

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

Before: Justice Pierre Boutet, Presiding
Justice Bankole Thompson
Justice Benjamin Itoe

Interim Registrar: Mr. Lovemore G. Munlo

Date filed: 23 January 2006

THE PROSECUTOR

Against

**Issa Hassan Sesay
Morris Kallon
Augustine Gbao**

Case No. SCSL-04-15-T

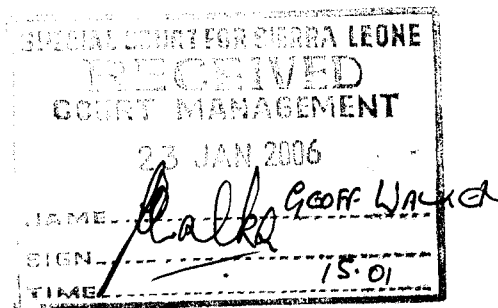
**PROSECUTION RESPONSE TO THE SESAY MOTION TO DIRECT THE
PROSECUTOR TO INVESTIGATE THE MATTER OF FALSE TESTIMONY BY
WITNESS TF1-366**

Office of the Prosecutor:
Desmond de Silva, Q.C.
Christopher Staker
James C. Johnson
Alain Werner
Peter Harrison

Defence Counsel for Issa Hassan Sesay
Wayne Jordash
Sareta Ashraph

Defence Counsel for Morris Kallon
Shekou Touray
Charles Taku
Melron Nicol-Wilson

Defence Counsel for Augustine Gbao
Andreas O'Shea
John Cammegh



Introduction

1. The Sesay “Defence Motion To Direct The Prosecutor To Investigate The Matter Of False Testimony By Witness TF1-366” dated 12 January 2006 (the “Motion”) is misleading and it should be dismissed.
2. The prosecution raises three preliminary objections. First, paragraphs 15 and 18, and footnote 10 of the Motion state that Appendix A must be referred to for the evidence. Appendix A was not filed. Second, the Motion exceeds the page limit for motions imposed by the Court. And third, unlike Rule 91 of the ICTR, which specifically states that the Chamber may direct the Prosecutor to investigate a matter of alleged false testimony,¹ Rule 91 of the Special Court includes no such provision. The Trial Chamber has no jurisdiction under Rules 91 or 77 to direct the Prosecutor to investigate a matter of alleged false testimony and the Motion should be dismissed for lack of jurisdiction.
3. The prosecution wishes to respond to the merits of the application. Paragraph 15 of the Motion alleges three instances of false testimony by the witness. They will be addressed in the order stated in para. 15.

Sesay Shooting and Killing of a Person at Bumpe

4. The transcript of 7 November 2005 does not record TF1-366 saying that the person shot by Issa Sesay at Bumpe was named Akim. The transcript shows the witness never gave a name to the person killed at Bumpe by Sesay, either in direct examination or cross-examination. There is no false testimony and Sesay’s counsel misled the court.

¹ Rule 91(B) states: “If a Chamber has strong grounds for believing that a witness has knowingly and wilfully given false testimony, it may:

- (i) direct the Prosecutor to investigate the matter with a view to the preparation and submission of an indictment for false testimony; or
- (ii) where the Prosecutor, in the view of the Chamber, has a conflict of interest with respect to the relevant conduct, direct the Registrar to appoint an *amicus curiae* to investigate the matter and report back to the Chamber as to whether there are sufficient grounds for instigating proceedings for false testimony.”

5. The allegation made by Sesay is that it is written in proofing notes that the witness said that Sesay shot and killed a person at Bumpe named Vandy, then in direct examination the witness said the person's name was Akim, then in cross-examination the witness said he did not know the name of the person shot by Sesay at Bumpe.

6. The transcript makes clear what happened. The witness began testifying at 12:15 p.m. on 7 November, 2005. He testified about a person named Akim Turay who went to the airfield near Magburaka. Issa Sesay, Morris Kallon and others went. The purpose was to receive a shipment of arms and ammunition being carried to Sierra Leone.² Later on the same page of transcript the witness referred to the person as Akim.³

7. At p. 101 of the 7 November transcript (and about 90 minutes later) the witness again referred to Akim, however, this time the transcript recorded that the interpreter pronounced the name as Akim Toulay. This reference to Akim was in the context of an order being given by Issa Sesay, Morris Kallon and "Akim Toulay" to disarm the Guineans at Masiaka during the retreat from Freetown following the February 1998 ECOMOG intervention.⁴ On the following page the witness is asked the name of the third person listed and he said "Akim". He was asked for the last name, and the witness stated: "I don't know his last name. It's only Akim Toulay [as interpreted] that I know."⁵

8. A few pages later the witness refers to a meeting at Makeni (after the February 1998 ECOMOG intervention), where it was decided that Akim Turay and Superman should lead the convoy to Kono.⁶ Issa Sesay, Morris Kallon, Akim Turay and Superman spoke at this Makeni meeting.⁷ He then described events from Makeni to Kono: "We then advanced to Koakoyima. Superman, Akim, including me, we were all in that fighting. We went to Koakoyima."⁸

² Transcript 7.11.05, p. 76, l. 3-11.

³ Transcript 7.11.05, p. 76, l. 25.

⁴ Transcript 7.11.05, p. 101, l. 27.

⁵ Transcript 7.11.05, p. 102, l. 2-7.

⁶ Transcript 7.11.05, p. 105, l. 23.

⁷ Transcript 7.11.05, p. 106, l. 1-2, 23-24.

⁸ Transcript 7.11.05, p. 112, l. 14-15.

9. The transcript makes clear that throughout the witness was referring to a specific former SLA soldier as Akim or Akim Turay (although at times the interpreter pronounced it as Akim Toulay), who fought with the RUF in 1998 and 1999. The transcript of the direct evidence also makes clear that: 1) the witness was not asked for the name of the person shot and killed by Issa Sesay at Bumpe; 2) the witness never gave a name to the person shot and killed by Issa Sesay at Bumpe; and 3) it was not Akim who Sesay shot and killed at Bumpe.

10. Sesay's Motion refers to lines 10-13 of p. 113 of the 7 November 2005 transcript. A review of pages 113-119 demonstrate the false and misleading nature of the allegation:

Q. Mr. Witness, I was just asking you if you could tell the Court what happened at Bumpe. If you could just take your time in giving your answer.

A. The thing that happened in Bumpe was that I saw Issa shoot somebody, who fell down. He was one of us.

Q. What was shot?

A. Our colleague soldier.

Q. Did you see this happen?

A. In my presence. I was standing, watching.

Q. Tell the Court what it is you saw happen.

A. Well, what happened after Issa shot the man was that when he saw us having withdrawn to Bumpe, he called Akim.

Q. He called Akim. Please continue.

A. And Superman and Morris Kallon. Then he told Morris Kallon –

Q. Please continue.

A. That Johnny Paul Koroma was with us there. We should fight and clear Kono. If we do not clear Kono there would be a problem.

Q. Why was this person shot?

A. He fell out of the line and stood in front of Johnny Paul Koroma. So he hid and came and stood by the president.

THE INTERPRETER: Sorry, Your Honours, the interpreter would like to correct the record. The witness is saying they were together on the front line, so he escaped and came and stood by the president.

MR HARRISON:

Q. Who escaped and came and stood beside the president?

A. The soldier. We were together on the front line. He is my

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colleague combatant.

PRESIDING JUDGE: The front line, do you mean where you had been in Koakoyima? What do you mean by front line?

THE WITNESS: When we advanced to Koakoyima and we were Repelled, we came back to Bumpe. When we were pushed out we came to Bumpe and Johnny Paul Koroma, we should have been able to defend them. But if we had come together all of us would have died together. That was why he killed that guy; for us to get courage to go and capture Kono.

PRESIDING JUDGE: So you say he killed that guy because you had withdrawn from Koakoyima?

THE WITNESS: Yes. That was why he killed that guy. So that we should forcefully take that place. Because we had all been frightened.

MR HARRISON:

Q. Tell the Court what you mean when you say you had all been frightened.

A. The example that he set. He had identified somebody -- so many people that died there. Because we were dispersed by the South Africans and the Kamajors, so he had to set that example so that everybody would be conscious.

JUDGE ITOE: I am not getting it clear at all.

MR HARRISON:

Q. Who had to set the example?

A. Issa set the example. When he killed our colleague he set that example. We were all standing and watching.

Q. And why did the example have to be set?

JUDGE ITOE: And why on that particular soldier?

THE WITNESS: Hadn't he set that example they would have
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put us in disarray. But when he set the example all of us were conscious, Superman, Akim and Morris Kallon -- all of us gain conscious because Johnny Paul Koroma was amongst us and Sam Bockarie said we should make sure that nothing should happen to him, he should be taken safely to Kailahun. So we were in the midst of it all.

....

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MR HARRISON:

Q. What was your understanding of the events that led up to the shooting of this person?

A. Okay. The first thing that happened why that guy was killed, as I was telling you -- the guns that we took at Koakoyima, two AAs, one twin barrel and a grenade launcher, three grenade launchers. The first that we took to the town and we were repelled, they took all these guns from us, except the twin barrel. The grenade launcher, the single barrel, they were taken

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from us.

THE INTERPRETER: He is going very fast again,
Your Honours.

PRESIDING JUDGE: Take it back again to where you were saying they took all of these guns from us, and go slowly from there, please.

THE WITNESS: Okay. When we first advanced to on Koakoyima they took the two single barrel from us -- two single barrels from us -- one barrel. The Kamajors and the South Africans took that from us. We withdrew and we met Issa and others in Bumpe. But when he saw the convoy, he was worried and he was angry. With the bossmen, we should not joke with them. Whatever they say we should do, we should do. But if you were scared and go to them it is a problem; it would not be good for you, you should go on the front line. When the situation is now under control and they -- you would have some problems. So that soldier was frightened. That is why he came closer to the bosses. That was why he was shot, because he was close to them. He was in the front line and he left and came -- withdrew to the back. We were all in the front line. They took the support weapons from us. That is what I know, because he had come from the front line to be by the bosses. Because there are some people who are free to be in the front line, they are not supposed to be with the COs. That is what I know. That is why.

Q. You have talked about this shooting. What do you do next?

A. After he had been shot, then he told Akim and others, and Superman and Morris Kallon --

Q. Who told these people?

A. Issa Sesay, he told these people that all these guns they

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have taken from us, if we did not recapture them we would have some problems. So we had to go there and recapture the guns again. We went to Koidu Town.⁹ [underlining added]

11. On the following day of testimony, 8 November 2005, the witness again referred to Akim Turay. The witness said that it was Morris Kallon, Superman and Akim Turay who escorted JPK (Johnny Paul Koroma) from Bumpe to Koidu.¹⁰ The witness then referred to a meeting in Koidu at Kimberlite attended by Johnny Paul Koroma, Issa Sesay, Morris Kallon, Superman, the witness and Akim and that Bockarie had sent a

⁹ Transcript 7.11.05, pp. 113-119.

¹⁰ Transcript 8.11.05, p. 4, l. 20-21

message saying that JPK should be escorted to Kailahun.¹¹ The witness referred to Akim as one of the commanders involved in taking JPK from Kono to Kailahun.¹²

12. After the person was killed at Bumpe Sesay actually ordered Akim, Morris Kallon and Superman to recapture the guns taken from them.¹³ In his direct evidence the witness never said the name of the person killed. Sesay's counsel attempted to mislead the witness on 14 November 2005 when he said that the witness had invented the name the previous week during cross-examination.¹⁴

13. Words recorded in proofing notes (which are in English and were not reviewed with the witness or read back) were put to the witness but the witness denied uttering the words put to him.¹⁵ The transcript makes clear that the witness in no way tried to mislead the Court. The same cannot be said for defence counsel.

Number of Trips to Monrovia

14. In the direct evidence the witness said he went to Monrovia with Issa Sesay once and that when they returned to Sierra Leone they brought back arms and other items.¹⁶

15. When cross-examined by Sesay's counsel the witness talked about one trip that he made to Monrovia with Issa Sesay.¹⁷ Words from an English language statement dated 30 August 2004 (this was not a proofing note) were put to the witness. The witness accepted some of the words as being true and denied making other parts of the statement

¹¹ Transcript 8.11.05, p. 6, l. 12-20.

¹² Transcript 8.11.05, p. 23, l. 13-16. Further references to Akim or Akim Turay can be found in the transcript of 8 November 2005, at p. 27, l. 18; p. 63, l. 12; p. 64, l. 2; p. 69, l. 10; p. 77, l. 4; p. 90, l. 23 and 29; p. 91, l. 6 and 29; p. 92, l. 16; p. 93, l. 4 and 29. References to Akim and Akim Turay also exist in the subsequent days of transcript.

¹³ Transcript 7.11.05, p. 118, l. 25-29, p. 119, l. 1-3.

¹⁴ Transcript 14 November 2005, p. 14, l. 18-29, p. 15, l. 1-1-12.

¹⁵ The relevant passage of the statement was "I saw him [Sesay] shoot and kill one of our fighters named Vandy". Transcript 14 November 2005, p. 15, l. 16-23, p. 16, l. 21-29, p. 17, l. 1-2.

¹⁶ Transcript, 10.11.05, p. 33, l. 1-29; p. 34, l. 1-24.

¹⁷ Transcript 15.11.05, p. 35, l. 16-29; p. 36, l. 1-17; p. 37, l. 13-29.

that were put to him.¹⁸ A portion of the relevant part of the statement was not put to the witness.¹⁹

16. The Court has before it evidence of an event where Issa Sesay went to Monrovia to get arms and returned to Sierra Leone with those arms. That was the evidence in the direct examination and cross-examination. Sesay's counsel put a statement to the witness, some of which the witness denied having said. There may be some evidence of a prior inconsistent statement, which the prosecution does not concede, but there is nothing more. The allegation made against the witness is without merit.

Code Names of Issa Sesay

17. The witness testified for 10 days.²⁰ The subject matter of his testimony spanned 10 years. On the 9th day the witness was asked for Sesay's code names, on the 10th day he was asked to repeat those names. He was asked twice to repeat the names and the witness said that the lawyer could look them up in the record. On the third request to give the names he responded. When told that the answers were not the same as the ones given the previous day the witness immediately said that he had given the names to see if the lawyer recalled what was said the previous day. The answers could be looked up in the transcript, everyone knew that, and the court could not have been misled. There was animosity between the witness and counsel, and the witness' response made clear to the court that the witness acknowledged that the answer he gave was not the same as the previous day's. In the context of testifying over 10 days with extensive cross-examination, responding incorrectly after being asked three times to repeat what he had said the previous day, and then immediately making clear that he was aware that his answer was not the same as the one given the previous day does not constitute false testimony.

The Law

¹⁸ Transcript 15.11.05, p. 38, l. 18-29; p. 39, l. 1-29; p. 40, l. 1-29; p. 41, l. 1-19.

¹⁹ Transcript 15.11.05, p. 41, l. 20-25.

²⁰ The dates are 7, 8, 9, 10, 11, 14, 15, 16, 17, 18 November 2005.

18. The Motion asks the Chamber to direct the Prosecutor to investigate the testimony of the witness. On any reading of Rules 91(B) and 77 the Motion is inappropriate. The prosecution says the Motion is frivolous or an abuse of process and that the Court should consider an appropriate remedy under Rule 46(C). Rule 91(B) charges the Chamber with deciding whether to follow the procedure in Rule 77, if the Chamber has strong grounds for believing a witness may have given false testimony. That is the exclusive province of the Chamber. Rule 77 provides the Chamber with different procedural options, where the Chamber decides to act on a possible contempt of the Special Court.

19. The Motion misleads the Chamber on the evidence before it, and effectively seeks to have the Trial Chamber rule on the credibility of a witness before such assessment should properly be made. Defence counsel has opted to invoke a clearly inappropriate procedure, and one lacking in jurisdiction, to attack the evidence of, in reality, one incident following ten days of testimony by the witness.

20. The elements of false testimony are: a) the witness must make a solemn declaration; b) the false statement must be contrary to the solemn declaration; c) the witness must believe at the time the statement was made that it was false; and d) there must be a relevant relationship between the statement and a material matter within the case.²¹ Elements b) and c) are not established and the evidence of code names given by this witness, which was not adduced by the prosecution but by counsel for Kallon and Gbao, is not a material matter in the prosecution case.

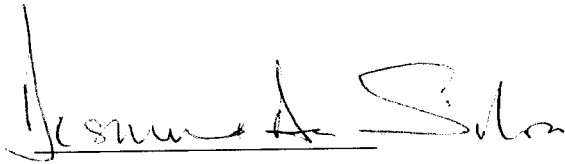
Conclusion

21. Rule 91 does not give the Trial Chamber jurisdiction to direct the Prosecutor to investigate alleged false testimony. Sesay's counsel misled the witness during cross-

²¹ *Prosecutor v. Akayesu*, Case No. ICTR-96-4-T, "Decision on the Defence Motions to Direct the Prosecutor to Investigate the Matter of False Testimony by Witness 'R'", 9 March 1998, p. 2.

examination and sought to mislead the Trial Chamber. The Motion should be dismissed and the Prosecutor asks the Trial Chamber to impose a remedy under Rule 46(C).

Dated: 23 January 2006 at Freetown, Sierra Leone

A handwritten signature in black ink, appearing to read "Desmond de Silva". The signature is written in a cursive style with a horizontal line underneath the name.

Desmond de Silva, Q.C.

Index of Authorities

A. Orders, Decisions and Motions

1. *Prosecutor v. Akayesu*, Case No. ICTR-96-4-T, “Decision on the Defence Motions to Direct the Prosecutor to Investigate the Matter of False Testimony by Witness ‘R’”, 9 March 1998

B. Rules of Procedure and Evidence

Rules of Procedure and Evidence of the Special Court, Rules 46(C), 77, 91

C. Transcript

Transcript 7.11.05, pp. 76, 101, 102, 105, 106, and 112-119

Transcript 8.11.05, pp. 4, 6, 23, 27, 63, 64, 69, 77, and 90-93

Transcript 10.11.05, pp. 33 and 34

Transcript 14.11.05, pp. 14-17

Transcript 15.11.05, pp. 35-41