

1036

SCSL-04-15-T
(24701-24722)

24701

SPECIAL COURT FOR SIERRA LEONE
FREETOWN – SIERRA LEONE

TRIAL CHAMBER I

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

Registrar: Mr. Herman von Hebel

Date filed: 6th March 2008

THE PROSECUTOR

v.

Issa Hassan Sesay
Morris Kallon
Augustine Gbao

Case No. SCSL-04-15-T

Urgent and Public with Confidential Annex

**Sesay Defence Application for the Admission of
the Witness Statement of DIS-129 under
Rule 92bis or, in the Alternative, under 92ter**

Office of the Prosecutor
Mr. Peter Harrison
Mr. Reginald Fynn
Mr. Charles Hardaway
Mr. Vincent Wagana

Defense Counsel for Issa Hassan Sesay
Mr. Wayne Jordash
Ms. Sareta Ashraph

Defense Counsel for Morris Kallon
Mr. Shekou Touray
Mr. Charles Taku
Mr. Ogetto Kennedy
Ms. Tanoo Mylvaganam

Defense Counsel for Augustine Gbao
Mr. John Cammegh
Mr. Scott Martin

SPECIAL COURT FOR SIERRA LEONE
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06 MAR 2008

NAME M. AUREN EDWARDS
SIGN. M. Edwards
TIME 15:55

INTRODUCTION

1. The Sesay Defence gives notice pursuant to Rules 92*bis* of the Rules of Procedure and Evidence of the Special Court for Sierra Leone (the "Rules") of its intention to have admitted into evidence the confidential Statement (the "Statement") in Confidential Annex A without direct- or cross-examination of the witness. In the alternative, should the Statement not be accepted under Rule 92*bis*, the Sesay Defence applies for the Statement to be admitted under Rule 92*ter*.

LEGAL STANDARD

2. Rule 92*bis* provides that:
 - (A) In addition to the provisions of Rule 92*ter*, a Chamber may, in lieu of the oral testimony, admit as evidence in whole or in part, information including written statements and transcripts, that do not go to proof of the acts and conduct of the accused.
 - (B) The information submitted may be received in evidence if, in the view of the Trial Chamber, it is relevant to the purpose for which it is submitted and if its reliability is susceptible of confirmation.
 - (C) A party wishing to submit information as evidence shall give 10 days notice to the opposing party. Objections, if any, must be submitted within 5 days.
3. Should the Statement not be accepted for admission under Rule 92*bis*, the Sesay Defence seeks the admission of the Statement under Rule 92*ter*:

With the agreement of the parties, a Trial Chamber may admit, in whole or in part, the evidence of a witness in the form of a written statement or transcript of evidence given by a witness in proceedings before the Tribunal, under the following conditions:

- (i) the witness is present in court;
- (ii) the witness is available for cross-examination and any questioning by the Judges; and
- (iii) the witness attests that the written statement or transcript accurately reflects that witness' declaration and what the witness would say if examined.

ARGUMENTS

Admission of the Statement Under Rule 92bis

4. Admitting evidence pursuant to Rule 92*bis* involves a four-step process. First, although not explicit in the text of Rule 92*bis*, evidence admitted must be relevant and have probative value, and its probative value must not be substantially outweighed by the need to ensure a fair trial (as under Rule 89(C) and (D)).

5. Second, a Trial Chamber must determine whether the statement or transcript goes to proof of a matter other than the acts and conduct of the accused. By its plain meaning, the phrase "acts and conduct of the accused" is specific to the "deeds and behaviour of the accused." "It should not be extended by fanciful interpretation. No mention is made of acts and conduct by alleged co-perpetrators, subordinates or indeed, of anybody else. Had the rule been intended to extend to acts and conduct of alleged co-perpetrators or subordinates it would have said so."¹
6. There is a "clear distinction drawn in the jurisprudence of the Tribunal between (a) the acts and conduct of those others who commit the crimes for which the indictment alleges that the accused is individually responsible, and (b) the acts and conduct of the accused as charged in the indictment which establish his responsibility for the acts and conduct of those others. It is only a written statement which goes to proof of the latter acts and conduct which Rule 92bis(A) excludes from the procedure laid down in that Rule."²
7. Third, a Trial Chamber must satisfy itself that the admission of the statement or transcript is fair in the circumstances of the case. Rule 92bis favours admitting evidence in the form of statements or transcripts when that evidence is cumulative, relates to background, relates to statistical or general analysis, or relates to impact of crimes upon victims.
8. Fourth, a Trial Chamber must decide whether the witness should be called *viva voce* or for cross-examination. Relevant to this assessment are the following factors, *inter alia*: the right to a fair trial under Articles 20 and 21 of the Statute;³ whether the evidence in question relates to a "live and important issue between the parties, as opposed to a peripheral or marginally relevant issue",⁴ and the proximity of the accused to the acts and conduct described in the evidence.⁵
9. The proffered evidence relates and is relevant to contextual social or economic background

¹ *Prosecutor v. Stanislav Galic*, IT-98-29-AR73.2, "Decision on Interlocutory Appeal Concerning Rule 92bis(C)", 7 June 2002.

² *Id.*, at para. 11.

³ See *Prosecutor v. Sikirica et al.*, Case No. IT-95-08-T, "Decision on the Prosecution's Application's to Admit Transcripts under Rule 92bis", 23 May 2001, para. 4; *Prosecutor v. Popovic et al.*, Case No. IT-05-88-T, "Decision on Prosecution's Confidential Motion for Admission of Written Evidence in Lieu of *Viva Voce* Testimony Pursuant to Rule 92bis", 12 September 2006, para.16.

⁴ See *Prosecutor v. Milosevic*, Case No. IT-02-54-T, "Decision on Prosecution's Request to Have Written Statements Admitted Under Rule 92bis", 21 March 2002, paras. 24-25; *Popovic*, para.16

⁵ See *Galic*, para. 13; *Milosevic*, para. 22; *Popovic*, para. 16.

information. The Sesay Defence submits that part of the evidence proffered contains facts regarding the everyday life conditions of the inhabitants of the respective areas, a factor that favours admission of the evidence under Rule 92*bis*.

10. The admission of this written evidence pursuant to Rule 92*bis* will reduce the length of trial and permit the Defence for Mr. Sesay to adhere to the Trial Chamber's imposed schedule to complete the trial on or by 13th March 2008. There is thus a strong public interest in favour of admitting this written evidence to reduce the length of trial.


In the alternative, admission of the Statement under Rule 92*ter*

11. Should the parties object, or the Statement otherwise not be admitted under Rule 92*bis*, the Defence requests that the parties agree to the admission of the Statement under Rule 92*ter*. The parties would be able to fully confront and cross-examine the witness with the entirety of the proffered evidence. The rights of the parties will not be infringed.
12. Should the parties desire to cross-examine the witness, the admission of this evidence pursuant to Rule 92*ter*, obviating the need for direct-examination of the witness, will assist with ensuring an expeditious trial for the First Accused in. This is especially in view of the imposed schedule to complete the Defence case on or by the 13th March 2008.
13. The Defence would wish to call DIS-129 to testify on Monday, the 10th March 2008, or Tuesday, the 11th March 2008.

REQUEST

14. The Defence urgently requests that the confidential Statement of DIS-129 be admitted into evidence pursuant to Rule 92*bis*. Should that request be denied, the Defence requests that the Statement be admitted into evidence pursuant to Rule 92*ter*.

Dated 6th March 2008


PP Wayne Jordash
R Sareta Ashraph

LIST OF AUTHORITIES

24705

Decisions

Prosecutor v. Milosevic, Case No. IT-02-54-T, "Decision on Prosecution's Request to Have Written Statements Admitted Under Rule 92bis", 21 March 2002.

Prosecutor v. Popovic et al., Case No. IT-05-88-T, "Decision on Prosecution's Confidential Motion for Admission of Written Evidence in Lieu of *Viva Voce* Testimony Pursuant to Rule 92bis", 12 September 2006.

Prosecutor v. Sikirica et al., Case No. IT-95-08-T, "Decision on the Prosecution's Application's to Admit Transcripts under Rule 92bis", 23 May 2001.

Prosecutor v. Stanislav Galic, IT-98-29-AR73.2, "Decision on Interlocutory Appeal Concerning Rule 92bis(C)", 7 June 2002.

ANNEXES

A Statement of DIS-129



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Court Management Section – Court Records

CONFIDENTIAL DOCUMENT CERTIFICATE

This certificate replaces the following confidential document which has been filed in the *Confidential* Case File.

Case Name: The Prosecutor – v- Sesay, Kallon & Gbao

Case Number: SCSL-2004-15-T

Document Index Number: 1036

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- Correspondence
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- Other
- Reply
- Response
- Application**

Document Title: **Confidential Annex – Sesay Defence Application for the Application for the Admission of the Witness Statement of DIS-129 under Rule 92bis or, in the alternative, under 92ter**

Name of Officer:

Maureen Edmonds

Signed: 