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SPECIAL COURT FOR SIERRA LEONE

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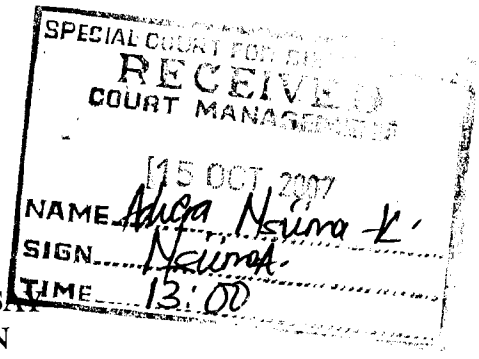
TRIAL CHAMBER I

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

Registrar: Herman von Hebel

Date: 15th of October 2007



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

Public Document

DECISION ON PROSECUTION'S APPLICATION FOR LEAVE TO APPEAL MAJORITY DECISION REGARDING THE OBJECTION TO THE ADMISSIBILITY OF PORTIONS OF THE EVIDENCE OF WITNESS TF1-371

Office of the Prosecutor:
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Defence Counsel for Issa Hassan Sesay:
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Defence Counsel for Morris Kallon:
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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;

MINDFUL of the Written Reasons on Majority Decision on Oral Objection Taken by Counsel for the Third Accused, Augustine Gbao, to the Admissibility of Portions of the Evidence of Witness TF1-371 rendered by Hon. Justice Thompson and Hon. Justice Itoe and filed on the 2nd of August 2006 ("Majority Decision");[1]

MINDFUL of the fact that the Majority Decision uphold an objection made by Court Appointed Counsel for Augustine Gbao ("Defence") during the testimony of Witness TF1-371 on the 21st and the 24th of July 2006, to the admission of testimonial evidence by this Witness to the effect that Accused Gbao knew about the alleged killings in Kono District on the grounds that the admission of this evidence at trial will be in violation of the doctrine of fundamental fairness;[2]

MINDFUL that the Majority Decision also ordered, *inter alia*, that the evidence in question "be expunged and deleted from the record" and, in particular, that the Trial Chamber will file in due course a Consequential Order that will specify the exact portions of the transcript that will be expunged from the record ("Consequential Order");[3]

SEIZED of the Prosecution Application for Leave to Appeal Majority Decision on Oral Objection Taken by Counsel for the Third Accused to the Admissibility of Portions of the Evidence of Witness TF1-371 filed publicly by the Office of the Prosecutor ("Prosecution") on the 21st of August 2006 ("Application");

NOTING the Response to the Application filed by the Defence on the 4th of September 2006 ("Response")[4], opposing the Application, and the Prosecution Reply thereto filed on the 11th of September 2006 ("Reply");

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[1] See also Separate and Concurring Written Reasons of Hon. Justice Bankole Thompson on Majority Decision on Oral Objection Taken by counsel for the Third Accused, Augustine Gbao, to the Admissibility of Portions of the Evidence of Witness TF1-371, 2 August 2006; Dissenting Written Reasons of Hon. Justice Pierre Boutet on Majority Decision on Oral Decision on Objection Taken by Counsel for the Third Accused, Augustine Gbao, to the Admissibility of Portions of the Evidence of Witness TF1-371, 2 August 2006.

[2] See Majority Decision, for instance, paras 15, 22-23 and 16.

[3] See also Trial Transcripts, 24 July 2006, pages 34 and 47.

THE TRIAL CHAMBER HEREBY ISSUES THE FOLLOWING DECISION:

I. PARTIES SUBMISSIONS

A. The Application

1. The Prosecution submits that its Application is founded on two separate basis, namely that the Majority erred in its Decision to exclude the relevant portions of the testimony of TF1-371 and that the Majority was not entitled in law to "expunge" material from the record, and, consequently, it submits that both of these bases give rise to "exceptional circumstances" and "irreparable prejudice".[5]

2. With regard to the first basis for the Application, the Prosecution suggests that the Majority Decision contains the following errors which together give rise to exceptional circumstances:

a. The Majority erred in its application of Rule 89(C) of the Rules and refused to consider the relevance of the disputed evidence;

b. The Majority Decision is inconsistent with the Trial Chamber's initial decision to grant leave to add Witness TF1-371 to the Prosecution witness list;

c. The Majority did not consider its previous jurisprudence regarding disclosure or the timeliness and extent of Prosecution disclosure and should have considered that it has always been in issue that Mr. Gbao should have known what was happening in Kono;

d. The Majority erred in not requiring the Defence to substantiate why a lengthy adjournment would be necessary or why it would need to recall Prosecution witnesses; and

e. The Majority was guided too strongly by a desire to facilitate the closing of the Prosecution case as scheduled.[6]

3. The Prosecution also submits that while the possibility of an erroneous ruling is not enough in itself, this combined with the "important issues raised in this application" related to the interaction between rules concerning relevance and admissibility of evidence at a late stage in a party's

[4] See also the Defence Memorandum filed on the 15th of September 2006 which noted an error in paragraph 12 of the Response.
[5] Application, paras 2 and 28.
[6] *Ibid.*, paras 12-18.

case, disclosure and the yardstick of fundamental fairness, together result in "exceptional circumstances".[7]

4. As to "irreparable prejudice", the Prosecution states that Witness TF1-371 was the only insider witness to be in possession of this evidence which "could potentially mean the difference between a verdict of guilt or innocence on a particular incident" and that the prejudice is irreparable as the Trial Chamber is best placed to hear all of the evidence in case and that recall of the relevant witnesses may not be possible at the appeals stage.[8]

5. With regard to the second basis for the application, the Prosecution submits that the order of the Trial Chamber to expunge the evidence in question is impermissible in law, in that expunging the evidence could potentially interfere with the course of justice and should therefore by decided by the Appeals Chamber.[9]

6. The Prosecution also submits that the Trial Chamber has no authority to expunge the record, but rather should have found that the disputed portions of the testimony were inadmissible and excluded them from consideration.[10] The Prosecution further suggests that expunging the portions of the evidence of Witness TF1-371 from the trial record is likely to cause "irreparable prejudice" in that some of the evidence that appellate court would need in its re-evaluation of the evidence on any appeal against judgement would be missing from the trial record.[11]

B. The Response

7. In its Response, the Defence submits that far more than the probability of an erroneous ruling and a dissent are required to satisfy the test of "exceptional circumstances" and that there is nothing exceptional about questions relating to the admissibility of evidence or the power of the Trial Chamber to expunge evidence, both of which have been raised before.[12]

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[7] *Ibid.*, para 19.
[8] *Ibid.*, para 20.
[9] *Ibid.*, para 21.
[10] *Ibid.*, paras 22-26.
[11] *Ibid.*, para 27.
[12] Response, paras 3-8. The Defence also submits that since the Defence summarized the essence of the evidence that was expunged on the record and that the Appeals Chamber would not be assisted by the evidence since it was excluded on grounds of fairness and not relevance.

8. The Defence also argues that the Prosecution cannot be prejudiced by the fact that it was not allowed to rely on evidence "produced in a manner which is blatantly unfair on the accused".[13]

9. The Defence further submits that the expunging of the record cannot cause "irreparable prejudice" since it is not different than what occurs when the question of the admissibility of evidence is determined on the content of witness statements prior to the evidence being led during the trial.[14]

C. The Reply

10. In its Reply, the Prosecution emphasizes that it is necessary to assess all of the relevant circumstances as a whole in order to determine whether or not "exceptional circumstances" have been established.[15] The Prosecution also disagrees with the *Gbao* Defence's assertion that this matters deals only with questions of admissibility of evidence and submits that the Majority Decision was premised upon the rights of the Accused under Article 17 of the Statute.[16]

11. The Prosecution submits that it would be prejudiced if evidence of the guilt of an Accused were improperly excluded[17] and that the calling of additional evidence before the Appeals Chamber would not be the equivalent of calling the evidence before the Trial Chamber.[18]

12. The Prosecution also reiterates that the decision to expunge the record is irreversible and submits that this measure should therefore be taken only if it is clear that the Trial Chamber has this power and that the power is being exercised in accordance with the appropriate criteria.[19]

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[13] *Ibid.*, para. 10. According to the Defence, any prejudice could be repaired simply by following the common practice of recalling witnesses at the appeals stage. See *Ibid.*, para 11.
[14] *Ibid.*, paras 9-12 and Defence Memorandum.
[15] Reply, paras 2-4. The Prosecution notes that the fact that there is conflicting case law at the Trial Chamber level may be one of the factors to be considered in this assessment. It also emphasises that the ascertainment of the truth is an overriding function of the Court. *Ibid.*, paras 5-7.
[16] *Ibid.*, paras 8-10. The Prosecution submits that the Majority Decision found that it had no discretion to admit the evidence as it would be a violation of Article 17 to do so, even if the Defence were granted an adjournment.
[17] *Ibid.*, paras 11-12.
[18] *Ibid.*, para 13.
[19] *Ibid.*, para 14. The Prosecution states that the expunging of the evidence will not be reversible on final appeal as, even if the appeal were granted, the evidence would not exist and could not be admitted by the Appeals Chamber. See *Ibid.*, paras 15-16.

II. APPLICABLE LAW

13. The law governing applications seeking leave to appeal against interlocutory decisions by this Chamber is embodied in Rule 73(B) of the Rules. The relevant provision is in these terms:

> Decisions rendered on [motions other than preliminary motions] are without interlocutory appeal. However, in exceptional circumstances and to avoid irreparable prejudice to a party, the Trial Chamber may give leave to appeal. Such leave should be sought within 3 days of the decision and shall not operate as a stay of proceedings unless the Trial Chamber so orders.

14. Giving Rule 73(B) its plain and ordinary meaning, and guided by the Decisions of the Appeals Chamber on this subject, this Chamber has consistently held that the application must satisfy the two-pronged test of "exceptional circumstances" and "irreparable prejudice" conjunctively. To this end, the Chamber has laid down certain principles of law in determining the merits or otherwise of interlocutory applications for leave to appeal.

15. The first principle is that, as a general rule, interlocutory decisions are not subject to appeal.[20] A second is that Rule 73(B) involves a high threshold that must be met before the Chamber can exercise its discretion to grant leave to appeal.[21] Another principle is that the Rule specifically requires that an application for leave to appeal must show "exceptional circumstances" and "irreparable prejudice".[22] A further principle is that the two-pronged test is conjunctive in the sense that both requirements must be satisfied before leave is granted.[23] Yet another principle is that the legislative rationale behind the restrictive character of the Rule is to avoid International Criminal Tribunal becoming encumbered by a multiplicity of interlocutory appeals thereby causing protracted delays in such trials.[24]

16. We have also opined, as a Chamber, that a key procedural assumption in the Special Court is that trials will continue to their conclusion without delay or diversion caused by interlocutory appeals

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[20] *Prosecutor v. Sesay, Kallon and Gbao*, SCSL-04-15-T, Decision on Application by the Second Accused for Leave for Interlocutory Appeal against the Majority Decision of the Trial Chamber of 9th December 2004 on the Motion on Issues of Urgent Concern to the Accused Morris Kallon, 2 May 2005, para 17; *Prosecutor v. Sesay, Kallon and Gbao*, SCSL-04-15-PT, Decision on Prosecution's Application for Leave to File an Interlocutory Appeal against the Decision on the Prosecution Motion for Joinder, 13 February 2004, para 10.

[21] *Id.*

[22] *Id.*

[23] *Id.*

[24] *Id.*

on procedural matters, and that any errors which affect the final judgement will be corrected in due course by the Appeals Chamber on appeal.[25]

17. Consistent with the foregoing reasoning, the Chamber has affirmed that the probability of an erroneous ruling by the Chamber does not, of itself, constitute 'exceptional circumstances' for the purpose of a Rule 73(B) application[26] and also that the fact of judicial dissent amongst the Judges of the Chamber on the applicable law and procedure applied in the Impugned Decision does not in itself constitute an exceptional circumstance, although the nature and significance of the matters sought to be appealed, in conjunction with the fact of dissent, might be considered as factors relevant to this determination.[27]

18. It is also worth recalling that the Chamber has gone the length of defining "exceptional circumstances" in these terms:

> "Exceptional circumstances" may exist depending upon the particular facts and circumstances, where, for instance the question in relation to which leave to appeal is sought is one of general principle to be decided for the first time, or is a question of public international law importance upon which further argument or decision at the appellate level would be conclusive to the interests of justice, or where the cause of justice might be interfered with, or is one that raises serious issues of fundamental legal importance to the Special Court for Sierra Leone in particular, or international criminal law, in general, or some novel and substantial aspect of international criminal law for which no guidance can be derived from national criminal law systems.[28]

III. DELIBERATION

19. Guided by the aforementioned principles and considerations, the Chamber has reviewed and examined the merits of both the Prosecution and the Defence submissions on the issue and avoiding the judicial temptation of examining the merits or otherwise of the alleged errors of law in respect of the Majority Decision,[29] and attaching no undue weight to the fact of judicial dissent in respect of the

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[25] *Prosecutor v Norman, Fofana and Kondewa.*, SCSL-04-14-AR73, Decision on Amendment of the Consolidated Indictment, 16 May 2005, para 43.

[26] *Prosecutor v Sesay, Kallon and Gbao*, SCSL-04-15-T, Decision on Application for Leave to Appeal the Ruling (2nd May 2005) on Sesay -Motion seeking Disclosure of the Relationship between Governmental Agencies of the United States of America and the Office of the Prosecutor, 15th of June, 2005, para 20.

[27] *Prosecutor v. Norman, Fofana and Kondewa*, SCSL-04-15-T, Decision on Request by First Accused for Leave to Appeal against the Trial Chamber's Decision on Presentation of Witness Testimony on Moyamba Crime Base, 23 May, 2005, p. 3. Similarly, no appeal might arise from a concurring opinion. See *ibid*, Decision on Interlocutory Appeals against Trial Chamber Decision Refusing to Subpoena the President of Sierra Leone, (AC), 11 September 2006, paras 40-42.

[28] *Prosecutor v. Sesay, Kallon and Gbao*, SCSL-04-15-T, Decision on Defence Applications for Leave to Appeal Ruling of the 3rd of February, 2005 on the Exclusion of Statements of Witness TF-141, 28 April 2005, para 26.

[29] See *Prosecutor v. Sesay, Kallon and Gbao*, SCSL-04-15-T, Decision on Sesay Defence Application for Leave to Appeal Decision on Motion for Immediate Protective Measures for Witensses and Victims and for Non-Public Disclosure, 28

Decision sought to be appealed, the Chamber is satisfied that because of the novelty and substantiality of the issue raised in the context of international criminal law, the lack of precedents on the matter, and the likelihood of irreparable prejudice to the Prosecution, leave ought to be granted in this matter.

IV. DISPOSITION

20. For the foregoing reasons, **THE CHAMBER** is satisfied that, in the circumstances, the exceptional circumstances and the irreparable prejudice conjunctive requirement for leave to file an interlocutory appeal has been met in the Application.

Accordingly, the Chamber **GRANTS** the Application for leave to appeal the Majority Decision; and, consequently

ORDERS that, as an *interim* measure, the issuing of its Consequential Order be stayed until a Decision is issued by the Appeals Chamber.

Done at Freetown, Sierra Leone, this 15th day of October 2007

Hon. Justice Pierre Boutet

Hon. Justice Benjamin Mutanga Itoe
Presiding Judge
Trial Chamber I

Hon. Justice Bankole Thompson

[Seal of the Special Court]

February 2007, para 13; See also *ibid.*, Decision on Defence Applications for Leave to Appeal Ruling of the 3rd of February, 2005 on the Exclusion of Statements of Witness TF-141, 28 April 2005, paras 15-16;