

438



SPECIAL COURT FOR SIERRA LEONE
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Case Name:	The Prosecutor vs. Sesay, Kallon and Gbao
Case Number:	SCSL-04-15-T
Classification	<input type="checkbox"/> UNDER SEAL <input type="checkbox"/> EX PARTE <input type="checkbox"/> CONFIDENTIAL <input checked="" type="checkbox"/> PUBLIC
Dates:	Filing date: 27 October 2005 Document's date: 27 October 2005
Pages:	Total No. of Pages: 6 No. of Annexes: none
Annexes:	Please list particulars of annexes: -
Document's Full Title	DECISION ON PROSECUTION MOTION OBJECTING TO DEFENCE SUBMISSIONS OF WITNESS STATEMENTS WITH INCONSISTENCIES MARKED

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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

TRIAL CHAMBER I

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

Interim Registrar: Mr. Lovemore Green Munlo

Date: 27th of October, 2005

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

DECISION ON PROSECUTION MOTION OBJECTING TO DEFENCE SUBMISSIONS OF WITNESS STATEMENTS WITH INCONSISTENCIES MARKED

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

SUSAN GUNSTONE
Sgunstone
09.30

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

SEIZED of the *Prosecution Motion Objecting to Defence Submission of Witness Statements with Inconsistencies Marked* ("Motion") filed by the Office of the Prosecutor ("Prosecution") on the 11th of July, 2005;

NOTING the Response to the Motion filed by the Defence for the Accused Issa Hassan Sesay ("Defence") on the 19th of July, 2005 ("Response") and the Reply thereto filed by the Prosecution on the 25th of July, 2005 ("Reply");

NOTING the *Decision on Disclosure of Witness Statements and Cross Examination* filed in the CDF Case on the 16th of July, 2004 ("Decision on Cross-Examination");¹

NOTING the *Defence Submission of Statements of Prosecution Witnesses Called in July 2004 with Inconsistencies Marked* filed by the Defence on the 29th of June, 2005;

NOTING the *Defence Submission of Statements of Prosecution Witnesses Called in October 2004 with Inconsistencies Marked* filed by the Defence on the 1st of July, 2005;

NOTING the *Defence Submission of Statements of Prosecution Witnesses Called in January and February 2005 with Inconsistencies Marked* filed by the Defence on the 5th of July, 2005;

I. BACKGROUND

1. In our *Decision on Cross Examination* in the case of the *Prosecutor v. Norman, Fofana and Kondewa*, the Chamber outlined the standard procedure governing prior inconsistent witness statements which, in our opinion, requires the formal tendering of any such statement as an exhibit only for the limited purpose of examining the alleged inconsistency, in the following terms:

- (i) A witness may be cross-examined as to previous statements made by him or her in writing, or reduced into writing, or recorded on audio tape, or video tape or otherwise, relative to the subject matter of the case, in circumstances where an inconsistency has emerged during the course of *viva voce* testimony, between a prior statement and this testimony;

¹ *Prosecutor v. Norman, Fofana and Kondewa*, SCSL04-14-T, Decision on Disclosure of Witness Statements and Cross Examination, 16 July 2004, para. 21.

- (ii) In conducting cross-examination on inconsistencies between *viva voce* testimony and a previous statement, the witness should first be asked whether or not he or she made the statement being referred to. The circumstances of the making of the statement, sufficient to designate the situation, must be put to the witness when asking this question;
- (iii) Should the witness disclaim making the statement, evidence may be provided in support of the allegation that he or she did in fact make it;
- (iv) ... a witness may be cross-examined as to previous statements made by him or her, relative to the subject matter of the case, without the statement being shown to him or her. However, where it is intended to contradict such witness with the statement, his or her attention must, before the contradictory proof can be given, be directed to those parts of the statement alleged to be contradictory;
- (v) ... the Trial Chamber may direct that the portion of the witness statement that is the subject of cross-examination and alleged contradiction with the *viva voce* testimony, be admitted into the Court record and marked as an exhibit;

2. During the RUF trial proceedings of the 14th of January, 2005 it became apparent that the Defence had departed from the standard procedure by merely reading portions of the witness statement during cross-examination of a witness in order to have the alleged inconsistency transcribed into the official court records. Consequently, the Defence never sought to tender a witness statement in evidence on alleged grounds of showing inconsistency between the witness' statement and his oral testimony. During the ensuing discussion, the Chamber insisted on compliance with its *Decision on Cross-Examination*.

3. Subsequently, on three different occasions,² the Defence filed excerpts of statements from witnesses who had already testified at trial, in order to demonstrate inconsistencies between their prior written statements and their oral testimonies. They indicated that they were in compliance with the prescribed procedure set out in the *Decision on Cross-Examination*.

II. PARTIES SUBMISSIONS

A) The Prosecution Motion

4. The Prosecution submitted that no specific order has been issued by the Chamber during the proceedings of the 14th of January, 2005 for the filing of the witness statements of previous witnesses for the purposes of showing inconsistencies with their oral testimonies many months after they had

testified at trial. The Prosecution further submitted that according to the *Decision on Cross-Examination* and the established practice of other International Criminal Tribunals, any inconsistency with a prior witness statement should be contextually raised during the cross-examination of that witness.³

5. It claimed that the procedure followed by the Defence is formally incorrect, in that the alleged inconsistencies in the filed statements are marked without any transcript or date reference.⁴ It further contended that the Defence would need to prove that the filed statements actually represent inconsistencies introduced at trial during cross-examination of previous witnesses and that it should have been allowed to comment on any alleged inconsistency.⁵

6. In conclusion, the Prosecution invited the Chamber to reject the written statements filed by the Defence as inadmissible or, in the alternative, to order the Defence to file a motion requesting the admission of such written statements with a contextual explanation in support, to which the Prosecution should be entitled to respond.⁶

B) *The Defence Response*

7. In its Response, the Defence submitted that it had complied with the procedure of the *Decision on Cross-Examination* and the established international jurisprudence. In particular, the Defence stated that the filed portions of the witness statements are exactly those previously put to the various witnesses during their cross-examination at trial as being inconsistent with their oral testimonies. It submitted that in so doing, it has complied with the Chamber's order to have such statements form part of the trial record.⁷

8. Further, the Defence rejected the alternative proposed by the Prosecution regarding a specific request for the admission of the witness statements by means of a Defence motion as an attempt to re-litigate the issue already determined by the *Decision on Cross-Examination*. The Defence also stated that the Prosecution was in a position to challenge the alleged inconsistencies during each witness'

² 29 June, 1 and 5 July 2005 respectively. These statements refer to witnesses TF1-074, TF1-241, TF1-064, TF1-077, TF1-305, TF1-139, TF1-167, TF-304, TF2-077 and TF1-012.

³ Motion, para. 6ff.

⁴ *Id.*, paras 8-9.

⁵ *Id.*, paras. 11-12.

⁶ *Id.*, paras. 13-14.

⁷ Response, paras 6-10.

testimony at trial and that it would nevertheless still be in a position to challenge such inconsistencies at a later stage of the trial, when the Trial Chamber will invite relevant submissions of the Parties.⁸

C) *The Prosecution Reply*

9. In its Reply, the Prosecution claimed that the court transcripts of the 14th of January, 2005 show that there has been a discrepancy between the Chamber and the Defence on what constitutes an inconsistency and that the filing of the witness statements by the Defence is a late attempt to remedy its failure to apply the proper procedure during trial. The Prosecution further reiterated that the Defence is unilaterally determining what constitutes an inconsistency between the witness statements and the oral testimonies at trial and does not provide the Chamber with the necessary contextual foundation for such a determination nor allows the Prosecution to challenge it.⁹

III. DELIBERATION

17. The issue for determination by the Chamber is whether there is merit in the Prosecution's Motion objecting to the filing by the Defence of statements highlighting alleged inconsistencies of prosecution witnesses who had already been examined-in-chief and cross-examined, but whose statements were not tendered in evidence by the Defence at the proper time. The pith of the Prosecution's objection is that the said filing is formally and substantively defective in that it did not emanate from an Order of the Trial Chamber requesting such filing. In other words, the issue for determination is whether the Trial Chamber ordered the filing by the Defence of the alleged marked inconsistencies for the purpose of receiving the said statements in evidence retrospectively or whether it is a unilateral filing.

18. The Chamber has meticulously reviewed the transcripts of the trial proceedings of the 14th of January 2005¹⁰ and finds no record from the relevant transcripts of the trial proceedings of any order by this Chamber granting such an option or leave to the Defence to make the said filing. Indeed, the records show clearly that during the legal discussion between the Bench and Mr. Jordash on the subject, the Chamber stressed that a witness's statement should routinely be tendered in evidence as an exhibit when it is alleged that there is an inconsistency between the witness's out-of-court statement to the investigators and his oral testimony.

⁸ *Id.*, paras 12.-13.

⁹ Reply, paras 4-9.

¹⁰ For reference, see Transcripts, 14 January 2005, pp. 96-105.

19. Again, the records show that the Bench reminded Learned Counsel that the applicable procedure was that laid down in the Chamber's *Decision on Cross-Examination* of the 16th July, 2004 at paragraphs 10, 11, 23, and 24 thereof. The records further disclose that the Bench clearly emphasized the distinction between using a witness's statement to refresh his memory, which does not trigger off the procedure under reference and that of cross-examining as to alleged inconsistencies, which indeed triggers off the said procedure.¹¹

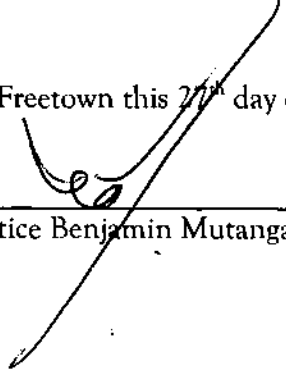
IV. CONCLUSION

20. In the light of the foregoing finding as to the state of the records on this issue, the Chamber is of the view that there is merit in the Prosecution's objection to the Defence filing, and holds that the said filing is not properly before the Chamber. The Chamber cannot therefore address its merits.


V. DISPOSITION

21. Based on the foregoing considerations, the Chamber upholds the Prosecution's objection and accordingly GRANTS the Motion.

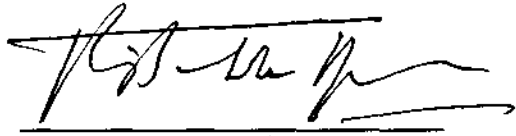
Done at Freetown this 27th day of October, 2005



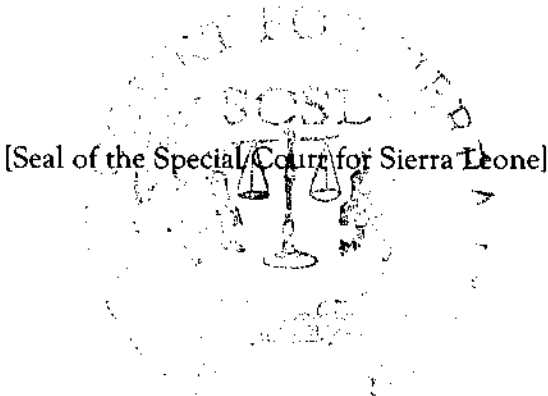
Hon. Justice Benjamin Mutanga Itoe



Hon. Justice Pierre Boutet
Presiding Judge
Trial Chamber I



Hon. Justice Bankole Thompson



¹¹ See, for instance, *Id.*, page 96, at lines 6-17, page 97, at lines 5-14, page 98, at lines 16-21, page 99, at lines 9-17, p. 100, at lines 6-15, page 101, at lines 3-18 and p. 104, at lines 8-17.