SCSL-2004-14-T-352

352

(12225 - 12232)

12225.

SPECIAL COURT FOR SIERRA LEONE
JOMO KENYATTA ROAD • FREETOWN • SIERRA LEONE
PHONE: +1 212 963 9915 Extension: 178 7000 or +39 0831 257000 or +232 22 295995
FAX: Extension: 178 7001 or +39 0831 257001 Extension: 174 6996 or +232 22 295996

THE TRIAL CHAMBER

Before:	Hon. Justice Benjamin Mutanga Itoe, Presiding Judge Hon. Justice Bankole Thompson Hon. Justice Pierre Boutet
Registrar:	Robin Vincent
Date:	28th of February, 2005

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

DECISION ON JOINT MOTION BY SAM HINGA NORMAN, MOININA FOFANA AND ALLIEU KONDEWA SEEKING PERMISSION FOR DEFENCE INVESTIGATORS TO SIT IN COURT DURING CLOSED SESSIONS

Office of the Prosecutor:

Luc Côté
James Johnson

Court Appointed Counsel for Sam Hinga Norman:

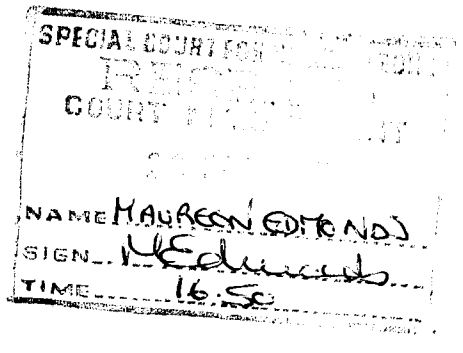
Dr. Bu-Buakei Jabbi
John Wesley Hall, Jr.
Tim Owen, Q.C.

Court Appointed Counsel for Moinina Fofana:

Michiel Pestman
Arrow Bockarie
Victor Koppe

Court Appointed Counsel for Allieu Kondewa:

Charles Margai
Yada Williams
Ansu Lansana



Downloaded from worldcourts.com. Use is subject to terms and conditions. See worldcourts.com/terms.htm

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

SEIZED OF the Oral Motion of Court Appointed Counsel for the Third Accused on the 26th of November, 2004;

SEIZED OF the *Joint Motion by Sam Hinga Norman, Moinina Fofana, and Allieu Kondewa Seeking Permission for Defence Investigators to Sit in Court During Closed Sessions* (sic), filed by the Defence on the 2nd of December, 2004;

CONSIDERING the *Prosecution Response to the Joint Motion by Sam Hinga Norman, Moinina Fofana, and Allieu Kondewa Seeking Permission for Defence Investigators to Sit in Court During Closed Sessions* filed by the Prosecution on the 6th of December, 2004;

MINDFUL OF the provisions of Article 17(4)(b) and (e) of the Statute of the Special Court for Sierra Leone ("Statute") and Rules 75 and 79 of the Rules of Procedure and Evidence of the Special Court for Sierra Leone ("Rules");

TRIAL CHAMBER I ISSUES THE FOLLOWING DECISION:

I. SUBMISSIONS OF THE PARTIES

Defence Submissions

1. The Defence submit that investigators should be considered as part of the "Defence Team", and not part of the press or public that are excluded from attending closed session hearings within the meaning of Rule 79(A) of the Rules.

2. The Defence refer to the definition of a Defence Team in the Directive on the Assignment of Counsel which gives the following definition in Article I: "The individuals providing services to a Suspect or Accused in accordance with a Provisional Assignment Agreement or Legal Services Contract described in Article 16 of this Directive". The Defence submit that investigators should be

Downloaded from worldcourts.com. Use is subject to terms and conditions. See worldcourts.com/terms.htm

considered part of the Defence Team on account of their providing services to the Accused in accordance with a Legal Services Contract.

3. The Defence submit that it can be inferred from Rule 69(C) of the Rules that investigators are granted the privilege of knowing the identities of all victims or witnesses who are to be called during the course of the trial by virtue of this Rule which provides that "[...] the identity of the victim or witness shall be disclosed in sufficient time before a witness is called to allow adequate time for preparation of the prosecution and the defence".

4. The Defence state that Prosecution investigators have attended Court on numerous occasions during closed sessions and submit that the principle of equality of arms necessitates that the Defence be granted this same privilege.

5. The Defence submit that allowing investigators to fully participate in all aspects of the trial assists to provide the Accused with "adequate time and facilities for the preparation of his or her defence" within the meaning of Article 17(4)(B) of the Statute of the Special Court. It is stated that the Defence investigators have extensive knowledge on the occurrence of the war and can provide immediate and invaluable information to Defence Counsel to assist in the cross-examination of Prosecution witnesses. The Defence state that if investigators are not in Court they may not be able to communicate to Defence Counsel "pertinent information concerning the evidence given during the examination in chief". The Defence submit that a failure to allow Defence investigators to be present during closed sessions would prejudice the quality of the defence of the Accused persons.

Prosecution Response

6. The Prosecution respond that they do not object to the Motion as submitted by the Defence. However, they request that the senior defence team leader should accept responsibility for the conduct of their respective investigators, which includes the manner in which the investigators utilise the information acquired from attending closed sessions. The Prosecution, furthermore, submit that the Court should exercise direct control over those persons who have unfettered access to the closed session testimonies.

Downloaded from worldcourts.com. Use is subject to terms and conditions. See worldcourts.com/terms.htm

II. DELIBERATION

7. This Motion concerns a Joint Request from the Defence for the Trial Chamber to grant permission for Defence investigators to be present in Court during the testimony of witnesses delivered in closed session.

8. Pursuant to Rule 79 of the Rules, the press and the public may be excluded from all or part of the proceedings conducted during closed session, for reasons of national security, protecting the privacy of persons, or protecting the interest of justice from prejudicial publicity. The Trial Chamber has held in previous decisions concerning applications to hear witness testimony in closed session, that Rule 79 "reflects the affirmative obligation of the Court to afford protection to victims and witnesses where their privacy or security may be threatened",[1] when read together with Rule 75 of the Rules which provides appropriate measures to safeguard the privacy and security of victims and witnesses, and in conformity with Article 17(2) of the Statute.

9. Rule 79 of the Rules provides as follows:

> Closed Sessions
>
> (A) The Trial Chamber may order that the press and the public be excluded from all or part of the proceedings for reasons of:
>
> i. national security; or
> ii. protecting the privacy of persons, as in cases of sexual offences or cases involving minors; or
> iii. protecting the interest of justice from prejudicial publicity.
>
> (B) The Trial Chamber shall make public the reasons for its order.
>
> (C) In the event that it is necessary to exclude the public, the Trial Chamber should if appropriate permit representatives of the press and/or monitoring agencies to remain.

10. The Defence argue that investigators should be considered as part of the "Defence Team" and not part of the press or public that are excluded from attending closed session hearings within the meaning of Rule 79(A) of the Rules. Article 1 of the Directive on the Assignment of Counsel, adopted on the 1st of October, 2003 defines a "Defence Team" as composed of those individuals

[1] *Prosecutor v. Sam Hinga Norman, Moinina Fofana, Allieu Kondewa*, Order on an Application by the Prosecution to Hold a Closed Session Hearing of Witnesses TF2-082 and TF2-032, 13 September 2004.

Downloaded from worldcourts.com. Use is subject to terms and conditions. See worldcourts.com/terms.htm

providing services to a Suspect or Accused in accordance with a Provisional Assignment Agreement or Legal Services Contract described in Article 16 of the Directive.

11. Given the plain and ordinary meaning of Article 1 of the said Directive, the Trial Chamber holds that where investigators conduct investigations or provide services to the Accused for the preparation of the Defence of the Accused, they should be considered part of a Defence team for that Accused person. The Chamber further holds that investigators, by the very nature of their work, may provide immediate and invaluable information to assist in the preparation and conduct of the defence of the Accused as stipulated in Articles 17(4)(b) and 17(4)(e) of the Statute which provide as follows:

12. Article 17(4)(b) of the Statute provides that:

> (4) In the determination of any charge against the accused pursuant to the present Statute, he or she shall be entitled to the following minimum guarantees, in full equality:
>
> > (b) To have adequate time and facilities for the preparation of his or her defence and to communicate with counsel of his or her own choosing;

13. Article 17(4)(e) of the Statute provides that:

> > (e) To examine, or have examined, the witnesses against him or her and to obtain the attendance and examination of witnesses on his or her behalf under the same conditions as witnesses against him or her;

14. We conclude, therefore, that the presence of Defence investigators in the Court Room during closed session hearings of witness testimony would be consistent with the rights of the Accused to have adequate time and facilities available for the preparation of the Defence of the Accused, and for the Accused to be given the full opportunity to examine or have examined, the witnesses against him or her as enshrined respectively in Articles 17(4)(b) and (e) of the Statute.

15. We also note that in accordance with the Trial Chamber's Decision on Protective Measures, Defence investigators, as part of the Defence Team may be provided with the unredacted statements of witnesses and that the Defence is required to "maintain a log indicating the name, address and position of each person or entity which receives a copy of, or information from, a witness statement, interview report or summary of expected testimony, or any other non-public material, as well as the

Downloaded from worldcourts.com. Use is subject to terms and conditions. See worldcourts.com/terms.htm

date of disclosure; and that the Defence shall ensure that the person to whom such information was disclosed follows the order of non-public disclosure".[2]

16. Emphasising that the practice at International Criminal Tribunal for the Former Yugoslavia ("ICTY") has been to allow investigators to be present in Court during trial proceedings,[3] we here recall that the Trial Chamber of the ICTY, presided over by Judge May, in the case of *Kordic and Cerkez* granted permission for investigators to be present in Court during closed session hearings.[4]

17. We have carefully balanced the rights of the Accused to a fair and public hearing with the need to guarantee adequate protection and respect for the rights of victims and witnesses, and conclude that it is permissible for Defence investigators to be present in Court during the testimony of witnesses in closed session. In addition, we hold that Defence investigators, as members of the Defence Team, are required to comply with the Trial Chamber's Decisions on Protective Measures for witnesses, that include the *Decision on Prosecution Motion for Modification of Protective Measures for Witnesses,* rendered by this Trial Chamber on the 8th of June, 2004, especially the stipulation that:

> (g) [...] the Defence shall maintain a log indicating the name, address and position of each person or entity which receives a copy of, or information from, a witness statement, interview report or summary of expected testimony, or any other non-public material, as well as the date of disclosure; and that the Defence shall ensure that the person to whom such information was disclosed follows the order of non-public disclosure.

18. Furthermore, the Chamber directs that Court Appointed Counsel for the Accused, responsible for leading the Defence Team of the Accused person, will be held accountable to it for ensuring the full compliance of all members of the Defence Team with the existing Decisions on Protective Measures delivered by the Trial Chamber and with future Decisions of this nature, and in particular, for ensuring that Defence investigators that comprise members of the Defence Team and who may be present during closed session hearings, do not disclose the identity of protected witnesses or the evidence given during those closed sessions to anybody outside the Defence Team.

---

[2] Order 2(g).

[3] *Prosecution v. Naletilic and Martinovic,* Decision on Prosecutor's Motion to Permit Investigators to Follow the Proceedings, 31 April 2001; *Prosecution v. Mrksic, Radic, Sljivancanin and Dokmanovic,* Order Permitting Investigators to Follow Proceedings, 23 April 1998.

[4] Oral Ruling, later confirmed in writing; *Prosecutor v. Kordic and Cerkez,* Order Permitting Investigators to Follow Proceedings, 19 April 1999.

Downloaded from worldcourts.com. Use is subject to terms and conditions. See worldcourts.com/terms.htm

19. In conclusion, the Trial Chamber is of the opinion that it is in the interests of justice and in conformity with the doctrine of equality of arms for investigators that comprise members of both the Defence and Prosecution Teams to be allowed access in the Court Room during the testimony of witnesses in closed session, and that Senior Counsel in the Prosecution Teams, in the same terms as Leading Counsel in the Defence Teams, shall ensure the compliance of all members of the Prosecution Team with the Decisions delivered by the Trial Chamber in relation to this Decision and others of a similar nature.

FOR THE ABOVE REASONS, THE CHAMBER

GRANTS this Motion and **ORDERS:**

1.) That investigators from the Defence and Prosecution Teams may be present in Court during closed session hearings.

2.) That investigators who constitute members of the Defence or Prosecution Teams comply with the Trial Chamber's existing and future Decisions on Protective Measures for victims and witnesses before this Court.

3.) That the Senior members of the Defence and Prosecution Teams ensure that investigators that comprise members of their Teams, and who are present during closed session hearings, do not disclose the identity of protected witnesses nor should they disclose the evidence that constitutes their testimony during such closed session hearings to any unauthorised person.

4.) That the names, qualifications and professional details of the investigators of both Defence and Prosecution teams who shall be present at each closed session be filed with Court Management on the same day that such investigators are present during a closed session hearing.

Downloaded from worldcourts.com. Use is subject to terms and conditions. See worldcourts.com/terms.htm

5.) That only one investigator from the Defence Team and from the Prosecution Team be present during a closed session hearing.

6.) That these Orders be carried out.

Done in Freetown, Sierra Leone, this 28th day of February, 2005

Hon. Justice Pierre Boutet | Hon. Justice Benjamin Mutanga Itoe | Hon. Justice Bankole Thompson

Presiding Judge
Trial Chamber I

[Seal of the Special Court for Sierra Leone]

Downloaded from worldcourts.com. Use is subject to terms and conditions. See worldcourts.com/terms.htm