

SPECIAL COURT FOR SIERRA LEONE
OFFICE OF THE PROSECUTOR
Freetown - Sierra Leone

Before: Justice Teresa Doherty, Presiding
Justice Richard Lussick
Justice Julia Sebutinde

Registrar: Mr. Robin Vincent

Date filed: 2 August 2005

THE PROSECUTOR

Against

**Alex Tamba Brima
Brima Bazy Kamara
Santigie Borbor Kanu**

Case No. SCSL-04-16-T

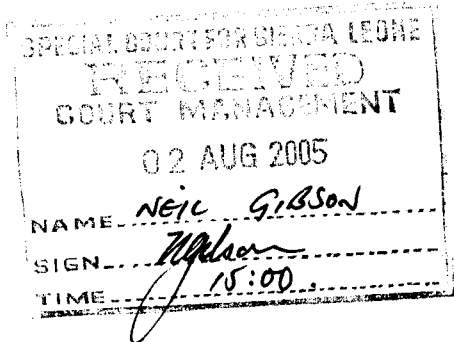
**PROSECUTION RESPONSE TO CONFIDENTIAL URGENT JOINT DEFENCE
MOTION TO EXCLUDE EVIDENCE GIVEN BY WITNESS TF1-157 AND EVIDENCE
TO BE GIVEN BY WITNESS TF1-158 BASED ON LACK OF AUTHENTICITY AND
VIOLATION OF RULE 95**

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I. Introduction

1. On 25 July 2005, the Defence filed a confidential “Urgent Joint Defence Motion to Exclude Evidence given by Witness TF1-157 and Evidence to be given by Witness TF1-158 Based on Lack of Authenticity and Violation of Rule 95” (“Motion”).
2. The Motion relates to evidence that emerged during the cross-examination of Witness TF1-157 that this witness bore a close family relationship to Witness TF1-158 who was also due to testify before the Court, and that the two witnesses resided in the same room while Witness TF1-157 was giving evidence, including over a weekend break in proceedings. The Defence argues that the relationship between the witnesses raises “grave concern about the authenticity and independence of their respective testimony” and alleges that Rule 95 of the Rules of Procedure and Evidence, and Article 17(2) and 17(4)(e) of the Statute, have been breached.
3. The Defence therefore seeks the exclusion of Witness TF1-157’s testimony, the preclusion of Witness TF1-158’s intended testimony¹, and a Court order that future AFRC Prosecution witnesses be prohibited from residing in the same room during their testimony.
4. The Prosecution submits that the Defense arguments lack merit, that the implicit allegations of collusion are groundless, and that the Motion should be dismissed in its entirety.

II. Argument

Communication between a party and a witness distinguished from communication between witnesses

5. The Defence argument relies almost exclusively on an analogy between the instant case and the ICTY case of *Prosecutor v. Kupreskic et al.*, where, in the midst of testimony, a

¹ In so far as the Motion seeks this relief, it is rendered moot. On 26 July 2005, the day following the filing of the Motion, Counsel for the Third Accused, on behalf of all Defence Counsel, made an oral application to prevent witness TF1-158 giving evidence on that day. That application was denied and the evidence of TF1-158 was concluded on 26 July 2005.

prosecution witness had contact with a member of the prosecution team. The Defence correctly articulates the concern of the Trial Chamber in *Kupreskic* that communication between a party and its witness carries a serious risk of influencing the witness, however unintentionally, to alter her testimony to favour the party. This may compromise the witness's intended role as "a witness for the truth" rather than as a witness for any particular party.² To protect against contamination, the ICTY Trial Chamber barred parties from communicating with witnesses from the time of the solemn declaration until the witness finished giving evidence.

6. The Prosecution submits that the Motion exhibits a basic misunderstanding of the *Kupreskic* Decision. The concerns that arise from communications between witnesses are not analogous to those that arise from communications between a witness and a party. Where a witness and a party communicate, it creates a perception that the witness may favor that party and not testify according to the witness's own recollection. This could impact upon the rights of the accused. However, where two witnesses communicate, the risk of party influence does not arise.
7. In national jurisdictions, husbands and wives, parents and children, family members and friends victimized in the same attack undertake solemn declarations, give evidence, hear the bench's admonition against discussing ongoing testimony, and when the court adjourns for the day, go home to spend the evening with other witnesses without objections being raised. Yet here, the Motion avers that the close quarters and the close relationship between the two witnesses raise "grave concern about the authenticity and independence of their respective testimony."³ If the line of reasoning of the Defence were followed to its logical conclusion, it would mean that any time a crime involved multiple victims having a close relationship, those victims would have to be sequestered, not only for the duration of their respective testimony, but also for the duration of investigations and proceedings, to fully insulate against contaminating each other's testimony.
8. The Prosecution submits that sufficient safeguards against contamination of testimony between witnesses already exist. First, the Defence has the right to test a witness's

² *Prosecutor v. Kupreskic*, IT-95-19-T, "Decision on communication between the parties and their witnesses," 21 September 1998.

³ Motion, para. 12.

credibility and raise any issues as the authenticity and independence of testimony through cross-examination.⁴ Second, witnesses are ordered by the Court not to discuss their testimony with anybody. It is a fundamental precept of criminal justice that it is to be assumed that witnesses (and others) follow judicial direction. That is why such directions are given by judges to witnesses (and juries). Witness TF1-157 was notified by the Trial Chamber that he was not to discuss his evidence with anyone else as long as he remained under oath and the witness indicated that he understood that order.⁵ Additional measures are neither appropriate nor warranted.

Collusion

9. Implicit in the Defence motion is the suggestion of collusion between Witness TF1-157 and TF1-158. However, the Defence failed to put this allegation directly to Witness TF1-157 during cross-examination. Moreover, the Defence has not correctly articulated the procedural steps to show collusion. In any event, matters affecting the credibility of evidence can only ever go to weight and not admissibility.
10. An allegation of collusion is one method of challenging the credibility of a witness. If a party has reason to suspect collusion, that party must confront the witness with the foundations for the suspicion and allow the witness to answer the accusation. The introduction of a suggestion of collusion without providing a witness the opportunity to answer the accusation constitutes an impermissible collateral attack on the witnesses' credibility. Witness TF1-157 was never confronted with any such accusation.⁶ When Witness TF1-158 was asked if he had asked Witness TF1-157 what had happened in court, Witness TF1-158 denied doing so.⁷
11. Furthermore, an allegation of collusion goes beyond a mere suggestion that two witnesses may have discussed their evidence because they are related and have stayed together during their testimony. Collusion suggests an agreement to abuse the legal system and mislead the court. Mere propinquity does not presume collusion. In the *Ndindabahizi*

⁴ *Prosecutor v. Nyiramasuhuko et al*, ICTR-97-21-T, Decision on the prosecutor's motions for leave to call additional witnesses and for the transfer of detained witnesses, 24 July 2001, para. 19.

⁵ Trial Transcript, 22 July 2005, pp 108-9; 25 July 2005, pp. 73-4.

⁶ It is to be noted that the evidence of TF1-157 has not concluded.

⁷ Trial Transcript, 26 July 2005, pp. 53-54.

case before the ICTR, both Prosecution and Defence presented allegations that witnesses for the other side conspired in the presentation of false testimony where, for example, four defense witnesses were all imprisoned together with the brother of the accused,⁸ a witness was summoned to meet investigators by another witness,⁹ and a witness was accompanied by other witnesses to give her statement, one of them a close family member.¹⁰ In all of these instances, the Chamber found the evidence was insufficient to show collusion. In the instant case the Defence has failed to elicit any basis on which it could be inferred that TF1-157, contrary to the Court's order, communicated with TF1-158 about his testimony and vice versa. Such evidence would, in any case, be insufficient to prove collusion.

Inappropriateness of Remedy Sought

12. Even if the Defence had satisfied the procedural requirements for this type of attack on the credibility of a witness, exclusion or preclusion of witness testimony is an inappropriate remedy and would constitute a departure from established jurisprudence. Guidance may be found in the Special Court's own Rules of Procedure and Evidence. Rule 90(D) reads, "A witness...who has not yet testified may not be present without leave of the Trial Chamber when the testimony of another witness is given. However, *a witness who has heard the testimony of another witness shall not for that reason alone be disqualified from testifying.*"¹¹ Thus, if a witness who hears the full testimony of another witness is not disqualified from testifying, a witness who may have had the experience of testifying described to him by another witness should not be disqualified.
13. As has been highlighted, an allegation of collusion as a means of challenging a witness's credibility goes to the weight of evidence and not its admissibility. In *Prosecutor v. Kuspreskic et al.*, the ICTY Appeals Chamber considered a complex issue of influence arising from the statements of three close family members.¹² Although the Appeals Chamber found that the evaluation of one of the witness's testimony by the Trial

⁸ *Prosecutor v. Nindabahizi*, ICTR-2001-71-I, Judgment and Sentence, 15 July 2004, para. 111.

⁹ *Id* at para. 288.

¹⁰ *Id* at para. 299.

¹¹ Emphasis added.

¹² *Prosecutor v. Kupreskic et al.*, IT-95-16-A, Appeals Judgment, 23 October 2001, paras 200-201.

Chamber was “wholly erroneous,” it did not find that the Trial Chamber erred in failing to exclude the testimony from the outset. Rather, the error was to afford that witness inappropriate credibility when her evidence was evaluated against the totality of the evidence.¹³ “It is a fundamental principle...that the credit of a witness can never be finally determined until all of the evidence has been given.”¹⁴ Indeed, it is only by hearing the testimony of both Witness TF1-157 and Witness TF1-158 that the Trial Chamber places itself in a position to be able to scrutinize and assess the credibility of the witnesses and probity of their evidence in the context of the evidence as a whole.

14. The state of the evidence, no more and no less, is that two witnesses who share a close relationship stayed in the same room during the testimony of one. Contact does not amount to collusion. The Motion argues pursuant to Rule 95 that the admission of the evidence would bring the administration of justice into serious disrepute. The Prosecution submits that to the contrary, the non-admission of the evidence would bring the administration of justice into disrepute.
15. The Motion further seeks an order that Prosecution witnesses not reside in the same room and other “instructions” that prevent part heard witnesses having contact with pending witnesses. For the reasons outlined above, the Prosecution submits that such an order and/or “instruction” is neither appropriate nor warranted. Further, in this respect, the Motion ignores the difficulties of housing multiple witnesses in a finite pool of accommodation in Freetown.

III. Conclusion

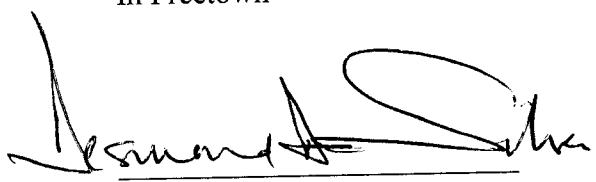
16. For the reasons stated above, the Prosecution submits that the testimony of Witnesses TF1-157 and TF1-158 is admissible. Issues of credibility go to weight not admissibility. The Defence may test the credibility of the witnesses through cross-examination, this being the appropriate time to confront the witnesses with any allegation of collusion. It is for the Trial Chamber to determine issues of credibility when all of the evidence has been heard. The Prosecution therefore submits that the Defence Motion should be denied.

¹³ *Id* at para. 225.

¹⁴ *Id* at para. 202. See also *Prosecutor v. Kunarac et al.*, IT-96-23-T and IT-96-23/1-T, “Decision on motion for acquittal,” 3 July 2000, para. 4.

Filed this 2nd day of August 2005

In Freetown



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The Prosecutor



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Senior Trial Counsel

TABLE OF AUTHORITES

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3. *Prosecutor v. Kupreskic et al*, Judgment, IT-95-16-A, paras 200-201, and 225, 23 October 2001. Available at: <http://www.un.org/icty/kupreskic/appeal/judgement/kup-aj011023e.pdf>.
4. *Prosecutor v. Ndindabahizi*, Judgment and Sentence, ICTR-2001-71-I, para. 111 and 112, 15 July 2004. Available at: <http://www.ictr.org/ENGLISH/cases/Ndindabahizi/judgement/Ndindabahizi%20Judgment.pdf>.
5. *Prosecutor v. Nyiramasuhuko et al*, “Decision on the prosecutor’s motions for leave to call additional witnesses and for the transfer of detained witnesses,” ICTR-96-15-T, para. 19, 24 July 2001. Available at: <http://www.itcr.org/ENGLISH/cases/Nyira/decisions/240701.htm>.