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Errata to Document Certificate

This certificate elicits the error in the following document in the Court Records

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Note that from this Document Number SCSL-04-15-T-932; the subsequent pagination which was supposed to be # 32610 was inadvertently skipped; and instead substituted with # 23610; hence leading to a duplication of the paginations on all the subsequent respective documents/filings running through Document Number SCSL-04-15-T-1234, pagination #32609.

Name of Officer:
Alhassan Fornah

Signed

932)

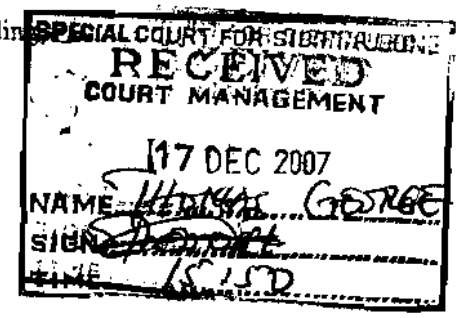
SCSL-04-15-T
(23610 — 23627)

SPECIAL COURT FOR SIERRA LEONE

THE APPEALS CHAMBER

23610

Before: Hon. Justice George Gelaga King, Presidin
Hon. Justice Emmanuel Ayoola
Hon. Justice Raja Fernando
Hon. Justiee Renate Winter
Hon. Justice Jon Kamanda



Registrar: Mr. Herman Von Hebel

Date filed: 17 December 2007

THE PROSECUTOR **against** **ISSA HASSAN SESAY**
MORRIS KALLON
AUGUSTINE GBAO

Case No. SCSL -2004-15-T

PUBLIC

KALLON REPLY TO PROSECUTION CONSOLIDATED RESPONSE TO THE SESAY, KALLON AND GBAO APPEAL OF THE DECISION ON THE DEFENCE MOTION FOR VOLUNTARY WITHDRAWAL OR DISQUALIFICATION OF JUSTICE BANKOLE THOMPSON FROM THE RUF CASE AND LIST OF AUTHORITIES WITH ANNEX A

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INTRODUCTION

1. On 14 November 2007, the First and Third Accused filed a "Joint Motion for Voluntary Withdrawal or Disqualification of Justice Bankole Thompson from the RUF Case" [1] ("the Motion") based on the comments contained within a Separate Concurring and Partially Dissenting Opinion, ("the Opinion") which was annexed to the judgment in the CDF trial.[2] The Second Accused filed a statement in support of the Motion on 20 November 2007.[3]
2. On 6 December 2007, Hon. Justiee Benjamin Mutanga Itoe, presiding, and Hon. Justice Pierre Boutet, sitting as Trial Chamber I, rendered their decision on the Motion ("the Decision") in which it dismissed the Motion in its entirety.[4] On the same day, after hearing oral submissions of the parties, leave was granted to appeal the Decision.[5]

3. On 12 December the Second Accused filed its appeal,[6] as did the First and Third Accused and on 14 December 2007 the Prosecution filed its response.[7] The Kallon Defence ("the Appellant") hereby files its reply.

4. The Prosecutor engages in a generalized aeademie analysis of the Principles for recusal without any attempt to relate those principles to the unique circumstances of the case at hand.

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[1] *P v. Sesay et al.*, SCSL-04-15-T, Sesay and Gbao Joint Motion for the Voluntary Withdrawal or Disqualification of Justice Bankole Thompson from the RUF Case, 14 Nov. 07.
[2] *P v. Fofana and Kondewa*, SCSL-04-16-T, Judgment, 2 Aug. 07.
[3] *P v. Sesay et al.*, SCSL-04-15-T, Kallon Statement in Suuport of the Sesay and Gbao Joint Motion for the Voluntary Withdrawal or Disqualification of Justiec Bankole Thompson from the RUF Case Filed on the 14th Day of November 2007, 20 Nov. 07.
[4] *P v. Sesay et al.*, SCSL-04-15-T, Decision on Sesay and Gbao Motion for the Voluntary Withdrawal or Disqualification of Justice Bankole Thompson from the RUF Case, 6 Dec. 07.
[5] *P v. Sesay et al.*, SCSL-04-15-T, Decision on Leave to Appeal Decision on Sesay and Gbao Motion for Voluntary Withdrawal or Disqualification of Hon. Justiee Bankole Thompson from thc RUF Case, 6 Dec. 07.
[6] *P v. Sesay et al.*, SCSL-04-15-T, Kallon Notice of Appeal and Submissions on the Decision on Sesay and Gbao Motion for Voluntary Withdrawal or Disqnalification of Hon. Justice Bankolc Thompson from thc RUF Case, 12 Dec. 07, ("the Appeal").
[7] *P v. Sesay et al.*, SCSL-04-15-T, Prosecution Consolidated Response to the Sesay, Kallon and Gbao Appeal of the Decision on the Defenee Motion for Voluntary Withdrawal or Disqualification of Justice Bankole Thompson from the RUF Case, 14 Dec. 07, ("the Response").

5. The Appellant respeetifully submits that the Response fails to address the substance of the 3 respective Appeals and invariably misinterpretes and misapplies the material law .

THE RESPONSE

(a) Jurisprudence Clted in Support of the Response.

6. The Prosecution eites several deeisions in apparent support of their opposition to the Appeal[8]. It is noteworthy that those deeisions though of persuasive authority in terms of the legal principles applicable, are clearly distinguishable from the case at hand. In all those decisions, the court was of the opinion that no bias had been established against the judges sought to be recused. In none of those deeisions was there a finding that some level of an appearance of bias had been demonstrated.

7. In the present case, the Trial Chamber has clearly stated that Justice Thompson's comments exhibit some indieia of an appearance bias. It is on the basis of this finding that the Appellant contends an appearance of bias has been established.

(b) A Judge Hearing Two or More Cases Arising Out of the Same Series of Events: Misinterpretation by the Prosecution.

8. The Prosecutor addresses, in eonsiderable detail, the argument that a judge is not disqualified from hearing two or more criminal trials arising out of the same series of events[9]. The Appellant respeetfully submits this is a non-issue in this case.

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[8] See for instance,Prosecutor vs Furundzija,IT-95-17/1-A, Appeal Judgement,21 July 2000, *Prosecutor vs Brdanin* IT-99-36-R 77,Decision on Application for Disqualification,11 June 2004, *Prosecutor vs Delalic, Mucic, Delic, Landzo* IT-96-21-A (Celebici Appeal Judgement) 20 February 2001, *Prosecutor vs Brdanin and Talic*, IT-99-36 / I-T, Decision on Application by Momir Talic for Disqualification and withdrawal of a Judge (Talic Decision) 18 May 2000, *Prosectuor vs Kordic and Cerkez*, Decision on the Application of the Accused for Disqualification of Judges Jorda and Riad,21 May 1998, ICTR Media Case Appeals Judgement, 28 Nov 2007, *Prosecutor vs Blasojevic, Obrenovic, Jokic and Nikolic,IT-02-60,Decision on Blagojevic's Application pursuant to Rule 15(b) (Bureau)*,19 March 2003.

[9] The Response at paras 19 - 25

9. None of the appellants has made the argument that a judge cannot hear two or more cases arising out of the same series of events *per se*. The Appellants' case is that a Judge, who in the course of deciding one case, acts in a manner suggesting a pre-judgement of the facts of the second case, must be recused.

10. Indeed, the Appellant has not sought to have Justices Boutet and Itoe recused although they too heard the CDF case. To the best of the Appellant's knowledge there is nothing in the two Learned Judges conduet of the CDF proceedings suggesting a pre-judgement of the facts and issues in the RUF trial.

(c) The Prosecution Ineorrectly States that "the Case Law of the ICTR[10] and ICTY[11] is Relevant to the Interpretation and Application of Rule 15(A) of the Special Court Rules."[12]

11. The Prosecution submits that "[t]he Defence is incorreet when they elaim that the test under Rule 15(A) is different from the test under the ICTR and ICTY Rules." The Appellant reiterates its submission[13] that the wording of the respective Rules[14] governing the disqualification of judges, at the ICTR and ICTY on the one hand, and at the Special Court on the other, are patently and deliberately diffcrent, thereby establishing different tests for bias. The Trial Chamber recognised as sueh in the Decision.[15] Thus, the Prosecution contradicts the finding of the Trial Chamber when it states: "[t]he test under the present text of Rule 15(A) of the Special Court Rules is, and always has been the same as that at the ICTY and ICTR."

12. The Prosecution alludes to the amendment of Rule 15(A) "in order to make it more consistent with the actual test applied by the Appeals Chamber in the Justice Robertson decision."[16] In effect, the amendment served to *broaden* the scope of Rule

[10] International Criminal Tribunal for Rwanda ("ICTR").
[11] International Criminal Tribunal for the Former Yugoslavia ("ICTY").
[12] Rules of Procedure and Evidence of the Special Court for Sierra Leone, ("the Rules").
[13] The Appeal, at para 20-29.
[14] See Rule 15(A) of the Rules of Procedure and Evidenee for the ICTR, ICTY and the Special Court for Sierra Leone, ("the Special Court").
[15] The Decision, at para 45.
[16] The Response, at para 8; referring to *P v. Sesay et al.*, SCSL-04-15-AR15, Decision on Defence Motion

15(A) and, in so doing, reflect the position of the law of the Special Court, as interpreted by the Appeals Chamber in the Robertson Decision, which the Prosecution correctly observes. It is noteworthy that the amendment of 24 November 2004, referred to by the Prosecution, came sometime after the recusal decision regarding Justice Winter on 28 May 2004.[17] Therefore it is clear that that decision was within the contemplation of the draftsmen at the time the amendment was passed to broaden the scope of Rule 15(A).

13. The Appellant submits that the Prosecution's contention that "the case law of the ICTR and ICTY is relevant to the interpretation and application of Rule 15(A) of the Special Court Rules"[18] is erroneous as the respective rules are different and, in a case where the jurisprudence of the *ad hoc* tribunals diverges from or contradicts the regime of rules governing the Special Court, the latter should prevail.

(d) The Prosecution Incorrectly Applies the 'Presumption of Impartiality.'

14. The prosecution misapplies the presumption of impartiality of Judges of the Special Court[19]. Article 13 of the Statute states, *inter alia,* that: "judges shall be persons of high moral character, impartiality and integrity." The Appellant sumits that this statutory provision cannot be used by a judge, or indeed a party to proceedings, to protect a judge against claims of bias. On the contrary, the intention and effect of the provision is to guarantee that all accused persons before the Special Court are tried by judges who attain the absolute standard of impartiality. Any other interpretation would serve to corrode the fundamental rights of the accused enshrined in the foundations of any criminal judicial system and laid down in the Statute by, *inter alia*: Article 17(1)- "[a]ll accused shall be equal before the Special Court"; Article 17(2)- "[t]he accused shall be entitled to a fair and public hearing"; Article 17(3)- "[t]he accused shall be presumed innocent until proven guilty." To that extent the

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Seeking the Disqualification of Justice Robertson from the Appeals Chamber, 13 March 04, ("the Robertson Decision").

[17] *P v. Norman et al.*, SCSL-04-14-PT-112, Decision on Motion to Recuse Judge Winter from Deliberation in the Preliminary Motion on the Recruitment of Child Soldiers (AC), 28 May 04.

[18] The Response, at para 11.

[19] The Response, at paras 12-18

Prosecution's application of the presumption of impartiality is inconsonant with the rest of the Statute.

15. In order to properly administer these fundamental rights, it can be the only correct statement of the law that an accused is "entitled to nothing less than the cold neutrality of an impartial judge."[20] The Appellant reiterates that references to an apprehension of bias being "firmly established" describe the evidential standard required on which to base an allegation of bias. No degree of bias, howsoever small, can be accommodated by a court seeking to adhere to the aforementioned principles.

16. The *Celebici* jurisprudence, cited by the Prosecution in support of this contention is irrelevant. The Appellant agrees with the finding that "[a] reasonable and informed observer...would not expect judges to be morally neutral about torture." This in no way refutes the contention that a judge should, under all circumstances, be morally neutral about the *accused* over who he or she sits in judgment.

(e) The Prosecution Incorrectly States that the Words of Justice Thompson do not Connote Criminality

17. The Prosecution states that: "[t]he Trial Chamber...correctly adduce[d] that...Mr. Justice Thompson did not make any finding as to the criminality of the AFRC and RUF."[21] It also states that: "[a]t no time in Mr. Justice Thompson's Dissenting Opinion did he mention the Accused or assign them any culpability for any crimes that were detailed in the CDF trial."[22] Given the findings of the Trial Chamber that Justice Thompson was "actually referring to both the AFRC and the RUF when speaking in terms of tyranny, anarchy and rebellion, the intensely conflictual situation and the fear, utter chaos, widespread violence of immense dimensions that he has

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[20] The Appeal, at para 34; quoting *State v. Steele*, 348 So.2d 398, 401 (Fla. App. 1977). See also Piersack v Belgium (1983) 5 EHRR 169 at paragraph 30, De Cubber v Belgium (1984) 7 EHRR 236 at Para 24, Hauschild v Denmark (1990) 12 EHRR 266 at para 46 and 48. Discussed in Kallon Appeal Supra note 6 at para 35. also available at http://cmiskp.echr.coe.int/tkp197/portal.asp?sessionId=4029649&skin=hudoc-en&action=request

[21] The Response, at para 30.

[22] The Response, at para 31.

identified,"[23] the Appellant submits that the absenee of an express mention of the three accused is irrelevant. It is further submitted that the careful selection of language by Justice Thompson according to which he does not mention the RUF does little to mitigate the bias otherwise implicit in his Opinion."[24] Notwithstanding the careful use of language by Justice Thompson,the reasonable observer informed of all relevant circumstances will nevertheless clearly read bias against the RUF defendants.[25]

18. The Appellant submits that through the careful selection of language again , Justice Thompson does not *expressly* attribute to the AFRC/RUF conduct which is criminal according to the Statute.The Appellant submits such language is not required to establish grounds for disqualification, according to the standard of an "appearance of bias".

19. Where the words complained of are ***explicit*** about the criminality of the defendants,thc test would no longer be 'appearance of bias',but actual bias. The Appellant maintains its position that the langauge used by Justice Thompson leads to the irresistible conclusion that the independent bystander would infer criminality. If the connotations of criminality specifically are implicit in the words "'tyranny, anarchy and rebellion'... an 'intensely conflictual situation...dominated by utter chaos, fear, alarm and despondency', and the 'immediate threat of harm purportedly feared, to wit, fear, utter chaos, widespread violence of immense dimensions resulting form the coup and intcnse diseomfiture, locally and nationally,'"[26] then illegality and illegitimacy is explieit in the notion of "a rebellion against the legitimate government of a State."[27] It is submitted that through this express attribution of illegality and

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[23] The Decision, at para 75; see also the Decision at para 72, where the Trial Chamber finds that the words of Justiee Thompson "could be perceived or understood as aggressive, offensive and injurious to the interests of the three aggrieved RUF Defendants." See also the Decision at para 79 where the Chamber coneludes that ..For the reasons we have outlined above,we find that this larger evil that was to be avoided by the CDF's actions ean only be actions brought by the AFRC and the RUF forces"

[24] *P v Furundzija*,Case No. IT-95-17/1-A, Judgment, 21 July 00. At para 189

[25] Indeed The Chamber has found that "... the context of the Judgement in whieh the Opinion is written leads to the Conclusion that this larger evil that was to be avoided by the CDF's actions can only be actions brought by the AFRC and the RUF forees" The Deeision at para 79

[26] The Deeision, at para 71; quoting the Opinion, at para 69, 90 and 91(ii).

[27] The Opinion, at para 88; see also the Opinion, at para 68, ("an examination of the totality of the evidence...reveals...that the CDF and Kamajors were fighting to restore the lawful and demoeratically

illegitimacy to the RUF, Justice Thompson has prejudged many of the matters at issue in the RUF trial which constitutes a bias as would be perceived in abudance by the 'independent bystander.'

20. Furthermore, the Prosecution misrepresents the findings of the Trial Chamber with the following statement: "[t]he language used by the learned Judge in his Separate Opinion 'could be perceived or understood as aggressive, offensive and injurious' but it becomes less so when read within the context of the evidence and the findings in the CDF case on which the learned Judge bases his opinion."[28] In such a way the Prosecution seeks to play down the finding of the Trial Chamber as to the "aggressive, offensive and injurious" nature of the words of Justice Thompson. The statement presupposes that the finding of the Trial Chamber was made without having considered the comments in the wider context of the "evidence and findings in the CDF case," and that, with benefit of such context, the Trial Chamber would have found differently. This assumption is completely without basis. The Trial Chamber found that the words of Justice Thompson were "aggressive, offensive and injurious" without further qualification[29].

(f) The Prosecution does not correctly apply the Standard that the 'Reasonable Observer' be 'Properly Informed'

21. The Prosecution seeks to emphasise that the reasonable observer is "properly informed of the facts and findings in the CDF case in which the learned Judge used

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elected Government of President Kabbah"), the logical implication of this is, therefore, that the actions of the RUF/AFRC were illegitimate and unlawful; the Opinion, at para 2, ("[a]s I perceive it, the present case confronts this court with the complex and delicate task of determining where legitimate action...in defence of one's own state, country, town, community or village against forces that have usurped the legal and democratic order ends and where criminality begins"), where the irresistible implication is that the RUF represent the illegitimate and unlawful forces that have "usurped the legal and democratic order"; the Opinion, at para 87(5), ("[t]he restoration of democracy to a country where there has been a violent overthrow of the lawful and democratically elected government is a supreme end or a good worth pursuing even if effected through launching military attacks"), where the "violent overthrow of the lawful and democratically elected government" by the RUF/AFRC can lead to no other conclusion than that the RUF acted illegitimately and unlawfully.

[28] The Response, at para 35; quoting the Decision, at para 72.

[29] The Decision at para 72.

the words and language complained of."[30] According to *Furundzija*:

> "[T]he reasonable person must be an informed person with knowledge of all the relevant circumstances"[31]

22. The Appellant submits that included in "all the relevant circumstances" are the presumption of innocence, the right of an accused to a fair trial and the compromising effect that ***any bias whatsoever*** has on those principles. In addition, the Appellant submits that the "reasonable person" would be fully informed of the circumstances of the war in Sierra Leone, including the political causes for which each side fought such that he would be able to reach no other conclusion than that anarchic, tyrannical and rebellious RUF[32] were fighting an illegitimate and illegal war, according to the views of Justice Thompson.

CONCLUSION

23. The Prosecution has substantially failed to address the grounds of appeal. Notably, the Response does not refute that the Trial Chamber found the jurisprudence to require a certain degree of bias to be established to ground disqualification.

24. The Response interprets material law to engineer an outcome which favours the Prosecution position. It invokes Article 13 as safety net behind which a judge may seek refuge whenever his impartiality is challenged. This interpretation is misplaced because it is incongruous with the statutory rights of the accused. The correct interpretation is that Article 13 and Rule 15(A) intend that no bias towards or against the accused is tolerated. The comments of Justice Thompson create the clearest appearance of bias to the 'reasonable observer.' Notwithstanding the Trial Chamber's gross understatement of the words of the Opinion, it did find "some indicia of an appearance of bias"[33] and that is sufficient to discharge the standard described in Rule 15(A).

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[30] The Response, at para 37.
[31] *P v Furundzija*, Case No. IT-95-17/1-A, Judgment, 21 July 00. At para 189
[32] See the Decision, at para 71-73, the Trial Chamber found that when Justice Thompson spoke of "tyranny, anarchy and rebellion" he was referring to the actions of the RUF.
[33] The Decision, at para 84.

DONE in Freetown on this 12th Day of December, 2007.

For Defendant **KALLON,**

Shekou Touray

Charles Taku

Kennedy Ogetto

Lansana Dumbuya

LIST OF AUTHORITIES

In accordance with Article 7 (D) of the Practice Direction on filing of Documents before the Special Court for Sierra Leone, Defence Counsel for the Second Accused herewith files the list of authorities and a copy of authority referred to in its "Kallon reply to prosecution consolidated response to the Sesay, Kallon and GBAO Appeal of the Decision on the Defence Motion for voluntary withdrawal or disqualification of justice Bankole Thompson from the RUF case".[34]

A. International Conventions

1. Statute of the Special Court for Sierra Leone
2. Rules of Procedure and Evidence of the Speeial Court for Sierra Leone
3. Rules of Procedure and Evidence of the International Criminal Tribunal for Rwanda
4. Rules of Procedure and Evidence of the International Criminal Tribunal for the Former Yugoslavia

B. Judgments and Decisions

(i) Special Court for Sierra Leone

5. *P v. Sesay et al.,* SCSL-04-15-T, Decision on Sesay and Gbao Motion for the Voluntary Withdrawal or Disqualification of Justice Bankole Thompson from the RUF Case, 6 Dec. 07.
6. *P v. Sesay et al.,* SCSL-04-15-T, Decision on Leave to Appeal Decision on Sesay and Gbao Motion for Voluntary Withdrawal or Disqualification of Hon. Justice Bankole Thompson from the RUF Case, 6 Dec. 07.
7. *P v. Fofana and Kondewa,* SCSL-04-16-T, Judgment, 2 Aug. 07.

[34] Prosecutor v. Sesay et al. SCSL-04-15-T-919. Kallon reply to prosecution consolidated response to the Sesay, Kallon and GBAO Appeal of the Decision on the Defence Motion for voluntary withdrawal or disqualification of justice Bankole Thompson from the RUF case

8. *P v. Norman et al.*, SCSL-04-14-PT-112, Decision on Motion to Recuse Judge Winter from Deliberation in the Preliminary Motion on the Recruitment of Child Soldiers (AC), 28 May 04.
9. *P v. Sesay et al.*, SCSL-04-15-AR15, Decision on Defence Motion Seeking the Disqualification of Justice Robertson from the Appeals Chamber, 13 March 04.

(ii) **International Criminal Tribunal for the Former Yugoslavia:**

10. *P v Furundzija,* Case No. IT-95-17/1-A, Judgment, 21 July 00. At para 189.

(iii) **European Court of Human Rights**

a. Piersack V Belgium (1983 5 EHRR 169 at para 30
b. De Cubber v Belgium (1984) 7 EHRR 236 AT para 24
c. Hauschild v Denmark (1990) 12 EHRR 266 AT para 46 & 48.

(available at http://cmiskp.echr.coe.int/tkp197/portal.asp?sessionId=4029649&skin=hudoc-en&action=request)

IV. **Domestic Jurisdiction**

State v. Steele, 348 So 2d 398, 401 (Fla. App.1977) **(annexed herewith)**

C. Motion and Other Filings

11. *P v. Sesay et al.*, SCSL-04-15-T, Prosecution Consolidated Response to the Sesay, Kallon and Gbao Appeal of the Decision on the Defence Motion for Voluntary Withdrawal or Disqualification of Justice Bankole Thompson from the RUF Case, 14 Dec. 07
12. *P v. Sesay et al.*, SCSL-04-15-T, Kallon Statement in Suuport of the Sesay and Gbao Joint Motion for the Voluntary Withdrawal or Disqualification of Justice Bankole Thompson from the RUF Case Filed on the 14th Day of November 2007, 20 Nov. 07.

13. *P v. Sesay et al.*, SCSL-04-15-T, Sesay and Gbao Joint Motion for the Voluntary Withdrawal or Disqualification of Justice Bankole Thompson from the RUF Case, 14 Nov. 07.
14. *P v. Sesay et al.*, SCSL-04-15-T, Kallon Notice of Appeal and Submissions on the Decision on Sesay and Gbao Motion for Voluntary Withdrawal or Disqualification of Hon. Justice Bankole Thompson from the RUF Case, 12 Dec. 07.

ANNEX A

23623

23624

LEXSEE 348 SO.2D 398

The STATE of Florida, Petitioner, v. Ralph Howard STEELE, Respondent

No. 76-2086

Court of Appeal of Florida, Third District

348 So. 2d 398; 1977 Fla. App. LEXIS 16319

July 26, 1977

COUNSEL: [**1] Richard E. Gerstein, State Atty. and John P. Durant, Asst. State Atty., for Petitioner.

Colin Gny, Miami, for Respondent.

JUDGES: Hubbart, Judge.

OPINION BY: HUBBART

OPINION

[*399] This is a traffic infraction proceeding in which a motorist was adjudged guilty of a traffic offense and fined. The circuit court reversed and the State petitions this court for a writ of certiorari.

[*400] The issue presented for review is whether a hearing officer on a traffic infraction hearing may precede the hearing with an opening statement discouraging charged motorists from pleading not guilty by giving a law lecture on alleged frivolous defenses to traffic infractions and, in particular, stating that there is no defense to a traffic infraction involving a rear-end collision except total brake failure. We hold that such an opening statement is improper as a general rule and in particular constitutes a basis to recuse the judge in a traffic infraction proceeding conducted thereafter in which a motorist is charged with a traffic offense involving an alleged rear-end collision. We, accordingly, find no departure from the essential requirements of law in the circuit court's reversal of the traffic [**2] infraction conviction herein and deny the State's petition for a writ of certiorari.

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On February 22, 1976, the respondent Ralph Steele was issued a traffic ticket for careless driving resulting in a rear-end collision in violation of Section 316.030, Florida Statutes (1975). On April 25, 1976, the case came on for a trial before a hearing officer, the Honorable Judge James Rainwater of the County Court of Dade County, Florida.

Prior to calling the case, the judge made a lengthy opening statement to the courtroom of ticketed motorists whose cases were on the court calendar for that evening. In the statement, he gave a law lecture on alleged frivolous defenses to various offenses, the import of which was to discourage not guilty pleas. Specifically, he stated that under the law there was no defense to a traffic offense involving a rear-end collision except total brake failure. He emphasized that he did not want to hear any defenses which he thought were frivolous. He did not explain basic court procedures, the various pleas which could be entered or any of the rights of the ticketed motorists.

The judge then called the respondent Steele's case along with a companion case. [**3] The respondent Steele was represented by counsel who entered a plea of not guilty to the charge and requested the judge to recuse himself from the case based upon his opening statement. The following proceedings took place:

> "[DEFENSE COUNSEL]: On behalf of the Defendant Steele, my name is Colin Guy. I represent him, and we would enter a plea of not guilty at this time.
>
> Your Honor, I have a motion to make at this time.

I would ask the Judge, this Honorable Court to recuse itself from this type of case. It is a rear end collision and you made a specific statement that there is no defense to a rear end collision.

THE COURT: There is none.

Your motion is denied. That is the law and I am not going to repeat myself by telling you about the law.

Obviously, there is no other excuse. It might be in a civil case, but not in a traffic case because you run into the rear of someone, then you are guilty unless you have brake failure.

If you do not have brake failure, anything you tell me is simply in mitigation of what happened.

There is no defense.

MR. GUY: Then I feel that the Court has prejudged the case.

THE COURT: No.

I am just quoting you the law." [**4] [Emphasis added]

Prior to taking testimony, the judge qualified his statements on the alleged law of rear-end collisions by announcing that he had been talking only of a "true rear-end collision" by which he meant to exclude a case where "somebody cuts in front of you."

The judge took testimony thereafter which revealed that in the early evening hours of February 22, 1976, the respondent Steele was driving his car south in the left hand lane on South Dixie Highway in Dade County, Florida. It had been raining earlier and it was still drizzling. The traffic was moderate to heavy. Traveling ahead of the Steele vehicle was a large van which blocked Steele's view of the traffic ahead of [*401] the van. Steele was traveling within the 45 mph speed limit at the time at about 34-40 mph. The van then switched lanes suddenly revealing just ahead in Steele's lane, a vehicle in the process of stopping for another vehicle which in turn was stopped to make a left hand turn off South Dixie Highway. Steele applied his brakes immediately but they did not take hold causing him to rear-end the vehicle stopped ahead of him. This vehicle in turn rear-ended the vehicle stopped [**5] ahead of it.

At the close of the evidence, defense counsel argued to the judge that Steele was not guilty of careless driving because the accident under the circumstances was unavoidable due to the sudden appearance of the stopped vehicle on a fast-moving thoroughfare after the van had changed lanes together with the unexpected brake failure of the Steele vehicle. The judge found the defendant guilty as charged and fined him $ 100 plus $ 4 court costs.

The respondent Steele appealed his conviction to the Circuit Court for the Eleventh Judicial Circuit of Florida, *Section 318.16(1), Florida Statutes* (1975). The circuit court heard the appeal and entered an order reversing the conviction with directions to afford the defendant a new trial before another hearing official. The circuit court concluded that the judge should have recused himself in view of his opening statement to the ticketed motorists which in effect pre-judged the respondent's case prior to hearing any evidence. The State now petitions this court for a writ of certiorari seeking to quash the circuit court's decision.

II

It is the established law of this State that every litigant, including the State in criminal [**6] cases, is entitled to nothing less than the cold neutrality of an impartial judge. It is the duty of the court to scrupulously guard this right of the litigant and to refrain from attempting to exercise jurisdiction in any manner where his qualification to do so is seriously brought into question. The exercise of any other policy tends to discredit and place the judiciary in a compromising attitude which is bad for the administration of justice. *Crosby v. State, 97 So.2d 181 (Fla.1957)*; *State ex rel. Davis v. Parks, 141 Fla. 516, 194 So. 613 (1939)*; *Dickenson v. Parks, 104 Fla. 577, 140 So. 459 (1932)*; *State ex rel Mickle v. Rowe, 100 Fla. 1382, 131 So. 331 (1930)*.

A judge must not only be impartial, he must leave the impression of impartiality upon all those who attend court. *Anderson v. State, 287 So.2d 322 (Fla.1st DCA 1973)*. The attitude of the judge and the atmosphere of the courtroom should be such that no matter what charge is lodged against a litigant or what cause is before the

court, the judge can approach the bar with every assurance that he is in a forum which is everything a court represents: impartiality and justice. The due process guarantee [**7] of a fair trial can mean nothing less than this. *State ex rel. Davis v. Parks, 141 Fla. 516. 194 So. 613 (1939).*

The prejudice of a judge is a delicate question for a litigant to raise but when raised as a bar to the trial of a cause, if predicated on grounds with a modicum of reason, the judge in question should be prompt to recuse himself. No judge under any circumstances is warranted in sitting in the trial of a cause whose neutrality is shadowed or even questioned. *Dickenson v. Parks, 104 Fla. 577, 140 So. 459 (1932); State ex rel. Aguiar v. Chappell, 344 So.2d 925 (Fla.3d DCA 1977).*

In the instant case, the judge delivered an opening statement to the respondent and the other ticketed motorists in the court audience which placed in question his impartiality to sit on the respondent's case. He gave a law lecture on defenses to traffic charges the import of which was to discourage the entry of not guilty pleas and defenses to traffic charges upon pain of incurring the judge's disfavor. At no time during this lecture did he explain the rights of the ticketed motorists in court nor the basics of court procedure. Almost the entire statement was taken up telling [**8] litigants about defenses the judge considered frivolous [*402] and did not wish to hear. In our judgment, this alone disqualified him from sitting as a judge on the respondent's case.

We think it is entirely proper for a traffic judge or hearing officer to give a brief opening statement to the assemblage of ticketed motorists prior to hearing any traffic cases. Such motorists are usually unrepresented by counsel and the opening statement should assist them in understanding court procedures as well as their rights. An opening statement may properly cover the procedure to be followed when a defendant's name is called by the clerk, the necessity of entering a plea and the types of pleas available, the possible results of each plea, basic trial procedure including the procedures to be followed once the case is concluded, and the rights of the defendant. A short lecture on the importance of traffic safety may also be in order. See Florida Traffic Court Manual 18-19 (1974).

It is quite another matter, however, for the judge or hearing officer to deliver a law lecture, as in this case, on alleged frivolous defenses to traffic charges or indicate in any way that he or she might [**9] be displeased with the assertion of certain defenses or the entry of a not guilty plea. To do so constitutes a basis for recusal of the judge or hearing officer to sit on any subsequent traffic matter as it casts a cloud on his or her impartiality.

Beyond that, the judge's statements in this case on the law of rear-end collisions compounds the already sufficient grounds for the judge's recusal herein. He clearly pre-judged the case by stating he would entertain only one defense to a traffic offense involving a rear-end collision, total brake failure. Although this was slightly modified later, the respondent Steele did not get a fair hearing on the defense which he presented since it did not fit the judge's preconception as to what a proper defense in this case would be.

The respondent was charged with violating Section 316.030, Florida Statutes (1975), which provides as follows:

> "(1) Any person operating a vehicle upon the streets or highways within the state shall drive the same in a careful and prudent manner, having regard for the width, grade, curves, corners, traffic, and all other attendant circumstances, so as not to endanger the life, limb, or property of any person. [**10] Failure to drive in such manner shall constitute careless driving and a violation of this section.
>
> (2) Any person found guilty of careless driving shall be punished as provided in s. 316.026."

A person is in violation of the above statute when he drives his vehicle in a careless or imprudent manner so as to endanger the life, limb, or property of any person, taking into consideration all the attendant circumstances including, but not limited to, the width, grade, curves, corners and traffic conditions. It is the duty of the traffic judge or hearing officer to determine whether the ticketed motorist is guilty of careless driving taking into consideration all the circumstances of the case.

A rear-end collision does not create a rebuttable presumption of guilt under the careless driving statute. Each case must be evaluated on its own facts based on all the attendant circumstances in determining whether the

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ticketed motorist failed to operate his vehicle "in a careful and prudent manner . . . so as not to endanger the life, limb or property of any person." Section 316.030, Florida Statutes (1975). A rear-end collision is just one such attendant circumstance. So is brake [**11] failure or a sudden cut-off of the rear-ending motorist by another vehicle. We cannot begin to canvass all of the myriad attendant circumstances which daily confront a busy traffic judge or hearing officer in cases of this nature. But none of these circumstances, standing alone, either convicts or acquits a motorist charged under the statute. It is the duty of the trier of fact to weigh and evaluate all of the attendant circumstances, not to fasten upon one circumstance to the exclusion of all others. See *Read v. Frizzell, 60 So.2d 172 (Fla.1952)*; *Padron v. State, 153 So.2d 745 (Fla.3d DCA 1963)*.

[*403] In the instant case, the respondent Steele contended that under all the circumstances of the case he was not guilty of careless driving. He asserted that the rear-end collision was unavoidable because of the sudden change of lanes by the van in front of him which suddenly revealed a stopped vehicle on a very busy thoroughfare and because of subsequent brake failure. We express no view on whether the evidence herein requires the respondent's conviction or acquittal of careless driving. Such an expression would not be in order as we are not the trier of fact. We [**12] do insist, however, that the respondent was entitled to have a fair and impartial hearing officer evaluate the entire case with an open mind based on all of the attendant circumstances.

The judge, therefore, committed reversible error in refusing to recuse himself at the request of the respondent. The circuit judge in reversing the traffic judgment herein did not depart from the essential requirements of the law.

III

The State argues that it was harmless error for the judge, even if he was not impartial, to sit in this case because the evidence was more than sufficient to sustain the careless driving conviction. The flaw in this contention is that any argument based on sufficiency of the evidence as a predicate for harmless error presupposes that an impartial judge evaluated the evidence at the trial level and found against the party appealing the judgment. We cannot make that supposition in this case. Any error based on the lack of impartiality of the trier of fact constitutes a denial of due process and, accordingly, is per se reversible error. *Crosby v. State, 97 So.2d 181 (Fla.1957)*; *Rockett v. State, 262 So.2d 242 (Fla.2d DCA 1972)*; *Skelton v. Beall, 133* [**13] *So.2d 477 (Fla.3d DCA 1961)*. See Traynor, *The Riddle of Harmless Error* 64-65 (1970).

The refusal of the judge to recuse himself in the traffic proceeding herein constituted reversible error. The circuit court did not depart from the essential requirements of law in reversing the conviction and remanding the cause for a new trial before a different hearing officer. The petition for a writ of certiorari is, therefore, denied.