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SCSL-04-15-T
(25902 - 25909)

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SPECIAL COURT FOR SIERRA LEONE
OFFICE OF THE PROSECUTOR
FREETOWN - SIERRA LEONE

TRIAL CHAMBER I

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

Acting Registrar: Mr. Herman von Hebel

Date filed: 8 May 2008

THE PROSECUTOR

Against

Issa Hassan Sesay
Morris Kallon
Augustine Gbao

Case No. SCSL-04-15-T

PUBLIC

PROSECUTION RESPONSE TO GBAO REQUEST FOR LEAVE TO CALL FOUR ADDITIONAL WITNESSES AND FOR ORDER FOR PROTECTIVE MEASURES

Office of the Prosecutor:
Pete Harrison
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I. INTRODUCTION

1. On 30 April 2008, the Accused Gbao filed a “Request for Leave to Call Additional Witnesses and for Order for Protective Measures, with Annex A” (“Leave Application”).¹ The Leave Application should be dismissed.

II. THE APPLICABLE LAW

2. Rule 73 *ter* states that:

(E) After the commencement of the defence case, the defence may, if it considers it to be in the interests of justice, move the Trial Chamber for leave to reinstate the list of witnesses or to vary its decision as to which witnesses are to be called.

3. This Trial Chamber in its “Scheduling Order Concerning the Preparation and the Commencement of the Defence Case,” made the following order:

1. That each of Defence Team files the following materials, no later than Friday, the 16th of February 2007 at 4 p.m.

- (a) A “core” and “back-up” witness list of all the witnesses that each Defence Team intends to call

Should the Defence seek to add any witnesses or to modify this list after 16th February 2007 it may be permitted to do so only upon good cause being shown.²

4. The “good cause” standard was considered in four Prosecution applications to add witnesses to the Prosecution witness list in this trial.^{3, 4} Rule 73 *bis* (E), which

¹ *Prosecutor v. Sesay et al*, SCSL-04-15-T-1107, “Gbao – Request for Leave to Call Four Additional Witnesses and for Order for Protective Measures,” 30 April 2008.

² *Prosecutor v. Sesay et al*, SCSL-04-15-T-659, “Scheduling Order Concerning the Preparation and the Commencement of the Defence Case,” 30 October 2006, pp. 1-2. The Trial Chamber later adjourned the filing date of Defence witness lists to 5 March 2007.

³ *Prosecutor v. Sesay et al*, SCSL-04-15-T-221, “Decision on Prosecution Request for Leave to Call Additional Witnesses,” 29 July 2004 (“First Prosecution Leave Decision”), *Prosecutor v. Sesay et al*, SCSL-04-15-T-320, “Decision on Prosecution Request for Leave to Call Additional Witnesses and Disclose Additional Witness Statements,” 11 February 2005 (“Second Prosecution Leave Decision”), *Prosecutor v. Sesay et al*, SCSL-04-15-T-534, “Decision on Prosecution Request for Leave to Call An Additional Witness and Notice to Admit Witness’ Solemn Declaration Pursuant to Rules 73 *bis*(E) and 92 *bis*,” 5 April 2006 (“Third Prosecution Leave Decision”), and *Prosecutor v. Sesay et al*, SCSL-04-15-T-579, “Written Reasons for the Decision on Prosecution Request for Leave to Call Additional Witness TF1-371 and for Order for Protective Measures,” 15 June 2006 (“Fourth Prosecution Leave Decision”).

⁴ The Third Prosecution Leave Decision was different from the others, there the Prosecution sought to add a witness so that his solemn declaration could be admitted under Rule 92*bis*, and during a Status Conference the First Accused indicated that he did not oppose the motion and none of the Accused filed responses to the motion.

governs Prosecution applications is in all material respects the same as Rule 73 *ter* (E).

5. In its prior decisions this Trial Chamber has cited the following proposition from the *Nahimana* case:

In assessing the “interests of justice” and “good cause” Chambers have taken into account such considerations as the materiality of the testimony, the complexity of the case, prejudice to the Defence, including elements of surprise, on-going investigations, replacements and corroboration of evidence. The Prosecution’s duty under the Statute to present the best available evidence to prove its case has to be balanced against the right of the Accused to have adequate time and facilities to prepare his Defence and his right to be tried without undue delay.⁵

6. The test developed by this Trial Chamber for showing “good cause” was stated in the Fourth Prosecution Leave Application decision:

9. As regards the requirement of good cause being shown, the operative principle is that the Prosecution must advance credible reasons for failing to fulfill, within the time limits imposed by Rule 66(A)(ii), the obligation of disclosing to the Defence the existence of these witnesses and, in particular, must satisfy the Chamber that it has met these stipulated criteria:

- i) That the circumstances surrounding these reasons as advanced by the Prosecution are directly related, and are material to the facts in issue;
- ii) That the facts to be provided by these witnesses in their statements and eventually in their testimony, are relevant to determining the issues at stake and would contribute to serving and fostering the overall interest of the law and justice;
- iii) That granting leave to call new witnesses and the disclosure of new statements, will not unfairly prejudice the right of the accused to a fair and expeditious trial as guaranteed by Article 17(4)(a) and 17(4)(b) of the Statute as well as by the provisions of Rules 26bis of the Rules;
- iv) That the evidence the Prosecution is now seeking to call, could not have been discovered or made available at a point earlier in time notwithstanding the exercise of due diligence on their part.⁶ [underlining added]

7. The evidence referred to in the Leave Application of the proposed witnesses (“Proposed Witnesses”) could have been made available earlier, therefore, the Leave Application should be dismissed.

⁵ *Prosecutor v. Nahimana et al*, Case No. ICTR-99-52-1, “Decision on the Prosecutor’s Oral Motion for Leave to Amend the List of Selected Witnesses,” 26 June 2001, para. 20.

⁶ Fourth Prosecution Leave Decision, para. 9.

III. ARGUMENT

8. Proposed Witnesses DAG-047 and DAG-063 had been on the Third Accused's witness list, but were removed from the list on or about 26 October 2007, the date of filing of the "Gbao – Filing of Updated and Reduced Witness List."⁷ A delay of over 6 months has lapsed between dropping the witnesses and the Leave Application and no explanation has been offered for this delay. For these 6 months the Prosecution has not carried out any steps to investigate these witnesses and as a consequence has suffered prejudice. A party is entitled to apply to add witnesses but it bears the burden of demonstrating that the evidence could not have been discovered or made available at a point earlier in time notwithstanding the exercise of due diligence on their part. The evidence could have been made available much earlier and the failure to do so means that the Third Accused should not now be permitted to add these two witnesses to the Third Accused's witness list.
9. The name of Proposed Witness DAG-112 was used in the public filing⁸ and the filing advises that no protective measures are requested for DAG-112.⁹ Nonetheless, a pseudonym was also used in the Leave Application and a pseudonym is itself a protective measure. Out of an abundance of caution and to give the Third Accused the opportunity to clarify whether they expect a pseudonym to be used for this witness throughout the proceedings the Prosecution will refer to him by the pseudonym.
10. The Leave Application advises that on 10 January 2008, the First and Third Accused announced their decision to share an expert witness.¹⁰ Presumably, the agreement was reached some time earlier, although that is not addressed in the Leave Application. The question remains of whether this evidence could have been discovered or made available at a point earlier in time.
11. This expert witness, or such other expert witness the Third Accused deemed appropriate, could have been retained earlier and the expert report disclosed. To date no report has been

⁷ *Prosecutor v. Sesay et al*, SCSL-04-15-T-854, "Gbao – Filing of Updated and Reduced Witness List," 26 October 2007. These two witnesses are not included in this list, although they were included in the list of 16 April 2007, see *Prosecutor v. Sesay et al*, SCSL-04-15-T-753, "Gbao – Filing of Revised Witness List and Revised Indictment Chart in Accordance with the Court Order of 28 March 2007," 16 April 2007.

⁸ Leave Application, p. 15.

⁹ Leave Application, para. 25.

¹⁰ Leave Application, para. 14.

disclosed and no indication has been given of when it will be disclosed. The Prosecution closed its case over 21 months ago. The Third Accused's delay in deciding whether to retain an expert and in having the report disclosed expeditiously has caused prejudice to the Prosecution by denying Prosecution the opportunity to review the background and qualifications of the expert, the material relied on to form his opinion, and the probative value and relevance of his opinion. Therefore, the application to add DAG-112 to the Third Accused's witness list should be denied.

12. The Leave Application advises that Proposed Witness DAG-113 was on the witness list of the First Accused. The pseudonym given to this Proposed Witness by the First Accused is not stated in the Leave Application and it is unknown to the Prosecution. Since the close of the Prosecution case the Accused have been advised of their prerogative to designate witnesses as common witnesses. Any witness of such importance to a defence case that the defence would want to call that person as a witness should have been designated a common witness. No explanation is given as to why DAG-113 was not designated a common witness. It must have been known to the Gbao Defence from at least as early as the time the First Accused's witness list was filed on 5 March 2007, of the existence of this witness, and that the Third Accused wished him to give evidence on behalf of the Third Accused. Choosing to not add this witness to the Gbao witness list or to name him as a common witness may have been a tactical decision so that the Third Accused would be permitted to cross-examine the witness and thereby suggest answers to the witness, as is permitted in cross-examination. In such factual circumstances the test for adding witnesses has not been met. The existence of this witness has been known to the Third Accused for over one year and his intention to call this evidence could have been made known months ago. Without knowing the pseudonym given to this witness by the First Accused, the Prosecution cannot say if it has taken any steps to prepare for questioning this witness. Certainly no preparation has taken place with respect to questioning him or her as a witness for the Third Accused and the Prosecution is prejudiced by this late decision to apply to add DAG-113 to the Third Accused's witness list.

13. In *Krstic*, the ICTY Appeals Chamber, held that

... before additional evidence will be admitted pursuant to Rule 115, the defence is obliged to demonstrate not only that the evidence was not available at trial but also that the evidence could not have been discovered through the exercise of due diligence, which means that the defence must show (*inter alia*) that it made use of –

[...] all mechanisms of protection and compulsion available under the Statute and the Rules of the International Tribunal to bring evidence on behalf of an accused before the Trial Chamber,

and that it had brought any difficulties in relation to obtaining evidence on behalf of the accused, including those arising from intimidation or inability to locate witnesses, to the attention of the Trial Chamber. This obligation of due diligence is therefore directly relevant to the procedures of the Tribunal (in particular, Rule 54) both before and during trial, as well as on appeal.¹¹

14. None of the Proposed Witnesses should be added to the Gbao witness list.

IV. PROTECTIVE MEASURES


15. In the event the Trial Chamber grants the Leave Application the Prosecution does not oppose the granting of protecting measures referred to at paragraph 23 of the Leave Application for Proposed Witnesses DAG-043, DAG-067 and DAG-113. Paragraph 25 of the Leave Application advises that a protective measures order is not sought for DAG-112.

V. CONCLUSION

16. For the above reasons the Leave Application should be dismissed.

Done in Freetown, 8 May 2008

For the Prosecution,



Pete Harrison

¹¹ *Prosecutor v. Krstic*, Case No. IT-98-33-A, “Decision on Application for Subpoenas,” 1 July 2003, para. 5.

INDEX OF AUTHORITIES

A. Decisions and Motions

Prosecutor v. Sesay et al, SCSL-04-15-T-1107, “Gbao – Request for Leave to Call Four Additional Witnesses and for Order for Protective Measures,” 30 April 2008.

Prosecutor v. Sesay et al, SCSL-04-15-T-854, “Gbao – Filing of Updated and Reduced Witness List,” 26 October 2007.

Prosecutor v. Sesay et al, SCSL-04-15-T-753, “Gbao – Filing of Revised Witness List and Revised Indictment Chart in Accordance with the Court Order of 28 March 2007,” 16 April 2007.

Prosecutor v. Sesay et al, SCSL-04-15-T-659, “Scheduling Order Concerning the Preparation and the Commencement of the Defence Case,” 30 October 2006

Prosecutor v. Sesay et al, SCSL-04-15-T-221, “Decision on Prosecution Request for Leave to Call Additional Witnesses,” 29 July 2004

Prosecutor v. Sesay et al, SCSL-04-15-T-320, “Decision on Prosecution Request for Leave to Call Additional Witnesses and Disclose Additional Witness Statements,” 11 February 2005

Prosecutor v. Sesay et al, SCSL-04-15-T-534, “Decision on Prosecution Request for Leave to Call An Additional Witness and Notice to Admit Witness’ Solemn Declaration Pursuant to Rules 73 bis(E) and 92 bis,” 5 April 2006

Prosecutor v. Sesay et al, SCSL-04-15-T-579, “Written Reasons for the Decision on Prosecution Request for Leave to Call Additional Witness TF1-371 and for Order for Protective Measures,” 15 June 2006

Prosecutor v. Sesay et al, SCSL-04-15-T-221, “Confidential, with Ex Parte Under Seal Annex Prosecution Request for Leave to Call Additional Witness and for Order for Protective Measures Pursuant to Rules 69 and 73 bis (E)”, 10 March 2006

Prosecutor v. Sesay et al, SCSL-04-15-T-705, “Decision and Order on Defence Applications for an Adjournment of the 16th of February Deadline for Filing of Defence Materials,” 7 February 2007

Prosecutor v. Krstic, Case No. IT-98-33-A, “Decision on Application for Subpoenas,” 1 July 2003

<http://www.un.org/icty/krstic/Appeal/decision-c/030701.htm>

Prosecutor v. Nahimana et al, Case No. ICTR-99-52-1, “Decision on the Prosecutor’s Oral Motion for Leave to Amend the List of Selected Witnesses,” 26 June 2001
<http://69.94.11.53/ENGLISH/cases/Nahimana/decisions/260601.htm>

B. Statutes and Rules of Procedure and Evidence

Rules *73 bis* and *73 ter* of the Rules of Procedure and Evidence of the Special Court.