AND VICTIMS AND FOR
NON-PUBLIC DISCLOSURE AND URGENT REQUEST FOR INTERIM
MEASURES UNTIL APPROPRIATE PROTECTIVE MEASURES ARE IN
PLACE**

Office of the Prosecutor
Luc Cote, Chief of Prosecutions
James C. Johnson, Senior Trial Counsel
Sharan Parmar, Assistant Trial Counsel

Defence Counsel
James MacGuill, Lead Counsel
James Evans, Co-Counsel

1. In a Motion filed on 3 July 2003, and received as a hard copy by defence counsel in Dublin by e-mail late on 11 July 2003, the Prosecution requests an order allowing the Prosecution to make its initial Rule 66(A)(i) disclosure to the Registry and to order the Registry to keep the disclosed material under seal until the Designated Judge or the Trial Chamber has issued orders for the appropriate protective measures for witnesses, victims and non-public documents.
2. An Application for an extension of time in which to respond to the Prosecution Motion was made on 10 July 2003 by the Defence Office. On the same day, the Court granted an extension of time for 7 days to allow the Defence time in which to file a response to the Prosecution Motion. A copy of the Court's Order was received by Defence Counsel in Dublin by e-mail from the Defence Office on 14 July 2003.
3. This Response to the Prosecution Motion is filed on the understanding that Defence Counsel has not yet had the benefit of taking instructions from the Accused. Therefore, this Response is filed without prejudice to the Accused's right to raise further grounds of objection to the Prosecution's Motion either in advance of or at the hearing of the Motion.
4. Firstly, Rule 66(A)(i) of the Rules of Procedure and Evidence require the disclosure *to the Defence*. The rules correctly do not provide for disclosure to the Registry. It is respectfully submitted that lodging evidence with the Registry cannot in any sense be construed as disclosure, let alone disclosure to the Defence. Disclosure is also a requirement of the rules of natural justice and procedural fairness. The purpose of disclosure is in order to allow the defence to prepare for the trial. 'The accused's right to fair disclosure is an inseparable right to a fair trial'. This is an essential ingredient to the right to a fair trial. ('The accused's right to fair disclosure is an inseparable right to a fair trial.': *R v Brown (Winston)* [1995] 1 Cr App R 1, at 67). Rule 66(A)(i) is designed to give effect to that right. It is therefore submitted that the prosecutions

obligation of disclosure to the defence cannot be complied with in the manner suggested by the prosecution.

5. Quite apart from the proper interpretation of Rule 66(A)(i), it is respectfully submitted that a ruling to the effect that the prosecution has complied with its obligation of disclosure in terms of Rule 66(A)(i) would have the effect of prejudicing the defence case in a material fashion. In particular, it would mean that time would begin to run for the purpose of the filing of preliminary motions by the defence in terms of Rule 72 of the Rules of Procedure and Evidence, when such motions cannot be properly considered or filed by the Defence until it has seen the prosecution evidence. This is implicit in the fact that Rule 72 links the time limit for preliminary motions to the prosecution's disclosure obligation.
6. Rule 66(A)(i) is in any event expressly subject to the Rule 69 and 75 on measures for the protection of victims and witnesses, which are themselves evolved from Articles 17(4) and 16(2) of the Statute of the Special Court for Sierra Leone, and the possibility of the Judge providing for protective measures for witnesses under Rules 54 and 69. The Prosecution should therefore rather have requested the judge to order the temporary non-disclosure of names and identity of witnesses to the Defence, while requiring the Prosecution to otherwise comply with its disclosure obligations in terms of Rule 66(A)(i), until such times as the issue of protective measures has been fully argued and ruled upon.
7. Additionally, Rule 69 provides that the Court shall only "*in exceptional circumstances*" [emphasis added] entertain a Motion ordering non-disclosure as sought by the Prosecution. It is respectfully submitted that the material produced by the Prosecution in its Motion does not evidence "exceptional circumstances" and further no "exceptional circumstances" vis-à-vis the Accused have been identified by the Prosecution. Relevantly, Article 17 of the Statute of the Special Court affords the accused the right to a fair trial including, adequate time and facilities for the preparation of his defence. The non-disclosure of material in the manner sought by the Prosecution Motion

effectively deprives the Accused of his expressly guaranteed rights and his rights under international principles of natural justice and procedural fairness.

8. Further and/or in the alternative, if the prosecution is not ready to disclose evidence in a manner which does not reveal the identity of witnesses, and Defence counsel appreciates that this might involve a fair amount of work in order for it to be done in a proper manner which does not unnecessarily deprive the Defence of parts of witness statements or other documents, the proper course in our submission would be to request an extension of time for the disclosure of evidence in terms of Rule 66(A)(i). That the judge has the power to grant such an extension of time is implicit in both the cross-reference to Rule 69 and expressly permitted under Rule 54.
9. The Defence for the Accused would not object to an extension of time with regard to the Prosecution's disclosure obligations if kept within the strict bounds of the time necessary to have the issue of protective measures resolved by the Court, and without prejudice to the Defence's right to be accorded proper time and facilities to examine the prosecution evidence in order to prepare its Defence, as provided for in Article 17(4)(B) of the Statute of the Special Court.
10. The Prosecution further requests an order:
 - (a) prohibiting the Defence from sharing, discussing or revealing, directly or indirectly, any disclosed non-public materials of any sort, or any information contained in such documents, to any person or entity other than the Defence.
 - (b) Ensuring that the Defence does not interview Prosecution witnesses without the consent of the Chamber and reasonable prior notice to the Prosecution.

Defence Counsel voluntarily consents to comply with the requests of the Prosecution, save that he understands the word 'Defence' to include the accused with whom he will discuss any matter necessary for the preparation of the Defence.

11. Where matters are appropriately dealt with in the national and international ethical obligations of counsel, it is submitted that it is not conducive to the cooperative conduct of proceedings, nor is it mindful of the limited funds available to the Court to encourage counsel for the prosecution and defence to seek orders against each other to ensure compliance with their existing ethical obligations, in the absence of any indication of a propensity to breach such obligations. Counsel can in any event be called to answer for such breaches by virtue of their duty to respect such obligations in terms of Rule 44(B) of the Rules of Procedure and Evidence.

12. Finally, there is no evidence in the Prosecution Motion (including grounding material) which identifies any specific threat made by the Accused himself, or others at his direction, against any witness or victim. Nor is there any evidence before the Court, as set out in the Prosecution Motion, allowing the conclusion to be drawn that the Accused himself has directed others to make threats against any witness or victim. In the absence of any specific evidence that the Accused himself has engaged in such activities or directed others to do so, it is respectfully submitted that the proposed non-disclosure sought in the Prosecution Motion severely prejudices the Accused's ability to adequately prepare his defence and hence, his right to a fair trial. It is respectfully submitted that the Court should have specific evidence before it, rather than supposition, in entertaining any such Motion by the Prosecution.

Dublin, 16 July 2003
For Defence Counsel

FOR *I. S. Schaefer*
~~*I. S. Schaefer*~~

James MacGuill
Lead Counsel

James Evans
Co-Counsel