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SCSL-04-15-T
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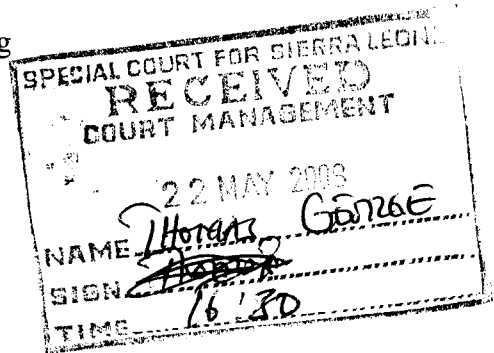
26123

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

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

Registrar: Mr. Herman Von Hebel

Date filed: 22nd May 2008



THE PROSECUTOR

against

**ISSA HASSAN SESAY
MORRIS KALLON
AUGUSTINE GBAO**

Case No. SCSL -2004-15-T

URGENT AND PUBLIC WITH CONFIDENTIAL ANNEX

**KALLON DEFENCE APPLICATION FOR THE ADMISSION OF THE WITNESS
STATEMENTS OF DMK – 422 AND DMK – 400 UNDER RULE 92BIS OR, IN THE
ALTERNATIVE, UNDER RULE 92TER**

Office of the Prosecutor:

Peter Harrison
Reginald Fynn

Counsel for Issa Sesay:

Wayne Jordash
Sareta Ashraph

Counsel for Morris Kallon:

Charles Taku
Kennedy Ogetto
Tanoo Mylvaganam

**Court-Appointed Counsel for
Augustine Gbao:**

John Cammegh
Scott Martin

INTRODUCTION

1. The Kallon 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 Statements (the “Statement”) in Confidential Annex A without direct or cross-examination of the witnesses.

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. 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 Statements under Rule 92bis

4. Admitting evidence pursuant to Rule 92bis involves a four-step process. First, although not explicit in the text of Rule 92bis, 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 matter 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.

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

Prosecutor v. Sesay et al., SCSL-04-15-T

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 Kallon Defence respectfully requests admission of the two confidential statements on the basis that proffered evidence relates and is relevant to contextual social and political background of the Defence case. Both statements contain relevant and probative material from credible sources, a factor that favours admission of the evidence under Rule 92bis.
10. The admission of this written evidence pursuant to Rule 92bis will reduce the length of trial and permit the Defence for Mr. Kallon to adhere to the Trial Chamber’s imposed schedule to complete the trial on or by 30th May 2008. There is thus a strong public interest in favour of admitting this written evidence to reduce the length of trial.
11. Whilst it is of course for the Chamber to determine the merits of such an application the Prosecution and both the First and Third accused are content to waive time limits and the defence have no objection to the proposed statements. It is anticipated that there is unlikely to be an objection from the Prosecution in respect of DMK-400 but an issue of relevance may be raised in respect of DMK-422 for resolution. Admission is sought for statement of DMK-422 as it provides probative and relevant evidence about the personality and character of Sankoh from a very independent and

³ See Prosecutor v. Sikirica et al., Case No. IT-95-08-T, “Decision on the Prosecution’s Application 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.

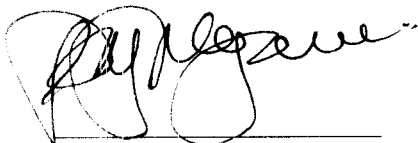
⁵ See Galic, para. 13; Milosevic, para. 22; Popovic, para. 16

credible source. It also provides an insight into the efforts which were made to bring peace to the region and challenges to the process.

12. Admission of the statement of DMK-400 is sought on the basis that it provides relevant contextual background and is probative. It provides a useful insight which highlights aspects of distinction between the AFRC and the RUF as available to the witness at the relevant time.
13. The Defence requests that the confidential Statements of DMK-422 and DMK-400 be admitted into evidence pursuant to Rule 92bis. Should that request be denied, the Defence requests that the Statements be admitted into evidence pursuant to Rule 92ter.

Dated this 22nd day of May 2008

For Defendant **Kallon**



**Chief Charles A. Taku
Kennedy Ogeto
Tanoo Mylvaganam**

LIST OF AUTHORITIES

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 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 DMK – 422
- B. Statement of DMK – 400

Prosecutor v. Sesay et al., SCSL-04-15-T



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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: 1141
Document Date 22 May, 2008
Filing Date 22 May, 2008 at 16:30
Number of confidential pages: 15
Page Number: **26129-26143**

Document Type: -

- Affidavit
- Indictment
- Motion
- Order
- Other**
- Decision
- Response
- Application

Document Title: **Urgent and Public With Confidential Annex
Kallon Defence Application For The Admission
Of The Witness Statements Of DMK-442 And
DMK-400 Under Rule 92BIS Or, In The
Alternative, Under Rule 92TER**

Name of Officer:

Thomas P.K. George

Signed:

A handwritten signature in black ink, appearing to read 'Thomas P.K. George', written over a horizontal line.