

SCSL-2003-05-PT-043-1st
(890-904)

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IN THE SPECIAL COURT FOR SIERRA LEONE

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

Registrar: Mr. Robin Vincent

Date filed: 30th May 2003

THE PROSECUTOR

Against

ISSA HASSAN SESAY
(Case No. SCSL 2003-05-PT)

APPLICATION FOR RECONSIDERATION OF AND/OR LEAVE TO APPEAL
REGARDING THE ORDER OF JUDGE BANKOLE THOMPSON (PROTECTIVE
MEASURES FOR WITNESSES AND VICTIMS) RENDERED ON THE 23rd MAY
2003

Office of the Prosecutor:

Luc Cote, Chief of the Prosecution

Defence Counsel:

William Hartzog, Lead Counsel
Alexandra Marcil, Co-Counsel

2- June 03 2:10 hrs.

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Variation of Order or Leave to Appeal

1. Defence counsel for Mr. Issa Hassan Sesay fully endorse the submissions in the Application for Reconsideration of and/or Leave to Appeal “Decision on the Prosecutor’s Motion for Immediate Protective Measures for Witnesses and Victims and for Non-public Disclosure”, filed in The Prosecutor against Morris Kallon (case no SCLS-2003-07-PT) on the 30th of May 2003.
2. Counsel for Issa Hassan Sesay respectfully submits that these arguments apply *mutatis mutandis* in the case of Mr. Sesay.
3. On the grounds set out in the said Application, it is requested that Judge Bankole Thompson reconsider the “Decision on the Prosecutor’s Motion for Immediate Protective Measures for Witnesses and Victims and for Non-public Disclosure” and issue a variation of the Decision made.
4. In the alternative, it is requested that, pursuant to Rule 73 (B) of the Rule of Procedure and Evidence, this application seeks leave to appeal the Decision.

Objections to measures (a), (g), (h), (k)

5. The Decision on the Prosecutor’s Motion for Immediate Protective Measures for Witnesses and Victims and for Non-Public Disclosure was rendered on May 23rd, 2003.
6. Counsel representing Issa Hassan Sesay dispute paragraphs (a), (g), (h) et (k) of the said Decision.
7. It is submitted that measures (a), (g), (h), (k) are not strictly necessary and proportionate to their aim which is the protection of the witnesses of the Prosecutor.

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8. It is submitted that these four measures violate the right of the accused to a fair and expeditious trial. As provided for in Rule 73 (B), Counsel for the accused therefore respectfully submit that a decision from the Appeals Chamber is necessary and essential in order to insure and protect these rights.
9. The Decision on the Prosecutor's Motion for Immediate Protective Measures for Witnesses and Victims and for Non-Public Disclosure grants the measure requested by the Prosecutor in **paragraph (a)**: "the Prosecution may withhold identifying data of the persons the Prosecution is seeking protection [...], until 42 (forty-two) days before the witness is to testify at trial". The measure (a) is disputed for the following reasons.
10. It is submitted that the granted measure (a) violates the rights to a fair and expeditious trial in using the date of testimony rather than the date of trial as the point of departure. The effect will be that at the commencement of the trial the Defence will probably not know the identities of the majority of the witnesses that the Prosecution intends to call at trial. The Defence will cross-examine witnesses in the early stages of the trial without a complete knowledge of the Prosecution case. As pointed out in the Application for Reconsideration of and/or Leave to Appeal "Decision on the Prosecutor's Motion for Immediate Protective Measures for Witnesses and Victims and for Non-public Disclosure", filed in the Prosecutor against Morris Kallon (case no SCLS-2003-07-PT) on the 30th of May 2003, the real consequence of this may be that Prosecution witnesses will have to be recalled for further cross-examination after the completion of the Prosecution case, with the effect of seriously delaying trial proceedings.
11. The measure (a) will violate the accused's right to a fair trial, because it imposes significant limit to his capacity to lead truly efficient investigations. Investigations in relation to the vast majority of the witnesses will not be complete before the trial. During the trial the Defence will be fully absorbed mentally and physically in advocacy and the conduct of the trial itself. The Defence will be in a weak position to lead investigations concerning facts that are revealed by the evidence during the trial and in the meantime leading

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investigations regarding future witnesses on elements that should have been searched for way before the trial. Accordingly it is submitted that this measure is totally incongruous in the context of a non-stop trial.

12. The measure (a) will violate the right of the accused to an expeditious trial, since the order of witnesses is often difficult to control for many reasons that are not under the complete control of the Prosecution. The measure may induce delays.
13. The said Decision grants the measures requested by the Prosecution in **paragraph (g)** of its Motion: « the Defence shall maintain a log indicating the name, address and position of each person or entity which receives a copy of, or information from, a witness statement [...]».
14. It is submitted that the judge erred in ordering measure (g) for the reasons set out in the Application for Reconsideration of and/or Leave to Appeal “Decision on the Prosecutor’s Motion for Immediate Protective Measures for Witnesses and Victims and for Non-public Disclosure”, filed in the Prosecutor against Morris Kallon (case no SCLS-2003-07-PT) on the 30th of May 2003.
15. The said Decision grants the measures requested by the Prosecution in **paragraph (h)** of its Motion: “the Defence provide to the Chamber and the Prosecution a designation of all persons working on the Defence team [...] and requiring the Defence to advise the Chamber and the Prosecution in writing of any changes in the composition of this Defence team”.
16. It is submitted that measure (h) raises a considerable structural problem which undermines the independence of the different entities of the Court, notwithstanding the Statute of the Court. In an adversarial system, it is incoherent that one party, in the case in point the Defence, has its members and activities supervised by the opposite party, in this case the Prosecutor. This specific measure, which was granted at the request of the Prosecutor, reveals an unjustified lack of trust on the Registrar. It is up to the Registrar to exercise control *a priori* over the members and the behaviour of the members

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of the Defence teams regarding the identity of protected witnesses. The Prosecution should not have the means to control *a priori* the activities of the members of the Defence nor should it have a control over their ethics. If doubts arise with regard to the lack of compliance of a Defence team member regarding the identity of protected witnesses, the Prosecution may alert the Victims and Witnesses Unit which can investigate the matter. If appropriate, a complaint for contempt of court could be made. As a last resort, it is for the Trial Chamber to exercise a control *a posteriori* over lawyers, Defence team members or members of the OTP, regarding their compliance with the order(s) for the protection of witnesses. In addition, it should be noted that every lawyer is also subject to the supervision of his or her national bar.

17. The said Decision grants the measure requested by the Prosecution in **paragraph (k)** of his Motion: “the Defence Counsel make a written request to the Trial Chamber or a Judge thereof, for permission to contact any protected witness or any relative of such person [...]”.

18. It is respectfully submitted that the measure (k) also raises a considerable structural problem which undermines the independence of the different entities of the Court, notwithstanding the Statute of the Court. It is for the Victims and Witnesses Unit to supervise any situation in which the Defence should want to meet a witness or a victim for whom protection has been asked by the opposite party. Where there is no opposition from the Prosecutor and from the protected witness or victim, that Unit is fully qualified to manage the situation. It is precisely his duty and mandate to do so. The impact of this measure is to impose a blanket overall requirement for judicial intervention to supervise the investigations of the Defence, even when there is no opposition from the parties. Therefore, this measure is unnecessarily oppressive and may cause needlessly cumbersome, costly and time consuming procedures.

Orders sought:

19. It is hereby requested that the learned Judge reconsider his “Decision on the Prosecutor’s Motion for Immediate Protective measures for Witnesses and

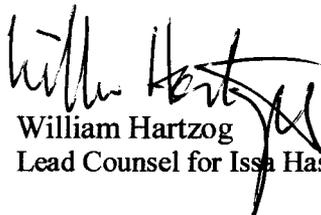
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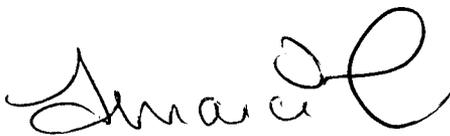
Victims and for Non-Public Disclosure” by revising his order in conformity with Counsel present submissions.

20. In the alternative, it is requested that the Trial Chamber, pursuant to Rule 73 (B) of the Rules of Procedure and Evidence, grant leave to appeal from the “Decision on the Prosecutor’s Motion for Immediate Protective measures for Witnesses and Victims and for Non-Public Disclosure”.

Respectfully submitted

Dated 30th May 2003, at Freetown


William Hartzog
Lead Counsel for Issa Hasssan Sesay


Alexandra Marcil
Co-Counsel for Issa Hassan Sesay

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APPENDIX

SPECIAL COURT FOR SIERRA LEONE

TRIAL CHAMBER

SCSL-2003-07-PT
(558-566)

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Before: Judge Thompson, Presiding Judge
Judge Itoe
Judge Boutet

Registrar: Robin Vincent

Date: 29 May 2003

The Prosecutor Against: Morris Kallon

(Case No. SCSL-2003-07-PT)

APPLICATION FOR RECONSIDERATION OF AND/OR LEAVE TO
APPEAL 'DECISION ON THE PROSECUTOR'S MOTION FOR
IMMEDIATE PROTECTIVE MEASURES FOR WITNESSES AND VICTIMS
AND FOR NON-PUBLIC DISCLOSURE'.

Office of the Prosecutor:

Luc Cote, Chief of Prosecution

Defence Counsel:

James Oury
Steven Powles

SPECIAL COURT FOR SIERRA LEONE
COURT RECORDS
RECEIVED
NAME Justice Thompson
SIGNATURE [Signature]
DATE 30-05-03 TIME 9:31 am

1. This application is filed on behalf of Mr Kallon on the basis that His Honour Judge Bankole Thompson, as the Presiding Judge of the Trial Chamber who issued 'Decision on the Prosecution's Motion for Immediate Protective Measures for Witnesses and Victims and for Non-Public Disclosure' (the "Decision") on 23 May 2003, is still *functus officio* in this matter and accordingly at liberty to reconsider the said Decision and issue a variation of the Orders made.
2. In the alternative, it is respectfully requested that this application be read as an application to the Trial Chamber pursuant to Rule 73(B) for leave to appeal the said Decision on the basis that, for the reasons set out below, it would be in the interest of a fair and expeditious trial.

Variation of Order

3. It is a common feature of most domestic jurisdictions that a judge is still *functus officio* in relation to any decision made and may, during a reasonable time frame, issue a variation of the decision.
4. It is requested that the Decision be reconsidered for the following reasons. James Oury and Steven Powles were provisionally assigned as lead counsel and co-counsel respectively to Mr Kallon on 1 May 2003. It follows that at the time of the Prosecution Motion for 'Immediate Protective Measures for Victims and Witnesses and for Non-Public Disclosure' filed 7 April 2003, Mr Kallon's counsel were not instructed in this matter. To avoid delays the Defence Office filed a response to the Prosecution Motion on behalf of Mr Kallon on 23 April 2003. In their Response the Defence Office stipulated that the Defence Office filed the Response on behalf of Mr Kallon "without prejudice to the position that might be taken by their assigned counsel once such counsel is assigned" (para 3).
5. The Prosecution filed a reply on 29 April 2003, and asserted that once Defence Counsel were assigned to Mr Kallon, no opportunity should be given to respond to the Prosecution Motion (para 28). The propriety of the Defence

Office's request that their Response be treated on a "without prejudice" basis was correctly not considered in the Decision as, at the time of Decision, no indication had been made on behalf of Mr Kallon that present counsel would seek to rely upon the Defence Office's request that their response be considered on a without prejudice basis and thereafter file an additional response.

6. In short, Counsel now assigned on behalf of Mr Kallon do seek to address the learned judge in respect of the Prosecution's Motion. Counsel for Mr Kallon do not set out a lengthy response in this application. Instead, aware of the comprehensive Response made on behalf of Mr Gbao to the 'Prosecution's Motion for Immediate Protective Measures for Witnesses and Victims and for Non-Public Disclosure' (which was made in identical terms to the original request for Protective Measures in Mr Kallon's case), 'Response to Prosecution Motion for Immediate Protective Measures for Witnesses and Victims and for Non-Public Disclosure', filed 26 May 2003, counsel for Mr Kallon would simply seek to support and adopt the arguments made on behalf of Mr Gbao as their response to the Prosecution Motion in Mr Kallon's case.

7. In the event that the learned judge is in agreement with the Prosecution's submission that newly assigned counsel for Mr Kallon should not be permitted to file their own response to the Prosecution Motion, a secondary and alternative submission is made. If, after having considered the response and submissions of Mr Gbao in *Prosecutor v Augustine Gbao*, the learned judge decides to order different Protective Measures to those ordered in the case of Mr Kallon, it is respectfully requested that the Orders made on 23 May 2003 in Mr Kallon's case be varied to the same as those to be ordered for Mr Gbao. This is on the basis that all defendant's should be treated equally and enjoy similar circumstances for the preparation of their respective defences. In short, given the general nature of the Prosecution's Motion, identical in relation to each accused currently indicted by the Special Court, it would be unfair for different protective measures and disclosure regimes to exist for each accused. If the Prosecution take a uniform approach to protective measures for each

accused, it is respectfully submitted ~~that~~ the Court should similarly adopt a uniform regime.

Leave to Appeal

8. In the event that the learned judge, His Honour Judge Bankole Thompson, is not minded to vary his Decision and/or Orders of 23 May 2003, it is respectfully requested that leave is granted pursuant to Rule 73(B) for leave to appeal on the grounds that a decision by the Appeals Chamber on this matter would be in the interest of a fair and expeditious trial.
9. The provision of protective measures and questions relating to the resulting disclosure by the Prosecution to the Defence are fundamental and form part of the 'paramount due process right of the Accused to a fair trial' (Decision para 10). Moreover, for the reasons set out below, resolution of these matters by the Appeals Chamber at this stage in the proceedings is central to ensuring both a fair and expeditious trial.
10. In its Reply to the Defence Response, filed 29 April 2003, the Prosecution sought to rely on the additional material of (i) Allan Quee, Director of Pride, (ii) Saleem Vahidy, Chief of Witness and Victims Unit for Special Court, (iii) President Kabbah's letter to the UN Security Council, (iv) Keith Biddle Inspector General of Police. This material had not been included as part of the Prosecution's initial Motion. It is respectfully submitted that the learned judge correctly took this new and additional material into consideration in reaching his Decision in this case. The provision of protective measures to witnesses by the Special Court is, as stated by the Prosecution in its Motion of 7 April 2003, critical to safeguarding the security and privacy of witnesses and victims and the integrity of the evidence and the proceedings (para 3). Thus the learned judge was right to admit and take into consideration all relevant evidence in the making of his decision.
11. It is, however, respectfully submitted, that given the importance of the fair resolution of questions pertaining to protective measures, the learned judge

erred in not allowing the Defence for Mr Kallon to address and comment upon the fresh material presented by the Prosecution in its Reply filed on 29 April 2003. Some of the assertions made by the Prosecution as to the security situation in Sierra Leone are incorrect. In the interests of justice the Defence should not have been denied the opportunity to address and confront the assertions made by the Prosecution and should have been given the opportunity to present contradictory evidence to the learned judge. In the absence of such submissions by the Defence, it is submitted that the learned judge did not have the benefit of having the complete facts upon which to base his Decision.

12. Furthermore, it is respectfully submitted that the learned judge erred in ordering that the Prosecution may withhold identifying data of the persons the Prosecution is seeking protection as set forth in paragraph 16 of the Motion and any other information which could lead to the identity of such a person to the Defence, until forty-two days before the witness is to testify at trial.
13. In *Brdjanin and Talic* 'Decision on Motion by Prosecution for Protective Measures', 3 July 2000, the Trial Chamber, Judge Hunt (Presiding), now a senior judge on the Appeals Chamber for both the ICTY and ICTR, held that the Prosecution should not be permitted to seek a blanket protective measures regime and redact identifying material from every statement. The Trial Chamber held that the general security situation in the former Yugoslavia could not of itself amount to "exceptional circumstances" for the purpose of seeking protective measures. It was held that the Prosecution decision to redact the name and identifying features in *every* statement, "although no doubt administratively convenient, was both unauthorised and unjustified" (para 13).
14. Thus, the Prosecution should be required to justify the protective measures sought for each individual witness. It is not enough for the Prosecution to make blanket assertions and for blanket protective measures to be made for all witnesses solely on the basis of the prevailing security situation in Sierra

Leone itself. The situation of each witness must be considered in isolation and then appropriate protective measures, if any, ordered for that witness.

15. In *Hadzihasanovic et al* 'Decision Granting Provisional Release to Mehmed Alagic' 19 December 2001, the Trial Chamber held that:

"A measure in public international law is proportional only when (1) suitable, (2) necessary and when (3) its degree and scope remain in a reasonable relationship to the envisaged target. Procedural measures should never be capricious or excessive. If it is sufficient to use a more lenient measure, it must be applied." (para 8)

Although a decision on provisional release, it is submitted that the principle set out by the Trial Chamber is applicable to all facets of international criminal proceedings. In relation to protective measures it is submitted that where a less restrictive regime is possible with the effect of achieving the same result, it must be adopted. Not all witnesses will require protective measures. Although it may be administratively easier for the Prosecution to simply delay disclosure of witnesses' identity 42 days before testimony, it is submitted that this is clearly not necessary for each and every witness. In order to be a proportionate measure under international law the Prosecution must be required to identify which witnesses truly require a delay in disclosure of their identity so as to ensure their safety. The Trial Chamber must then determine the appropriateness of withholding the identity for that individual witness. A blanket delay in disclosure of witnesses' identity until 42 days before testimony is simply disproportionate and unlawful under international law.

16. Moreover, the effect of withholding the identity of witnesses until 42 days before testimony will be that at the commencement of the trial the Defence will not know the identities of many, if not the majority of witnesses that the Prosecution intends to call at trial. A consequence of this will be that the Defence will be cross-examining witnesses in the early stages of the trial, without full knowledge of the Prosecution case. A very real consequence of this may be that Prosecution witnesses will have to be recalled for further

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cross-examination after the completion of the Prosecution case, with the effect of seriously delaying trial proceedings.

17. Finally, it is submitted that the learned judge erred in ordering that (g) the Defence maintain a log indicating the name, address and position of each person or entity which receives a copy of or information from a witness statement and (h) that the Defence provide to the Chamber and the Prosecution a designation of all persons working for the Defence team who, pursuant to (f) have access to information referred to in the order.

18. In *Brdjanin and Talic* 'Decision on Motion by Prosecution for Protective Measures', 3 July 2003, the Trial Chamber rejected the Prosecution request for the maintenance of a log by the defence team. This was held to be oppressive and, if details provided in the log were eventually to be used in contempt proceedings against members of the defence team pursuant to Rule 77, the disclosure of such a log could potentially amount to a violation of the rule against self-incrimination, something impermissible under the Statute of the Special Court. (see Decision para 49)

19. Accordingly, it is submitted that the Defence should not be required to maintain any such log and most definitely should not be required to disclose the details of persons working with the Defence to either the Chamber and most certainly not the Prosecution.

Orders sought:

- (i) Variation of the 'Orders for Immediate Protective Measures for Witness and Victims and for Non-Public Disclosure' after consideration of the submissions made on behalf of Augustine Gbao in 'Response to Prosecution Motion for Immediate Protective Measures for Witnesses and Victims and for Non-Public Disclosure', filed 26 May 2003.

In the alternative:

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- (ii) Leave to appeal 'Decision on the Prosecutor's Motion for Immediate Protective Measures for Witnesses and Victims and for Non-Public Disclosure', 23 May 2003.

James Oury

Steven Powles

London, 29 May 2003

Signed by the Defence office on behalf of Steven Powles, for the reasons set out in the attached e-mail.



John Jones

29/5/2003

Acting Chief

Defence office