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SCSL-04-15-T
(17128-17137)

17128

THE SPECIAL COURT FOR SIERRA LEONE

BEFORE:

Justice Pierre Boutet, Presiding
Justice Bankole Thompson
Justice Benjamin Itoe

Registrar: Mr. Lovemore Munlo

Date filed: 12th January 2006

The Prosecutor

-v-

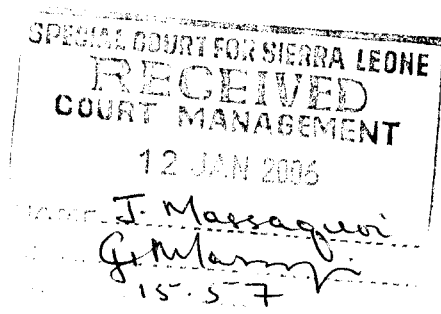
Issa Hassan Sesay

Case No: SCSL – 2004 – 15 – T

**DEFENCE MOTION REQUESTING THE EXCLUSION OF PARAGRAPHS
1, 2, 3, 11 and 14 OF THE ADDITIONAL INFORMATION PROVIDED BY
WITNESS TF1-117 DATED 25th, 26th, 27th AND 28th OCTOBER 2005.**

Office of the Prosecutor
Peter Harrison
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Defence Counsel
Wayne Jordash
Sareta Ashraph
Chantal Refahi



INTRODUCTION

Service of Statements

1. The Prosecution served an unredacted copy of the witness statement of TF1-117, dated 17th January 2003 on 2nd June 2003. On 11th March 2004 the Prosecution disclosed Interview Notes, dated 28th February 2004. On 28th October 2005 the Prosecution served notes of “proofing” of TF1-117 taken on 25th, 26th, 27th and 28th October 2005 entitled “Additional Information provided by Witness TF1-117”. On 2nd November 2005 the Prosecution served another “Additional Information” document arising from the “proofing” dated 28th October 2005. The Defence on behalf of Mr. Issa Sesay (“the Defence”) submits that paragraphs 1, 2, 3, 11 and 14 of the Additional Information provided by TF1-117 dated 25th, 26th, 27th and 28th October 2005 (“the relevant evidence”) contain wholly new allegations against Mr. Sesay.

3. The Defence submits that, applying the reasoning employed in *Prosecutor v. Bagosora*,¹ the relevant supplemental evidence of TF1-117 ought to be characterised as new evidence. The Defence thus requests that the Trial Chamber exclude the relevant evidence which arose from the Additional Information provided by TF1-117 dated 25th, 26th, 27th and 28th October 2005 unless the Prosecution is able to show good cause pursuant to Rule 66A².

SUBMISSIONS

5. The Defence relies upon the reasoning employed in the *Bagosora* Decision, which inter alia states “that in determining whether to exclude additional or supplemental statements of prosecution witnesses within the framework of prosecutorial disclosure obligations, a comparative evaluation should be undertaken designed to ascertain whether the alleged additional statement is new in relation to the original statement, (ii) whether there is any notice to the Defence of the event that the witness will testify to in the Indictment or the Pre-Trial Brief of the Prosecution, and (iii) the extent to which the evidentiary

¹ *The Prosecutor v. Bagosora, ICTR-98-41-T, Decision on the Admissibility of Evidence of Witness DP*, 18 November 2003 (“the *Bagosora* Decision”).

² Rule 66: Disclosure of materials by the Prosecutor; *Rules of Procedure and Evidence of the Special Court of Sierra Leone* p.30

material alters the incriminating quality of the evidence of which the Defence already had notice.”³

The Alleged Additional Statement is New in Relation to the Original Statement

7. New allegations (those that do not appear in any form in the witness’s original statement) are as follows:
 - (a) Issa Sesay was overall commander and Augustine Gbao was his field commander at the time the Witness was captured [para. 1]
 - (b) Issa Sesay would usually address the “Muster Parade” in Kono attended by the Witness [para.2]
 - (c) Issa Sesay selected the Witness in the early stages of his capture to be part of his team of bodyguards. They patrolled towns like Kono, Tongo and the border areas [para. 3]
 - (d) Issa Sesay attended a meeting of the AFRC and RUF commanders in Kailahun retreating from Freetown after the reinstatement of President Kabba. The purpose of the meeting was to plan how to attack the government. From there AFRC and RUF units were mobilised to attack towns again where in Kono civilians were killed, houses burnt, limbs amputated and kerosene looted [para. 11]
 - (e) Issa Sesay was sent from Kailahun by Sam Bockarie aka Mosquito to Charles Taylor in Liberia in order to procure arms supplies [para. 14].

8. The original statement of TF1-117 served on the defence on 2nd June 2003 did not mention these allegations, nor were they referred to in the Interview Notes of 28th February 2004 disclosed on 11th March 2004. This is particularly noteworthy given that the original statement makes direct reference to several individuals, including AFRC and RUF commanders, specifying their role in the events detailed but does not once mention Issa Sesay. It could not have been foreseen therefore that this witness would be relied upon to incriminate Mr. Sesay. The absence of disclosure of both the underlying events and the specific allegations against Mr. Sesay thus denies the Defence even “some

³ *Ruling on Oral Application for the Exclusion of Statements of Witness TF1-141 dated Respectively 9th October 2004, 19th and 20th October 2004 and 10th January 2005, 3 February 2005, para 19.*

general context”⁴ of Mr. Sesay’s involvement in the events to which this witness would testify.

9. It is both telling and disturbing in the context of any criminal trial, serious or otherwise, that for two years (pre-trial and during trial) no evidence incriminating the Accused arises from a witness yet a few days before the trial session the Prosecution obtain through their so-called proofing new evidence. The Defence submits that the paragraphs containing these allegations must therefore be considered new in relation to the original statement. It is impossible otherwise to discern the purpose of Rule 66 of the Rules. It has been rendered comprehensively obsolete by the techniques employed by the Prosecution who seek (and have been permitted) to continuously bolster their case with evidence never before disclosed.

10. It is clear that the Prosecution’s approach is systematic and calculated. The first piece of evidence ever relied upon by the Prosecution suggesting that there had been a meeting in Kailahun in which there had been planning to ensure that units were mobilised to attack civilians and their possessions during the Kono attack of December 1998 arose in the 6th Trial Session and was given by TF1-045. The Prosecution have clearly and pointedly sought to corroborate this demonstrably false allegation by seeking new evidence from witness TF1-117.

Neither the Indictment nor the Pre-Trial Brief Put the Defence on Notice of the Events

9. The Defence does not dispute that the allegations contained in (a) - (e) above are germane to the *general* allegations as set out in pages 2-8 of the Amended Consolidated Indictment and also the charges as specified and particularised in Counts 1-18 thereof (excluding counts 3, 7, 10, 11 and 14-17).⁵ The Defence further accepts that the allegations are germane to the basic *factual* allegations

⁴ *Ruling on Application for the Exclusion of Certain Supplemental Statements of Witness TF1-361 and Witness TF1-122*, 1 June 2005, para. 28(iv).

⁵ *Annex B; Updated Compliance Report 3: 13405* dated 13th April 2005 TF1-117 at p.11742

as specified and particularised in the Amended Consolidated Indictment and the Prosecution's Pre-Trial Brief.

10. However, the Defence submits that the fact that a disputed allegation is germane to the factual allegations disclosed is not sufficient to enable a finding to be made that they are not new. In other words it is meaningless to state that, simply because the disputed evidence is germane, it is not new. Not only does this ignore the commonsense everyday meaning of "new" but also it renders the *Bagosora* test obsolete, or at best reduces it to a simple test of relevancy. Any allegation of crime within Sierra Leone relating to the indictment period is germane to the factual allegations disclosed. This has little, if anything, to do with an assessment of whether it is new. In the event that it was not germane it would not be admissible per se. The fact that it is germane does not make it admissible per se.
11. The purpose of Rule 66 is to allow the Defence the opportunity to know, promptly and in detail the Prosecution case in order to be able to effectively advise and communicate and prepare a defence for trial. This emerges from the Accused's right, under Article 17(4)(a) of the Statute, to be "informed promptly ... of the nature and cause of the charge against him." In accordance with this right, the Accused is entitled to know not only the outline of the case against him at the outset of the trial, but also additionally the strength of the evidence against him. It is only by requiring the Prosecution to justify its continual reliance on new evidence could the protections envisaged by Article 17 be afforded the accused. The present approach by the Prosecution simply rides roughshod over an accused's right to know the case (both in detail and strength) against him.
12. Moreover, the Defence should also be able to rely on the specificity in the Summaries of 102 Witnesses on the Prosecution's Renewed List ("Witness Summary") provided by the Prosecution on 23rd November 2004.⁶ The summary of TF1-117's evidence provides specific detail of incidents not

⁶ *Summaries of 102 Witnesses on Prosecution's Renewed List* dated 23rd November 2004

involving Issa Sesay; namely RUF attacks on civilian residences and the looting of property, rapes of civilians by RUF commanders and the murder of civilians on the orders of a co-Accused. Several RUF and AFRC commanders are named in the original statement and yet again in the Witness Summary. Issa Sesay is not named⁷.

13. Furthermore, in the Updated Compliance Report filed on 5th May 2005 there is no indication that the Witness intended to incriminate Issa Sesay as he was not named nor alluded to by the Witness⁸. Until October 28th 2005, the Prosecution had been consistent with regards to the anticipated testimony of the Witness and in particular in reference to the alleged participants of the events specified in the original witness statement. The same commanders named in the first Witness Statement served on 2nd June 2003 have been referenced without change (no amendment had been made) in three subsequent documents filed by the Prosecution until service of the Additional Information provided by Witness TF1-117 on 28th October 2005.⁹ The combined failure to mention the Accused with the positive assertion of criminal acts by others provides a wholly erroneous picture of the evidence this witness would give. Thus, not only does it deny the Defence sufficient notice, but also it actively misleads the Defence as to the Prosecution case.
14. The Defence submits that, apart from the very general accusations in the Amended Consolidated Indictment and the Pre-trial Brief, the Defence has not had notice that this witness would testify on the allegations outlined above in (a) - (e). Prior to the service of the Additional Information provided by Witness TF1-117 on 28th October 2005, the Defence had no notice that this witness would be testifying as to Issa Sesay's alleged actions or command position in any location at all.

⁷ *Ibid.* p.35-36

⁸ *Annex A; Updated Compliance Report: "Materials Filed Pursuant to a Consequential Order to the Decision on Further Renewed Witness List"* dated 14th April 2005 at para. 67 p.11690

⁹ Three subsequent documents disclosed; Interview Notes served on 11th March 2004, the Witness Summary served on 23rd November 2004 and the Updated Compliance Report served on 5th May 2005.

The New Evidence Wholly Alters the Incriminating Quality of the Evidence of Which Defence Already Had Notice

15. The Defence submits that, beyond the general allegations asserted in the Pre-Trial Brief and Amended Consolidated Indictment, the Prosecution provided no notice of the allegations set out in paragraph 7 (a) – (e) above. The relevant evidence asserts that the Witness knows Issa Sesay personally. The Witness asserts that he observed the Accused as overall commander addressing the Muster Parades in Kono and that he served as one of a team of bodyguards to the Accused in the early stages of his capture. Although there are no dates given to enable the Defence to understand the detail of the allegation, the implication is that the Witness was selected by this Accused whilst still a child. The alteration in the incriminating quality of the evidence speaks for itself. Moreover the quality of this evidence is significantly different in relation to Issa Sesay as it purports to be direct rather than hearsay evidence. Direct evidence has significant probative value standing alone and therefore will require investigations to be carried out by the defence¹⁰.
16. The witness also seeks to implicate Issa Sesay in several new incidents never mentioned before by this Witness. At para 11, the Accused is alleged to have attended a meeting of the AFRC and RUF commanders in Kailahan where attacks on the government and civilians were planned. Furthermore, at para.14, it is alleged that Issa Sesay travelled on the orders of Sam Bockarie (aka Mosquito) to Liberia to procure arms from Charles Taylor. The relevant evidence consists of five new elements of testimony and significantly the relevant evidence is skeletal in its form. It provides insubstantial detail, which leaves the Defence unable to ascertain clearly exactly where and when the Witness's allegations are meant to have taken place. For these reasons, the new evidence in paragraphs 1, 2, 3, 11 and 14 of the relevant statement wholly alters the incriminating quality of the evidence of which the Defence had prior notice.

¹⁰ As indicated in paragraph 8 of the *Bagosora* decision

**The Practice of the Prosecution in Continually Seeking and Producing
“Supplemental” Statements**

17. The frequency of late disclosure of statements suggests that the additional and/or new evidence is the result not of spontaneous recollections, but arises due to focused efforts of the Prosecution to continuously expand and bolster their case. The Additional Information provided by TF1-117 dated 25th, 26th, 27th and 28th October 2005 in particular suggests that the additional information was actively sought. The Prosecution had until disclosure of the latter document made no indication that the testimony of this Witness would seek to directly implicate Issa Sesay in any of the four documents disclosed to the Defence since June 2003 yet in this document Issa Sesay is the sole subject of five of the fifteen paragraphs and the Witness refers to him in passing in yet another. In paragraphs 1, 3 and 13 Issa Sesay is alleged to have come into direct contact with the Witness.

18. Whilst Rule 66 does oblige the Prosecution to continually disclose new evidence up to 60 days prior to trial, it does not oblige *or allow* continued investigation into new evidence through existing witnesses. Rule 66 allows the Chamber to exclude new evidence not disclosed within the proper time period barring a showing of good cause.

19. If such new evidence is not excluded, the potential growth of the Prosecution's case will remain limitless until the end of the trial. Whatever the technical definition's employed by the jurisprudence (at the Special Court or elsewhere) it is unarguable that (i) the case against Mr Sesay is growing (ii) that the Prosecution are directing its growth to purposely bolster the various weakness in its case and (iii) that the Defence are being forced to defend a moving target. Whenever the Defence successfully challenge an area of evidence the Prosecution knowingly and wilfully seek further evidence from its witnesses. Never before has this being allowed in any International Tribunal. The Defence seek a response to this specific allegation against the Prosecution. It is the Defence expectation that the Prosecution will ignore this assertion (or fail to identify any other court where this occurs) because it knows it to be true and in the context of fair trial rights pursuant to Article 17 of the Statute and

the practice of all other tribunals indefensible. It is a retrograde technique, which rides roughshod over fair trial rights.

20. A conviction in these circumstances will represent nothing more than an unfair growth of the Prosecution case. It is not difficult to succeed in proving a case when it is continuously grows – like a modern day Hydra from the myth of Heracles - cut off one head and seven grow in its stead. This does not elevate justice, fairness or truth to their rightful place but instead subordinates them to the efforts of the Prosecution to increase the size of its case according to the inroads made by the Defence. Ultimately this approach undermines the laudable mandate of the court as well as the minimum rights of any Accused.

REQUEST

21. The Defence thus submits that, applying the *Bagosora* Decision, the allegations made in paragraphs 1, 2, 3, 11 and 14 of the Additional Information provided by TF1-117 on 25th, 26th, 27th and 28th October 2005 can only be characterised as “new.” The Defence therefore requests that the Trial Chamber exclude these paragraphs unless the Prosecution is able to meet the good cause requirement of Rule 66.

Dated this 12th day of January 2006

Chantal Refahi

WJ Wayne Jordash
SA Sareta Ashraph
Chantal Refahi

BOOK OF AUTHORITIES

1. *The Prosecutor v. Bagosora*, ICTR-98-41-T, Decision on the Admissibility of Evidence of Witness DP, 18 November 2003 (Readily available from ICTR website)
2. Ruling on Oral Application for the Exclusion of Statements of Witness TF1-141 dated Respectively 9th October 2004, 19th and 20th October 2004 and 10th January 2005, 3 February 2005 (readily available from SCSL Court Records website)
3. Ruling on Application for the Exclusion of Certain Supplemental Statements of Witness TF1-361 and Witness TF1-122, 1 June 2005 (readily available from SCSL Court Records website)
4. Prosecution Supplemental Pre-Trial Brief Pursuant to Order to OTP to File a Supplemental Pre-Trial Brief of 30th March as Amended by Order of 2 April 2004, 21st April 2004 (readily available from SCSL Court Records website)
5. Materials Filed Pursuant to “Order to Prosecution to Produce Witness List and Witness Summaries,” 12 July 2004 (readily available from SCSL Court Records website)
6. Materials Filed Pursuant to the Consequential Order to the Decision on Further Renewed Witness List Dated 13 April 2005, 5 May 2005 (readily available from SCSL Court Records website)
7. Rules of Procedure and Evidence of the Special Court of Sierra Leone As Amended at Sixth Plenary, 14 May 2005 (readily available from SCSL Court Records website)