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SPECIAL COURT FOR SIERRA LEONE
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THE TRIAL CHAMBER

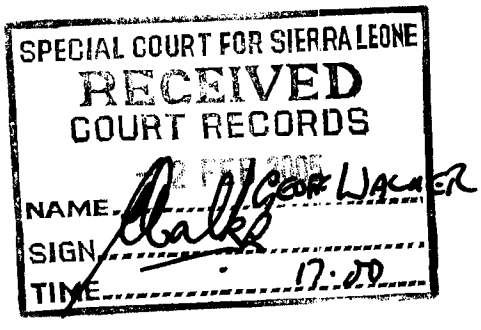
Before:	Hon. Judge Benjamin Mutanga Itoe, Presiding Judge Hon. Judge Bankole Thompson Hon. Judge Pierre Boutet
Registrar:	Robin Vincent
Date:	7th of December, 2004

PROSECUTOR **Against** SAM HINGA NORMAN
MOININA FOFANA
ALLIEU KONDEWA
(Case No.SCSL-04-14-PT)

RULING ON DEFENCE ORAL APPLICATION TO CALL OTP INVESTIGATORS WHO TOOK DOWN IN WRITING STATEMENTS OF PROSECUTION WITNESS TF2-021

Office of the Prosecutor:

Luc Côté
James Johnson



Court Appointed Counsel for Sam Hinga Norman
Dr. Bu-Buakei Jabbi
John Wesley Hall, Jr.
Tim Owen, Q.C.

Court Appointed Counsel for Moinina Fofana:
Michiel Pestman
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Victor Koppe

Court Appointed Counsel for Allieu Kondewa:
Charles Margai
Yadda Williams
Ansu Lansana

THE TRIAL CHAMBER ("Trial Chamber") of the Special Court for Sierra Leone ("Special Court") composed of Hon. Judge Benjamin Mutanga Itoe, Presiding Judge, Hon. Judge Bankole Thompson, and Hon. Judge Pierre Boutet;

SEIZED of an Oral Application by Defence Counsel for the First and Second Accused, Sam Hinga Norman and Moinina Fofana respectively ("the Defence") and their supporting grounds and submissions during the trial proceedings on 5th November, 2004 for an order that the Prosecution call as witnesses, Virginia Chitanda, Office of the Prosecutor ("OTP") investigator and Tamba Gbeki, OTP investigator, who respectively took down in writing the statements dated 4th February, 2003 and 13th January, 2003 of Prosecution Witness TF2-021 to explain alleged inconsistencies between the aforesaid statements and the Witness' oral testimony, and the Prosecution's Response to the said Application, and the Defence's Reply thereto;

CONSIDERING the recent Ruling[1] of this Chamber in this case that prior inconsistent statements are generally admissible in international criminal trials as a means to impeach the credibility of a witness;

AFTER DELIBERATION

HEREBY ISSUES THE FOLLOWING RULING:

I. Introduction

1. This is the unanimous Ruling of the Trial Chamber of the Special Court on the oral application by Counsel for First and Second Accused (with whom Counsel for the Third Accused associated) on the 5th November, 2004 for an order that the Prosecution in this case call as witnesses, Virginia Chitanda, Office of the Prosecutor ("OTP") investigator and Tamba Gbeki, OTP investigator who, respectively, took down in writing the statements dated 4th February 2003 and 13th January 2003 of Prosecution Witness TF2-021 on the grounds that there are alleged inconsistencies between the witness' statements and his oral testimony before the Court.

2. The application was argued by Miss Quincy Whitaker, then Counsel for the First Accused. In support of the said application, Counsel contended that during cross-examination of Prosecution Witness TF2-021 the Defence demonstrated several major inconsistencies between certain specific portions of the witness' statements made to the OTP investigators through interpreters or translators.

3. The Defence stated that they have not been provided with the original statements but only with the translated versions, and submitted that the Chamber should order the Prosecution to call the investigators to testify so as to enable the Chamber adequately and effectively to (i) test the credibility of the said witness, (ii) assess the veracity of the statements given by the said witness to the OTP investigators, and (iii) determine what weight to attach to the witness's testimony.

4. Miss Whitaker further submitted that the Defence is placed at a great disadvantage because the OTP investigators did not record the original statements but only the interpretation, thus the statements were not recorded in the proper way; and that in fairness to the witness, calling the investigators to testify would assist the Chamber in determining whether the inconsistencies resulted from erroneous translation or not.

5. Counsel also submitted that it was the responsibility of the Prosecution and not that of the Defence to call the investigators to testify to clarify these matters since the Prosecution served the statements as accurate records of the witness' testimony, and that if the Court accepted the Prosecution's assertion that the statements were entirely accurate, then there would have been no need to call the witness to testify.

6. Concluding, Miss Whitaker submitted that the legal rationale behind the application was to assist the Court in assessing the demeanour of the witness and whether or not he made previous inconsistent statements.

7. In response, the Prosecution strenuously opposed the application and submitted that the exercise of calling the investigators would be time-wasting and futile. It argued that it was the witness's *viva voce* testimony that was in force and not his prior statements. In addition, the Prosecution contended that the statement is just a guide and that the testimony is the evidence.

8. It is also the Prosecution's contention that the core feature of the Witness's testimony is that he was a child soldier attached to the CDF and was engaged in combat, there being no inconsistency as regards this core evidence, and that the only inconsistency was in respect of the evidence relating to the RUF.

9. It is further submitted by the Prosecution that there is no dispute that the statements were taken down in writing by investigators and that the accepted procedure for doing this was regularly

[1] Decision on Disclosure of Witness Statements and Cross-Examination (Case No. SCSL-04-14-PT) 16 July, 2004. para 18.

followed, and that it is a matter of common knowledge that difficulties do exist regarding interpretation of witnesses statements.

10. Another submission put forward by the Prosecution is that the Defence had the opportunity of cross-examining the witness and that this is how credibility should be assessed, citing page 166 of May and Wierda, *International Criminal Evidence*, ed 2000, and the Decision of this Chamber in this case dated 16th July 2004 on Cross-Examination and Prior Inconsistent Statements.

11. Finally, the Prosecution argues that the Defence request is not a proper application of the principle of orality emphasized by this Court as regards the treatment of prior inconsistent statements.

12. In their abbreviated reply, the Defence disagreed with the Prosecution (i) that the alleged inconsistencies relate only to "minor issues", and (ii) that the alleged inconsistencies were occasioned by "interpretation issues."

II. Merits of Application

13. The key issue for determination by the Chamber in this application is whether, in the light of the repudiation by Witness TF2-021 of significant and highly contentious portions of Exhibits 19A and 19B, statements taken down in writing by OTP investigators Virginia Chitanda and Tamba Gbeki on 4th February 2003 and 13th January 2003 respectively, the Chamber will, at the appropriate phase of this trial proceeding, be able, without more, to adequately, fairly, and effectively evaluate the probative value of the testimony of this witness. The Defence submits that the Court will not be able to do so without the testimonies of the investigators. The Prosecution also submits that it is a futile and time-wasting exercise and that there is no dispute that the investigators did take down Exhibits 19A and 19B in writing and that the accepted procedure for taking such statements was regularly followed.

14. We do emphasize that in the sphere of the criminal law the doctrine of *Omnia praesumuntur rite esse acta*, has a limited application. It generally applies to the diverse aspects of judicial administration covering the service of legal processes, production of official documents from lawful custody, and the exercise of supervisory roles in the context of judicial administration. It does not, we maintain, apply to matters of proof in the domain of criminal adjudication in respect of the very factual and legal issues, directly or indirectly, in controversy before the Court. In the context of the

instant application, the presumption of regularity cannot legitimately apply to the specific and contentious issues (factual and legal) forming the substratum of the Defence Application.

15. In effect, in our considered view, this Chamber finds no legal basis for presuming that an investigator who took down a witness's statement in writing did comply with every rule, requirement or practice governing the recording of witness statements. There is no judicial warrant to apply such a presumption in criminal trials.

16. Given, therefore, the state of the portions of the testimony of TF2-021 on those significant and highly contentious issues between the parties herein, coupled with the equally significant repudiations of what the witness allegedly told or did not tell the investigators, we find it extremely difficult, at this stage, to come to the conclusion that we do have before us all the necessary and relevant evidence upon which to evaluate adequately and effectively the probative value of the witness's testimony.

17. It is the Chamber's view that to adopt the approach canvassed by the Prosecution is tantamount to acknowledging a novel principle in international criminal law whereby the Courts are precluded from looking into the investigator's record of the statement in the absence of an irregularity *ex facie*, implying that to probe beyond the pale of the investigator's record of the witness' statement is not a proper matter for judicial inquiry. Such a position flies in the face of the doctrine that the persuasive burden of proof which it must discharge beyond reasonable doubt rests on the Prosecution. The Chamber is of the opinion that we can properly look behind the scenes and inquire whether a statement taken by investigators from witnesses was properly taken down in writing and is an accurate portrayal of the facts as stated.

18. A related issue that needs to be disposed of at this point is on whom the burden of producing the investigators as witnesses rest? Our considered reply to this question is that it is on the Prosecution. To suggest that it is on the Defence or the Bench is to shift some of the burden for establishing the guilt of the Accused persons on to the Defence or to the Bench.

19. It is noteworthy, as a matter of law, that the Prosecution is right in its citation of page 166 of May and Wierda *International Criminal Evidence* in support of the proposition that inconsistencies need not be fatal to the testimony of a witness, provided that they are not material. However, it is

also the law that one of the key factors in assessing credibility is *consideration of other witness accounts or other evidence submitted in the case and not only that of "strength under cross-examination".*[2]

20. Significantly, this Chamber recognises that one operative doctrine on this subject is the doctrine of collaterality. The essence of the principle is that questions in cross-examination designed ***solely*** at discrediting a witness or impeaching the witness' credibility are essentially collateral in nature if they do not touch on an issue which the Court is necessarily required to determine such as an element of the offence. The typical legal situation calling for the application of the so-called collateral-fact rule is where an effort is made to discredit a witness in a manner unrelated to the subject-matter of the offence. The law is that under cross-examination, in the context of the application of the collateral-fact rule, there is, generally, no opportunity to call evidence to refute answers which have been given by a witness, after asking further questions. Exceptionally, the Defence may be afforded the opportunity, where proper foundation has been laid, to call evidence where a prior inconsistent statement is alleged to contradict a witness's testimony.[3]

21. In this regard, whether an issue in a trial is collateral or central is not determined by reference to some judicial crystal ball. It depends upon the nature of the charges, the factual allegations in support, the definition of the issues in controversy, and the totality of the circumstances of the case. It is, therefore, the considered opinion of the Chamber that some clarifications from the OTP investigators will provide an evidentiary basis upon which TF2-021 can be judged on the grounds that TF2-021's credibility is central to the proof of the Prosecution's case in respect of the matters to which he has testified. Having regard to the nature of his testimony, some explanation as to why he has repudiated significant portions of his out-of-court statements may assist the Court in accurately evaluating his credibility. It is certainly within the realm of probability that the OTP investigator's evidence might remove any doubt that might be cast on the witness' credibility, and emanating from his unequivocal repudiation in court of certain significant portions of the said out-of-court statements to them.

22. In *R. v. Krause*, the Court laid down this guiding principle:

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[2] May and Wierda, *International Criminal Evidence*, New York: Transnational Publishers Inc, 2002 p167.

[3] See an instructive article on the subject of collaterality by Peter M. Brauti, *40 Criminal Law Quarterly*, (1997), pages 69 - 105, at pages 96 - 98. See also, *R.v.R. (D)* (1996) 2 S.C.R 291, *James Epley Jr, Appellant v. The State of Texas, Appellie* 704 S.W.2d 502 (1986), *People v. Frazier* 95 Mich App. 570 (1980).

> "In the cross-examination of witnesses essentially the same principles apply. Crown counsel in cross-examining an accused are not limited to subjects which are strictly relevant to the essential issues in case. Counsel are accorded a wide freedom in cross-examination which enable them to test and question the testimony of the witnesses and their **credibility**. Where something new emerges in cross-examination, which is new in the sense that the Crown had no chance to deal with it in its case-in-chief (i.e., there was no reason for the Crown to anticipate that the matter would arise), and where the matter is concerned with the merits of the case (i.e. it concerns an issue essential for the determination of the case) then the Crown may be allowed to call evidence in rebuttal. Where, however, the new matter is **collateral**, that is, not determinative of an issue arising in the pleadings or indictment or not relevant to matters which must be proved for the determination of the case, no rebuttal will be allowed."

Continuing, the Court observed that:

> "An early expression of this proposition is to be found in *Attorney-General v. Hitchcock*, [1847] 1 Ex. 91, 154 E.R. 38, and examples of the application of the principle may be found in *R. v. Cargill*, [1913] 2 K.B. 271 (Ct. Crim. App.); *R. v. Hrechuk* (1951), 58 Man. R. 489 (C.A); *R. v. Rafael*, [1972] 3 O.R. 238 (Ont. C.A.); and *Latour v. The Queen*, [1978)]1 S.C.R. 361. This is known as the rule against rebuttal on **collateral** issues."[4]

III. Conclusion

23. In the light of the foregoing considerations, The Chamber has no alternative option, given the state of the evidence of TF2-021 and the repudiations of significant portions of those statements, but to grant the said application. We must emphasize, however, that in granting the order sought, we do not suggest that every application of this nature will be granted as a matter of course. This Chamber will exercise its discretion on a case-by-case basis and will examine each application according to its merits having regard to the nature of the crimes, the nature of the pleadings, the definition of the issues, and the particular facts and circumstances of the case. It is important to mention that in this peculiar and almost extreme case we are confronted with the testimony and out-of-court statements of a prosecution witness, a child witness, who, without equivocation or hesitation, repudiated significant and highly contentious portions of his statements to the investigators, bearing in mind of course, that

[4] See *R. v. Krause* (1986) 2 S.C.R 466

the testimonies of this category of witnesses should, either as a matter of law or practice, be examined with some degree of judicial vigilance in view of their particular susceptibilities.

FOR ALL THE ABOVE STATED REASONS,

The Trial Chamber, accordingly, grants the Defence application and hereby orders the Prosecution to call as witnesses, in this case, Virginia Chitandra and Tamba Gbeki, Investigators of the Office of the Prosecutor to testify before this Court as to the taking down in writing of the statements of Prosecution Witness TF2-021 dated 4th February 2003 and 13th January 2003 marked Exhibits 19A and 19B respectively.

Done in Freetown, Sierra Leone, this 7th day of December 2004

Hon. Judge Pierre Boutet

Hon. Judge Benjamin Mutanga Itoe
Presiding Justice,
Trial Chamber

Hon. Judge Bankole Thompson

[Seal of the Special Court for Sierra Leone]