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SCSL-04-15-T
(32514-32525)



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SPECIAL COURT FOR SIERRA LEONE

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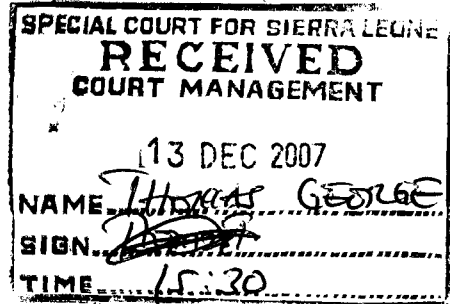
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IN THE APPEALS CHAMBER

Before: Justice George Gelaga King, Presiding Judge
Justice Emmanuel Ayoola
Justice Renate Winter
Justice Raja Fernando
Justice Jon Kamanda

Registrar: Herman von Hebel, Registrar

Date: 13 December 2007



PROSECUTOR

Against

**ISSA HASSAN SESAY
MORRIS KALLON
AUGUSTINE GBAO
(Case No.SCSL-04-15-T)**

**DECISION ON PROSECUTION MOTION REGARDING THE OBJECTION TO
THE ADMISSIBILITY OF PORTIONS OF EVIDENCE OF WITNESS TF1-371**

Office of the Prosecutor:

Mr. Peter Harrison
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I. INTRODUCTION

1. The Appeals Chamber is seised of an interlocutory appeal by the Prosecution¹ against a decision by Trial Chamber I that certain portions of the testimony of Witness TF1-371, which tended to show that Augustine Gbao (the “Accused”) knew about certain alleged killings in Kono District, are inadmissible and should be expunged from the record (“Impugned Decision”).² The Accused is charged with individual criminal responsibility pursuant to Article 6(1) and Article 6(3) for, among other things, unlawful killings of civilians in Kono District committed by members of the AFRC/RUF between 14 February 1998 and 30 June 1998.³

2. The issue on appeal traces to a 10 March 2006 motion by the Prosecution to add Witness TF1-371 to its “core” witness list.⁴ In the Trial Chamber’s decision on that motion (the “Decision to Add Witness TF1-371”), the Trial Chamber unanimously allowed Witness TF1-371 to testify⁵ over the Accused’s objections that Witness TF1-371 was being added too late in the trial.⁶ The Trial Chamber also ordered the Prosecution to “immediately disclose to the [Accused] the [witness’s] redacted statements” and to call Witness TF1-371 to testify at the end of the presentation of the Prosecution case.⁷

3. Pursuant to the Decision to Add Witness TF1-371, The Prosecution disclosed redacted statements of Witness TF1-371 on 11 April 2006 and unredacted statements of the witness on 8 May 2006.⁸

¹ *Prosecutor v. Sesay et al.*, SCSL-05-15-T, Prosecution Notice of Appeal and Submissions Regarding the Objection to the Admissibility of Portions of the Evidence of Witness TF1-371 with Confidential Appendices, 22 October 2007 (“Prosecution Appeal”).

² *Prosecutor v. Sesay et al.*, SCSL-05-15-T, Written Reasons on Majority Decision on Oral Objection for the Third Accused, Augustine Gbao, to the Admissibility of Portions of the Evidence of Witness TF1-371, 2 August 2006.

³ *Prosecutor v. Sesay et al.*, SCSL-05-15-T, Indictment, pp 11-12.

⁴ *Prosecutor v. Sesay et al.*, SCSL-05-15-T, Confidential, with ex parte Under Seal Annex Prosecution Request for Leave to Call Additional Witness and for Order for Protective Measures Pursuant to Rule 69 and 73bis (E), 10 March 2006.

⁵ *Prosecutor v. Sesay et al.*, SCSL-05-15-T, Decision on Prosecution Request for Leave to Call Additional Witness TF1-371 and for Order for Protective Measures, April 6 2006 (“Decision to Add Witness TF1-371”).

⁶ *Prosecutor v. Sesay et al.*, SCSL-05-15-T, Confidential Gbao Response to the Prosecution Motion to Add Witness, 20 March 2006.

⁷ Decision to Add Witness TF1-371, p. 3.

⁸ Prosecution Appeal, para. 16.

4. On 10, 13 and 14 July 2006, the Prosecution provided to the Accused unredacted “proofing notes” or investigator notes containing “new information” provided by the witness to the Prosecution.⁹

5. Witness TF1-371 testified at trial on 20, 21, 24, 28, 31 July 2006 and 1 and 2 August 2006.¹⁰ On 21 July 2006 and 24 July 2006, counsel for the Accused objected to the testimony of Witness TF1-371 stating that it implicated the Accused, for the first time, in incidents that had been addressed earlier in the trial.¹¹ Because the previous evidence of the incidents had not directly implicated the Accused, counsel for the accused had chosen not to cross examine those previous witnesses.¹²

6. The Trial Chamber accepted the Accused’s objection and held that the testimony of Witness TF1-371 contained information not previously disclosed to the Accused and resulting in unfair prejudice to the Accused in the preparation of his defence (“Impugned Decision”).¹³ Moreover, the Impugned Decision instructed that certain testimony of Witness TF1-371 would be expunged from the record.¹⁴ The Trial Chamber reasoned that the issue of the Accused’s knowledge of the Kono crimes was being adduced for the first time and that there had been no opportunity to cross-examine previous witnesses on this point.¹⁵ The Impugned Decision was accompanied by concurring and dissenting opinions. The concurring opinion postulated that the witness’ testimony was inadmissible because it considered whether the Accused had knowledge of the criminal act in Kono, an issue subject to determination by the bench. The dissenting opinion argued that an inquiry should have been made into whether the evidence was indeed new and prejudicial. The dissenting opinion concluded that the Accused had notice and was not prejudiced by the evidence.

⁹ Prosecution Appeal, para. 16, n. 17.

¹⁰ Prosecution Appeal, para. 2.

¹¹ RUF Trial Transcript, July 21 2006, pp. 6-8.

¹² *Ibid.*

¹³ *Prosecutor v. Sesay et al.*, SCSL-05-15-T, Written Reasons on Majority Decision on Oral Objection for the Third Accused, Augustine Gbao, to the Admissibility of Portions of the Evidence of Witness TF1-371, 2 August 2006 (Impugned Decision), para. 21.

¹⁴ Impugned Decision, p. 9.

¹⁵ *Ibid.*, paras. 20-22.

II. STANDARD OF REVIEW

7. According to Rule 73(B) of the Rules and Procedure and Evidence (“the Rules”),¹⁶ the purpose of granting leave to appeal from an interlocutory decision is to “avoid irreparable prejudice to a party.”¹⁷ Article 20(1) of the Statute of the Special Court for Sierra Leone (“the Statute”) and Rule 106 of the Rules provide that the Appeals Chamber shall hear appeals on the following grounds: (a) A procedural error; (b) An error on a question of law invalidating the decision; or (c) An error of fact which has occasioned a miscarriage.

8. As the Appeals Chamber at the ICTY has noted, a Trial Chamber exercises its discretion in numerous instances, including in “relation to the admissibility of some types of evidence, in evaluating evidence, and (more frequently) in deciding points of practice or procedure.”¹⁸ A Trial Chamber’s determination of the admissibility of evidence and control over the trial record are occasions when it exercises its discretion.

9. It is well established that in reviewing the exercise of a discretionary power, an appellate tribunal does not necessarily have to agree with the Trial Chamber’s decision as long as that Chamber’s discretion was properly exercised in accordance with the relevant law in reaching that decision.¹⁹ In order to demonstrate a discernible error, an appellant must show that the Trial Chamber misdirected itself as to the legal principle or law to be applied, took irrelevant factors into consideration, failed to consider relevant factors or failed to give sufficient weight to relevant factors, or made an error as to the facts upon which it has exercised its discretion.²⁰ The Appeals Chamber will also consider whether

¹⁶ Special Court for Sierra Leone, Rules of Procedure and Evidence, as amended 13 May 2006.

¹⁷ See also *Prosecutor v. Norman et al.*, SCSL-04-14-T, Decision on Prosecution Appeal against the Trial Chamber’s Decision of 2 August 2004 Refusing Leave to File an Interlocutory Appeal, 17 January 2005, para. 29.

¹⁸ *Prosecutor v. Milosević*, Decision on Interlocutory Appeal of the Trial Chamber’s Decision on the Assignment of Defense Counsel, Case no. IT-02-54-AR73.7 1 November 2004 (“*Milosević* Decision on Assignment of Counsel”), para. 10 (internal quotations omitted).

¹⁹ *Prosecutor v. Norman et al.*, SCSL-04-14-T, Decision on Interlocutory Appeals Against Trial Chamber Decision Refusing to Subpoena the President of Sierra Leone, 11 September 2006, (*Norman* Subpoena Decision), para. 5.

²⁰ *Norman* Subpoena Decision, para. 6. See also *Prosecutor v. Slobodan Milosević*, IT-99-37-AR73, IT-01-50-AR73, IT-01-51-AR73, International Criminal Tribunal for the former Yugoslavia, Reasons for Decision on Prosecution Interlocutory Appeal from Refusal to Order Joinder, 18 April 2002, para. 6; *Prosecutor v. Karemera et al.*, ICTR-98-44-AR73, International Criminal Tribunal for Rwanda, Decision

the Trial Chamber's decision was so unreasonable or plainly unjust that the Appeals Chamber is able to infer that the Trial Chamber must have failed to exercise its discretion properly.²¹

10. In summary, a Trial Chamber's exercise of discretion will be overturned if the challenged decision was (1) based on an incorrect interpretation of governing law; (2) based on a patently incorrect conclusion of fact; or (3) so unfair or unreasonable as to constitute an abuse of the Trial Chamber's discretion. Absent an error of law or a clearly erroneous factual finding, then, the scope of appellate review is quite limited: even if the Appeals Chamber does not agree with the Impugned Decision, it will stand unless it was so unreasonable as to force the conclusion that the Trial Chamber failed to exercise its discretion judiciously.²²

III. SUBMISSIONS OF THE PARTIES

11. The Prosecution appeal challenges the Trial Chamber's exclusion of the evidence and its decision to expunge the record.²³ The Prosecution argues that the Trial Chamber erred in excluding the testimony of Witness TF1-371. Although the Prosecution concedes that the testimony of Witness TF1-371 departed from earlier disclosures, the Prosecution emphasises that the Defence had adequate notice of the allegations against Gbao and sufficient opportunity to prepare for the cross-examination of TF1-371.²⁴ In the alternative, the Prosecution argues that the Trial Chamber erred in expunging the evidence from the record.²⁵

12. The Accused filed his "Response to Prosecution Notice of Appeal and Submissions regarding the Objection to the Admissibility of Portions of the Evidence of Witness TF1-371 with Confidential Appendices" on 29 October 2007. The Accused

on Prosecutor's Interlocutory Appeal Against Trial Chamber III Decision of 8 October 2003 Denying Leave to File an Amended Indictment, 19 December 2003, para. 9.

²¹ *Milosević* Decision on Assignment of Counsel, para. 11.

²² *Norman* Subpoena Decision, para. 5. See also *Prosecutor v. Milosević*, IT-99-37-AR73, IT-01-50-AR73, IT-01-51-AR73, International Criminal Tribunal for the former Yugoslavia, Reasons for Decision on Prosecution Interlocutory Appeal from Refusal to Order Joinder, 18 April 2002, para. 6.

²³ Prosecution Appeal, paras. 9-10.

²⁴ Prosecution Appeal, para. 27.

²⁵ Prosecution Appeal, para. 10.

argues that the addition of Witness TF1-371 and the new evidence offered on the stand prejudiced the Accused as the Defence did not have the opportunity to prepare adequately to cross examine Witness TF1-371.²⁶ Moreover, the Accused claimed prejudice from the new information to the extent that he was not able to cross-examine previous witnesses who testified about the Kono crime base.²⁷

IV. DISCUSSION

13. As a preliminary matter, the Appeals Chamber notes that the Trial Chamber considered and rejected the argument that allowing the Prosecution to lead evidence from Witness TF1-371 at the end of its case would unfairly prejudice the Accused.²⁸ Consequently, any unfair prejudice arising out of Witness TF1-371's testimony must have resulted from new—that is, previously undisclosed—testimony adduced at trial.

14. In prior decisions, the Trial Chamber has taken, in its words, a “clear and unambiguous”²⁹ approach to evaluating potential violations of the Prosecution's disclosure requirements pursuant to Rule 66(A)(i) and (ii),³⁰ and the admissibility of evidence disclosed for the first time during oral testimony.³¹ According to that jurisprudence, the Trial Chamber should first engage in a “comparative assessment of the allegedly new evidence, the original witness statement as well as the Indictment and the Pre-Trial Brief” to determine if the evidence is “new” or if it “merely supplements

²⁶ *Prosecutor v. Sesay et al.*, SCSL-05-15-T, Gbao Response to Prosecution Notice of Appeal and Submissions Regarding the Objection to the Admissibility of Portions of the Evidence of Witness TF1-371 with Confidential Appendices, 29 October 2007, (“Gbao Appeal”), para. 18.

²⁷ Gbao Appeal, para., 30.

²⁸ Decision to Add Witness TF1-371, paras 18-19.

²⁹ *Prosecutor v. Sesay et al.*, SCSL-05-15-T, Decision on Defence Motion for Clarification and for a Ruling that the Defence has been Denied Cross-Examination Opportunities, 3 August 2006, p. 4.

³⁰ See e.g., *Prosecutor v. Sesay et al.*, SCSL-04-15-T, Ruling on Oral Application for the Exclusion of “Additional” Statement for Witness TF1-060, 23 July 2004.

³¹ See *Prosecutor v. Sesay et al.*, SCSL-04-15-T, Ruling on the Application for the Exclusion of Certain Supplemental Statements of Witness TF1-361 and TF1-122, 1 June 2005 (“Decision to Exclude Evidence of Witness TF1-361”); *Prosecutor v. Sesay et al.*, SCSL-04-15-T, Ruling on Oral Application for the Exclusion of Statements of Witness TF1-141 Date Respectively 9th of October, 2004, 19th and 20th of October, 2004, and 10th of January, 2005, 3 February 2005; *Prosecutor v. Sesay et al.*, SCSL-04-15-T, Ruling on the Oral Application of the Exclusion of Part of the Testimony of Witness TF1-199, 26 July 2004; *Prosecutor v. Norman et al.*, SCSL-04-14-T, Decision on Disclosure of Witness Statements and Cross Examination, 16 July 2004.

evidence which has previously been disclosed”.³² The Accused who objects to the admissibility of evidence bears the burden of substantiating by a *prima facie* showing that the Prosecution has violated its disclosure requirements.³³ If the evidence is not shown to be new and it is otherwise admissible, then it will be admitted.³⁴

15. On the other hand, if the oral evidence is new, then the Trial Chamber should look to determine whether sufficient notice was provided to the Accused of the event about which the witness testified.³⁵ If the event has not been previously disclosed, then the Trial Chamber should determine to what extent the new evidence alters the incriminating quality of the evidence of which the Defence already had notice.³⁶ Where evidence has not been disclosed or is disclosed so late as to prejudice the fairness of the trial, the Trial Chamber may apply appropriate remedies, which may include the exclusion of such evidence.³⁷ The Appeals Chamber notes this approach enjoys support in the practice of other international criminal tribunals,³⁸ and similarly endorses the approach.

16. In the Impugned Decision, however, the Trial Chamber does not appear to apply the law it has elaborated. For example, the Trial Chamber appears to have excluded from consideration the critical question of whether the Prosecution breached its “disclosure obligations under Rule 66 of the Rules of Procedure and Evidence,”³⁹ and instead framed the inquiry as an examination of whether admission of the evidence “would be in violation of the doctrine of fundamental fairness.”⁴⁰

³² *Prosecutor v. Sesay et al.*, SCSL-04-15-T, Ruling on the Oral Application of the Exclusion of Part of the Testimony of Witness TF1-199, 26 July 2004, para. 9.

³³ See e.g., *Prosecutor v. Norman et al.*, SCSL-04-14-T, Decision on Disclosure of Witness Statements and Cross Examination, 16 July 2004, paras 21-22.

³⁴ *Prosecutor v. Sesay et al.*, SCSL-04-15-T, Ruling on the Oral Application of the Exclusion of Part of the Testimony of Witness TF1-199, 26 July 2004, para. 9.

³⁵ Decision to Exclude Evidence of Witness TF1-361, para. 22.

³⁶ Decision to Exclude Evidence of Witness TF1-361, para. 22.

³⁷ See *Prosecutor v. Sesay et al.*, Case No. SCSL-2004-15-T, Ruling on Oral Application for the Exclusion of Statements of Witness TF1-141 Dated Respectively 9th of October, 2004, 19th and 20th of October, 2004, and 10th of January, 2005, 3 February 2005, para. 20.

³⁸ See e.g., *Prosecutor v. Bagosora*, ICTR-98-41-T, International Criminal Tribunal for Rwanda, Decision on the Admissibility of Evidence of Witness DP, 18 November 2003, para. 8.

³⁹ Impugned Decision, para. 13.

⁴⁰ Impugned Decision, para. 15.

17. Rather than examining whether the evidence in question is new, the Trial Chamber appears to have relied on the Prosecution's statement that the oral evidence "contains more than a simple amplification of what is contained in the previous statement" of Witness TF1-371.⁴¹ However, contrary to the Trial Chamber's inference that the Prosecution conceded the witness statement was new, the Prosecution in fact argued the information was previously disclosed and therefore not new. The relevant passage of the transcript states:

So the Prosecution's position is that the information was disclosed at the earliest possible opportunity that it could do so. What is subsequently disclosed is an amplification on the earlier disclosure, and the Prosecution has to concede that it's not simply an amplification. The witness disclosure in the subsequent one is no longer saying Augustine Gbao should know, the words on the statement read literally are that he does know. *But it still is the same information, the same context and, on that basis, there has been no violation of any rule.*⁴²

18. Moreover, the Trial Chamber erroneously rejected the Prosecution's arguments that the Accused had notice of his alleged knowledge of killings at Kono because he Accused knew of the allegations in the Indictment against him. The Impugned Decision and Concurring Opinion appear to have conflated notice provided by an allegation in an indictment with the *mens rea* of knowledge. This lead to the erroneous conclusion that such knowledge was a "fact in issue" that could not be taken as proven simply "because it is alleged in the Indictment."⁴³ Of course, any notice provided by information contained in an indictment is distinct from knowledge as the *mens rea* for any crimes charged in the indictment.

19. The Trial Chamber's own jurisprudence directs a comparison of the oral evidence with the Indictment and the Prosecution's disclosures.⁴⁴ Such a comparison here demonstrates the information contained in Witness TF1-371's testimony was not new. The Accused objected when Witness TF1-371 was asked if he "kn[e]w if anyone else was aware of [certain killings in Kono]," and the witness answered, "[t]he senior man, who usually monitored their radio who get intelligence report via their VHF knew about

⁴¹ Impugned Decision, para. 10, citing RUF Trial Transcript, 21 July 2006, p. 21.

⁴² RUF Trial Transcript, 21 July 2006, 22:15-23.

⁴³ Impugned Decision, para. 20.

⁴⁴ Decision to Exclude Evidence of Witness TF1-361, para. 22.

it, specifically Issa Sesay knew about it, and the security commander knew about it, that is *Augustine Gbao knew about it.*⁴⁵

20. Yet, the Accused's alleged knowledge of the killings and the fact that Witness TF1-371 would provide evidence on that issue had been amply disclosed. The Indictment put the Accused on notice of his alleged individual criminal responsibility for—and therefore awareness of—unlawful killings of civilians in Kono. The Indictment states in relevant part:

About mid February 1998, AFRC/RUF fleeing from Freetown arrived in Kono District. Between about 14 February 1998 and 30 June 1998, members of AFRC/RUF unlawfully killed several civilians in various locations in Kono District, including Koidu, Tombodu, Foindu, Willifeh, Mortema and Biaya.⁴⁶

21. The Indictment also put the Accused on notice of the allegation that he was in command of Intelligence and Security units in the AFRC/RUF forces. Witness TF1-371 gave evidence that the Accused knew about the killings as a consequence of his position in Intelligence. The Indictment states in relevant part:

Between about mid 1998 and about January 2002, **AUGUSTINE GBAO** was Overall Security Commander in the AFRC/RUF forces, in which position he was in command of all Intelligence and Security units with the AFRC/RUF forces. In this position, **AUGUSTINE GBAO** was subordinate only to the leader of the RUF, FODAY SAYBANA SANKOH, and the leader of the AFRC, JOHNNY PAUL KOROMA.⁴⁷

22. Moreover, the Prosecution's disclosures provided notice that Witness TF1-371 would testify to the Accused's knowledge of the killings. The initially disclosed statements of the witness indicated that the witness would give evidence that went toward the proof that the Accused knew of the killings from reports received from his Intelligence Officers:

When Kallon did the massacre there, people brought the news to Mosquito. I was not there but the IO's reported it to Mosquito. I was there when the IO's gave their report. Mosquito even called Kallon to report. [...] The IO's brought the information to Mosquito. I saw the reports. [...] *Augustine Gbao was chief of the IO. He should have known what his people were reporting.* The IO's reported directly Gbao as well as to

⁴⁵ RUF Trial Transcript, 21 July 2006, p. 6 (emphasis added).

⁴⁶ *Prosecutor v. Sesay et al.*, SCSL-05-15-T, Indictment, para. 48.

⁴⁷ *Prosecutor v. Sesay et al.*, SCSL-05-15-T, Indictment, para. 32.

Bockerie. Gbao came to Buedu on a regular basis to brief Mosquito on reports made by his IO's.⁴⁸

23. The proofing note provided to the Accused on 10 July 2006 further indicated that the witness would give evidence that the Accused knew of the killings in Kono from intelligence reports:

I heard that Kallon and his boys killed civilians and burned them in houses around Koidu. It was reported to both Sesay and Mosquito. Kallon was told to report to Buedu, then after a couple of weeks he was told to go back to Kono. Nothing happened to him. CO Rocky, Emmanuel Johnson, was under the command of Kallon in Kono. Rocky was involved in killing civilians in Kono and he was called to report to Buedu. *The report about what Rocky did was sent to Bockerie and Augustine Gbao.* Rocky stayed a short time in Buedu and then went back to Kono. Kallon and Savage both killed civilians around Tombodu, they are separate incidents. *The IDU reported these killings to Gbao and they reported to Mosquito and Sesay.*⁴⁹

24. As a result of failing to make the necessary comparisons to the Prosecution's disclosures and the Indictment, the Trial Chamber erroneously considered that the testimony was new.⁵⁰

25. Upon erroneously finding that the testimony was new, the Trial Chamber considered that allowing such new evidence into the record would violate the fair trial rights of the Accused⁵¹ because (1) Witness TF1-371 was the last witness called by the Prosecution and any adjournment would delay completion of the Prosecution's case,⁵² and (2) the Accused would be unfairly prejudiced because he had not cross-examined any prior witnesses about the Accused's alleged knowledge of the killings at Kono.⁵³

26. Again, the Trial Chamber erred in the exercise of its discretion by giving weight to an irrelevant factor. The Accused was on notice from the beginning of the Prosecution's case that he was alleged to bear individual criminal responsibility pursuant to Article 6(1) and 6(3) for certain unlawful killings of civilians in Kono. Such criminal responsibility requires constructive knowledge of the killings, at a minimum; therefore

⁴⁸ Prosecution Appeal, Confidential Appendix A (emphasis added).

⁴⁹ Prosecution Appeal, para. 18 (emphasis added).

⁵⁰ Impugned Decision, para. 23.

⁵¹ Impugned Decision, para. 23.

⁵² Impugned Decision, para. 31.

⁵³ Impugned Decision, paras 21-23.

the Accused was on notice from the start of the trial that he was alleged to have such knowledge of the killings. The Accused's choice not to cross-examine witnesses about his alleged knowledge for "professional and strategic reasons"⁵⁴ cannot be the cause of his prejudice when he was on full notice of the allegation of his knowledge of the killings at Kono.

27. The Appeals Chamber notes that the Trial Chamber previously found the evidence to be relevant and admissible and that no prejudice would be caused to the Accused by admitting the evidence.⁵⁵ Having found error in the Trial Chamber's decision to exclude the evidence, the Appeals Chamber now directs the Trial Chamber to admit the evidence of Witness TF1-371 and to allow the Accused sufficient time to cross-examine Witness TF1-371, if he chooses to do so. Pursuant to Rule 90(F), and the inherent power to control the proceedings during the course of the trial, the Trial Chamber should determine the appropriate time at which to recall the witness to complete his testimony.

V. DISPOSITION

28. For the foregoing reasons, the Appeals Chamber **GRANTS** the Prosecution's motion, **QUASHES** the Impugned Decision, and **ORDERS** the Trial Chamber to admit the evidence of Witness TF1-371 while providing for adequate opportunity for cross-examination.

⁵⁴ See Impugned Decision, para. 21.

⁵⁵ Decision to Add Witness TF1-371, paras 18-19.

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Done at Freetown this 13 December 2007.

Justice George Gelaga King,
Presiding

Justice Emmanuel Ayoola

Justice Renate Winter

Justice Raja Fernando

Justice Jon Kamanda

