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SCSL-04-15-T
(30100-30121)

30100

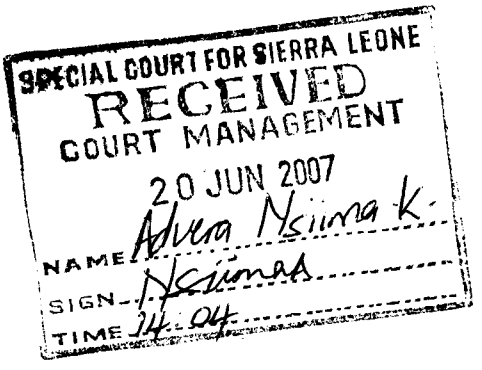
THE SPECIAL COURT FOR SIERRA LEONE

BEFORE:

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

Acting Registrar: **Mr. Herman von Hebel**

Date filed: **20th June 2007**



The Prosecutor

-v-

Issa Hassan Sesay
Morris Kallon
Augustine Gbao

Case No: SCSL – 04 – 15 – T

Skeleton Argument
Exclusion of Mr. Sesay's statements to the OTP obtained in breach of Article 17 of the Statute

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"[T]he blood of the accused is not the only hallmark of an unconstitutional inquisition.... [T]he efficiency of the rack and thumbscrew can be matched, given the proper subject, by more sophisticated modes of 'persuasion'" (Jackson v. Denno, 84 S.Ct. 1774, 1788 (1964)).

"[L]ife and liberty can be as much endangered from illegal methods used to convict those thought to be criminals as from the actual criminals themselves," (Spano v. New York, 360 U.S. 315, 320-21 (1959)).

Application to Exclude

1. The Defence submits that the prior statements of the first Accused (10th, 11th, 12th, 14th, 17th, 18th, 24th and 31st March and 14th and 15th April 2003) are inadmissible pursuant to Rule 89 and 95 of the Rules of Procedure and Evidence ("The Rules"). The statements were obtained in breach of Articles 17(4)(a) and 17(4)(g) of the Statute of the Special Court for Sierra Leone ("The Statute") and Rules 42, 43 and 63.

Ground One

Oppressive Course of Conduct

2. The Prosecution's conduct from the initial arrest until the end of the interviewing process was oppressive. It was designed, by its nature and duration and other attendant circumstances, to excite fears of the consequences of the process and hopes of immediate release from charge and detention that so affected the mind of Mr. Sesay such that his free will was overborne and left him with no choice but to speak, when otherwise he would have stayed silent. The resulting statements were thus taken in violation of the fundamental right to remain silent (Article 17(4)(g) of the Statute) and must be excluded pursuant to Rule 95.

Ground Two

Involuntariness (inducements, promises, threats)

3. The Statements of the Accused were obtained as a result of an investigative conspiracy designed to confuse the accused and sap his will. Mr. Sesay did not voluntarily waive his right to Counsel nor did he voluntarily provide the statements to the Prosecution. The Prosecution's investigators deliberately deprived Mr. Sesay of his rights pursuant to Rule 42, 43 and 63.

4. In short the Prosecution's investigators;
   (i) Executed a deliberate plot to threaten, coerce and persuade Mr. Sesay in order to sap his will and procure his consent to being interviewed in breach of his right to silence and without the protection of a lawyer;
   (ii) Deliberately failed to explain the full meaning and import of the Accused Article 17 and Rule 42, and 63 rights. The Prosecution investigators (Mr. Morrisette, Mr. Berry, Mr. White and Mr. Saffa) inculcated a process designed to trick Mr. Sesay into believing, notwithstanding his detention, that he was a witness for the Prosecution and not an Accused facing an approved indictment; and
   (iii) Engaged in conversations off-tape concerning Mr. Sesay's co-operation with the Prosecution and crimes alleged in the indictment in breach of Rules 43 and 63.

5. The Prosecution's conduct was in breach of minimum rights which have been recognised as fundamental to any civilised justice system. The involuntariness of the waiver of the right to Counsel and the involuntariness of the statement is manifest from the face of the transcripts and the oral testimony given by Mr. Morrisette, Mr. Berry, Mr. Lamin and Mr. Saffa. In light of this evidence the Prosecution are *unable* to discharge their burden of proof pursuant to Rules 42, 43, 63 and 92.

Ground Three

Breach of the right to counsel

6. During the course of his custodial interviews, Mr. Sesay expressed a desire for counsel on at least three occasions: in a request form submitted on March 13,[1] during his first appearance in the presence of the Prosecution,[2] and in a 24 March letter witnessed and signed by John Berry.[3] All interviews conducted subsequent to Mr. Sesay's initial invocation of his rights on March 13 took place without the presence of Counsel and should therefore be excluded, and all subsequent waivers were invalid.[4]

7. Mr. Sesay's right to Counsel was not explained to him "in a language he...understands," as required by Rule 42. At the time of his interviews, Mr. Sesay did not understand the meaning of the words "waive" and "counsel."

8. The explanation of the right to counsel proffered by Mr. Morissette during the first interview was wilfully or negligently misleading, and failed to communicate the substance of the right. Absent any subsequent effort to disabuse Mr. Sesay of his misunderstandings, all subsequent waivers were invalid.

9. Mr. Sesay demonstrated confusion as to his rights to immediate legal assistance (as opposed to legal assistance once his case went to trial) during his first appearance on March 15.[5] He also demonstrated a misunderstanding of the meaning of the waivers during his interview on April 14. Mr. Berry and Mr. Morissette failed to adequately correct these misunderstandings as required by Rules 42 and 63. All subsequent waivers were therefore invalid.

10. The Prosecution investigators failed to sufficiently explain the roles and responsibilities of duty counsel. By neglecting to correct Mr. Sesay's

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[1] See Initial Appearance of Issa Hassan Sesay held before Judge Benjamin Mutanga Itoe on Saturday, 15 March 2003, The Special Court for Sierra Leone, Case No. SCSL-2003-05-I, Transcript p. 54, ln. 14, for reference to this document.
[2] Mr. Sesay clearly invoked his right to counsel by answering "I will get a lawyer" in response to Justice Itoe's query as to whether he desired legal assistance. Id, p. 55, ln. 17. See also id. pp. 54-56.
[3] Exhibit A4 of the voir dire.
[4] See Prosecutor v. Bagasora/ICTR/para. 20.
[5] Transcript, Initial Appearance of Issa Hassan Sesay held before Judge Benjamin Mutanga Itoe on Saturday, 15 March 2003, The Special Court for Sierra Leone, Case No. SCSL-2003-05-I, p. 6, lns. 10-13.

misapprehensions as to duty counsel's duty of confidentiality, Mr. Morissette effectively failed to offer him the services of a lawyer.

Ground Four

Breach of the Accused's right to be informed promptly and in detail in a language which he or she understands of the nature and cause of the charge against him, under Article 17(4)(a)

11. Mr. Sesay was not served his indictment until after his first interview, when his cooperation with the Prosecution was first obtained.

12. Due to the circumstances of his incarceration at Bonthe, Mr. Sesay had no practical opportunity to read his indictment prior to his first appearance on March 15, when it was read to him and translated into Krio.

13. As indicated by the extensive translation needed to explain the indictment to Mr. Sesay during his March 15 first appearance, which took over two hours to accomplish, Mr. Sesay had yet to be informed in detail of the charges against him in a language he understood at that time.

14. The Prosecution can not in good faith abdicate responsibility for this failure. It was incumbent upon the Prosecution to ensure that during the course of the interview process, his understanding of the charges was sufficient to make an informed decision concerning his cooperation

General Legal Submissions

15. Article 17(g) of the Statute and the rights therein have been recognised by all civilised nations as essential to a fair trial – see Article 14 of the International Covenant on Civil and Political Rights (ICCPR) / Article 7 of the African Charter on Human and Peoples Rights (ACHPR) / Article 6 of the European Convention on Human Rights (ECHR) / Article 8 of the American Convention on Human Rights (ACHR).

16. The right not to be subjected to torture or to cruel, inhumane or degrading treatment or punishment is equally ingrained in the legislative doctrines of civilised nations and enshrines one of the fundamental values of the democratic societies – see Article 7 of the ICCPR/Article 5 of the ACHR/Article 3 of ECHR/Article 5 of the ACHR and the UN Torture Convention.[6]

17. Both torture and cruel, inhuman and degrading treatment can be exclusively psychological in nature. See Human Rights Committee, General Comment 20, Article 7 (Forty-fourth session, 1992), para. 5.

18. A v others: House of Lords (2005) UKHL 71 Para 15; "It is... of significance that the common law... refused to accept that oppression or inducement should go to weight rather than the admissibility of the confession. The common law has insisted on an exclusionary rule." See for a clear affirmation of the rule, Wong Kam- ming v The Queen (1980) AC 247.

19. A statement taken in violation of the fundamental right to the assistance of counsel must be excluded pursuant to Rule 95 (Prosecutor v. Bagasora/ICTR/ Para. 21). An involuntary statement ought to be excluded pursuant to Rule 95. A statement obtained in breach of internationally protected human rights ought to also be excluded pursuant to Rule 95 (Prosecutor v. Delalic/Trial Chamber/ICTY/Para 35).

20. It is also important to bear in mind the provisions of Rule 5 (Prosecutor v. Delalic/ Trial Chamber / ICTY/ Para. 37).

21. Using an incriminating statement, obtained from an Accused in violation of his rights, generally results in unfairness because it infringes his privilege against self-incrimination and does so in a most prejudicial way – by

[6] See, e.g., Soering v. United Kingdom (1989) 11 EHRR 439 and A and others v Secretary of State for the Home Department (2005) UKHL 71.

supplying evidence which would not otherwise be available. There can be no greater unfairness to an Accused than to convict him or her by use of unreliable evidence (R. v Evans (1991) 1 S.C.R 869).

22. Rules 42 and 95 include no caveats for evidence introduced for purposes of impeachment during cross-examination.

Use of inadmissible statements

23. The use of inadmissible statements in any capacity is impermissible; "a statement made by a prisoner under arrest is either admissible or not admissible. If it is admissible, the proper course is for the police to prove it... If it is not admissible, nothing more ought to be heard of it. It is a complete mistake to think that a document which is otherwise inadmissible can be made admissible in evidence simply because it is put to an accused person in cross – examination" (R. v. Treacy (1944) 2 All ER 229).[7]

Burden of Proof

24. Rule 42 embodies the essential provisions of the right to a fair hearing as enshrined in Article 14(3) of the ICCPR and Article 6(3) of the ECHR (Prosecutor v. Delalic/ Trial Chamber/ ICTY/Para 43). Rule 42 and 95 must be read together. It would be extremely difficult for a statement taken in violation of Rule 42 to be admissible within Rule 95, which protects the integrity of the proceedings by the non-admissibility of evidence obtained by

[7] See R v G (B) (1999) 240 N.R. 260 at pp. 3 and 19. The majority rejected the reasoning in the earlier case of R v Kuldip (1990) (as presently relied upon by the Prosecution); see pp. 26 and 27. See also R v Brooks 28 C.C.C (3d) 441 wherein the Prosecution were permitted to cross examine the accused on statements "following a voir dire in which the trial judge was satisfied that the statements had been proved voluntary" (pp. 1). See also Harrold v Territory of Oklahoma; 169 F. 47, 94 C.C.A 415 at pp. 3, 4, 5, 6, and 7. See also Bayless v US (1945) 150 F.2d at pp. 1, 4 and 5. See also People v Yeaton (1988) 75 Cal, 17 P. 544 at pp. 1 and 2. See also People v. Rodriguez (1943) 58 Cal. App.2d. 415. at pp. 2, 3, 4, 5, 7, and 10. See also Supreme Court of Illinois v. Reid Pelkola, 19 Ill. 2d 156 at pp. 6 which also highlights the huge prejudicial effect of the Prosecution's approach in failing to tender the evidence during the course of its case. See People v Sweeny (1922) 304 Ill. 502, 136 N.E. 687 at pp. 8. See Monette v. The Queen 23. C.R 244 (1956) at pp. 1 and 2. See also Supreme Court of Illinois v. Reid Pelkola, 19 Ill. 2d 156 at pp. 6 which also highlights the huge prejudicial effect of the Prosecution's approach in failing to tender the evidence during the course of its case. See People v Sweeny (1922) 304 Ill. 502, 136 N.E. 687 at pp. 8. See Monette v. The Queen 23. C.R 244 (1956) at pp. 1 and 2. See Beatrice Lynumn v. Illinois (1963) 372 U.S. 528 for examples of the types of issues to be considered: see pp. 1, 4 and 5.

methods which cast substantial doubts on its reliability (Prosecutor v. Delalic/ Trial Chamber/ICTY/Para 43/44).[8]

25. The Prosecution's burden is a heavy one and Rule 42 contains stringent requirements. The Court must demand the most exacting standard (Prosecutor v. Bagasora /ICTR/Para. 17).

26. The Prosecution claiming voluntariness on the part of the Accused/suspect, or absence of oppressive conduct, is required to prove it convincingly and beyond reasonable doubt (Prosecutor v. Delalic/ Trial Chamber/ ICTY/ Para. 42). There can be no presumption of voluntariness under Rule 92 where violations of either Rule 43 or Rule 63 are manifest.

27. ***When there is more than one conclusion reasonably open on the evidence, it is not for the Trial Chamber to draw the conclusion least favourable to the accused (Prosecutor v Tadic, IT – 94 – 1 – T, Opinion and Judgement, 7th May 1997, Para. 240).***

Failure to make an independent and contemporaneous note of the events

28. The events concern the arrest and interview of a high profile member of the RUF at the behest of the Prosecution at an International Court. It is alleged that Mr. Sesay is responsible for grave breaches of International Law. These were circumstances in which, par excellence, any arrest and interrogation should have been conducted with the meticulous observance of the rules of fairness, whether those rules were by virtue of a Judge's Order from Trial Chamber I or by adherence to the Rules and the case law. See R. v. Delaney, (1989) 88 Cr. App. R. 338, 340.

29. See also R. v. Canale, (1990) 91 Cr. App. R. 1:

> [T]he importance of the rules relating to contemporaneous noting of interviews can scarcely be over-emphasized. The object is twofold: not merely to ensure, so far as possible, that the suspect's remarks are

[8] See also R. v. Manninen, Supreme Court of Canada, 21 O.A.C. 192, 25 June 1987: "[T]he use of self-incriminatory evidence obtained following a denial of the right to counsel will generally go to the very fairness of the trial and thus will generally bring the administration of justice into disrepute."

> accurately recorded and that he has an opportunity when he goes through the contemporaneous record afterwards of checking each answer and initialling each answer, but likewise it is a protection for the police, to ensure, so far as possible, that it cannot be suggested that they induced the suspect to confess by improper approaches or improper promises. If the contemporaneous note is not made, then each of those two laudable objects is apt to be stultified.

30. The failure to keep contemporaneous notes of the conversations with the accused is a clear indication that the Prosecution has failed to adhere to these fundamental rules of fairness. Contemporaneous notes would have provided the accused with safeguards to enable him to contest the voluntariness of the statements and the resulting waiver of rights, and would have prevented the investigators from inventing accounts about the questioning.

31. By failing to take contemporaneous notes, or indeed any notes, as soon as practicable, the officers deprived the court of what was, in all likelihood, the most cogent evidence as to what took place during the process of obtaining Mr. Sesay's "co-operation" and what induced him to confess. The Trial Chamber is *pro tanto* disabled from having the full knowledge upon which to base its decision. The Trial Chamber is entitled to ask itself why the investigators did not take notes. Was it mere laziness or was it something more devious? Was it perhaps a desire to conceal from the court the full truth of the suggestions held out to the accused? "These are matters which may well tip the balance in favour of the defendant in these circumstances and make it impossible for the... [Trial Chamber] to [be] satisfied beyond reasonable doubt, and so require... [it].. to reject the evidence."[9]

Ground one: Oppressive Conduct

32. R v. Praeger (1972) 56 Cr. App. R. 151, cited in Prosecutor v. Delalic/ Trial Chamber/ICTY: "Oppressive questioning is questioning which by its nature, duration or other attendant circumstances (including the fact of custody) excites hopes (such as hopes of release) or fears, or so affects the mind of the

[9] See R v Keenan (1990) 2 Q.B. 54, 90 Cr.App.R. 1, CA, at p. 341, R v Delaney (1989) 88 Cr.App. R. 338 at p. 4, and R v. Canale (1990) 91 Cr. App. R. 1 at p. 6.

subject his will crumbles and he speaks when otherwise he would have stayed silent."

33. The Trial Chamber must approach the question in a common sense way and ask if the prosecution have proved that the contested statement was voluntary in the sense that it was not obtained by fear of prejudice or hope of advantage excited or held out by a person in authority.

34. This Trial Chamber has previously held that witnesses should be contacted by WVS rather than directly by the police, for fear of witness intimidation:

> We find merit in the Defence submission that the general population might feel intimidated by being approached by the police directly, considering that this Country has been through many years of armed conflict and that the social and political situation in Sierra Leone is such that it might reasonable lead to apprehension within the general population as to the role and power of the police. The Chamber, therefore, accepts the Defence submission that the appropriate organ to contact witnesses would be WVS, which statutorily, is tasked, *inter alia*, with 'provid[ing] [...] appropriate assistance for witnesses [...] who appear before the Court'. We opine therefore that the WVS, by virtue of their functions and objectives, namely, to provide protection, security and support to witnesses and victims, is in the best position to determine how to approach a witness, who may otherwise feel intimidated, to explain to a witness his or her right to refuse to be interviewed and to make sure that a proper consent for an interview was obtained from the witness.[10]

It would be incongruous to afford any less protection to an accused, or to hold that similar situations would not make an Accused's consent to interview any less improper.

35. Similar to an involuntary confession, statements induced by coercion, force or fraud, or oppressive conduct saps the concentration and has sapped the free will of the suspect through various acts and weakens resistance rendering it impossible for the suspect to think, clearly may constitute such conduct oppressive and the statement resulting from its exercise unreliable. This is

[10] Prosecutor v. Norman et al., Decision on Joint Defence Motion Regarding the Propriety of Contacting Defence Witnesses, SCSL-04-14-T-629, 20 June 2006, para. 23.

however a question of fact. Whether or not conduct is oppressive in each case will depend upon many factors, the categories of which cannot be exhausted (Prosecutor v. Delalic/ Trial Chamber/ICTY/Para 66).

36. Some of the factors to be considered may be the characteristics of the person making the statement, the duration of the questioning and the manner of the questioning. What may be regarded as oppressive with respect to a child, old man or invalid or someone inexperienced in the ways of the administration of justice may not be oppressive with a mature person, familiar with the police or judicial process. The effect is therefore relative (Prosecutor v. Delalic/ Trial Chamber/ICTY/Para 67).

Failure to inform Mr. Sesay's relatives of his arrest

37. Numerous international bodies have condemned incommunicado detention.[11] The rationale behind the constitutional norm is that it is an inalienable duty to inform relatives or good friends of a person as to any deprivation of liberty. This provision is based upon lessons learned in Germany from World War II whereby legal safeguards must exist such that never again should the judiciary or the prosecution be able to abuse its power by causing human beings to just disappear.

Ground two: Involuntariness (inducements, promises, threats)

Canadian Law

38. R. v. Oickle, Supreme Court of Canada, 2000 SCC 38 (1999), paras. 15, 49:

> A statement will be involuntary if it is the result of either 'fear of prejudice' or 'hope of advantage' held out by persons in authority....

[11] Juvenal Kajelijeli v. The Prosecutor, Judgement in the Appeals Chamber, 23 May 2005, ICTR-98-44A-A, para. 221, quoting: Standard Minimum Rules for the Treatment of Prisoners, art. 92; U.N Human Rights Commission Resolutions 1998/38, Para. 5, and 1997/38, Para. 20; U.N. Commission on Human Rights, Report of the Special Rapporteur on Torture and Cruel, Inhuman or Degrading Treatment or Punishment, Para. 926 (d); Inter- American Commission, 1982 – 1983; Mukong v. Cameroon, Para. 9.4. El-Megreisis v. Libyan Arab Jamahiriya, Para. 5.4; Suarez Rosero Case, para. 91 (describing detainees being cut off from communication with his family as cruel, inhuman, and degrading treatment). See also Art. 104 (4) of the German Constitution: "A relative or a person enjoying the confidence of the person in custody shall be notified without delay of any judicial decision imposing or continuing a deprivation of freedom."

> The classic 'hope of advantage' is the prospect of leniency from the courts. It is improper for a person in authority to suggest to a suspect that he or she will take steps to procure a reduced charge or sentence if the suspect confesses. Therefore in *Nugent, supra*, the court excluded the statement of a suspect who was told that if he confessed, the charge could be reduced from murder to manslaughter.... Intuitively implausible as it may seem, both judicial precedent and academic authority confirm that the pressure of intense and prolonged questioning may convince a suspect that no one will believe his or her protestations of innocence, and that a conviction is inevitable. In these circumstances, holding out the possibility of a reduced charge or sentence in exchange for a confession would raise a reasonable doubt as to the voluntariness of any ensuing confession. An explicit offer by the police to procure lenient treatment in return for a confession is clearly a very strong inducement, and will warrant exclusion in all but exceptional circumstances.

39. Threats, promises and inducements to a suspect need not be explicit: "Obviously, any confession that is the product of outright violence is involuntary and unreliable, and therefore inadmissible. More common, and more challenging judicially, are the more subtle, veiled threats that can be used against suspects. The Honourable Fred Kaufman, in the third edition of *The Admissibility of Confessions* (1979), at p. 230, provides a useful starting point:

> Threats come in all shapes and sizes. Among the most common are words to the effect that 'it would be better' to tell, implying thereby that dire consequences might flow from a refusal to talk. Maule J. recognized this fact, and said that 'there can be no doubt that such words, if spoken by a competent person, have been held to exclude a confession at least 500 times' (*R. v. Garner* (1848), 3 Cox C.C. 175, at p. 177).

Courts have accordingly excluded confessions made in response to police suggestions that it would be better if they confessed.... The most important consideration in all cases is to look for a *quid pro quo* offer by interrogators, regardless of whether it comes in the form of a threat or a promise" (R. v. Oickle, 2000 SCC 38 (1999), paras. 53, 57).

40. One purpose of the voluntariness rule is to ensure that confessions are reliable: "The confessions rule should recognize which integration techniques commonly produce false confessions so as to avoid miscarriages of justice" (R. v. Oickle, 2000 SCC 38 (1999), para. 32).

41. The problem of false confessions obtained through psychological coercion is well recognized in the literature on criminal law. See, e.g., R. A. Leo and R. J. Ofshe, "The Consequences of False Confessions: Deprivations of Liberty and Miscarriages of Justice in the Age of Psychological Interrogation" (1998), 88 *J. Crim. L. & Criminology* 429; R. J. Ofshe and R. A. Leo, "The Social Psychology of Police Interrogation: The Theory and Classification of True and False Confessions" (1997), 16 *Stud. L. Pol. & Soc.* 189; R. J. Ofshe and R. A. Leo, "The Decision to Confess Falsely: Rational Choice and Irrational Action" (1997), 74 *Denv. U. L. Rev.* 979; W. S. White, "False Confessions and the Constitution: Safeguards Against Untrustworthy Confessions" (1997), 32 *Harv. C.R.-C.L. L. Rev.* 105; G. H. Gudjonsson and J. A. C. MacKeith, "A Proven Case of False Confession: Psychological Aspects of the Coerced-Compliant Type" (1990), 30 *Med. Sci. & L.* 329; G. H. Gudjonsson and J. A. C. MacKeith, "Retracted Confessions: Legal, Psychological and Psychiatric Aspects" (1988), 28 *Med. Sci. & L.* 187; H. A. Bedau and M. L. Radelet, "Miscarriages of Justice in Potentially Capital Cases" (1987), 40 *Stan. L. Rev.* 21 (cited in R. v. Oickle, 2000 SCC 38 (1999), para. 35).

42. The personal characteristics of the defendant are important to take into consideration when considering the voluntariness of a confession:

> False confessions are particularly likely when the police interrogate particular types of suspects, including suspects who are especially vulnerable as a result of their background, special characteristics, or situation, suspects who have compliant personalities, and, in rare instances, suspects whose personalities make them prone to accept and believe police suggestions made during the course of the interrogation.[12]

Halilovic; Appeal: ICTY

43. An offer of cooperation on an issue like provisional release is clearly an inducement because it provides an incentive of a possible reward for cooperation (Halilovic; Appeal: ICTY, para. 35).

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[12] R. v. Oickle, 2000 SCC 38 (1999), para. 42, quoting White, Welsh S., False Confessions and the Constitution: Safeguards Against Untrustworthy Confessions" 1997, 32 *Harv. C.R. – C.L. L. Rev.* 105, 120.

44. Prosecutorial offers that serve as inducements to the Accused's cooperation may, if the inducement is sufficiently powerful, render statements made pursuant to that cooperation involuntary (Halilovic; Appeal: ICTY Para. 35). In any event they ought to be taken into account (Halilovic; Appeal: ICTY, para. 39).

45. It is not clear whether the Prosecution should be able to induce an Accused to cooperate by an offer of withdrawal of an indictment without full explanation to the accused of what the process involves (Halilovic; Appeal: ICTY, para. 44).

Ground three: Right to Counsel

Nature of right

46. Article 17 and Rule 42 state in unconditional terms that a detainee has a right to the immediate assistance of Counsel. The right is "rooted in the concern that the individual, when detained by officials for interrogation, is often fearful, ignorant and vulnerable; that fear and ignorance can lead to false confessions by the innocent; and that vulnerability can lead to abuse of the innocent and guilty alike, particularly when a suspect is held incommunicado and in isolation" (Prosecutor v. Bagasora/ ICTR/Para. 16).

47. Once the detainee has been fully apprised of his right to the assistance of counsel, he or she must be in a position to voluntarily waive the right. The waiver must be shown "convincingly and beyond reasonable doubt." It must be express and unequivocal, and must clearly relate to the interview in which the statement in question is taken (Prosecutor v. Bagasora/ICTR/ Para. 18).

48. Any implication that the right is conditional, or that the presence of Counsel may be delayed until after the questioning, renders any waiver defective (Prosecutor v. Bagasora/ICTR/ FN 11).

49. These rights, and the practical mechanisms for their exercise, must be communicated in a manner that is reasonably understandable to the detainee,

and not simply by some incantation which a detainee may not understand (Prosecutor v. Bagasora/ICTR/ FN11).

50. The right to Counsel includes an implicit requirement that the accused be given adequate opportunity to procure Counsel. See, e.g., R. v. Feeney, 1997 CanLII 342, Supreme Court of Canada, 22 May 1997 ("The Accused...was not given access to a telephone before being questioned; the police gave him the caution in the trailer, where no telephone existed. The police simply asked him whether he understood his rights, and given an indication that he did, proceeded to ask him questions about the blood on his shirt and his shoes. These police actions violated the Accused's s.10(b) [of the Canadian Charter] rights.")

51. When considering whether there has been a breach, "the substance of what the Accused can reasonably be supposed to have understood, rather than the formalism of the precise words used, must govern. What the accused was told, viewed reasonably in all the circumstances of the case, must be sufficient to permit him to make a reasonable decision" (R v Evans (1991) 1 S.C.R. 869).

52. The waiver cannot be voluntary unless a detainee knows of the right to which he is entitled (Prosecutor v. Bagasora/ICTR/Para. 17).

53. Where there are the indications that a witness is confused, steps must be taken to ensure that the suspect does actually understand the nature of his rights (Prosecutor v. Bagasora/ICTR/ FN14). See also R. v Evans (1991) 1 S.C.R 869, p. 4, imposing an obligation on the investigators in this situation to "take steps to facilitate that understanding."

Invocation of right

54. Under Rule 63, if an Accused "expresses a desire to have Counsel," questioning must cease until Counsel is present. In Bagasora, the court held that after an Accused's "confused attempt" to invoke his right to Counsel, investigators should have "ceased their questioning immediately" (Prosecutor v. Bagosora, Decision on Motion For the Admission of Certain Materials

Under Rule 89(C), Case No.: ICTR-98-41-T, 14 October 2004, para. 20). It is irrelevant whether a suspect expresses a desire to have counsel present immediately during the course of the interview sessions, or whether he simply expresses a general desire to obtain a lawyer in the future. See Bagasora, 14 October 2004, para. 20 (an Accused's stated desire to exercise his rights "as soon as I find out the case against me" held to constitute an invocation of the right to counsel, necessitating the cessation of questioning by interrogators). 30115

Ground four: Article 17(4)(a)

55. The Accused has a right to make an informed decision about participating in an interview process. An Accused cannot make an informed choice about speaking about the facts of the indictment without having sight of the indictment or without fully appreciating the seriousness of it. The taking of any interview without properly informing the Accused of the charges against him breaches Article 17, and such interviews are inadmissible.[13]

Prosecution case – at its highest

56. The following are the facts which the Prosecution rely upon as being true or have not been disputed (or could not reasonably be disputed):

Facts and problems

(i) Police Officer Lamin (agent for the OTP); failed, in breach of the obligation pursuant to the Warrant of Arrest, to read or serve a statement of the rights of the Accused upon Mr. Sesay until the 10th March 2007 interview.

(ii) Police Officer Lamin (agent for the OTP); failed to read or serve the indictment of the Accused upon Mr. Sesay until after the 10th March 2007 interview. The Warrant of Arrest stated that this must be done "at the time of his arrest or as soon as is practicable immediately following his arrest".

(iii) Mr. Sesay had not been informed of the indictment or his rights before agreement to cooperate was sought and obtained.

[13] Prosecutor v. Simic; Decision on Prosecutor's Request to Add Further Exhibits to the Confidential Prosecution Exhibit List Filed on 9th April 2001; Case No: IT-95-T, 11th September 2001.

(iv) The indictment was not read to Mr. Sesay before the 10th March 2007 interview (see pp. 28333 – 28382 at pp. 28337 whereupon Morissette indicates that the indictment will be served "as the turnover is done"). The turnover was done at 8 pm on the 10th March 2007 (15th June 2007/Lamin/pp. 60 when the indictment was given (but not read) to Mr. Sesay at Bonthe);

(v) The Prosecution at Jui did not explain who they were but simply referred to themselves as "investigators from the Special Court". Mr. Sesay's cooperation was obtained before he understood that he was agreeing to cooperate with the Prosecution (15th June 2007/Berry/pp. 19 – 20); and

(vi) The Prosecution did not explain the meaning of "cooperation" or "collaboration" (according to Mr. Berry and Mr. Saffa). The investigators at Jui did not explain any details of the choices before purportedly obtaining the agreement to cooperate (e.g. 15th June 2007/Saffa/pp.78).

(vii) The Prosecution turned up with at least 6 members of the OTP (Lahun, Pellman. White, Berry, Morrisette and Saffa) (e.g. 15th June 2007/Saffa/pp.71). The Warrant of Arrest stated that, "A member of the OTP could be present from the time of the arrest".

(viii) The Prosecution took Mr. Sesay into Prosecution custody, not Court custody, and detained him from approximately 2.30 pm until 4.30 pm (the end of the 10th March 2003 interview). The Warrant of Arrest states that the Accused shall be transferred to the custody of the "Special Court without delay". Mr. Morissette accepted that Mr. Sesay was only transferred into the custody of the court at Bonthe (13th June 2007/Morissette/pp. 13).

(ix) The Prosecution failed to refer to Mr. Sesay as an Accused throughout his interviews but inaccurately described him as a suspect (e.g. 13th June 2007/Morrisette/pp. 48 who accepted that Rule 63 should have been used to refer to an Accused).

(x) Mr. Morrisette inaccurately described the meaning of the waiver of the right to counsel as "In other words, are you willing to discuss with us your involvement? Are you willing to tell us what

happened and what you know of the events" (13th March 2007/Morrisette/pp. 28343).

(xi) Mr Morissette, by his own admission, acted inhumanely and to the disadvantage of the accused by failing to stop the 10th March interview to locate Mr. Sesay's family and inform them of his whereabouts (13th June 2007/Morrisette/pp. 66).

(xii) Mr. Morissette, by his own admission, did the bare minimum to advise Mr. Sesay of his right to Counsel. There were no explanations beyond those on the transcripts (12th June 2007/Morrissette/pp. 72).

(xiii) Mr. Morisette, admits that the process of interviewing Mr. Sesay was the taking of a "suspect statement" (12th June 2007/Morrisette/pp. 125) and yet stated to Mr. Sesay that the OTP may not "take a suspect statement" (10th March 2003/Morissette/pp. 28342).

(xiv) Mr. Berry, by his own admission, did the bare minimum to advise Mr. Sesay of his rights on the 11th March 2007 interview (14th June 2007/Berry/pp. 95).

(xv) The standard operating procedures which govern the interview of an accused at the Special Court are Rules 42, 43 and 63. The Prosecution investigation team have no other standardised rules (15th June 2007/Morrisette/pp. 60-61).

(xvi) The Prosecution investigation team have no standard operating procedure in relation to arresting a suspect (15th June 2007/Morrisette/pp. 60-61).

(xvii) Mr. Morrisette did not see it as part of his "investigative protocol to be confident at any time that Mr. Sesay understood that he had a right to counsel at the time of his interview (12th June 2007/Morrisette/pp. 79).

(xviii) Mr. Morrisette admits that he believes trickery is an acceptable way of obtaining an interview from a suspect (12th June 2007/Morrisette/pp. 84).

(xix) Mr. Morrisette believes that it is a legitimate investigative tactic, when investigating crimes under the statute of the Special Court, to

trick a suspect into (i) believing that by collaborating they would save themselves from the death penalty and (ii) believing that by collaborating they could save themselves from life imprisonment (12th June 2007/Morrisette/pp103).

(xx) Mr. Morrisette admits to having off the tape conversations with Mr. Sesay, without anyone else present (12th June 2007/Morrisette/pp. 39).

(xxi) Mr. Morrisette admits to not keeping any note of these conversations and not referring to them on tape (12th June 2007/Morrisette/pp. 70).

(xxii) Mr. Berry stated that it was unacceptable investigative practice to have conversations off tape which relate to the voluntariness of the statements and not record them on the transcript. If he had known Mr. Morissette was acting in this way he would have brought this to the attention of Mr. White (the Chief of Investigations)(14th June 2007/Berry/pp. 110).

(xxiii) None of the police officers or investigators kept notes of any of their dealings with Mr. Sesay except Mr. Berry who claims to have kept a note of the times of interview and the conversation with Mr. Sesay at Jui. The notes have not been produced by Mr. Berry (e.g. 14th June 2007/Berry/pp. 61 – 63).

(xxiv) Mr. Morrisette admits that he executed a deliberate plan to keep reassuring Mr. Sesay throughout the interview process that the prosecution "would take care of things" and "that it was in his best interests" to talk to the OTP (13th June 2007/Morrisette/pp.28/29). The plan was designed around the notion that it would be re-emphasised that the OTP would keep their word about what they "would do for" Mr. Sesay if he kept talking (13th June 2007/Morissette/pp. 28).

(xxv) Mr. Berry stated that it was unacceptable investigative conduct to trick someone into making a statement to the OTP by making them believe that they could save themselves from the death penalty (14th June 2007/Berry/pp. 72 – 75).

(xxvi) Mr. Berry stated that it was unacceptable investigative conduct to give assurances and make promises on a quid pro quo basis in exchange for testimony (14th June 2007/Berry/pp. 72 - 75).

(xxvii) Mr. Berry stated that it was unacceptable investigative conduct to deliberately approach an accused and offer quid pro quos in order to persuade them to keep them talking (14th June 2007/Berry/pp. 72 – 75).

(xxviii)Mr. Morrisette admitted to "promising" (on a quid pro quo basis) in exchange for Mr. Sesay's testimony (i) financial assistance for Mr. Sesay's family (ii) payment for schooling (iii) witness protection (iv) perhaps relocation to a new country (iv) health services (v) "a new life" and (vi) to approach the Trial Chamber to seek a lower sentence and save Mr. Sesay the life sentence (e.g. 13th June 2007/Morrisette/pp. 28/pp. 42).

(xxix) Mr. Morrisette admitted that he might have failed to tell Mr. Sesay that the decision concerning whether he became a witness had to be made by someone other than himself (13th June 2007/Morrisette/pp.47).

(xxx) Mr. Morrisette offered Mr. Sesay the same benefits as he offered TF1 – 046, who had been told that his indictment was to be dropped in exchange for him being a witness (12th June 2007/Morrisette/pp.94).

(xxxi) Mr. Sesay indicated inter alia on the 14th March 2003, in response to the rights wavier "all these days I'm saying yes, meaning yes, I'm not guilty". Mr. Berry repeated the rights in the same terms but did not offer further explanation (14th March 2003/pp. 28840). Mr. Berry accepts that he "must have missed his confusion" (15th June 2007/Berry/pp. 6).

(xxxii) The Prosecution did not facilitate a meeting between the lawyer from the Registry and Mr. Sesay on the 12th March 2003. The lawyer arrived from the Registry but was kept outside the interview (e.g. 12th June 2007/Morissette/pp. 54). The Prosecution have not adduced any evidence to dispute the written report of the Registrar, dated 13th May 2003, which alleges that Luc Cote, Chief of

Prosecutions, was aware of the fact that the Security staff at Bonthe had been told that the OTP had prohibited the Registry from sending a lawyer to speak to Mr. Sesay (see Exhibit I: confidential report of the Registry 13th May 2003).

(xxxiii) On the 13th March 2003 Mr. Sesay was visited by Duty Counsel, whilst at the OTP offices.

(xxxiv) On the 31st March 2003 Mr. Sesay was visited by Duty Counsel whilst at the OTP offices. For reasons unknown Mr. Berry signed Mr. Sesay's note wherein he requested a specific Counsel (Mr. Robinson). No explanation has been provided by the Prosecution to explain the intervention of an OTP investigator in privileged matters; except that Berry was requested to witness the document by Duty Counsel (14th June 2007/Berry/pp.41 – 43).

(xxxv) Mr. Sesay expressed a desire for counsel on at least three separate occasions during the period he was being interviewed—before his first appearance in a letter to the Registrar (referenced in the first appearance), during his first appearance on March 15, and in a letter signed and witnessed by John Berry on March 24—but questioning continued without counsel present.

(xxxvi) Notwithstanding that Mr. Sesay had indicated that he wanted Counsel on the 31st March 2007 and Mr. Berry had witnessed this request Mr. Berry did not speak to Mr. Sesay about this request nor seek further clarification from him concerning its import (15th June 2007/Berry/pp.13).

(xxxvii) On the 31st March 2003 Mr. Sesay confessed to a crime. This confession occurred after a one hour and forty five minute break in which Mr. Morissette admitted visiting the accused and having an "off the record discussion" in which it was explained to Mr. Sesay that "if [the OTP] were going to help him, he had to come out with evidence which would help" the OTP (13th June 2007/Morissette/pp.40 - 42).

(xxxviii) On the 14th April 2003 Mr. Sesay indicated that he did not understand that Duty Counsel had a duty of confidentiality and he was concerned that they might tell the other accused that he was

talking to the OTP (pp. 29521). Mr. Morissette accepted this meant that, in Sesay's mind the OTP were not offering him the right to a lawyer (13th June 2007/Morissette/pp.56/62).

(xxxix) Mr. Morissette accepted that he had not done anything to correct the impression that Duty Counsel did not have a duty of confidentiality (13th June 2007/Morissette/pp.60 - 64).

(xl) At no stage during the in interview process did the Prosecution discuss with Mr. Sesay his wanting a lawyer; only whether he wanted Duty Counsel. It had never entered Mr. Morissette's mind that Mr. Sesay might not understand the concept of Duty Counsel (

(xli) Mr. Morissette accepted that Mr. Sesay wanted a lawyer (13th June 2007/Morissette/pp. 64).

(xlii) Mr. Morissette accepted that Mr. Sesay was extremely worried about access to his family during the whole process (13th June 2007/pp. 65).

57. It is the submission of the Defence that taking the Prosecution case at its highest; the evidence is incapable of proof beyond a reasonable doubt. The totality of the evidence raises a reasonable doubt about the voluntariness of the waiver of counsel and the statements per se.

58. In the interests of justice and the protection of the integrity of the process, it is submitted that the Trial Chamber must exclude the statements pursuant to Rule 95. Anything less would bring the Special Court into disrepute.

Dated 20th June 2007

pp Wayne Jordash

pp Sareta Ashraph