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SCSL-11-02-T
(321-329)

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SPECIAL COURT FOR SIERRA LEONE

TRIAL CHAMBER II

Before: Justice Teresa Doherty, Single Judge

Registrar: Binta Mansaray

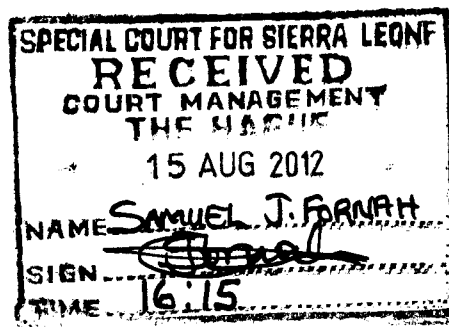
Case No.: SCSL-2011-02-T

Date: 15 August 2012

INDEPENDENT COUNSEL

v.

Hassan Papa BANGURA
Samuel KARGBO
Santigie Borbor KANU
Brima Bazzy KAMARA



PUBLIC

DECISION ON URGENT DEFENCE APPLICATION FOR PERMISSION TO INSTRUCT HANDWRITING
EXPERT

Independent Counsel:

Robert L. Herbst

Counsel for Bangura:

Melron Nicol Wilson

Counsel for Kargbo:

Charles Taku

Counsel for Kanu:

Kevin Metzger

Counsel for Kamara

Abdul Serry Kamal

Office of the Principal Defence

Claire Carlton-Hanciles

I, Justice Teresa Doherty, Single Judge of the Special Court for Sierra Leone (“Special Court”);

SEISED of the “Public with Confidential Annexes Urgent Defence Application for Permission to Instruct Handwriting Expert” filed on 6 August 2012 (“Motion”);¹

NOTING the “Prosecutor’s Brief in Opposition to Kanu’s Urgent Defence Application for Permission to Instruct Handwriting Expert,” filed on 8 August 2012 (“Response”);²

NOTING also the “Urgent Defence Response to Prosecutor’s Brief in Opposition to Kanu’s Urgent Defence Application for Permission to Instruct Handwriting Expert,” filed on 10 August 2012 (“Reply”);³

COGNISANT of the provisions of Article 17 of the Statute of the Special Court for Sierra Leone (“the Statute”) and Rules 73, 89 and 94bis of the Rules of Procedure and Evidence of the Special Court for Sierra Leone (“the Rules”);

HEREBY decides as follows solely on the written submissions of the parties pursuant to Rule 73(A):

SUBMISSIONS OF THE PARTIES

Kanu Motion

1. Counsel for Kanu, “following consideration of instructions from Mr. Kanu and the potential effect of the opinion evidence on handwriting adduced by the Independent Prosecutor,”⁴ requests permission to instruct and call a forensic document and handwriting expert in order to rebut the evidence of Mr. Sengabo, a witness called by the Independent Counsel. Counsel states he has contacted a “reputable forensic and document handwriting specialist,”⁵ and sets out her terms of engagement, the documentation she would require and states that she would expect to complete her work and produce her report within 14 to 18 days of receipt of all original documents requested.

Independent Counsel Response

2. Independent Counsel, in his Response, states that the application is unsupported and untimely, as it “comes one entire month after the trial was adjourned and two weeks before the anticipated

¹ SCSL-11-02-T-42.

² SCSL-11-02-T-43.

³ SCSL-11-02-T-44.

⁴ Motion, para. 4.

⁵ Motion, para. 5.



date for resuming the trial.”⁶ He notes that the application does not state when the documentation can be compiled and sent to the expert but, in any event, the report would not be received before the trial resumption date. He further notes that the application for permission does not comply with Rule 94bis, which mandates disclosure of the expert’s statement to an opposing party as early as possible and its filing with the Trial Chamber not less than 21 days prior to the date in which the expert is expected to testify. He further submits that the application is not supported by any statement explaining the factual basis for the requested handwriting analysis and is therefore “not substantively sufficiently supported.” Independent Counsel further objects to the confidential filing of the Annexes in support of the application and applies to have them made public.⁷

Kanu Reply

3. In Reply, Defence Counsel submits that the Prosecution has no *lotus standi* in this application. He notes that the statement of the witness Sengabo was not served on the Defence until “a matter of minutes” before Sengabo was called, and then only after being required to do so by the Court, and states “therefore it ill behoves the Prosecutor to object to Kanu’s request to rebut the opinion evidence of Sengabo.”⁸ He further submits that as “it may not have escaped the attention of all concerned that Mr. Sengabo was cross-examined about this matter,” as to make it “obvious that his opinion was not accepted by the Defence.”⁹
4. He states that Kanu has fair trial rights in Article 17 of the Statute, and he is entitled to call an expert witness to rebut the evidence of the Prosecution. In relation to the Independent Counsel’s objection to non-disclosure of matters filed confidentially he states that the annexes were filed to

⁶ Response, para. 2.

⁷ Response, para. 2-3.

⁸ Reply, para. 5.

⁹ Reply, para. 6.

keep the details of the handwriting expert and her *modus operandi* from the general public and that it is usual for such details to be kept confidential.¹⁰

APPLICABLE LAW

5. Rule 94bis provides:

- (A) Notwithstanding the provisions of Rule 66(A), Rule 73bis (B)(iv)(b) and Rule 73ter (B)(iii)(b) of the present Rules, the full statement of any expert witness called by a party shall be disclosed to the opposing party as early as possible and shall be filed with the Trial Chamber not less than twenty-one days prior to the date on which the expert is expected to testify.
- (B) Within fourteen days of filing of the statement of the expert witness, the opposing party shall file a notice to the Trial Chamber indicating whether:
 - (i) It accepts the expert witness statement; or
 - (ii) It wishes to cross-examine the expert witness.
- (C) If the opposing party accepts the statement of the expert witness, the statement may be admitted into evidence by the Trial Chamber without calling the witness to testify in person.

BACKGROUND

6. In the “Defence Pre-Trial Brief on Behalf of Santigie Borbor Kanu Filed Pursuant to Scheduling Order of 1 May 2012,” filed on the 29 May 2012, Counsel for Kanu states that on 15 May 2012 he obtained a statement from Mr. Sengabo, the Deputy Director of Mpanga Prison, and that Mr. Sengabo would deal with procedures relating to telephone facilities at Mpanga Prison and would produce, *inter alia*, “the relevant section of the manual log which records the use of telephone facilities.”¹¹
7. Later, in his Defence Submissions on Behalf of Santigie Borbor Kanu on the Proposals Contained Within the Scheduling Order of 1 May 2012 for the Conduct of Trial,” Counsel indicated that he would call at least one witness in an administrative capacity from the Rwandan

¹⁰ Reply, para. 7.

¹¹ SCSL-11-02-T-021, para. 27.

Correctional Services.¹² On the 23 June 2012 Counsel informed the Court that Independent Counsel had spoken to Sengabo “the witness named in the Defence Pre-Trial Brief [and] had asked him to examine records that were in his possession.”¹³ Mr. Metzger referred to Mr. Sengabo as a “declared Defence witness.”¹⁴ He indicated that, in the light of the contact between Independent Counsel and Sengabo, he did not intend to call Mr. Sengabo. Mr. Sengabo was called by Independent Counsel and gave evidence of the records kept at Mpanga Prison, including records of phone calls made by the Accused Kamara and Kanu. The aforesaid records were hand-written.

8. On the 4 July 2012, Mr. Sengabo gave evidence of the procedures for compiling the log of names, telephone numbers and telephone call recipients maintained at Mpanga Prison and produced a hand-written record which was admitted as Exhibit P15. On cross-examination by Counsel for Kanu, Mr. Sengabo identified particular entries as Kanu’s handwriting before the entry headed “called numbers.”¹⁵ Sengabo was asked if he was a graphologist or a handwriting analyst and replied “no” to both questions but stated that he was familiar with the handwriting of Kanu. On two occasions in the course of cross-examination Counsel asked Mr. Sengabo whether certain signatures were those of Kanu, and Mr. Sengabo answered in the affirmative.¹⁶ At no point in the course of cross-examination was it put to Sengabo that any of the signatures ascribed to Kanu by Sengabo in Exhibit P15 were not those of the Accused Kanu.

DELIBERATIONS

¹² SCSL-11-02-T-019, para. 3.

¹³ Transcript 23 June 2012 pg. 332.

¹⁴ Transcript 23 June 2012 p. 334.

¹⁵ Transcript 4 July 2012 p. 1073-1074.

¹⁶ Transcript 4 July 2012 p. 1080-1081. e.g. Q: “the signature there, that is Mr. Kanu’s signature, isn’t it?” A: “Yes.”

9. Counsel for Kanu seeks to adduce expert evidence to rebut the “opinion evidence from Mr. Hillary Sengabo.”¹⁷ Independent Counsel opposes the application as it is unsupported and untimely and relies on the provisions of Rule 94bis which provides that a full statement of any expert witness called by a party shall be disclosed as early as possible and filed not less than 21 days prior to the day when the expert is expected to testify. Following such filing, an opposing party is entitled to give notice of an intention to cross-examine the expert. It is apparent that Rule 94bis intends to give the opposing party a right to consider and challenge the expert and/or his/her report. There is no doubt that an opposing party must have sufficient time to consider an expert’s statement and assess whether they accept the statement or not.
10. Given that Kanu has had a statement from Sengabo since 15 May 2012, it appears he has had over two months to assess the need for forensic examination of the written records. I agree that this is a considerable delay which could lead to a delay in the trial which will, in turn, affect the fair trial rights of all four Accused. However, failure to conform with procedures, including time limit procedures, should not be a sole reason to dismiss an application such as this. The right of an Accused to call evidence on his own behalf is enshrined in the Statute and in international conventions. Failure to file timely notice should not in this instance be a bar to the Accused’s right to adduce evidence on his own behalf.¹⁸
11. Notwithstanding this observation, I disagree with the application of the Defence that “the Prosecution has no *locus standi* in the Defence application.” As already noted, the Independent Counsel has the duty under Rule 94bis (B) to file a notice to the Trial Chamber indicating whether he accepts the expert witness statement or intends to cross-examine. Counsel for the Defence’s statement that, because Independent Counsel only served the witness statement for

¹⁷ Motion, para. 3.

¹⁸ *The Prosecutor v. Zigiranyirazo*, ICTR-2001-73-T, Decision on the Prosecution Motion for Dismissal of the Defence Notice due to Failure to Meet the Lime Limit: Rule 94bis (B) of the Rules of Procedure and Evidence, 24 February 2006.

Sengabo minutes before he was called to give evidence, “therefore it ill-behoves (him) to object,” appears to be tit for tat petulance which is irrelevant and verges on the frivolous.

12. I note that neither counsel refers me to any jurisprudence relating to matters to be considered and assessed by a Trial Chamber in an application such as this.

13. Whilst bearing in mind the right of an Accused under Article 17(4)(e) to obtain the attendance of witnesses on his behalf, I also note an obligation, stated in Rule 89, to apply rules of evidence which best favour a fair determination of a matter and to admit any relevant evidence. An expert’s testimony is intended to enlighten the judges on specific issues of a technical nature requiring special knowledge in a specific field. The Court has the discretion to hear an expert on a particular issue if it deems it necessary.¹⁹

14. The procedures in Rule 94bis do not affect a Trial Chamber’s power to allow evidence or to exclude evidence under Rule 89. The power and duty of the Trial Chamber is to admit evidence which is relevant.²⁰ Rule 89 is the *lex generalis* on admission of evidence and Rule 94bis is the *lex specialis* with regard to the admission of expert evidence.²¹

15. In exercising the discretion to admit evidence which is relevant in a manner which is “fair under the circumstances and guided by the rules and principles of law”²² the Trial Chamber must determine whether the evidence of an expert in handwriting would enlighten the Chamber on specific issues of a technical nature and whether the specialised knowledge of the expert might

¹⁹ *The Prosecutor v. Edouard Karemera et al.*, ICTR-1998-44-T, Decision on Prosecution Prospective Experts [sic] Witnesses Alison Des Forges, Andre Guichaoua and Binaifer Nowrojee, 25 October 2007, paras. 14-15, citing *Laurent Semanza v. The Prosecutor*, ICTR-97-20-A, Judgement, 20 May 2005, paras. 303-304, *The Prosecutor v. Jean-Paul Akayesu*, ICTR-96-4-T, Decision on Defence Motion for Appearance of an Accused as an Expert Witness, 9 March 2008.

²⁰ *Prosecutor v. Dario Kordic and Mario Cerkez*, ICTY-95-14/2, Oral Decision on Expert Witness/Ordinary Witness, Transcript 28 January 2000, pp. 13306-13307.

²¹ *The Prosecutor v. Casimir Bizimungu et al.*, ICTR-1999-50-T, Decision on Prosecutor’s Motion Objecting to the Admission of Professor Geoffrey Corn’s Report, 16 May 2008, paras 4-5.

²² *The Prosecutor v. Milomir Stakic*, ICTY-1997-24-A, Judgement, 22 March 2006, para. 160.

assist the Chamber in understanding the evidence before it.²³ In cross-examination Mr. Sengabo made it clear that he is not a handwriting expert. When asked whether the signature he ascribed to Kanu in the log entry of the 30 November 2010 differed from the signature on the 26 November 2010,²⁴ Sengabo conceded that one signature is bigger than the other but stated they had some similarities and subsequently stated “but there is just slight difference.”²⁵ It was not put to Sengabo that the signature of the 30 November 2010 was more than “different,” e.g. that it was not Kanu’s signature, or that it was a forgery, or that it was signed by someone else.

16. I ask what evidence is there to rebut? Sengabo does not purport to be an expert and he agreed with counsel that there was a difference in the two signatures and identified the difference. In the circumstances of this conceded evidence I do not see how the specialised knowledge by a handwriting expert can assist me in understanding the evidence nor is the evidence of such a technical nature that I cannot understand the premise in Counsel’s question or the answer given by the witness in agreeing with that premise. In the circumstances, I do not consider that the expert will assist in the fair determination of the matter before me and accordingly I dismiss the motion.

17. I note that the proposed expert required, *inter alia*, the original disputed document. That document is an exhibit in the trial and cannot be released from the custody of the Court without leave. No such leave was sought.

18. In relation to the Independent Counsel’s application that the confidential filings of the Annexes to the motion should be filed publicly, “as there is no justifiable reason for them being confidential”²⁶ I agree that these annexes are necessary for Counsel to consider and assess whether the person was indeed an expert in the field of forensic evidence and those documents

²³ *The Prosecutor v. Casimir Bizimungu et al.*, ICTR-1999-50-T, Decision on Prosecutor’s Motion Objecting to the Admission of Professor Geoffrey Corn’s Report, 16 May 2008, para. 6.

²⁴ Transcript 4 July 2012 p. 1080.

²⁵ Transcript 4 July 2012 p. 1081.

²⁶ Response, para. 4.

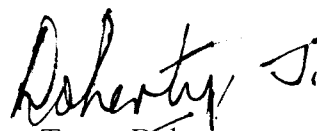
should have been disclosed. Accordingly, I order that the annexes to the Urgent Defence Application for Permission to Instruct Handwriting Expert be filed publicly and served on Independent Counsel.

FOR THE FOREGOING REASONS THE TRIAL CHAMBER

DENIES the motion and

ORDERS that the confidential annexes be filed publicly.

Done at The Hague this 15th day of August 2012.



Justice Teresa Boherty
Single Judge

