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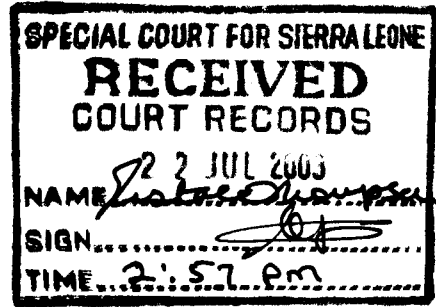
SCSL-2003-10-PT-022
(301-309)

301

**SPECIAL COURT FOR SIERRA LEONE
FREETOWN - SIERRA LEONE**

IN THE TRIAL CHAMBER

Before: Designated Judge
Registrar: Mr. Robin Vincent
Dated Filed: 22nd July 2003



THE PROSECUTOR

Vs

**BRIMA BAZZY KAMARA also known as
IBRAHIM BAZZY KAMARA also known as ALHAJI IBRAHIM KAMARA**

Case No. SCSL-2003-10-PT

**DEFENCE RESPONSE TO PROSECUTION MOTION FOR IMMEDIATE
PROTECTIVE MEASURES**

Office of the Prosecutor:

Luc Côté, Chief of Prosecutions

Defence Office

Sylvain Roy, Acting Chief of Defence
Ibrahim Sorie Yillah, Defence Associate
Ken Fleming QC

1. The basic thrust of the Statute of the Special Court for Sierra Leone (the Statute) and the Rules of Practice and Procedure made pursuant to that Statute (the Rules) is to ensure the proper conduct of both prosecution and defence in order to achieve a fair trial of the matter with which a Trial Chamber is seized.
2. The fact that there must be fairness to the accused is established throughout the Statute and the Rules (eg Article 17, Rules 39, 41, 42, 43, 57, 63, 66 and 68).
3. The Act and the Rules make provision for the protection of witnesses and victims, but not as alleged by the Prosecution material. Article 16(4) enables the Registrar to set up a Victims and Witnesses Unit which, in consultation with the Office of the Prosecutor, will provide “protective measures and security arrangements, counselling and other appropriate assistance for witnesses, victims who appear before the court and others who are at risk on account of testimony given by such witnesses”. This is given effect by Rule 69 which, by its introductory comments, ensures that “exceptional circumstances” must prevail for either of the parties to apply for nondisclosure of the identity of a victim or a witness who may be in danger or at risk.
4. Rule 75 enables orders to be made that, notably, “*are consistent with the rights of the accused*” (Rule 75(A)).
5. To return to Rule 69(C), the identity of a victim or witness “shall be disclosed in sufficient time before a witness is to be called *to allow adequate time for preparation of the prosecution and the defence.*”
6. It is for the defence to know the extent and strategy of a defence, and it stands to reason that such a defence should be fully known prior to the commencement of the prosecution case. This is supported by the rules themselves. I refer to the italicised words above in Rule 69(C). Such a provision is meaningless if it is read to say that, disjunctively, the witnesses

identity should be disclosed “to allow adequate time for preparation of the prosecution and to allow adequate time for the preparation of the defence.” The prosecution is already in possession of all of the material and there would be no point in a rule read disjunctively as I have just put it. The only true meaning of the rule, which also is consistent with the protection of an accused’s rights as required by Rule 75, is to read the word “and” conjunctively so that the provision requires the witnesses identity to be disclosed in adequate time “for preparation of the prosecution and the defence”, because it is only when the prosecution is adequately prepared that a defence can be adequately prepared. It stands to reason therefore that the material must be disclosed when the prosecution case is prepared, not on a rolling basis as is requested. Such a rolling disclosure denies the defence of, first, adequately preparing the defence before the case proceeds, and second, the right to cross-examine, effectively, witnesses whose testimony might be affected by subsequent prosecution witnesses.

7. The rules reflect the traditional common law policy decision that there must be an end to litigation. Consequently, upon an appeal additional evidence may only be adduced “which was not available to [the party] at the trial.” (Rule 115A) Further, consistent with the ICTR and ICTY rules, but not consistent with practice in most common law countries, either party can submit a Request for Review pursuant to Rule 120. Such a request is predicated upon the fact that “a new fact has been discovered which was not known at the time of the proceedings before the Trial Chamber or Appeals Chamber ...”. In order to conduct a trial effectively so that all issues are properly ventilated before a Trial Chamber, and therefore preclude the need to adduce material either at an appeal or a review, it is necessary to know all of the facts material to the defence of a matter at the beginning of the prosecution case.
8. It is not for the prosecution to pre-empt, second guess, or control the defence of an accused, but rather it is for an accused to have full liberty to conduct a defence appropriately, fully informed, and upon an equality with

the prosecution. It is therefore inappropriate that the prosecution control the flow of information to the defence.

9. Equally, it is inappropriate for the prosecution to appeal to general notions of what it might, or might not, do in the future in respect of its strategy and investigations. The protective measures are specifically directed to the accused in the particular matter in which the application is brought. That is made abundantly clear by Rule 75(A) in which it is provided that “the measures are consistent with the rights of *the* accused”. It is therefore entirely inappropriate to appeal to future strategy as has been done from time to time in both the written argument and material supporting that written argument. See paragraphs 11, 12, 13, 14, 15, 20 and 23 of the written argument. See further attachments A to G.

10. The fundamental error in the application of the Prosecutor is to ignore the specific, and concentrate on the general. I do not find a single mention of the accused in this matter in any of the material, whether it be the argument or the attachments.

11. Let me take paragraph 12 of the argument as an example. The generalisations are not supported by any particularity, and presume that they will happen in the particular case. Take, for example, the introductory sentence “the future of this and all other cases before the Special Court ...”. The sentence is offensive in that we are not dealing with all other cases, but rather the particular. The next sentence is baseless, presumptuous and offensive. It says that “threats, harassment, violence, bribery and other intimidation, interference and obstruction of justice are serious problems, for both the individual witnesses and the court’s ability to accomplish its mandate. The protective measures requested by the prosecution would protect witnesses and victims against this kind of misconduct and are designed to ensure their safety, as well as that of their families.”

12. There is no evidence whatsoever that the accused in this case has ever indulged in such behaviour or is likely to indulge in such behaviour. It is

inappropriate for the Prosecutor both to make such sweeping allegations against a particular accused, and to rely upon those generalised sweeping allegations to support an application which can only be made “in exceptional circumstances” (Rule 69(A)) and which are “consistent with the rights of the accused” (Rule 75(A)).

13. If further basis is needed for this unacceptable behaviour then I draw the court's attention to paragraph 15 of the written argument. It remains baseless, presumptuous and offensive in respect of the accused in this case. Who is it who can be protected by such an order? By Article 16 of the statute, which remains the source of power for the rules, it is “witnesses, victims who appear before the court and others who are at risk on account of testimony given by such witnesses”. Rule 69(A) uses the term “victim or witness” and “victims and witnesses”. Rule 75 uses the same formula. The written argument seeks to extend the protection to “categories of potential witnesses” (paragraph 19) and refers to practices in other places. What does the Prosecutor mean by such a term? Does he mean people who have been spoken to and who may become witnesses? Does it mean people about whom the prosecution knows, but have yet to be spoken to, and who may become witnesses? Does it mean a person who is not yet even known, and who may in the future be spoken to, and who may become a witness?

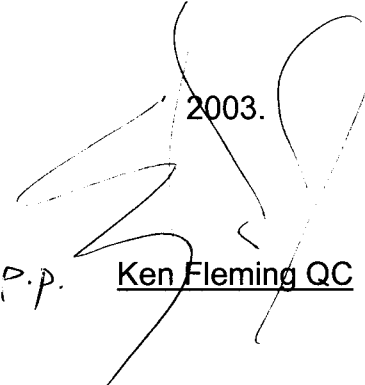
14. The implementation of any order made by a court must be workable. A Court does not act so that its orders become impractical, impossible or futile. The Prosecutor seeks orders in respect of what he might like to do in the future, not presently. The Court does not know to whom the order will apply, and certainly the defence does not know. The defence will prepare its case and may, from time to time, unwittingly, speak with persons who may be the subject of an order which, hypothetically, presently protects them. For those reasons any future operation of an order becomes an impossibility. Further, the Prosecutor may be given the impression by the court that he is entitled, according to his own will, to determine who is and who is not a protected person.

15. Neither the statute nor the rules delegates such a right to the Prosecutor. At all times that right remains in the hands of the Court. Accordingly, the Prosecutor must be specific in his requirements as to witnesses.
16. As stated previously, Rule 69(A) is introduced with the words "in exceptional circumstances ... ". Rather than show "exceptional circumstances" the Prosecutor has relied upon material prepared in a general and vague manner. There is no particularity creating the "exceptional circumstances". The word "exceptional" must be given some meaning. One can only assume that there are "circumstances" and, as opposed to that, "exceptional circumstances". Accordingly, it is only in "exceptional circumstances" that the court has power to act. The material annexed and upon which the prosecutor relies does not show "exceptional circumstances", but shows the status quo or simply put, "circumstances". The exceptional circumstances are not to be measured by reference to any other jurisdiction, but by reference to the circumstances that prevail in Sierra Leone. There is no reference to anything but the status quo in any of the material. They are the "circumstances" which prevail in Sierra Leone. Because "exceptional circumstances" must be taken as meaning something, the Prosecutor has failed in his attempt to establish such "exceptional circumstances".
17. As to the requirement that material be returned to the Prosecutor, this is a request to deprive the accused of the source material which may have provided a basis upon which he may be acquitted or convicted. Such a deprivation would be a fundamental interference with his right to appeal or to seek a Review of the matter.
18. Accordingly, for the reasons above, the application, as presently formulated, must fail.
19. There can be no objection to the prayer that the Prosecutor be allowed to transmit material to the Registry pending the outcome of this motion.

20. In the event that it is necessary to ask the court for an extension of time in which to put this reply before it, such application is made. Circumstances of such application are those relating to myself, rather than to the accused. It has been my confusion in both receiving and responding to this matter which has created the delay, not the conduct of the accused.

21. I request that there be oral argument on the motion. I will be present in Sierra Leone in the latter part of August 2003.

Dated this 22nd day of JULY 2003.


p.p. Ken Fleming QC



Sylvain Roy
07/22/2003 09:16 AM

To: Claire Carlton-Hanciles/SCSL@SCSL, Haddijatou
Kah-Jallow/SCSL@SCSL, Ibrahim S Yillah/SCSL@SCSL
cc:
Subject: Fw: FW:

FYI and Action

Sylvain Roy
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Special Court for Sierra Leone
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Sierra Leone
Tel.: +1-212-963-9915 ext 178-7020
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e-mail: roy@un.org

----- Forwarded by Sylvain Roy/SCSL on 22/07/2003 09:15 -----



"Ken Fleming"
<kfleming@qldbar.asn.
au>
22/07/2003 06:41

To: <roy@un.org>
cc:
Subject: FW:

Dear Sylvain,
Attached is a response to the Motion for Witness Protection. I am aware that this is late, but there is a request for an extension of time at the end. Could you please send it to Mr Kamara and also sign and file it on my behalf? I have also requested oral argument, but I know that is in the hands of the Court.
I am anxious to travel and I have heard nothing about my earlier request. I would like to leave Australia as close as possible after 15 August and spend 14 days in S.L. Could you please advise.
I also requested a method of contacting Mr Osho Williams, but have not received same.
Thank you in anticipation.
Ken Fleming Q.C.

-----Original Message-----

From: Mandy Evans [mailto:mandy@qldbar.asn.au]
Sent: Tuesday, 22 July 2003 4:22 PM
To: kfleming@qldbar.asn.au
Subject:

ken,
i have saved it on the PUBLIC DATA drive, so if you want to resave it on your drive that's were it is!
mandy



KCF.doc ATT00008.txt

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SPECIAL COURT FOR SIERRA LEONE

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Court Management Support – Court Records

CS7 - NOTICE OF DEFICIENT FILING FORM

Date: 22 - 07 - 03	Case Name: Case No:	The Prosecutor v. BRIMA BAZZY KAMARA SCSL-2003- 10 - PT
To:	OTP Γ D. Crane, Prosecutor Γ D. De Silva, Deputy Prosecutor Γ <u>Luc cote</u> Chief of Prosecutions Γ Trial Attorney in charge of case: _____, received by _____ (signature)	
	DEFENSE Γ Accused: _____ Γ Lead Counsel: <u>KEN FLEMING</u> (name) Γ In Freetown _____ (signature) Γ Fax Number: _____ Γ Co-Counsel: _____ (name) Γ In Freetown _____ (signature) Γ Fax Number: _____	
	CHAMBERS: <input checked="" type="checkbox"/> Trial Chamber Γ Appeals Chambers	
From:	Γ <u>LISTING</u> Γ <u>OFFICER</u> Γ _____ Γ _____ Γ _____	
CC:	Γ _____ Γ _____ Γ _____ Γ _____ Γ _____ Γ _____	
Subject	Pursuant to article 31 of the Directive to the Attention of the Registry, Court Management Section, the following document(s) does not comply with the formal requirements laid down in Articles 27-30.	

Document(s): DEFENCE RESPONSE TO PROSECUTION MOTION FOR IMMEDIATE PROTECTIVE MEASURES ~~FOR~~ Dated: 22:07:03

Reason:

- Article 27(1): Mis-delivered to the Court Management Section
- Article 27(2) : Format of Motions and other processes
- Article 29: After-hours filing
- Article 30: Urgent measures must be marked URGENT
- Illegible
- No locus standi
- Other reasons: LATE FILING

No. of pages transmitted including this cover sheet:		
In case of transmission difficulties, please contact: Fax Room:		
Tel: _____	Fax: _____	Email: _____