SCSL-2004-16-T
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SPECIAL COURT FOR SIERRA LEONE

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TRIAL CHAMBER II

Before:	Justice Teresa Doherty, Presiding Judge Justice Richard Lussick Justice Julia Sebutinde
Registrar:	Robin Vincent
Date:	24 May 2005

PROSECUTOR	Against	**Alex Tamba Brima** **Brima Bazzy Kamara** **Santigie Borbor Kanu** (Case No.SCSL-04-16-PT)

DECISION ON JOINT DEFENCE MOTION TO EXCLUDE ALL EVIDENCE FROM WITNESS TF1-277 PURSUANT TO RULE 89(C) AND/OR RULE 95

Office of the Prosecutor:
Luc Côté
Lesley Taylor

Defence Counsel for Alex Tamba Brima:
Glenna Thompson
Kojo Graham

Defence Counsel for Brima Bazzy Kamara:
Mohamed Pa-Momo Fofanah

Defence Counsel for Santigie Borbor Kanu:
Geert-Jan Alexander Knoops
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SPECIAL COURT FOR SIERRA LEONE
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TRIAL CHAMBER II ("Trial Chamber") of the Special Court for Sierra Leone ("Special Court"), composed of Justice Teresa Doherty, presiding, Justice Richard Lussick and Justice Julia Sebutinde;

SEISED of the Confidential and Under Seal Joint Defence Motion to exclude all evidence from Witness TF1-277 pursuant to Rule 89(C) and/or Rule 95 filed on 11 March 2005 on behalf of Brima, Kamara and Kanu ("Motion")

DECIDES AS FOLLOWS based solely on the written submissions of the parties pursuant to Rule 73(A) of the Rules of Procedure and Evidence of the Special Court ("Rules").

I. SUBMISSIONS OF THE PARTIES

The Motion

1. This is a Joint Defence Motion asking the Trial Chamber to exclude the evidence of Witness TF1-277 in its entirety or, alternatively, to exclude that part pertaining to hearsay evidence given at the trial on March 7 and 8, 2005. An objection to the hearsay evidence made by the Defence at the trial was overruled as premature, as it had not then been tested by cross-examination. The witness was subsequently cross-examined by all three Defence counsel.

2. The Defence refers particularly to the evidence of the Witness that he was present when a Mr. SAJ Alieu reported to the Witness's uncle that a person referred to as "55" shot a woman named Zainab. It is submitted that this testimony should be excluded because of its context and character, and particularly in view of the prior inconsistent statement given by the Witness to a Prosecution investigator.

3. The Defence submits that the assertion of the Witness that he was present during the making of a report from a second person to a third person factually amounts to a form of indirect hearsay. The Defence points out that it was not established that the other two persons were not available as witnesses. The admission of hearsay evidence in such a form, it is submitted, may seriously affect the administration of justice pursuant to Rule 95.

4. In support of this submission, the Defence relies on two particularities. Firstly, The Defence says that the inconsistencies between the Witness's prior written statement and his evidence given in court are material, in that the former states that he saw the particular shooting, while in the latter he alleges that he heard about the shooting while listening to a conversation between two other persons. Secondly, the Defence points to the existence of two so-called "will-say" statements, both of which were unsigned and one of which says of the Witness that "he clarified the circumstances surrounding the killing of Zainab by "55"." without providing any further details. The Defence submits that the said statements cannot be considered as "clarification". Further, it is submitted that in the light of these specific circumstances, it cannot even be said that the evidence given by the Witness qualifies as "any relevant evidence" as meant by Rule 89(C).

The Response

5. In response, the Prosecution argues that hearsay evidence is admissible and evaluated according to its probative value. It is submitted that reliability is not a separate requirement for admissibility. Further, Rule 89(C) requires only that the evidence be relevant to be admissible.

6. The Prosecution goes on to submit that the evidence of the Witness is both probative and reliable. It points to the evidence that the Witness was present and heard the entire report given by

SAJ Alieu to the Witness's uncle. It argues that the fact that he was not the addressee of the report is immaterial and that the evidence is not a particular subspecies of hearsay called "indirect" hearsay evidence.

7. The Prosecution also submits that any inconsistency that arises is not between the oral evidence and the first written statement, but between the statement dated 4 September 2003 and the Interview Note dated 17 February 2005, in which the Witness corrected the earlier statement.

8. As to the Defence reference to two unsigned "will-say" statements, the Prosecution submits that these statements do amount to clarification or correction of the first written statement and that the absence of a signature does not mean that they are not statements within the meaning of Rule 66(A)(i).

9. The Prosecution concludes its Response by contending that the Defence have failed to establish any prejudice to the Accused, have failed to show how the admission of the evidence would bring the administration of justice into serious disrepute pursuant to Rule 95 and that the Defence Motion should be dismissed in its entirety.

The Reply

10. It is submitted in the Joint Defence Reply that hearsay evidence should be restricted to instances where difficulties in obtaining first hand evidence exist. Given the fact that the Prosecution has not shown that the two persons engaged in the conversation overheard by the Witness are not available to be called as witnesses, the Defence contends that the hearsay evidence of the Witness is not admissible.

11. In respect of Rule 89(C), the Defence says that a logical interpretation of the word "relevant", which is not defined in the Rules, includes the requirement of probative value.

II. DELIBERATIONS

12. It is well settled in the practice of international tribunals that hearsay evidence is admissible. Under the Rules, the Trial Chamber has a broad discretion to admit relevant hearsay evidence. Rule 89, which is not restrictive in its provisions[1], states:

> (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.*

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[1] *Prosecutor v. Sam Hinga Norman et al*, Case No. SCSL-04-14-AR65, Fofana – Appeal against Decision Refusing Bail, 11 March 2005, para. 22.

13. Rule 89(C), under which evidence need only be relevant to be admissible, is in broader terms than the equivalent provisions of the ICTY and ICTR Rules, which require that evidence be both relevant and probative.

14. We approve and adopt the interpretation given to Rule 89(C) by the Appeal Chamber of this Court in the *Fofana Bail Appeal Decision* stating:

> *"Rule 89(C) ensures that the administration of justice will not be brought into disrepute by artificial or technical rules, often devised for jury trial, which prevent judges from having access to information which is relevant. Judges sitting alone can be trusted to give second hand evidence appropriate weight, in the context of the evidence as a whole and according to well-understood forensic standards. The Rule is designed to avoid sterile legal debate over admissibility so the court can concentrate on the pragmatic issue [...].*[2]

15. It is clear that the admission of hearsay evidence is not indicative of a finding as to its probative value. In the *Akayesu Appeal Judgement* the Appeals Chamber of the ICTR held that the admission of hearsay evidence does not automatically carry any particular finding as to its assessment.[3] The fact that a Trial Chamber admits hearsay does not imply that it accepts it as reliable and probative. The probative value of hearsay evidence is something to be considered by the Trial Chamber at the end of the trial when weighing and evaluating the evidence as a whole, in light of the context and nature of the evidence itself, including the credibility and reliability of the relevant witness[4]. This principle was also followed by the Appeals Chamber of this Court in *Fofana*, in which it held that:

> "Evidence is admissible once it is shown to be relevant: the question of its reliability is determined thereafter, and is not a condition for its admission."[5]

16. In the present case, the hearsay evidence complained of by the Defence relates to crimes allegedly committed by a person known as "55", which is an alternative name given to one of the Accused in the Further Amended Consolidated Indictment. So, in our view, the evidence is relevant.

17. However, the Defence argues that the evidence should be excluded because, if admitted, it may seriously affect the administration of justice pursuant to Rule 95 because, firstly, it amounts to "indirect hearsay" and, secondly, that the Prosecution did not establish that the other two persons engaged in the conversation were not available to give evidence.

18. Firstly, we disagree with the submission by the Defence that the passage of evidence complained of amounts to a form of "indirect hearsay". The evidence of the Witness was that he was present when the person named SAJ Alieu told the uncle about the shooting of Zainab. In those circumstances, it defies all logic to argue that the fact that the remarks were not directed personally at the Witness renders the hearsay evidence inadmissible.

19. Secondly, in our opinion, it was not strictly necessary for the Prosecution to establish that the other two persons engaged in the conversation were not available to give evidence. This is a not a

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[2] *Ibid.*, para. 26.
[3] *Prosecutor v. Jean-Paul Akayesu*, Case No. ICTR-96-4-A, Appeals Chamber, Judgment, 1 June 2001, para. 292.
[4] John R.W.D. Jones & Steven Powles, *International Criminal Practice* (Third Edition), Oxford University Press 2003, para. 8.5.654.
[5] *Prosecutor v. Sam Hinga Norman et al*, Case No. SCSL-04-14-AR65, Fofana – Appeal against Decision Refusing Bail, 11 March 2005, para. 24

matter which would affect the admissibility of the Witness's evidence, but goes to its weight to be determined thereafter.

20. The Defence has made reference to material inconsistencies between the Witness's prior written statement and his sworn evidence. This, in our view, would not affect the admissibility of either the sworn evidence or the prior written statement. In the *Akeyesu* case, the ICTR Trial Chamber was confronted with the problem of alleged inconsistencies between the oral testimonies of witnesses and pre-trial statements that were composed of interview notes not made in English which had to be translated from the indigenous language of the witness.[6] The Trial Chamber decided that the issue was one of probative value and not of admissibility.

21. In any event, we find that this argument from the Defence has no basis, since it is clear from the evidence that the inconsistency was not between the prior written statement and the sworn testimony of the Witness, but between the said statement (Exhibit D1) and the Interview Note dated 17 February 2005 (Exhibit D1A), in which the Witness made corrections to the earlier statement, one of which was that "I did not actually see 5'5 shoot Zainab. Zainab and her boyfriend, Sajalieu, an SLA, were sitting on the verandah in the house across from where I was staying. When 5'5 shot Zainab, Sajalieu ran into the house where I was staying and explained that 5'5 had shot Zainab. I looked through the door and saw 5'5 as he was walking away."[7]

22. The Defence submission that the two so-called "will-say" statements, both of which are unsigned, cannot amount to relevant evidence under Rule 89(C) is contrary to the ruling of Trial Chamber I that "a statement can be "anything that comes out of the mouth of a witness" regardless of the format. By parity of reasoning, the fact that a statement does not contain a signature, or is not witnessed does not detract from its substantive validity."[8]

23. We find that these two documents fall within that definition and are statements relevant to other evidence given by the Witness and are therefore admissible. Consequently, we reject that particular Defence submission.

24. We hold that the hearsay evidence given by the Witness is relevant evidence and is therefore admissible evidence under Rule 89(C). We find that the Defence has not made out a case for the exclusion of that evidence, let alone for the exclusion of the Witness's evidence in its entirety. Nor has anything been put before us which would justify the conclusion that the admission of the evidence would bring the administration of justice into serious disrepute pursuant to Rule 95. On the contrary, the evidence in our view is so clearly relevant that the judicial process would be brought into disrepute by excluding it.[9]

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[6] *Prosecutor v. Jean Paul Akayesu*, Case No ICTR-96-4-. Trial Chamber, Judgment, 2 September 1998, para. 137.

[7] Exhibit D 1a, Interview Notes of the Office of the Prosecutor, dated 17 February 2005, Court Records Case File Page No. 6816.

[8] *Prosecutor v. Norman et al.*, SCSL-04-14-T, Decision on Disclosure of Witness Statements and Cross-Examination, 16 July 2004, paras. 22 to 24 incl.

[9] *Prosecutor v. Sam Hinga Norman et al*, Case No. SCSL-04-14-AR65, Fofana - Appeal against Decision Refusing Bail, 11 March 2005, para. 27.

FOR THESE REASONS

The Trial Chamber dismisses the Motion.

Done at Freetown this 24th day of March 2005

Justice Richard Lussick

Justice Teresa Doherty
Presiding Judge

Justice Julia Sebutinde

[Seal of the Special Court for Sierra Leone]