

**SPECIAL COURT FOR SIERRA LEONE
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TRIAL CHAMBER I

Before: Hon. Justice Benjamin Mutanga Itoe, Presiding Judge
Hon. Justice Bankole Thompson
Hon. Justice Pierre Boutet

Registrar: Robin Vincent

Date: 23rd of May 2005

PROSECUTOR **Against** **ISSA HASSAN SESAY**
MORRIS KALLON
AUGUSTINE GBAO
(Case No. SCSL-04-15-T)

**RULING ON GBAO APPLICATION TO EXCLUDE EVIDENCE OF PROSECUTION
WITNESS MR. KOKER**

Office of the Prosecutor:

Luc Côté
Lesley Taylor
Peter Harrison

Defence Counsel for Issa Hassan Sesay:

Wayne Jordash
Sareta Ashraph

Defence Counsel for Morris Kallon:

Shekou Touray
Melron Nicol-Wilson

Defence Counsel for Augustine Gbao

Andreas O'Shea
John Cammegh

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

SEIZED of the oral application made by Counsel for the Third Accused on the 28th of April 2005 to exclude a portion of the testimony of Prosecution Witness Mr. Koker;

NOTING the oral response made by the Prosecution and the reply thereto by Defence;

MINDFUL of the provisions of Rule 89 of the Rules of Procedure and Evidence of the Court (“Rules”);

MINDFUL that the Chamber indicated that it would take this application under advisement and come out with an appropriate ruling;

NOW CONSIDERS the matter on the basis of the oral submissions of the Parties;

1. On the 28th of April 2005 during trial proceedings, Prosecution Witness Mr. Koker testified that when he was in Baoma on his way to Kailahun, Mr. Augustine Gbao took his medicine away from him. He stated that he had been given the ear drops since his ear was bleeding. Mr. Gbao allegedly stated that the medicine was “government property”. The Witness also stated that Mr. Gbao was the chief intelligence military officer and the leader of the MIB – military investigation and broadcasting.[\[1\]](#)

2. At the conclusion of this Witness’ testimony, Counsel for Mr. Gbao brought an oral application for the exclusion of this evidence under Rule 89(C) of the Rules. He contended that the evidence that Mr. Gbao had stolen the medicine from the Witness “paints a picture” of the Third Accused as “having a spiteful nature”. He submitted that the evidence is prejudicial, but has absolutely no probative value whatsoever and is not relevant to any count in the Indictment. In Response, the Prosecution submitted that the incident may be evidence of looting and thus is relevant and may have probative value.

3. Rule 89 of the Rules provides that:

Rule 89: General Provisions

(A) The rules of evidence set forth in this Section shall govern the proceedings before the Chambers. The Chambers shall not be bound by national rules of evidence.

(B) In cases not otherwise provided for in this Section, a Chamber shall apply rules of evidence which will best favour a fair determination of the matter before it and are consonant with the spirit of the Statute and the general principles of law.

(C) A Chamber may admit any relevant evidence.

4. Thus, as has often been noted by this Court, the Rules favour a flexible approach to the issue of admissibility of evidence, leaving the issue of weight to be determined when assessing probative value of the totality of the evidence.[\[2\]](#)

5. This view of the law is reinforced by the observation of the Trial Chamber of the International Criminal Tribunal for the Former Yugoslavia that:

The principle... is one of extensive admissibility of evidence – questions of credibility or authenticity being determined according to the weight given to each of the materials by the judges at the appropriate time.[\[3\]](#)

6. To this effect is Rule 89(c) of our Rules whose object and purpose, gathered from its plain and ordinary meaning, is to vest the Trial Chamber with discretionary power to admit any relevant evidence and to exclude evidence that is not relevant.

7. By parity of reasoning, under Rule 95, the Trial Chamber can exclude evidence where its admission would bring the administration of justice into disrepute. Thus, the Chamber may exercise its discretion under this Rule and under its inherent jurisdiction to exclude evidence where its probative value is manifestly outweighed by its prejudicial effect.

8. However, as this Chamber has already emphasised, evidence is not prejudicial merely because it is incriminating.^[4] What is crucial in any such determination, where it is alleged that the probative value of the evidence under scrutiny is outweighed by its prejudicial effect, is whether admitting the evidence will impact adversely and unfairly on the integrity of the proceedings before the Court.

9. Counsel argued that the evidence relating to the seizure of the medicine by the Third Accused from the Witness on the basis that it was government property has no probative value whatsoever. This Chamber disagrees. As the Appeals Chamber of this Court has stressed, while the “probative value of particular items in isolation may be minimal, the very fact that they have some relevance means that they must be available” for consideration by the Chamber.^[5] In other words, individual pieces of evidence that may at first appear to have little probative value may later be of greater probative value when assessed in conjunction with all of the other evidence before the Court.

10. The Chamber finds that the evidence of the alleged theft of the medicine may, as the Prosecution submitted, be evidence of looting, as charged in count 14 of the Amended Consolidated Indictment. The Chamber is also of the opinion that the fact that the medicine was allegedly seized as “government property” may also have some probative value. It is also plausible to conjecture that the evidence may be relevant to the role that the Third Accused played within the RUF.

11. On the issue of its prejudicial effect, the Chamber cannot fathom how the alleged theft demonstrates that the Third Accused is a person with a spiteful nature. This Chamber is composed of professional judges who are certainly capable of not drawing inferences without proper evidentiary basis or foundation.^[6]

12. In conclusion, therefore, the Chamber is satisfied that the evidence in question may be relevant to the facts in issue and the relevant charge in the Indictment. We are, likewise, satisfied that the prejudicial effect of the admission of the evidence does not outweigh its probative value.

13. The Chamber therefore finds that the application of the Defence lacks merit. The evidence relating to the alleged theft of the medicine from the Prosecution Witness will be admitted in evidence. The Chamber wishes to emphasise that a final determination of its relevance, reliability and probative value will be made by the Trial Chamber at the appropriate time in light of all of the evidence adduced during the trial by the Prosecution and the Defence.

FOR ALL THE ABOVE REASONS, RULES that the Defence application is denied.

Done at Freetown this 23rd day of May 2005

Hon. Justice Pierre Boutet Hon. Justice Benjamin Mutanga Hon. Justice Bankole Thompson
Itoe
Presiding Judge
Trial Chamber I
[Seal of the Special Court for Sierra Leone]

[1] Transcripts of Trial Proceedings, 28 April 2005, pp. 49-51.

[2] See, for example, *Prosecutor v. Norman et al.*, SCSL-04-14-AR65, *Fofana – Appeal Against Decision Refusing Bail*, 11 March 2005 at paras 22-24.

[3] *Prosecutor v. Blaskic*, IT-95-14-T, *Judgement*, 3 March 2000 at para. 34.

[4] *Prosecutor v. Sesay et al.*, SCSL-04-15-T, *Ruling on the Admission of Command Structure Chart as an Exhibit*, 4 February 2005 at para. 21.

[5] *Id.* at para 23.

[6] *Prosecutor v. Gbao*, SCSL -2003-09-I, *Order on the Urgent Request for Direction on the Time to Respond to and/or an Extension on Time for the Filing of a Response to the Prosecution Motions And The Suspension of any Ruling on the Issue of Protective Measures that may be Pending before other Proceedings before the Special court as a Result of Similar Motions Filed to those that have been Filed by the Prosecution in this Case*, 16 May 2003 at p. 2. See also Judge Richard May and Marieke Wierda, *International Criminal Evidence* (New York: Transnational Publishers, 2002) at para. 4.09.
