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SCSL-03-01-T
(29712-29722)

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SPECIAL COURT FOR SIERRA LEONE

TRIAL CHAMBER II

Before: Justice Julia Sebutinde, Presiding Judge
Justice Richard Lussick
Justice Teresa Doherty
Justice El Hadji Malick Sow, Alternate Judge

Registrar: Binta Mansaray

Case No.: SCSL-03-1-T

Date: 12 August 2010

PROSECUTOR

v.

Charles Ghankay TAYLOR

DECISION ON DEFENCE MOTION TO EXCLUDE CUSTODIAL STATEMENTS OF ISSA SESAY

Office of the Prosecutor:
Brenda J. Hollis
Nicholas Koumjian
Sigall Horowitz

Counsel for the Accused:
Courtenay Griffiths, Q.C.
Terry Munyard
Morris Anyah
Silas Chekera
James Supuwood

TRIAL CHAMBER II ("Trial Chamber") of the Special Court for Sierra Leone ("Special Court");

SEISED of the "Public with Annexes A, B, C and D Defence Motion to Exclude Custodial Statements of Issa Sesay", filed on 1 July 2010 ("Motion"),[1] wherein the Defence requests that the eleven custodial interview statements taken from Issa Sesay by the Prosecution in 2003 should be excluded from evidence in the current trial pursuant to Rule 95, on the basis that the admission of these documents would bring the administration of justice into disrepute[2] or, in the alternative, that if the statements are used during cross-examination and/or admitted in evidence, the entire *voir dire* record be admitted into evidence pursuant to Rule 92*bis*, as the Trial Chamber should not ignore the circumstances under which the statements were given when determining what weight, if any, to afford the statements;[3]

NOTING the "Public with Annexes A-C Prosecution Response to Defence Motion to Exclude Custodial Statements of Issa Sesay", filed on 12 July 2010 ("Response"),[4] wherein Prosecution advises that it will only seek to use Sesay's first interview, dated 10 March 2003, during its cross-examination of this witness,[5] but opposes the Motion on the basis that the decision in the case of *Prosecutor v. Sesay, Kallon and Gbao* to exclude the statements was based on the legal finding that they were a violation of Sesay's rights as an accused, and is inapplicable to the current situation where Sesay is appearing as a witness;[6] and that, in any event, in the case of the 10 March 2003 interview, the efforts to secure Sesay's cooperation were not made in coercive, oppressive or shocking circumstances;[7]

NOTING ALSO that the Prosecution also opposes the Defence's alternative application to admit into evidence the records of the *voir dire* in the RUF case, on the basis that the proper legal method for the admission of such evidence is Rule 94, and that the requirements of this rule cannot be met by the Defence;[8]

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[1] SCSL-03-01-T-998.
[2] Motion, para. 6.
[3] Motion, paras 7, 34.
[4] SCSL-03-01-T-1002.
[5] Response, para. 3.
[6] Motion, paras 11-15, referring to *Prosecutor v. Sesay, Kallon and Gbao*, SCS-04-15-T, Transcript 5 July 2007; *Prosecutor v. Sesay, Kallon and Gbao*, SCSL-04-15-T, Written Reasons – Decision on the Admissibility of Certain Prior Statements of the Accused Given to the Prosecution, 30 June 2008.
[7] Motion, paras 16-20.
[8] Response, para. 26.

NOTING the "Defence Reply to Prosecution Response to Defence Motion to Exclude Custodial Statements of Issa Sesay", filed on 19 July 2010 ("Reply");[9]

NOTING the "Corrigendum to 'Prosecution Response to Defence Motion to Exclude Custodial Statements of Issa Sesay'", filed on 21 July 2010;[10]

COGNISANT of the provisions of Article 17 of the Statute of the Special Court for Sierra Leone ("Statute") and Rules 26*bis*, 73, 89 and 92*bis* and 95 of the Rules of Procedure and Evidence ("Rules");

NOTING that the documents described in the Motion are "fresh evidence" as defined in the Trial Chamber's "Decision on Prosecution Motion in Relation to the Applicable Legal Standards Governing the Use and Admission of Documents by the Prosecution During Cross-Examination" dated 30 November 2009 ("Decision on Documents"), in that the documents "were not admitted during the Prosecution case, whether or not they were available to the Prosecution at the time"; [11]

CONSIDERING that the Prosecution has not filed a motion addressing the criteria prescribed in the Decision on Documents for the use and/or admission of the document described by the Prosecution as "the interview dated 10 March 2003" ("Interview") which it intends to use in its cross-examination of the witness Issa Sesay;

CONSIDERING ALSO that the Trial Chamber has not yet seen the Interview and is thus not able to make any ruling on its use and/or admissibility;

FINDING therefore, by majority, Justice Sebutinde dissenting, that the Motion is premature;

DISMISSES the Motion.

Justice Sebutinde appends a separate dissenting opinion.

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[9] SCSL-03-01-T-1009.
[10] SCSL-03-01-T-1010.
[11] Decision on Documents, para 23.

Done at The Hague, The Netherlands, this 12th day of August 2010.

Justice Richard Lussick

Justice Teresa Doherty

[Seal of the Special Court for Sierra Leone]

SEPARATE DISSENTING OPINION OF THE HON. JUSTICE JULIA SEBUTINDE ON THE DEFENCE MOTION TO EXCLUDE CUSTODIAL STATEMENTS OF ISSA SESAY - WITNESS DCT-172

I. Introduction:

1. In this Separate Opinion, I respectfully dissent from the approach of the Majority as found in the Trial Chamber's "Decision on Defence Motion to Exclude Custodial Statements of Issa Sesay", to which this Opinion is appended.

2. I do not share the view that the documents in question legitimately qualify for consideration by the Trial Chamber as ""*fresh evidence*" as defined in the Trial Chamber's "Decision on Prosecution Motion in Relation to the Applicable Legal Standards Governing the Use and Admission of Documents by the Prosecution During Cross-Examination" dated 30 November 2009 ("Decision on Documents"), as those documents having been excluded by Trial Chamber I of the Special Court ("Trial Chamber I") on the grounds that their admission into evidence and/or use even for the limited purpose of cross-examination would "bring the administration of justice into disrepute."[12] Rather, I take the view that the said documents should be excluded in this trial on the same grounds, notwithstanding that Mr. Sesay now appears in this trial as a witness and not as an Accused person. In my considered opinion, a distinction must be drawn by the Trial Chamber between legitimate witness statements that are obtained in legally acceptable circumstances and which may legitimately be used in evidence and/or during cross examination, on the one hand, and those that are obtained in illegal or illegitimate circumstances rendering their admission into evidence and/or use in cross-examination an embarrassment to the administration of justice, on the other. While the former are admissible, the latter are not.

II. Background:

3. Issa Hassan Sesay (currently Witness DCT-172) was charged with war crimes and crimes against humanity by the Special Court in an Indictment dated 7 March 2003, as amended on 2 August 2006.[13] He was detained on 10 March 2003 by the Sierra Leone Police (SLP) and placed at the disposal of the Special Court Prosecutor and Investigators for investigation and interrogation.[14] On various dates between 10 March 2003 and 15 April 2003, the Prosecution conducted a total of 11

[12] *Prosecutor v. Sesay, Kallon and Gbao*, SCSL-04-15-T-1188, Written Reasons- Decision on the Admissibility of Certain Prior Statements of the Accused Given to the Prosecution, 30 June 2008 ("Written Reasons - Decision").
[13] *Prosecutor v. Sesay*, SCSL-03-05-PT, Decision Approving the Indictment and Order for Non-Disclosure, 7 March 2003; *Prosecutor v. Sesay, Kallon and Gbao*, SCSL-04-15-PT, Corrected Amended Consolidated Indictment, 2 August 2006.
[14] Written Reasons-Decision, para. 1.

interviews with Mr. Sesay while he was in the custody of the Special Court.[15] These interviews were documented by the Prosecution for later use in Mr. Sesay's own trial (*The Prosecutor v. Sesay et. al.* SCSL-04-15-T or "RUF Trial"), herein referred to as the "Sesay Statements".

4. Subsequently, Mr. Sesay was tried and convicted by the Special Court, of war crimes and crimes against humanity.[16] During his trial before Trial Chamber I, Sesay testified on his own behalf. On 5 June 2007, the Prosecution sought to use the Sesay Statements in his cross-examination "for the limited purpose of impeaching his credibility".[17] The Sesay Defence objected to the use and/or admissibility of the Sesay statements on the grounds *(i)* that they were obtained by the Prosecution investigators involuntarily from Mr. Sesay in violation of his Article 17 (4) (g) rights and *(ii)* that Mr. Sesay's alleged waiver of his right to be questioned in the presence of Counsel pursuant to Rule 63, was also involuntary.[18]

5. On 8 June 2007, Trial Chamber I conducted a *voir dire* ("*voir dire* proceedings") to determine whether or not the said statements and waiver had been obtained voluntarily from Sesay. Trial Chamber I found *inter alia*, as follows:

> (i) that on the morning of 11th March 2003, the First Accused Sesay was taken from his cell by guards armed with pistols and truncheons. He was handcuffed and taken to an office where a black cloth was tied over his face, then taken to a vehicle and subsequently aboard a helicopter. While he was on the helicopter, the blindfold was removed but it was replaced when the helicopter was about to land. He was then taken via another vehicle to a "container room" where the blindfold and the handcuffs were both removed. Morissette was there. John Berry subsequently joined him;
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> (ii) that the First Accused was interrogated by John Berry and Gilbert Morissette who are Special Court Prosecution Investigators. That in executing their mission in this respect, they were acting as and were in fact, persons in authority in the Prosecutor's Investigation Department of the Special Court;
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> (iii) that during the course of the interview, the investigators, as persons in authority in the Special Court, did indicate to the First Accused that he would be called as a witness for the Prosecution if he co-operated with them in their investigations of the alleged crimes charged in the Indictment;
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> (iv) that the said investigators told the First Accused that they had the authority to speak to the Judges for leniency for the First Accused if he co-operated with them and that the Judges would accept whatever they, the investigators told the Judges;
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> (v) that the co-operation of the First Accused in the investigation would also enable the Investigators to ask the Court for a reduced sentence for the First Accused;
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> (vi) that the Investigators also indicated that the Prosecution would take care of the family of the First Accused during the duration of his interrogation;

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[15] *Ibid.*, para. 2.

[16] See *Prosecutor v. Sesay, Kallon and Gbao*, SCSL-04-15-T-1234, Judgement, 2 March 2009; *Prosecutor v. Sesay, Kallon and Gbao*, SCSL-04015-A-1321, Judgement, 26 October 2010.

[17] *Prosecutor v. Sesay, Kallon, Gbao*, SCSL-04-15-T, Transcript 5 June 2007, p. 5.

[18] *Prosecutor v. Sesay, Kallon, Gbao*, SCSL-04-15-T, Transcript 5 June 2007, pp. 51-52.

(vii) that Gilbert Morissette did request Protective Measures from the Witness and Victim Section ("WVS") for Mrs. Sesay and children;

(viii) that Gilbert Morissette explicitly stated that the First Accused's family would be placed in protective custody and there would also be financial benefits and possible relocation of the family to another country. [19]

6. Furthermore, Trial Chamber I found that

> ...the manner in which the Accused was approached and questioned created some confusion in his mind as to whether he was going to able to escape prosecution by being a witness or at the least, gave him the hope as a reward for co-operating. We take cognisance of the fact that the Investigators also repeatedly referred to the Accused throughout the interviews as a suspect, rather than as an accused, although he had been charged and they were very much aware of it. This lends support to the inference that the accused may have been further confused about his role during the first interview because up to that point, he had not yet been served with the Indictment. [20]

and further, that the Prosecution role during the interviews:

> ... borders on a semblance of arm-twisting and holding out promises and inducements to the Accused in the course of the interrogation and particularly during the un-recorded conversations in the course of the break in order to sustain the Accused's cooperation with the Prosecution.[21]

7. Trial Chamber I concluded thus:

> The Chamber is of the opinion and so holds, that the statements taken from the First Accused [Sesay] during the interviews referred to earlier in a custodial setting were involuntary having been so obtained out of "fear of prejudice and the hope of advantage", especially that the First Accused would be a witness and not an accused person.[22] The Chamber orders, pursuant to Rule 95, that all the confessional statements given by the Accused during his interviews with the Prosecution Investigators are not admissible and accordingly excluded from evidence even for the limited purpose of cross-examining the first Accused, as their admission would bring the administration of justice into disrepute, as they were obtained in violation of Article 17(4)(a), (d) and (g) of the Statute and Rules 42 and 63 of the Rules.[23]

8. The Defence filed the Motion on 12 July 2010, a few days before Issa Hassan Sesay was to be called as Defence witness. The Prosecution served the Defence with copies of the 11 Sesay Statements in compliance with its disclosure obligations to the Defence,[24] but the Prosecution has indicated that it only seeks to use Sesay's first interview dated 10 March 2003 during his cross-examination.[25]

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[19] Written Reasons – Decision, para. 45

[20] *Ibid.*, para. 46.

[21] *Ibid.*, para. 51.

[22] *Ibid.*, para. 66.

[23] *Ibid.*, para. 68. Trial Chamber I did however, find that Sesay's waiver of his right to have Counsel present during the said interviews was informed and voluntary. *Ibid.*, para. 65.

[24] Motion, para. 5. Letter from Ms. Brenda Hollis, Prosecutor, to Courtenay Griffiths, Lead Defence Counsel, dated 14 July 2010.

[25] Response, para. 3.

III. The Current Dispute

9. It is these very statements that are the subject of the Defence Motion in the present case where Mr. Sesay now appears not as an Accused but rather as a Defence Witness for Mr. Charles Taylor, the Accused. The Defence requests the Trial Chamber to exclude all eleven custodial statements (Sesay Statements) on the basis that Trial Chamber I has already determined them to have been made involuntarily and in circumstances that would bring the administration into dispute.[26] Alternatively the Defence requests that if the statements are used during cross-examination and/or admitted into evidence, then the transcripts and exhibits from the *voir dire* proceedings conducted by Trial Chamber I should also be admitted into evidence under Rule 92*bis*, "as the Trial Chamber could not possibly ignore the circumstances under which the Statements were given, when determining what weight, if any, to afford the Statements".[27]

10. In its Response the Prosecution opposes the Motion arguing that the findings of Trial Chamber I are not binding on this Trial Chamber in as far as Mr. Sesay is appearing as a Defence Witness in this case and not as an Accused. As such he does not enjoy the guarantees accorded to accused persons under Article 17.[28] The Prosecution argues that

> the issue presently before the Chamber is the impeachment of a witness with a prior inconsistent statement, whereas the decision in the RUF Case involved the use of an accused's prior self-incriminatory statements to impeach his testimony in his own trial. The Prosecution in the present case seeks to put to the witness his own words concerning Taylor's relationship with the AFRC / RUF, information this surviving senior RUF commander is uniquely situated to provide.[29]

The Prosecution has clearly indicated in its Response that it intends to rely on the Interview Statement of 10 March 2003 during the cross-examination of Mr. Sesay.[30] The Prosecution is also opposed to the Defence's alternative request for the admission of the transcripts and exhibits from the *voir dire* proceeding under Rule 92*bis* describing them as irrelevant and unnecessary.[31] Neither of the parties appended the said statement/statements to their pleadings.[32]

11. In my view, the central issue for determination is whether or not the Sesay Statements once adjudged involuntary and consequently inadmissible in one trial on the grounds that their admission and/or use even for the limited purpose of cross examining Sesay as an Accused, would bring the

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[26] Motion, para. 33.
[27] Motion, paras 7, 34.
[28] Response, paras 13-14.
[29] Response, para. 2.
[30] Response, para. 3.
[31] Response, paras 1, 4, 26.
[32] The Prosecution appended a portion of the interview of 10 March 2003 in its Response, Annex C.

administration of justice into dispute, are now admissible in evidence and/or cross-examination of Mr. Sesay in his capacity as a witness, in order to impeach his credibility in the present trial.

12. The admission of evidence by the Trial Chamber is governed by the provisions of Rule 89(C) and (D) and Rule 95. While Rule 89(C) confers on the Trial Chamber the discretionary power to admit "*any relevant evidence*"; Rule 95 confers an obligation on the Trial Chamber to exclude evidence whose admission "*would bring the administration of justice into serious disrepute*". Furthermore, the Trial Chamber has an inherent discretionary power to "*exclude evidence if its probative value is substantially outweighed by the need to ensure a fair trial.*"[33] While Rule 95 specifies no indicia of what would bring the administration of justice into disrepute, involuntary statements that are obtained in a custodial setting[34] or through torture,[35] or other oppressive[36] or coercive conduct[37] or by promise of inducement,[38] have been held to be involuntary and consequently inadmissible under Rule 95. It is also trite law that the burden is on the party seeking to have the evidence admitted to prove that the statement was voluntary and not obtained in illegal circumstances.[39]

13. I note that in addressing the central issue, both the Defence and the Prosecution attempt to re-visit the same arguments previously canvassed and extensively examined by Trial Chamber I during the *voir dire* proceedings. Although this Trial Chamber is generally not bound by the decisions of Trial Chamber I, in this case, and in the view of the extensive *voir dire* inquiry carried out by Trial Chamber I in regard to the Sesay Statements, it appeals to judicial sense and economy to take judicial notice of the findings and conclusions of Trial Chamber I in relation to these documents, especially as those findings were not overturned on appeal. It is clear from those findings that the Sesay Statements were excluded by Trial Chamber I on the grounds that they were obtained involuntarily and their admission and/or use even for the limited purpose of cross-examining of Sesay would have brought the administration of justice into disrepute. It is noteworthy that the statement of 10 March 2003

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[33] Written Reasons-Decision, para. 37; *Prosecutor v. Sesay, Kallon and Gbao*, SCSL-04-15-T, Defence Motion to Request the Trial Chamber to Rule that the Prosecution Moulding of Evidence is Impermissible, 1 August 2006, para. 12; *Prosecutor v. Sesay, Kallon and Gbao*, SCSL-04-15-T, Ruling on Gbao Application to Exclude Evidence of Prosecution Witness Mr. Koker, 23 May 2005.

[34] Written Reasons-Decision, para. 38.

[35] *A and others v. Secretary of State for the Home Department (No 2)*, [2006] 1 All ER 575.

[36] *Prosecutor v. Delalić et al.*, IT-96-21, Decision on Zdravko Mucić's Motion for the Exclusion of Evidence (TC), 2 September 1997, para. 66.

[37] *Prosecutor v. Perisić*, IT-04-81-T, Order for Guidelines on the Admission and Presentation of Evidence and Conduct of Counsel in Court, 29 October 2008 ("*Perisic*"), para. 38.

[38] *Prosecutor v. Halilović*, IT-01-48-AR73.2, Decision on Interlocutory Appeal Concerning Admission of Record of Interview of the Accused from the Bar table (AC), 19 August 2005.

[39] *Perisić*, para 38; Written Reasons-Decision, para. 42.

which the Prosecution intends to use in cross-examination of Sesay was not excluded from this characterisation.

14. In my considered opinion, it is the circumstances in which a statement is made and not the identity of the maker, that ultimately determine its admissibility. In the present case, it is the circumstances in which the Sesay Statements were originally made, and not the role that Sesay subsequently assumed in this trial, that should determine their admissibility and/or use in cross-examination. Those circumstances were characterised by Trial Chamber I as capable of "bringing the administration of justice into disrepute". The circumstances that originally tainted the integrity of those statements have not changed by reason of the fact that Sesay now appears as a witness in this trial, rather than as an accused.

15. The Prosecution cites two American cases in support of its proposition that the reliability of the statement is an issue that goes to its weight rather than admissibility.[40] Both cases are, in my view, distinguishable from the current case as they involve statements that were made under oath in either a previous trial or at a grand jury hearing. Thus although the court allowed the statements to be used to impeach the witness, there was no question of whether the statements had been illegally obtained.[41] Furthermore, the two cases are from lower State courts and of substantially little value in setting acceptable evidentiary standards in International Criminal Tribunals.

IV. Conclusion

16. In the circumstances, I find that the admission of the Sesay Statements in this trial, even for the limited purpose of cross-examining Witness Sesay would bring the administration of justice into disrepute. I would accordingly grant the Defence Motion and exclude them including the statement of 10 March 2003 pursuant to Rule 95.

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[40] See cases cited in footnote 33 of the Response.

[41] *People v. Ball*, 821 P.2d 905 (Court of Appeals of Colorado, 1991), entails the use of a Defendant's testimony at his retrial. The statements in question were made under oath during his first trial where the prosecution was accused of pressuring the witness. During the retrial, the court held that the prosecution's behaviour went to the weight of the prior statements and not to the ability of the prosecution to use them. *People v. Adams* 283 Ill. App. 3d 520, entails the use of a witness's grand jury testimony to impeach his testimony at the actual trial. The witness admitted that his grand jury testimony was false as he was worried about perjury charges.

Done at The Hague, The Netherlands, this 12th day of August 2010.

Justice Julia Sebutinde

Presiding Judge

[Seal of the Special Court for Sierra Leone]