

SEIZED OF the Oral Motion on the 11th of February, 2005, brought by Court Appointed Counsel for the Third Accused, Allieu Kondewa, during the trial proceedings;

NOTING the Oral Response made by the Prosecution on the said Oral Motion and the Reply of Court Appointed Counsel for the Third Accused during the same day trial proceedings;

NOTING Rules 26bis, 54, and 90(F) of the Rules of Procedure and Evidence of the Special Court (“Rules”);

ISSUES THE FOLLOWING DECISION:

I.SUBMISSIONS OF THE PARTIES

Defence Submissions

1. On the 11th of February, 2005, Court Appointed Counsel for the Third Accused, Mr. Charles Margai, made an oral application for the Court to issue a subpoena for Mr. Thomas Lahun, an Investigator for the Office of the Prosecution, to appear before the Court and testify as to the veracity and authenticity of a statement he took from Witness TF2-022 on the 27th of January, 2004, with particular reference to paragraph three of this statement, marked as Exhibit 57(B).
2. Court Appointed Counsel for the Third Accused in making this application, referred to the Chamber’s Ruling in the case of *Prosecutor v. Sam Hinga Norman, Moinina Fofana and Allieu Kondewa*, Decision on Defence Oral Application to Call OTP Investigators Who Took Down in Writing Statements of Prosecution Witness TF2-021, delivered on the 7th of December, 2004. In this Ruling, the Trial Chamber granted the request to call as witnesses, “Virginia Chitandra and Tamba Gbeki, Investigators of the Office of the Prosecutor to testify before the Court as to the taking down in writing of the statements of Prosecution Witness TF2-021 dated the 4th of February, 2003 and the 13th of January, 2003 both marked Exhibits 19A and 19B respectively”.[\[1\]](#)

Prosecution Response

3. The Prosecution responded that the procedure set forth in the Trial Chamber's ruling of the 7th of December 2004, for calling investigators to testify to the veracity and authenticity of statements taken from witnesses applies only in circumstances where there are significant and highly contentious issues arising from such statements.

4. The Prosecution submitted that the main issue in question is the witness' recollection of certain dates and organisations that were in control of Tongo, that are neither significant nor highly contentious. The Prosecution submitted that there is nothing exceptional that justifies the granting of this application. The Prosecution stated that there is an adopted procedure by the Trial Chamber to allow witness statements recorded by the investigators to be tendered into evidence where they constitute prior inconsistent statements. The Prosecution submitted that they do not oppose the tendering of such statements as it assists the Court in assessing the credibility of the witnesses.

Defence Reply

5. Court Appointed Counsel for the Third Accused replied that Exhibit 57(C), a corrigendum to statement purports to correct an error in Exhibit 57(B), an error that has not been accepted by the purported maker of Exhibit 57(B). Counsel submitted that the witness had denied making the contents of paragraph 3 of Exhibit 57(B), which Exhibit 57(C) purports to correct and that the investigators who recorded these statements should be brought to testify as to the veracity and authenticity of the contents of paragraph 3 of Exhibit 57(B).

II. DELIBERATION

6. The Chamber reaffirms that it has the statutory authority to call a witness *proprio motu* at any stage of the trial proceedings. Consistent with its obligation to ensure that the trial is fair and expeditious and that "the proceedings before the Special Court are conducted in accordance with the Agreement, the Statute and the Rules, with full respect for the rights of the accused and due regard for the protection of victims and witnesses".[\[3\]](#)

7. In keeping with this obligation, Rule 54 of the Rules states that the Trial Chamber may issue "[a]ny orders, summonses, subpoenas, warrants and transfer orders as may be necessary for the purposes of an investigation or for the preparation or conduct of the trial". Rule 90(F) of the Rules provides that the Trial Chamber shall exercise control over the mode and order of interrogation of witnesses and the presentation of evidence.

8. In this Trial Chamber's opinion, unquestionably the above-mentioned Rules provide it with the authority to exercise control over the conduct of the trial, and in particular, to call witnesses before it. The Trial Chamber endorses the following comments of the Trial Chamber of the ICTY in the *Delalic* case where it held that the Chamber has power to call witnesses and to control the nature of the testimony, stating that:

26. There is no doubt that the Trial Chamber is vested with powers as defined in the Statute and the Rules for regulating the proceedings before it. This power involves control of the witnesses before it, and their testimony. If properly construed, it extends to the calling of witnesses. If properly construed, it extends to the calling of witnesses. Article 20(1) of the Statute states the general powers vested in the Trial Chambers "to ensure that a trial is fair and expeditious and that proceedings are conducted in accordance with the rules of procedure and evidence, with full respect for the rights of the accused...". This provision summarises and includes the protection of the rights of the accused, without spelling them out *in extenso* as in Article 21. A fair trial involves all the protection for the accused as stated in Article 21. It will be fair to describe it as a pithy epitome of what constitutes "a fair administration of justice". In addition, Rule 54 provides another general rule under which "at the request of either party or *proprio motu*, a Judge or Trial Chamber may issue such orders, summonses etc., as may be necessary for the purposes of an investigation or for the preparation or conduct of the trial". Although this rule has been applied to orders, summonses, safe conduct, arrest warrants deemed necessary for the purposes of investigation or conduct of the trial, it is also applicable to measures for the control of proceedings necessary for the conduct of the trial.

[...]

28. There [are] therefore ample statutory provisions enabling the Trial Chamber to determine whether a particular witness could be called and to control the nature of the testimony.[\[4\]](#)

9. The Trial Chamber having found that it has authority to exercise control over the conduct of the trial, and in particular, to call witnesses to testify before it in accordance with the Rules and the Statute, turns now to consider the merits of the current Motion.

10. In its Decision of the 7th of December, 2004, this Trial Chamber ruled that when determining whether investigators should be called to testify before the Court on the taking of statements from a witness, it would exercise its discretion on a case-by-case basis, having regard "to the nature of the crimes, the nature of the pleadings, the definition of the issues, and the particular facts and the circumstances of the case". There, we took into consideration the rule against rebuttal on collateral issues, citing the case of *R. v. Krause*, where the Court laid down the guiding principle that:

[W]here [...] 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.[\[5\]](#)

11. Discussing the doctrine of collaterality we stated that:

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.^[6]

12. Continuing, we had this to say:

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.^[7]

13. The Chamber observes, in the light of the facts before it, and the preceding analysis, that the application currently pending is distinguishable from that determined by the Trial Chamber in its Decision of the 7th of December, 2004. In that case, the Chamber granted the Defence application to call investigators to testify as to the taking down of statements for Witness TF2-021, and stated 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 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".

14. In our considered opinion, therefore, the current application before the Trial Chamber concerns a prior statement of Witness TF2-022 regarding the organizations that were in "control" of Togo at a particular time, which is alleged to be at variance with his oral testimony in Court. It is noteworthy that the period of time testified to by this witness both in Court and in his prior statement concerns a timeframe that is not included within the specific factual allegations underpinning counts in the Indictment. We observe that while this evidence may be relevant to

the Indictment, it is collateral and is unrelated to the subject-matter of the offences as charged in the Consolidated Indictment. The Defence in making this application is effectively requesting the Court to subpoena an investigator to respond to one alleged inconsistency between the witness' oral testimony and written statement of the 27th of January, 2004, which inconsistency does not appear to us to be material or highly contentious and certainly not of such a nature that it could not have been properly canvassed and dealt with by appropriate cross-examination. As a matter of law, even if it were material, the question of whether its materiality goes to the issue of the probative value of the witness' testimony is a matter for judicial determination at the appropriate stage.

FOR THE ABOVE REASONS, THE TRIAL CHAMBER

DENIES this Motion brought by Court Appointed Counsel for the Third Accused.

Done in Freetown, Sierra Leone, this 1st of March, 2005

Hon. Justice Pierre Boutet

Hon. Justice Benjamin Mutanga
Itoe
Presiding Judge,
Trial Chamber I

Hon. Justice Bankole
Thompson

[Seal of the Special Court for Sierra Leone]

[1] *Prosecutor v. Sam Hinga Norman, Moinina Fofana, Allieu Kondewa*, Ruling on Defence Oral Application to Call OTP Investigators Who Took Down in Writing Statements of Prosecution Witness TF2-021, 7 December, 2005.
2 Decision, para. 21.

[3] Rule 26bis.

[4] *Prosecutor v. Delalic et al.*, Case No. IT-96-21-T, Decision on the Motion of the Joint Request of the Accused Persons Regarding the Presentation of Evidence, Dated 24 May 1998, 12th of June, 1998.

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

[6] 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).

[7] *Prosecutor v. Sam Hinga Norman, Moinina Fofana, Allieu Kondewa*, Ruling on Defence Oral Application to Call OTP Investigators Who Took Down in Writing Statements of Prosecution Witness TF2-021, 7 December, 2005, paras 20-21.
