

(11968-11976)

**SPECIAL COURT FOR SIERRA LEONE**  
OFFICE OF THE PROSECUTOR  
Freetown – Sierra Leone

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

Registrar: Mr. Robin Vincent

Date filed: 20 May 2005

**THE PROSECUTOR**

**Against**

**Issa Hassan Sesay**  
**Morris Kallon**  
**Augustine Gbao**

Case No. SCSL-04-15-T

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**PROSECUTION RESPONSE TO SESAY DEFENCE “APPLICATION FOR  
LEAVE TO APPEAL – RULING (2<sup>ND</sup> MAY 2005) ON MOTION SEEKING  
DISCLOSURE OF THE RELATIONSHIP BETWEEN GOVERNMENTAL  
AGENCIES OF THE UNITED STATES OF AMERICA AND THE OFFICE OF  
THE PROSECUTOR”**

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Office of the Prosecutor:

Luc Côté  
Lesley Taylor  
Peter Harrison  
Lorenzo Pugliatti

Defence Counsel for Issa Hassan Sesay

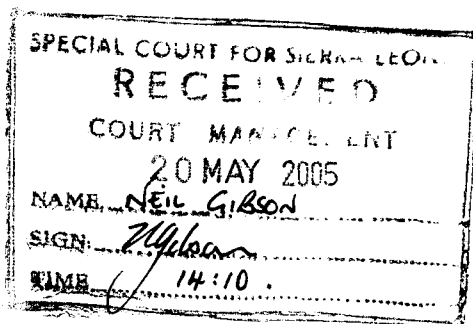
Wayne Jordash  
Sareta Ashraph

Defence Counsel for Morris Kallon

Shekou Touray  
Melron Nicol-Wilson

Defence Counsel for Augustine Gbao

Andreas O’Shea  
John Cammegh



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**I. INTRODUCTION**

1. The Prosecution files this Response to the Application by the First Accused filed 10 May 2005 entitled “Application for Leave to Appeal – Ruling (2<sup>nd</sup> May 2005) on Motion Seeking Disclosure of the Relationship Between Governmental Agencies of the United States of America and the Office of the Prosecutor” (the “Application”).
2. On 1 November 2004 the First Accused filed a Motion alleging various breaches of the Rules by the Prosecution, including of Article 15 of the Statute and Rule 68, and seeking disclosure of information and materials alleged to be in the possession of the Prosecution following the evidence of General Tarnue (the “Motion”). The Prosecution Response was filed on 16 November 2004 and the Reply thereto was filed on 19 November 2004.
3. On 2 May 2005 the joint decision of Justices Itoe and Thompson was delivered (the

“Decision”). The Decision dismissed the Motion and found *inter alia*:

- a) The Defence had failed to establish, by *prima facie* proof, the allegation of a breach of Article 15(1) by the Office of the Prosecutor.
  - b) The Defence had failed to establish, by *prima facie* proof, the allegation of a breach of Rule 68 by the Office of the Prosecutor.
  - c) That the Defence allegations of breaches of Article 15(1) and Rule 68 were premised on presumption, speculation and probability.
  - d) That to sustain an allegation that the Prosecution had breached its disclosure obligations under Rule 68, the Defence must demonstrate, by *prima facie* proof: (1) that the targeted evidentiary material is exculpatory in nature, (2) the materiality of the said evidence, (3) that the Prosecution has, in its possession, custody, or control, the targeted exculpatory material, and (4) that the Prosecution has, in fact, failed to disclose the targeted exculpatory material.
4. On the same day the partially dissenting Decision of Justice Boutet was delivered (the “partially dissenting Decision”). The partially dissenting Decision found:
- a) Relocation of a witness may be seen as a benefit and of such a nature as to affect the motivation of a witness to give evidence and, therefore, impact upon the credibility of that witness.
  - b) There was *prima facie* evidence from the evidence of General Tarnue that he would have received some assistance from the Prosecution as to his relocation and that of his family and as to his asylum claim.
  - c) Dr White would be a source of information as to role the Prosecution had in the relocation and asylum claim of General Tarnue.
5. The Application argues:
- a) The partially dissenting Decision is a strong dissent relating directly to the criteria of exceptionality governing the granting of leave pursuant to Rule 73(B).
  - b) That the interpretation of *prima facie* case implicit in the Decision is

- unreasonably high in that it requires the Defence to always prove *mala fides* on the part of the Prosecution.
- c) That there is a clear dispute between the Decision and the partially dissenting Decision as to whether the Defence have shown a *prima facie* case of exculpatory material.
  - d) That these issues ought to be examined by the Appeals Chamber as they relate to the ongoing fundamental obligation of the Prosecution to disclose material that could affect the assessment of all prosecution evidence.
  - e) That irreparable prejudice would be caused by the non-disclosure of material which could affect the assessment of all prosecution evidence because in the event of a successful appeal and retrial, such material may be lost.
6. The Prosecution submits that the Application fails to satisfy the twin criteria of Rule 73(B) and, accordingly, should be dismissed. In doing so the Prosecution does not oppose the application for an extension of time for filing the Application. The Prosecution accepts the difficulties of the Defence in complying with the normal time limits as described in paragraphs 11 and 12 of the Application.

## II. ARGUMENT

### The Test for Granting Leave to Appeal

7. Rule 73(B) of the Rules of Procedure and Evidence reads:

Decisions rendered on such motions are without interlocutory appeal. However, in exceptional circumstances and to avoid irreparable prejudice to a party, the Trial Chamber may give leave to appeal. Such leave should be sought within 3 days of the decision and shall not operate as a stay of proceedings unless the Trial Chamber so orders.

8. A previous decision of this Trial Chamber established that this Rule:

“involves a high threshold that must be met before this Chamber can exercise its discretion to grant leave to appeal. The two limbs of the test are clearly conjunctive and not disjunctive; in other words they must both be satisfied.”<sup>1</sup>

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<sup>1</sup> *Prosecutor v Sesay and others*, SCSL-2004-15-PT, “Decision on Prosecution’s Application for Leave to File an Interlocutory Appeal Against the Decision on the Prosecution Motions for Joinder”, 13 February 2004, para. 10.

9. A more recent decision observed that:

“At this point in time, as the trials are progressing, the Chamber must be very sensitive, and rightly so, to any proceedings or processes that will indeed encumber and unduly protract the ongoing trials. For this reason, it is a judicial imperative for us to ensure that the proceedings before the court are conducted expeditiously and to continue to apply the enunciated criteria with the same degree of stringency as in previous applications for leave to appeal so as not to defeat or frustrate the rationale that underlies the amendment of Rule 73(B).”<sup>2</sup>

10. In two recent Decisions this Trial Chamber has considered the exceptional circumstances requirement in Rule 73(B).<sup>3</sup> In particular, the 28 April 2005 Decision held that:

““Exceptional circumstances” may exist depending upon the particular facts and circumstances, where, for instance the question in relation to which leave to appeal is sought is one of general principle to be decided for the first time, or is a question of public international law importance upon which further argument or decision at the appellate level would be conducive to the interests of justice, or where the cause of justice might be interfered with, or is one that raises serious issues of fundamental legal importance to the Special Court for Sierra Leone, in particular, or international criminal law, in general, or some novel and substantial aspect of international criminal law for which no guidance can be derived from national criminal law systems.”<sup>4</sup>

#### No Exceptional Circumstances Demonstrated

11. The difference between the Decision and the partially dissenting decision does not concern the interpretation of the obligations under Rule 68. Rather, it concerns whether the Defence had in fact established that the Prosecution had Rule 68 material relevant to General Tarnue that it had failed to disclose. Accordingly, the partially dissenting Decision does not relate directly the “criteria of exceptionality” in Rule 73(B). No novel or complex issue as to the interpretation of Rule 68 warranting the granting of leave to appeal arises.

<sup>2</sup> *Prosecutor v Norman and others*, SCSL-2004-14-T, “Majority Decision on the Prosecution’s Application for Leave to File an Interlocutory Appeal Against the Decision on the Prosecution’s Request for Leave to Amend the Indictment Against Norman, Fofana and Kondewa”, 2 August 2004, para. 25.

<sup>3</sup> *Prosecutor v Sesay, Kallon and Gbao*, Case No. SCSL-2004-15-PT, “Decision on Defence Applications for Leave to Appeal Ruling of the 3<sup>rd</sup> of February, 2005 on the Exclusion of Statements of Witness TF1-141”, 28 April 2005 (the “**28 April 2005 Decision**”) and *Prosecutor v. Sesay, Kallon and Gbao*, Case No. SCSL-2004-15-PT, “Decision on Application by the Second Accused for Leave for Interlocutory Appeal Against the Majority Decision of the Trial Chamber of 9<sup>th</sup> December 2004 on the Motion on Issues of Urgent Concern to the Accused Morris Kallon”, 2 May 2005 (the “**2 May 2005 Decision**”).

<sup>4</sup> The 28 April 2005 Decision., para.26.

12. There is substantial jurisprudence, both from the Special Court and from the ad hoc tribunals, delineating the obligation of the Prosecution under Rule 68.<sup>5</sup> Further, the test of *prima facie* case necessary to substantiate an alleged breach of Rule 68 contained in the Decision was expressly stated to be a restatement of a previously articulated test.<sup>6</sup>
13. The Prosecution submits, therefore, that notwithstanding that Rule 68 imposes a fundamental and ongoing obligation on the Prosecution to disclose exculpatory material, no exceptional circumstances have been demonstrated as to the interpretation of Rule 68 or the test of *prima facie* case necessary to demonstrate a breach of it.
14. The Prosecution further submits that the difference between the Decision and the partially dissenting Decision as to whether the Prosecution held non-disclosed Rule 68 material with respect to General Tarnue does not constitute exceptional circumstances.
15. The Application asserts that the Decision was erroneous in holding that the Defence failed to identify the specific exculpatory material sought because the partially dissenting Decision was able to identify such material.<sup>7</sup> The Decision found that:
- “...a mere speculative assertion without specifying or advancing concrete proof of the nature and content of the exculpatory evidence which the Defence is alleging to be in the possession of the Prosecution of General Tarnue and his family’s relocation, to our mind, fails to meet the test required to warrant an Order by the Chamber for the Prosecution to disclose under Rule 68 of the Rules.”
16. The Prosecution submits that a difference of opinion as between a majority and dissenting judgment does not, without more, constitute exceptional circumstances. Further, this Trial Chamber has established that a submission in an application for leave to appeal that the impugned ruling was erroneous amounts to an invitation for

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<sup>5</sup> See paras. 30-35 of the Decision, setting out the relevant jurisprudence.

<sup>6</sup> See para. 36 of the Decision.

<sup>7</sup> See para. 7 of the Application.

the Chamber to examine the substantive merit of the projected appeal and, that the probability of an erroneous ruling by the Trial Chamber does not, of itself, constitute exceptional circumstances for the purpose of a Rule 73(B) application.<sup>8</sup>

### No Irreparable Prejudice

17. The Application asserts that the Decision demonstrates an error of law which could affect the credibility of all Prosecution evidence. This assertion is without foundation. Beyond the Rule 68 material alleged to held by the Prosecution with respect to General Tarnue, the Application relates to no material relevant to any other Prosecution witness. As a matter of logic, information about the relocation of General Tarnue and his family and as to his asylum claim can potentially affect the credibility of his evidence only.

18. The Decision does relieve the Prosecution from its ongoing obligation under Rule 68 to disclose exculpatory evidence or material in its possession, custody or control which may affect the credibility of prosecution evidence. If in the future the Defence establishes a *prima facie* case, in accordance with the well established criteria thereof, that the Prosecution has failed to do so, this Trial Chamber will grant the Defence relief. The issue of lost, destroyed or unavailable material in the event of a retrial is speculative at best.

19. The Prosecution submits, therefore, that no irreparable prejudice has been demonstrated.

### **III. CONCLUSION**

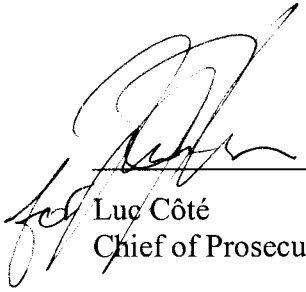
20. The Prosecution respectfully submits that the Application has failed to satisfy either of the conjunctive requirements of Rule 73(B) and should be dismissed in its entirety.

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<sup>8</sup> The 2 May 2005 Decision., para.20.

Dated this 20<sup>th</sup> day of May 2005.

In Freetown,



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Luc Côté  
Chief of Prosecutions



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Lesley Taylor  
Senior Trial Counsel



### **Prosecution Index of Authorities**

*Prosecutor v. Sesay, Kallon and Gbao*, Case No. SCSL-2004-15-PT, “Decision on Application by the Second Accused for Leave for Interlocutory Appeal Against the Majority Decision of the Trial Chamber of 9<sup>th</sup> December 2004 on the Motion on Issues of Urgent Concern to the Accused Morris Kallon”, 2 May 2005

*Prosecutor v. Sesay, Kallon and Gbao*, Case No. SCSL-2004-15-PT, “Decision on Defence Applications for Leave to Appeal Ruling of the 3<sup>rd</sup> of February, 2005 on the Exclusion of Statements of Witness TF1-141”, 28 April 2005

*Prosecutor v. Sesay, Kallon and Gbao*, Case No. SCSL-2004-15-PT, “Application by the Second Accused for Leave for Interlocutory Appeal Against the Majority Decision of the Trial Chamber of the 9<sup>th</sup> December 2004 on the Motion on Issue of Urgent Concern to the Accused Morris Kallon”, 9 April 2005

*Prosecutor v. Sesay, Kallon and Gbao*, Case No. SCSL-2004-15-PT, “Decision on Prosecution’s Application for Leave to File an Interlocutory Appeal Against the Decision on the Prosecution’s Motion for Joinder”, 13 February 2004

*Prosecutor v Norman and others*, SCSL-2004-14-T, “Majority Decision on the Prosecution’s Application for Leave to File an Interlocutory Appeal Against the Decision on the Prosecution’s Request for Leave to Amend the Indictment Against Norman, Fofana and Kondewa”, 2 August 2004