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SCSL-04-15-T
(27119 - 27126)

27119

CASE No.SCSL-2004-15-T

**SPECIAL COURT FOR SIERRA LEONE
TRIAL CHAMBER 1**

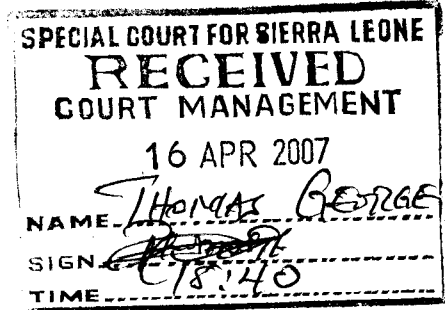
Before:

Hon Justice Bankole Thompson, Presiding Judge
Hon Justice Pierre Boutet
Hon Justice Benjamin Mutanga Itoe

Acting Registrar:

Mr Herman Von Hebel

Date: 16 April 2007



PROSECUTOR	Against	ISSA HASSAN SESAY MORRIS KALLON AUGUSTINE GBAO
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PUBLIC

**RESPONSE TO PROSECUTION MOTION THAT THE SECOND ACCUSED
COMPLY WITH RULE 67**

Office of the Prosecutor

Stephen Rapp
Christopher Staker
James C. Johnson
Peter Harrison

Defence Counsel for Morris Kallon

Shekou Touray
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Defence Counsel for Issa Sesay

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Augustine Gbao
Andreas O'Shea
John Cammegh

INTRODUCTION

1. On 28 March 2007, the Defence for Morris Kallon (“the Kallon Defence”) sent a letter to the Trial Chamber correcting a statement made at the Pre-Defence Conference. The letter indicated that the Kallon Defence would be relying on the defence of alibi but would not be relying on other special defences.¹
2. On 30 March 2007 the Prosecution filed a motion requesting an order from the Trial Chamber that on or before 30 April 2007, or such other appropriate date as determined by the Trial Chamber, the Kallon Defence deliver to the Prosecution a notice of alibi that complies with Rule 67 of the Rules of Procedure and Evidence (“the Rules”) containing the following information:
 - a. the place or places at which the Second Accused claims to have been present at the time of the alleged crimes;
 - b. the names and addresses of witnesses who the Second Accused intends to call in support of the alibi; and
 - c. any other evidence upon which the Second Accused intends to rely to establish the alibi.²

ARGUMENTS

3. The Kallon Defence intend to use its best endeavors to comply with the requirements of Rule 67 where possible and it is presumptuous of the Prosecution to suggest otherwise. The letter of 28 March 2007 should not be construed as ‘inadequate and incomplete notice’³ but rather an attempt to correct a statement made before the Trial Chamber as soon as possible. The letter was an indication of intention and clearly not a formal notice complying with Rule 67. The Kallon Defence contend that the Prosecution’s motion for the Second Accused to comply with Rule 67, filed two days following the receipt of the letter, is therefore premature and unwarranted.

¹ *Prosecutor v Sesay et al.* SCSL-04-15-T-747, Prosecution Motion that the Second Accused Comply with Rule 67 (“The Motion”), Appendix A, 30 March 2007.

² The Motion, para 8.

³ The Motion, para 7.

4. Rule 67 states, in part, as follows:

(A) As early as reasonably practicable and in any event prior to the commencement of the trial:

(ii) The Defence shall notify the Prosecution of its intent to enter:

(a) The defence of alibi; in which case the notification shall specify the place or places at which the accused claims to have been present at the time of the alleged crime and the names and addresses and any other evidence upon which the accused intends to rely to establish the alibi.

(B) Failure of the defence to provide such notice under this Rule shall not limit the right of the accused to rely on the above defences.

5. It is argued that Rule 67 must be read in conjunction with Rules of Evidence providing for the protection of witnesses. For example, Rule 26bis of the Rules empowers the Trial Chamber and the Appeals Chamber to “ensure that a trial is fair and expeditious and that proceedings before the Special Court are conducted in accordance with the Agreement, the Statute and the Rules, with full respect for the rights of the accused and due regards for the protection of victims and witnesses.” Rule 75(A) of the Rules states: “A Judge or Trial Chamber may, of its own motion, or at the request of either party, or of the Witnesses and Victims Sections, order appropriate measures to safeguard the privacy and security of victims and witnesses provided that the measures are consistent with the rights of the accused.” Rule 75(B) of the Rules allow for a variety of measures to protect the identity of victims and witnesses. Rule 69 of the Rules provide that a Judge or Trial Chamber may order at the request of either party “the non-disclosure of the identity of a victim or witness who may be in danger or risk, until the Judge or Chamber decides otherwise.” Rule 53(A) of the Rules states that a designated Judge may “in the interests of justice, order the non-disclosure to the public of any documents or information until further order.”

6. On 18 January 2007 the Kallon Defence applied for Immediate Protective Measures for Witnesses and Victims and for Non-Public Disclosure.⁴ In its decision of 18 March 2007 this Trial Chamber granted a wide variety of protective measures deemed necessary.⁵ Of note, this Chamber held that:

- a. The Defence for the Second Accused, Morris Kallon, shall be allowed to withhold the names or any other identifying data of its witnesses until 42 days prior to their testimony at trial;⁶
- b. The Defence for the Second Accused, Morris Kallon, shall designate a pseudonym for each of its witnesses, to be used during pre-defence disclosure of witness summaries and other materials and during trial proceedings;⁷
- c. The names or any other identifying data of these witnesses shall not be disclosed to the public or the media, and this order shall remain in effect after the conclusion of proceedings;⁸
- d. Upon disclosure of the witnesses' names or any other identifying data by the Defence ... the Prosecution, the Defence for the First Accused, Issa Sesay, and the Defence for the Third Accused, Augustine Gbao, respectively, shall inform the Witnesses and Victims Section of their intention, if any, to interview a witness listed as a witness for the Defence for the Second Accused, Morris Kallon. The Witnesses and Victims Section, upon being informed beforehand of the location of the witness, shall contact the witness and inform him or her of any party's intention to interview him or her and of his or right not to consent or give the interview. Should the witness consent to the interview, the Witnesses and Victims Section shall inform the relevant party as to the location for the interview. Except under exceptional circumstances, any such interview shall not take place at the outset of the witness' testimony in court.⁹

7. The Kallon Defence appreciate that it is necessary for the Prosecution to have adequate time to prepare its case and investigate the evidence on which the alibi

⁴ *Prosecutor v Sesay et al.* SCSL-04-15-T-682, Kallon Defence Motion for Immediate Protective Measures for Witnesses and Victims and for Non-Public Disclosure, 18 January 2007.

⁵ *Prosecutor v Sesay et al.* SCSL-04-15-T-739, Decision on Kallon Defence Motion for Immediate Protective Measures for Witnesses and Victims and for Non-Public Disclosure, 18 March 2007.

⁶ *Ibid* at para 34 c.

⁷ *Ibid* at para 34 e.

⁸ *Ibid* at para 34 f.

⁹ *Ibid* at para 34 j.

defence rests or else this may impair the interests of fair trial proceedings. However, the safety of witnesses testifying on behalf of Mr Kallon and their willingness to testify is also of grave concern to the Kallon Defence. As stressed in the application for protective measures for witnesses before this Trial Chamber, witnesses have expressed fear at being harassed by agents of the Prosecution as well as friends, relatives and associates of other Accused before this Court.

8. Other tribunals have been faced with similar considerations regarding Rule 67 and protective measures for witnesses. In *Delalić et al.*, the Defence had disclosed the names and addresses of some of their alibi and special defence witnesses. However, they also supplied an additional list of 13 witnesses for whom no addresses were included. The Defence stated that it was in the process of seeking certain protections for them and in addition stated during oral arguments that, should it be ordered to comply with the provisions of Sub-rule 67(A)(ii)(b) ICTY, it would apply for protective measures for some of the witnesses because of the sensitive position where they are living. The Chamber in that case held that the Defence must disclose the names and addresses of witnesses which they intended to call to testify on the defence of alibi and other special defences and that if they wished to apply for protective measures for these witnesses who may be at risk then they should do this rather than seek to avoid their obligations of disclosure on the grounds of a potential threat to a witness.¹⁰
9. The *Delalić* case is clearly distinguishable from the current application before this Trial Chamber where the Kallon Defence has already obtained a decision securing certain key protective measures for its witnesses.
10. Further, this application can be distinguished from an application for relief where Rule 67 has been violated. For example, in *Brima et al.* it was found that the First Accused was in breach of Rule 67 as no alibi notice was filed at all despite reference to the defence of alibi in his pre-trial brief and sworn evidence once trial had begun.¹¹

¹⁰ *Prosecutor v Delalić et al.*, IT-92-21, Decision on the Motion to Compel the Disclosure of the Addresses of the Witnesses, 13 June 1997.

¹¹ *Prosecutor v Brima et al.*, SCSL-04-16-T-521, Decision on Prosecution Motion for Relief in Respect of Violations of Rule 67, 26 July 2006.

REVISED ORDER REQUESTED

11. The Kallon Defence respectfully request this Chamber to make an order taking into account the Prosecution's need to have adequate time to prepare its case and also the necessary protective measures granted to Kallon Defence witnesses. In this regard, the status of Mr Kallon as Second Accused should be noted as indications at the Pre-Defence conference by the First Accused suggest that their defence case will take several months.¹² It is submitted that should the order requested below be granted the Prosecution will have sufficient time to prepare its case without infringing on the protective measures granted to Kallon Defence witnesses.
12. Therefore, the Kallon Defence requests the Chamber to Order that on or before 2 May 2007 (the day before the commencement of the Defence Case for the 1st Accused¹³) the Kallon Defence supply to the Prosecution a notice of alibi containing the following information:
- a. the place or places at which Mr Kallon claims to have been present at the time of the alleged crimes;
 - b. the pseudonyms of witnesses who Mr Kallon intends to call in support of the alibi; and
 - c. any other evidence upon which Mr Kallon intends to rely to establish the alibi.¹⁴
13. Further, that in compliance with the protective measures granted by this Trial Chamber, the Kallon Defence discloses the names of the above mentioned witnesses 42 days prior to their testimony at trial.¹⁵
14. Following such disclosure, should the Prosecution, or the Defence for the First or Third Accused, wish to interview any of the above mentioned witnesses, they should

¹² RUF Trial Transcript, 20 March 2007.

¹³ *Prosecutor v Sesay et al.* SCSL-04-15-T-746, Consequential Orders Concerning the Preparation and the Commencement of the Defence Case, 28 March 2007.

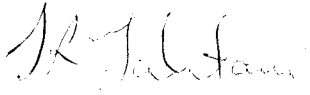
¹⁴ The Motion, para 8.

¹⁵ See *Prosecutor v Sesay et al.* SCSL-04-15-T-739, Decision on Kallon Defence Motion for Immediate Protective Measures for Witnesses and Victims and for Non-Public Disclosure, 18 March 2007 para 34 c.

27/25

inform the Witness and Victims Section of this intention and follow the procedure laid down in this Chamber's Decision granting protective measures.¹⁶

Dated 16 April 2007



pp. Shekou Touray
Lead Counsel 1

¹⁶ Ibid at para 34 j.

LIST OF AUTHORITIES

27/26

A. MOTIONS

Prosecutor v Sesay et al. SCSL-04-15-T-747, Prosecution Motion that the Second Accused Comply with Rule 67 (“The Motion”), Appendix A, 30 March 2007.

Prosecutor v Sesay et al. SCSL-04-15-T-682, Kallon Defence Motion for Immediate Protective Measures for Witnesses and Victims and for Non-Public Disclosure, 18 January 2007.

B. DECISIONS AND ORDERS

Prosecutor v Sesay et al. SCSL-04-15-T-746, Consequential Orders Concerning the Preparation and the Commencement of the Defence Case, 28 March 2007.

Prosecutor v Sesay et al. SCSL-04-15-T-739, Decision on Kallon Defence Motion for Immediate Protective Measures for Witnesses and Victims and for Non-Public Disclosure, 18 March 2007.

Prosecutor v Brima et al., SCSL-04-16-T-521, Decision on Prosecution Motion for Relief in Respect of Violations of Rule 67, 26 July 2006.

Prosecutor v Delalić et al., IT-92-21, Decision on the Motion to Compel the Disclosure of the Addresses of the Witnesses, 13 June 1997.

C. TRANSCRIPTS

RUF Trial Transcript, 20 March 2007.