

SCSL - 2004 - 16 - PT  
 (5807 - 5816)  
 SPECIAL COURT FOR SIERRA LEONE

OFFICE OF THE PROSECUTOR

FREETOWN - SIERRA LEONE

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

Registrar: Mr. Robin Vincent

Date filed: 6 September 2004

**THE PROSECUTOR**

**Against**

**ALEX TAMBA BRIMA  
 BRIMA BAZZY KAMARA  
 SANTIGIE BORBOR KANU**

Case No. SCSL - 2004 - 16 - PT

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**PROSECUTION RESPONSE TO KANU'S "APPLICATION FOR LEAVE TO FILE AN INTERLOCUTORY APPEAL AGAINST THE 'DECISION ON MOTIONS FOR EXCLUSION OF PROTECTION WITNESS STATEMENTS AND STAY ON FILING OF PROSECUTION STATEMENTS' OF JULY 30, 2004"**

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**Office of the Prosecutor:**

Luc Côté  
 Lesley Taylor  
 Melissa Pack  
 Marie-Hélène Proulx  
 Lorenzo Pugliatti

**Defence Counsel for Alex Brima**

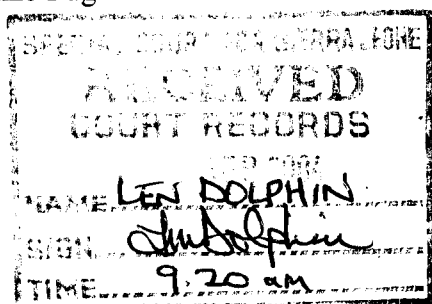
Karim Khan

**Defence Counsel for Brima Kamara**

Ken Fleming

**Defence Counsel for Santigie Kanu**

Geert-Jan Alexander Knoop  
 Carry J. Knoop  
 A.E. Manly-Spain



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**I. BACKGROUND**

1. On 18 and 19 March 2004, the Defence for Accused Santigie Borbor Kanu (the "Accused") filed a "Motion for Exclusion of Prosecution Witness Statements and Stay on Filing of Prosecution Witness Statements Pursuant to Rules 5 and 66(A)(i)", and an "Additional Motion for Exclusion of Prosecution Witness Statements and Stay on Filing of Prosecution Witness Statements Pursuant to Rules 5 and 66(A)(i)" (the "Defence Motions") respectively, requesting the Trial Chamber to exclude several Prosecution witness statements and to order that the Prosecution not be allowed to file any witness statements as from a date to be set by the Trial Chamber.
2. On 26 March 2004, the Prosecution filed its "Prosecution Response to Defence Motion for Exclusion of Prosecution Witness Statements and Stay on Filing of Prosecution

- Witness Statements Pursuant to Rules 5 and 66(A)(i) and Defence Additional Motion” (the “Prosecution Response”), requesting the Trial Chamber to dismiss the Defence Motions.
3. On 31 March 2004, the Defence filed its “Defence Reply to Prosecution Response to Defence Motion for Exclusion of Prosecution Witness Statements and Stay on Filing of Prosecution Witness Statements Pursuant to Rules 5 and 66(A)(i) and Defence Additional Motion” (the “Defence Reply”).
  4. On 1 April 2004, the Trial Chamber issued its “Order to the Prosecution to File Disclosure Materials and Other Materials in Preparation for the Commencement of Trial” (“the 1 April Disclosure Order”).
  5. On 30 July 2004, Judge Boutet, Designated Judge, issued his “Decision on Motions for Exclusion of Prosecution Witness Statements and Stay on Filing of Prosecution Statements” (the “Decision”), in which he dismissed the Defence Motions.
  6. On 4 August 2004, the Defence filed a document entitled “Kanu – Application for Leave to File an Interlocutory Appeal against the ‘Decision on Motions for Exclusion of Prosecution Witness Statements and Stay on Filing of Prosecution Statements’ on July 30, 2004” (the “Defence Application”), requesting the Trial Chamber to grant the Defence leave to appeal from the Decision.

## **II. ARGUMENTS**

7. The Defence application for leave to appeal is made under Rule 73(B) of the Rules of Procedure and Evidence (“the Rules”) on the following grounds (as paraphrased by the Prosecution):
  - i. The Prosecution’s disclosure obligations are a pre-trial matter: the Prosecution’s disclosure of the evidence upon which it bases its case ought properly to be the subject of an appeal at the pre-trial stage, because a denial of leave to appeal at this stage would be tantamount to a denial of the Defendant’s “fundamental right to appeal”,

considering that the refusal of leave could not be cured at a later stage.<sup>1</sup>

- ii. His Honour Judge Boutet's failure to rule on the "requirement of good cause" under Rule 66(A)(ii) created an ambiguity in the interpretation of Rule 66(A) which could not be cured by an appeal after the trial stage.<sup>2</sup>
- iii. His Honour Judge Boutet's failure to "condemn" the Prosecution and to "explicitly elaborate" on whether he considered that the Prosecution had in fact breached its disclosure obligations created an ambiguity, and would lead to a further ambiguity regarding the Prosecution's ongoing disclosure obligations. Again, this was a matter which could not be cured by an appeal after the trial stage.<sup>3</sup>
- iv. Rule 66(A) of the Rules is ambiguous. This ambiguity "may cause new interpretative questions for the Defence in future cases". This, of itself, justifies an interlocutory appeal.<sup>4</sup>

8. The Defence concludes that all of the above arguments, taken separately or together, constitute exceptional circumstances and matters constituting irreparable prejudice to the Accused.

9. Before dealing with each of the Accused's broad arguments in turn, the Prosecution makes the following submission: The Defence motions were made under the provisions of Rule 66(A)(i) as it was worded prior to amendment. In reaching his Decision on these motions, His Honour Judge Boutet found it appropriate to determine two issues: (i) whether the old or the new Rule 66(A) applied; and (ii) whether the Defence would suffer any prejudice if the disclosed materials were not excluded. The Learned Judge found that the new Rule 66(A) applied, and further that the Defence would not be prejudiced "in any

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<sup>1</sup> Paragraphs 4 to 6 of the Defence Application.

<sup>2</sup> Paragraphs 7 to 8 of the Defence Application. The Trial Chamber will note that the Defence application was in fact brought under the "old" version of Rule 66(A)(i), and not under Rule 66 (A)(ii).

<sup>3</sup> Paragraphs 9 to 12 of the Defence Application.

<sup>4</sup> Paragraphs 13 to 18 of the Defence Application.

way” as a consequence of the disclosure practice so far undergone by the Prosecution. He also found that the Trial Chamber’s Order of 1 April 2004 addressed the submissions contained in the Defence motions, and was in accordance with the applicability and scope of the provisions of the new Rule 66(A)(ii).

10. The Defence application is for leave to file an interlocutory appeal, as opposed to an application on the merits of an appeal. Even so, the Prosecution notes that the Defence does not apparently challenge either of the Learned Judge’s findings on its motions. Rather, so far as substantive matters are concerned, the focus is upon an alleged failure, whether under the provisions of the old Rule 66(A)(i), or the new rule 66(A)(ii), to consider the question of good cause.

#### The Construction of Rule 73(B)

11. This Trial Chamber has addressed the proper interpretation of Rule 73(B) in earlier Decisions. At paragraph 10 in its “Decision on Prosecution’s Application for Leave to File an Interlocutory Appeal against the Decision on the Prosecution Motions for Joinder”, dated 13 February 2004, in the proceedings *Prosecutor v. Sesay, Kallon, Gbao*, the Trial Chamber found as follows:

“[a]s a general rule, interlocutory decisions are not appealable and consistent with a clear and unambiguous legislative intent, this rule involves a high threshold that must be met before this Chamber can exercise its discretion to grant leave to appeal. The two limbs to the test are clearly conjunctive, not disjunctive; in other words, they must *both* be satisfied.”<sup>5</sup>

It appears, therefore, that the test under Rule 73(B) is a very strict one, and that it must be applied rigorously.<sup>6</sup>

<sup>5</sup> *The Prosecutor v. Sesay, Kallon, Gbao*, Case No. SCSL-2004-15-PT, “Decision on Prosecution’s Application for Leave to File an Interlocutory Appeal against the Decision on the Prosecution Motions for Joinder”, 13 February 2004.

<sup>6</sup> The proper interpretation of Rule 73 (B) has been the subject of other Decisions in this Chamber. See *The Prosecutor v. Brima, Kamara, Kanu*, Case No. SCSL-2004-16-PT, “Decision on Prosecution Application to File an Interlocutory Appeal against the Decision on Motion for Concurrent Hearing of Evidence Common to Cases SCSL-2004-15-PT and SCSL-2004-16-PT”, 1 June 2004; *The Prosecutor v. Sesay, Kallon, Gbao*, Case No. SCSL-2004-15-T, “Decision on Application for Leave to Appeal Gbao – Decision on Application to Withdraw Counsel”, 4

*The Defence Application Has Not Satisfied the Test under Rule 73(B)*Disclosure a Pre-Trial Matter

12. The Prosecution submits that the Defence Application does not meet the threshold of Rule 73(B). The fact that a matter is addressed during the pre-trial phase does not of itself constitute an exceptional circumstance within the meaning of Rule 73(B). In this case, the Defence motions were considered by the Trial Chamber, and subsequently adjudicated upon. Rule 73(B) serves two purposes: (1) to ensure that inappropriate interlocutory appeals are not brought; and (2) to ensure that appropriate interlocutory appeals can be brought. The Defence argument that denying leave to appeal on this matter amounts to a denial of the Accused's "fundamental right to appeal", and therefore an irreparable prejudice to the Accused, amounts to a complete misunderstanding of Rule 73(B), and of the purpose of that rule. It is submitted that the Defence argument would lead to an absurd result in rendering Rule 73(B) meaningless, conferring upon the Defendant a "right" of appeal in all circumstances where the substantive issues arising addressed pre-trial as opposed to trial matters.
13. The Defence maintains, at paragraph 6 of its Application, that dealing with the Application at this stage would allow a fair and expeditious continuation of the trial, whereas denial of the Application would prevent such continuation. This submission is unsupported by evidence and does not, in any event, merit consideration on an application for leave.
14. Further, this Trial Chamber has established that late disclosure by the Prosecution does not automatically generate prejudice to the Defence nor automatically result in such material being excluded from trial, even once the trial has commenced.<sup>7</sup> In the instant

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August 2004 and; *The Prosecutor v. Norman, Fofana, Kondewa*, Case No. SCSL-2004-14-T, "Majority Decision on the Prosecution's Application for Leave to File an Interlocutory Appeal against the Decision on the Prosecution's Request for Leave to Amend the Indictment against Samuel Hinga Norman, Moinina Fofana and Allieu Kondewa", 2 August 2004. The Prosecution notes that the Trial Chamber's interpretation of the provisions of Rule 73(B) is presently the subject of an appeal in *Prosecutor v. Samuel Hinga Norman, Moinina Fofana, Allieu Kondewa*, Case No. SCSL-2004-14-T, in its "Prosecution Appeal against the Trial Chamber's Decision of 2 August 2004 Refusing Leave to File and Interlocutory Appeal", 30 August 2004.

<sup>7</sup> See for example, *Prosecutor v. Norman, Fofana, Kondewa*, Case No. SCSL-2004-14-PT, "Decision on Disclosure of Witness Statements and Cross-Examination", 16 July 2004; *Prosecutor v. Sesay, Kallon, Gbao*, Case No. SCSL-2004-15-T, "Ruling on Oral Application for the Exclusion of "Additional" Statement for Witness TF1-060", 23 July 2004.

case no trial date has yet been set and the Defence have ample time to analyse the disclosed materials and prepare their case for trial. In the circumstances, the Defence have failed to demonstrate either exceptional circumstances or irreparable prejudice such as to justify leave to file an interlocutory appeal on this ground.

#### Trial Chamber did not Rule on Good Cause

15. The Defence alleges that the Learned Judge erred “by not granting sufficient weight to the requirement of ‘good cause’ in Rule 66(A)(ii) of the Rules”.<sup>8</sup> The Prosecution submits that errors of fact and law are matters to be examined by the Appeals Chamber once leave to appeal has been granted, and cannot constitute exceptional circumstances in themselves. In any event, the Prosecution submits that the Learned Judge did not err on this issue. It is only on this application<sup>9</sup> that the Defence has raised the issue of good cause under the new Rule 66(A)(ii). The original Motions were brought and argued under the old Rule 66(A)(i). It appears then that the Defence accepts that the Learned Judge rightly found the provisions of the old Rule to be inapplicable. His Honour Judge Boutet did not consider the issue of “good cause” under Rule 66(A)(ii), because the issue does not fall to be considered under the Rule unless an application is made to disclose additional witness statements 60 days, or less, before, or during, trial.

16. The Prosecution has a continuing obligation of disclosure, which obligation has been recognised in oral rulings by this Chamber over the course of the first month of trial in the proceedings *Prosecutor v. Sesay, Kallon, Gbao*.<sup>10</sup> A date has yet to be set for the beginning of the trial of the Accused in these proceedings. Nevertheless, the Trial Chamber has made an order (on 1 April 2004) requiring good cause to be shown where any witness is sought to be added to the witness list after 26 April 2004. That Order is not only compliant with the provisions of Rule 66(A)(ii) but limits its scope in favour of the Defence by requiring the Prosecution in these proceedings to show good cause well before the start of the 60 day time limit under the Rule. It is submitted that there is no ambiguity in the wording of Rule 66(A)(ii).

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<sup>8</sup> Defence Application, para. 7.

<sup>9</sup> Save for a peripheral reference at paragraph 26 of the Defence Reply.

<sup>10</sup> See oral rulings on 23 July and 26 July 2004 in *Prosecutor v. Sesay, Kallon, Gbao*, Case No. SCSL-2004-15-T.

Trial Chamber did not Condemn Prosecution

17. The Defence argues that the Learned Judge failed to “explicitly elaborate” on whether the Prosecution in this case has breached its disclosure obligations. The basis of this argument is misconceived. As is clear from the Decision, the interpretation of the Rule adopted by the Learned Judge makes it apparent that he considered that no such breach had occurred and, thus, no “condemnation” was required.<sup>11</sup>

18. Further, the Learned Judge found: “the Defence will not be prejudiced in any way as a consequence of the disclosure practice so far undergone by the Prosecution”.<sup>12</sup> The Decision is not ambiguous on this, or any other issue. In any event, the Prosecution further submits that a failure to elaborate on whether the Prosecution has breached its disclosure obligations would not constitute an exceptional circumstance or lead to irreparable prejudice to the Accused such as to merit the granting of leave under rule 73(B).

Interpretation of Rule 66 (A)

19. The Prosecution finally submits that the wording of Rule 66(A)(ii) does not raise “new interpretative questions” such as to merit a finding of exceptional circumstances or irreparable prejudice within the meaning of Rule 73(B). On the contrary, the interpretation of Rule 66 has been addressed by this Trial Chamber in written Decisions in the three cases pending before it,<sup>13</sup> and in oral rulings in the first month of trial in the *Sesay, Kallon, Gbao* proceedings. These Decisions and oral rulings place emphasis on the continuing nature of the disclosure obligation placed upon the Prosecution. The

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<sup>11</sup> At paragraph 23 of the Decision the Learned Judge said: “In the instant case, the Defence contention that the Prosecution has failed to comply with its disclosure obligations cannot be legally sustained in that, as demonstrated above, the Defence erred in its interpretation of the applicable provisions of Rule 66(A) either as these provisions existed before the amendment or since the new amendments.”

<sup>12</sup> Decision, para. 24.

<sup>13</sup> See *Prosecutor v. Sesay, Kallon, Gbao*, Case No. SCSL-2004-15-T, “Decision on Defence Motion for Disclosure Pursuant to Rules 66 and 68 of the Rules”, 9 July 2004; *Prosecutor v. Norman, Fofana, Kondewa*, Case No. SCSL-2004-14-PT, “Decision on Disclosure of Witness Statements and Cross-Examination”, 16 July 2004; *Prosecutor v. Brima, Kamara, Kanu*, Case No. SCSL-2004-16-PT, “Brima – Decision on Motion for Exclusion of Prosecution Witness Statements and Stay of Filing of Prosecution Statements”, 2 August 2004.



Learned Judge considered both written authorities in reaching his Decision. The Prosecution repeats that the Rule is unambiguous in its terms and scope.

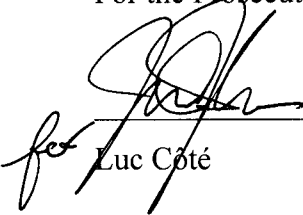
### III. CONCLUSION

20. For all the foregoing arguments, the Prosecution respectfully submits that the Defence arguments, separately or taken together, do not suffice to prove exceptional circumstances and irreparable prejudice to the Accused.

21. In consequence, the Prosecution submits that the Defence Application for leave should be dismissed.

Freetown, 6 September 2004

For the Prosecution,

  
\_\_\_\_\_  
Luc Côté

  
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Lesley Taylor

**PROSECUTION INDEX OF AUTHORITIES**

1. *The Prosecutor v. Sesay, Kallon, Gbao*, Case No. SCSL-2004-15-PT, “Decision on Prosecution’s Application for Leave to File an Interlocutory Appeal against the Decision on the Prosecution Motions for Joinder”, 13 February 2004.
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4. *The Prosecutor v. Norman, Fofana, Kondewa*, Case No. SCSL-2004-14-T, “Majority Decision on the Prosecution’s Application for Leave to File an Interlocutory Appeal against the Decision on the Prosecution’s Request for Leave to Amend the Indictment against Samuel Hinga Norman, Moinina Fofana and Allieu Kondewa”, 2 August 2004.
5. *Prosecutor v. Norman, Fofana, Kondewa*, Case No. SCSL-2004-14-PT, “Decision on Disclosure of Witness Statements and Cross-Examination”, 16 July 2004.
6. *Prosecutor v. Sesay, Kallon, Gbao*, Case No. SCSL-2004-15-T, “Ruling on Oral Application for the Exclusion of “Additional” Statement for Witness TF1-060”, 23 July 2004.
7. *Prosecutor v. Sesay, Kallon, Gbao*, Case No. SCSL-2004-15-T, “Decision on Defence Motion for Disclosure Pursuant to Rules 66 and 68 of the Rules”, 9 July 2004.
8. *Prosecutor v. Norman, Fofana, Kondewa*, Case No. SCSL-2004-14-PT, “Decision on Disclosure of Witness Statements and Cross-Examination”, 16 July 2004.
9. *Prosecutor v. Brima, Kamara, Kanu*, Case No. SCSL-2004-16-PT, “Brima – Decision on Motion for Exclusion of Prosecution Witness Statements and Stay of Filing of Prosecution Statements”, 2 August 2004.