

Case No. SCSL-2004-15-T
THE PROSECUTOR OF
THE SPECIAL COURT
V.
ISSA SESAY
MORRIS KALLON
AUGUSTINE GBAO

FRIDAY, 8 JUNE 2007
2.35 P.M.
TRIAL

TRIAL CHAMBER I

Before the Judges:	Bankole Thompson, Presiding Pierre Boutet Benjamin Mutanga Itoe
For Chambers:	Mr Matteo Crippa Ms Nicole Lewis
For the Registry:	Ms Advera Kamuzora
For the Prosecution:	Mr Peter Harrison Mr Charles Hardaway
For the Principal Defender:	Ms Haddijatou Kah-Jallow
For the accused Issa Sesay:	Mr Wayne Jordash Ms Sareta Ashraph Mr Tobias Berkman
For the accused Morris Kallon:	Mr Shekou Touray
For the accused Augustine Gbao:	Mr John Cammegh

1 [RUF8MAY07A - MC]
2 Friday, 8 May 2007
3 [Open session]
4 [The accused present]
5 [The witness entered court]
6 [Upon commencing at 2.35 p.m.]

7 PRESIDING JUDGE: Good afternoon, counsel. The trial is
8 resumed. We have a ruling on the admissibility issue.

Leone,

Judge,

Benjamin

9 The Trial Chamber I of the Special Court of Sierra
10 composed of Honourable Justice Bankole Thompson, Presiding
11 Honourable Justice Pierre Boutet and Honourable Justice
12 Mutanga Itoe, having heard the oral application made by the
13 Prosecution on 5 June 2007, to use statements by the first
14 accused Issa Sesay during the interviews conducted with the
15 Office of the Prosecutor, between 10 March 2003 and 15 April
16 2003, in order to cross-examine the accused for the purpose of
17 impeaching his credibility, having heard the submissions of
18 Prosecution, and of the Defence for the first accused, Issa
19 Sesay, on 5, 6 and 7 June 2007, on the issue of the
20 of these statements, for the limited purpose of cross-
examination

is 21 as to credibility and, in particular, on whether a voir dire
of 22 necessary in order to determine whether the accused's waiver
voluntarily, 23 the right to counsel, and the statements were made
enough 24 considering that the Chamber is not satisfied that it has
25 material before it at this stage to properly determine the
26 voluntariness of the statements, noting that it is within the
27 discretion of the Chamber to determine the best way of
proceeding
Evidence, 28 in line with Rule 89(B) of the Rules of Procedure and
evidence 29 according to which the Chamber shall apply the rules of

before

be

issued

be

adjourned

1 that will best favour a fair determination of the matter
2 it, and a consonant with the spirit of the Statute and general
3 principles of law, the Trial Chamber orders that a voir dire
4 conducted to determine the issue of the voluntariness of the
5 statements. A comprehensive and written decision will be
6 in due course.

7 We'll now proceed.

8 MR HARRISON: The Prosecution has to inform you that the
9 witnesses, the two witnesses, the primary witnesses that will
10 called on the voir dire are not available this afternoon but
11 could be available first thing on Monday morning.

12 PRESIDING JUDGE: Tuesday will be fine.

13 MR HARRISON: Yes.

14 PRESIDING JUDGE: Tuesday. Very well. You're making an
15 appropriate application.

16 MR HARRISON: Yes. I am asking that the Court be
17 until Tuesday at 9.30. If I can, just for the benefit of
18 everyone, the intention would be to have Mr Morissette as the
19 first witness.

20 PRESIDING JUDGE: Good.

21 MR HARRISON: And I have to also inform the Court that
we
22 are experiencing, the Prosecution is experiencing some
difficulty
23 in arranging the availability of the person who would be the
24 second witness, Mr Berry, and I will be speaking to everyone
25 again this afternoon to try to resolve that. But there is a -
-
26 quite a serious impediment right now to having him be before
the
27 Court, either on Tuesday or Wednesday or Thursday.
28 PRESIDING JUDGE: Well, we'll give you the weekend. You
29 try the best you can and we -- some of these things are
sometimes

1 outside one's control but I'm sure you will exert your best
2 professional endeavours. Mr Jordash, we have here -- we have
3 here an application for an adjournment to Tuesday morning
because
4 the Prosecution is unable to proceed at this point in time.

Do
5 you have any objection?

6 MR JORDASH: I don't have any objections but --

7 PRESIDING JUDGE: But you have some rider to attach to
it.

8 Let's hear it.

9 MR JORDASH: I have a specific reason why I don't have
an
10 objection which is this: That I would seek an order that
11 Mr Morissette and Mr Berry provide statements dealing with the
12 issues raised by the Defence, so that we have prior notice of
13 what it is they intend to say. But we would submit that would

be
14 fair so that we understand, as they understand, the issues
which
15 are between us.

16 PRESIDING JUDGE: Will you be applying in writing for
17 those?

18 MR JORDASH: No. I'd seek to apply now. It's clear
that
19 we have over three days gone into a great deal of detail about

the
evidence
a
approximately,

20 what our respective position is. The Prosecution haven't in
21 same way, for good reason: That is, we objected to the
22 being adduced in that way. What we are seeking now really is
23 quid pro quo. They know what we're going to say,
24 we would like to know what they're going to say in response to
25 the allegations we have made.

26 PRESIDING JUDGE: Let's have a quick resolution of that
27 matter. Do sit down. Mr Harrison, what is your response to
that
28 request?

29 MR HARRISON: I can advise right now what they're going
to

1 say.

2 PRESIDING JUDGE: Well, there you are. Are you prepared
3 to -- are you going to provide the answer preemptorily?

4 MR JORDASH: It's not an answer they are going to deny
5 everything. That's not an answer. What we are looking for is
6 witness statements.

want

7 PRESIDING JUDGE: Why are you preemptive? Don't you
8 to hear what he has to say before you respond?

9 MR JORDASH: No --

10 PRESIDING JUDGE: You are speculating.

as

11 MR JORDASH: We are sticking with what we consider fair
12 which is in the same way witnesses generally give some notice
13 to what they're going to say, through witness statements or
14 summaries, then we ask for the same from Mr Morissette and
15 Mr Berry. They're no different to any other witness who comes
16 into this Court and they are certainly no different to any
17 Prosecution witness who come into this Court.

with

18 PRESIDING JUDGE: But in a voir dire we are concerned
19 a very narrow issue. Mr --

two

20 MR HARRISON: I can say that it's exhibits -- the last
21 exhibits I think are -- 220, sorry, 223 would be the

declaration

222

22 that was filed. That's Mr Morissette's evidence and I think
23 is -- that's Mr Berry's evidence.

--

respond

24 PRESIDING JUDGE: What is your response? You have been
25 he has given you the details in terms of documentary material
26 that will form the basis of their testimony. How do you
27 to that?

28 MR JORDASH: Well, it's -- I'm assuming that's a serious
29 answer to the issue coming from the Prosecution but those

1 statements do not deal, as must be patently clear to all
2 concerned, I would submit, with the substance of what has been
3 alleged over the last two or three days. What they deal with
is
4 a chronology and a generalised denial of the assertion that
the
5 accused statements were involuntary or the waiver was
6 involuntary. There is no reference there to the very many
points
7 we've raised in which the real contentious issues --
8 JUDGE BOUTET: But, Mr Jordash, this is one of the, if
not
9 the very reason why we have agreed with some of your
submission
10 we should go on a voir dire to know what has transpired, if
11 anything. I mean, this is exactly what we are doing. You are
12 saying what you have been raising and suggesting that the
Court
13 doesn't know what has happened, and you've made suggestions
that
14 it may have been this and it may have been that. I mean, we
have
15 to a large extent acquiesced to what you have been suggesting
and
16 that's why say we need to know more before we make a decision,
so
17 this is why we are going through this voir dire.

18 MR JORDASH: Yes.

that,

19 PRESIDING JUDGE: And I would have thought, adding to
20 I would have thought that the process of voir dire is a very
21 limited one. I could say in a nutshell that we'll be
22 investigating or inquiring into the circumstances surrounding
23 leading to taking of alleged statements and also the alleged
24 waiver of right to counsel. These are the central issues and
25 they're not the central issues then what is the purpose of
26 ordering a voir dire? Because the whole issue is about the
27 alleged statements, their voluntariness or otherwise, and also
28 the waiver, whether in fact it was voluntary and informed.

or

if

have

29 I mean, the issue is all parceled together and I would

1 thought that when these witnesses come in a voir dire there
will
2 be an examination-in-chief by the Prosecution; there will be
3 right to cross-examine and there will be right of re-
examination.
4 The Court will have the opportunity of looking at these
5 witnesses, hearing them, watching their demeanour, tell their
6 story as to their procedural encounter with the accused
person.
7 Isn't that what we'll be investigating, Mr Jordash, or is
there
8 more?
9 MR JORDASH: I don't think there is anything that both
the
10 learned judges have just said which could possibly be of
11 difficulty.
12 PRESIDING JUDGE: Yes.
13 MR JORDASH: But, this is an issue of fair notice to the
14 Defence as to the evidence which is going to be given. There
is
15 no reason that Your Honours have just mentioned which goes to
why
16 Mr Morissette and Mr Berry should be treated as different to
17 other Prosecution witnesses, in the way in which they should
give
18 their evidence. The issue isn't that the voir dire is going
to
19 be concentrating on these narrow issues, of course it is. The

some
20 issue isn't that there is now going to be a voir dire and at
21 point we'll find out what they have to say. The issue is:
22 Should the Defence have notice concerning what it is they're
anybody
23 going to say about the specific allegations made? And if
hear
24 who has cross-examined recently will be able to confirm, to
25 a witness's evidence on specific points and then cross-examine
26 straightaway is a very very difficult process.
27 PRESIDING JUDGE: I can understand that. But isn't the
the
28 burden on the Prosecution to establish the voluntariness of
29 statements, alleged statements, beyond a reasonable doubt?

Prosecution

1 MR JORDASH: Exactly. But the burden is on the

2 in relation to --

burden

3 PRESIDING JUDGE: What is your burden? What is your

4 in law in regard?

the

5 MR JORDASH: To be given a proper opportunity to test

6 evidence. The burden is on the Prosecution in relation to the

statements

7 substantive issues in this trial but we get given the

8 because it's considered to be fair --

9 PRESIDING JUDGE: Yes.

is

10 MR JORDASH: -- that we have notice as to evidence which

11 going to impact adversely, potentially, on the accused. This

accused.

12 evidence is potentially going to impact adversely on the

seriously.

13 PRESIDING JUDGE: That's why we have taken it so

14 MR JORDASH: And we appreciate that.

from

15 JUDGE ITOE: Mr Jordash, what is it do you not know that

16 these witness are coming to say? What is it do you not know

you

17 the records that we have before us now, you know? What would

18 really reasonably say you do not know or you cannot anticipate

19 from the records that we have before us?

20 MR JORDASH: We don't know what they will say.

21 JUDGE ITOE: Just hold on. Hold on. Let my colleagues
22 listen to you. Yes. Yes.

23 MR JORDASH: We don't know what specifically they will
say
24 happened between 12.00 and 1.30 when Mr Sesay was arrested on
10
25 March. We don't know what the contents of the conversation
26 involved, concerning Mr Berry's attempt to seek Mr Sesay's
27 cooperation.

28 JUDGE ITOE: These are issues you have raised. The
29 question that -- which you have raised. And I think, to be
very

know

1 fair to you, you are in a position to admitting this. You
2 what you're contesting and you know what you expect from these
3 witnesses.

4 MR JORDASH: No, I don't.

the

5 JUDGE ITOE: And you will be given -- no, at least from
6 records you know that they're coming to tell, you know, that
7 waiver was voluntary and the statements were voluntary.

the

8 MR JORDASH: Yes.

9 JUDGE ITOE: And that they were taken in very regular
10 circumstances.

11 MR JORDASH: And that's it.

these

12 JUDGE ITOE: That's it. And the one advantage you have,
13 Mr Jordash, is that you have the latitude to cross-examine
14 two witnesses to the fullest extent and the length, you know,
15 whatever you know cross-examination is. I don't see you being
16 disadvantaged by not having a statement of what they're coming
17 to say.

of

to

statement

18 Let me say this: If they're going to give their

we

19 at all it might just well be a resume, a resume, you know, as

to 20 know them because you do not expect Mr Morissette or Mr Berry
21 sit down within the weekend and to produce a sort of statement
22 you need that will put you on notice on these matters.
say 23 You will complain about that statement, certainly, and
advantage, 24 that it doesn't contain everything, but you have the
have 25 at least, of cross-examining in detail as to what they would
say. 26 told you told here and what you anticipate they are going to
the 27 And it is during the cross-examination that you will fill in
28 gaps and you will question them, very very scrupulously on the
and 29 issues as to what happened during this time lapse and so on

disadvantaged

1 so forth. I think that -- I do not see you being

2 in these circumstances, really.

asked

3 MR JORDASH: If Your Honour -- Your Honours have been

every

4 in relation to each and every Prosecution witness, each and

5 Prosecution witness, of any substance, to take into account

6 inconsistencies between statements written prior to court and

for

7 oral testimony in court. There's the disadvantage. Because,

8 some reason, the Prosecution don't want that Mr Berry and Mr

the

9 Morissette to give those statements. That is an advantage to

10 Prosecution and a disadvantage to us.

you

11 PRESIDING JUDGE: So, in other words, you're saying if

12 don't have notice, we're not going to start on an even playing

13 field? Is that what you're saying?

14 MR JORDASH: We're not going to start.

15 PRESIDING JUDGE: On an even playing field.

16 MR JORDASH: We're not going to start on a fair playing

17 field.

this

18 PRESIDING JUDGE: Because I would have thought that in

19 particular situation the way this procedure's always worked in

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situation.

20 national systems is that the law presumes that the burden is
21 the Prosecution to establish the voluntariness of the
22 beyond a reasonable doubt. And so we start on a presumption,
23 some kind of presumption of involuntariness because a voir
24 is virtually saying there is something in doubt. Let us
25 the veil and look behind.
26 I mean, that process, the cross-examination is the most
27 effective weapon to help us achieve the truth here. And I
28 no doubt at all of your own creativity in making sure that you
29 use that weapon to the best advantage in that kind of

1 Because they're not going to come here and hide under, say,
2 statements they made. They will have to put everything on the
3 table for the Tribunal.

4 MR JORDASH: The difficulty isn't just the notice issue,
in
5 terms of being able to compare and contrast their written and
6 oral testimony. If statements are provided, and provided by
7 Monday, we can investigate the truth or otherwise of some of
the
8 assertions within. We can seek corroborative evidence, or
9 otherwise, to -- which will enable us to focus our
10 cross-examination. It will enable us to not take bad points.
It
11 will enable us to be able to controvert their bad points.
There
12 is no reason --

13 JUDGE ITOE: Mr Jordash, let me ask you: What if they
14 provide a statement to you and they testify and amplify on
that
15 without your having taking due notice of what they're
amplifying
16 on, would you stop the Tribunal from going ahead with the
17 proceedings because you were not put on notice?

18 MR JORDASH: The question, with respect, Your Honour,
19 cannot be answered in the abstract. It would depend. It
would

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20 depend how far it departed. It would depend upon the nature
21 the assertion which was made and whether ample time had been
22 given to be able to investigate that assertion. That's the
23 I'm making: Without notice, what we are facing is Mr
24 and Mr Berry in the witness box, giving their evidence, which
25 would hope goes a little bit further than the chronology they
26 provided so far, and then perhaps at that stage an application
27 adjourn to investigate what it is they have said and whether
28 actually holds up.
29 Your Honours must bear in mind there are many other

1 involved in this interviewing process. There was an acting
2 principal defender; there are members of the Defence Office;
3 there are members of security. And these people are the
people
4 we would want to speak with to see if what Mr Berry and
5 Mr Morissette say is correct or not, or might be correct.
6 JUDGE BOUTET: But, Mr Jordash, you have been for the
last
7 two days arguing and suggesting all sorts of wrongdoings by
these
8 two individuals. That's been your position. I assume, and I
9 presume you did that not based on mere speculation, that you
have
10 investigated some of that. You're now talking of
investigating
11 matters as such after you have thrown all this to -- in the
Court
12 setting. I presume that before you did that, you did your
13 homework, and I know you work hard and probably have done your
14 homework on this, so why are you now talking of further
15 investigation when, presumably, if you'd asked for what is
16 happening now, it's because of your own investigation in this
17 respect. And then we have answered in part your concerns and
18 we've ordered that this voir dire is to take place and you
will
19 be given all the opportunities in the world to do
20 cross-examination as it is normal in those circumstances.

21 I am really having a lot of difficulties for you now to
22 come and say to this Court that, in fairness, this is what
needs
23 to be happening now. I'm totally at a loss to understand
that.

24 MR JORDASH: One, I have a client.

25 JUDGE BOUTET: I know, I know. And then --

26 MR JORDASH: And the client has instructed me with the
27 detail I have used in the voir dire. That, combined with a
28 commonsense interpretation of what has gone on in this
29 transcript, has been underpinning my argument.

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1 JUDGE BOUTET: But the fact that your client may have
2 you some information, which is quite fair and normal as such,
3 I know, too, as an experienced counsel, you do carry some
4 investigation based on some of that information, either to
5 confirm or deny or to amplify whatever it is. I mean -- and
6 is fair process; I don't have any problem with that. And
7 yes.

8 MR JORDASH: Well, what would have been normal, the
9 Prosecution would have indicated in a proper way that they
10 still intending to rely upon these statements at that point we
11 would have investigated further than our own client's version
12 events but, of course, it didn't happen like that because the
13 Prosecution filed those statements during the course of
14 Mr Sesay's evidence.

15 Now, if I had gone to the Defence Office and said: Can
16 investigate the statements? I know the Prosecution haven't
17 indicated they're going to use them, but can I, just in case?
18 know what the Defence Office would have said to me. So we
19 haven't investigated further than our client's version of

20 because we haven't needed to, and we have been, respectfully,
21 somewhat ambushed by the Prosecution not indicating before our
22 client went into the witness box that if the statements were
23 inconsistent, as they saw it, they would seek to rely upon
them.

24 This is the problem. So we haven't. I haven't spoken to John
25 Jones, who was the acting principal defender. I have barely
26 spoken to Defence Office about these issues. I haven't spoken
to

27 any of the security. We don't go investigating things which
are

28 not part of the Prosecution case until the Prosecution
indicates

29 that they are. And without an investigation budget we can
hardly

1 do so.

2 So what we're asking now, and just going back to Your
3 Honour's comments about an opportunity in the same way, it's
4 an opportunity in the same way as other Prosecution witnesses,
5 that's what I'm arguing about. We are not asking for more, we
6 are asking for the same, as is with ordinary witnesses, and
7 are ordinary witnesses, professional witnesses perhaps, but
8 ordinary witnesses. And without statements we are hampered,
9 the same way as when we've got statements we are not.

10 PRESIDING JUDGE: Does the Prosecution have anything to
11 say
12 further on this?

13 MR HARRISON: I think the matter was raised three weeks
14 ago
15 on the 16th and they have known since then the Prosecution's
16 intention, and the Prosecution just wants to reaffirm, I
17 think,
18 what was said that the Prosecution is using this to cross-
19 examine
20 statement
21 as prior inconsistent statement. It is not until the
22 is uttered in court that any motivation for trying to use the
23 statement is triggered but it has been known since the 16th.

24 MR JORDASH: With respect, that argument is entirely

20 specious. What was required was a simple phone call from the
21 Prosecution to say: If there is an inconsistency we'll use
it.

22 Be on notice we know you object to the admissibility. Be on
23 notice. It is sensible practical advocacy and the idea that
24 somehow we are supposed to simply guess, or somehow the
25 Prosecution don't form an opinion before an inconsistency
comes

26 out of the witness's mouth, like I say, it's entirely
specious.

27 May I just conclude in this way: We have a procedure in
28 this Court. We followed it for two years. When Prosecution
29 witnesses give evidence they give a statement. The question

1 isn't: Why do you want a statement, Mr Jordash. The question
2 is: Why should we depart from the usual procedure?

for a

3 PRESIDING JUDGE: Counsel, we'll stand the Court down
4 while.

5 [Break taken at 3.14 p.m.]

6 [Upon resuming at 3.22 p.m.]

by

7 PRESIDING JUDGE: The Bench rules that the application
8 Mr Jordash for the Prosecution --

9 MS KAMUZORA: Your Honour, I beg your pardon, the
10 accused/detainee has not come.

by

11 PRESIDING JUDGE: The Bench rules that the application
12 Mr Jordash is meretricious and, accordingly, denies it.

a

13 Mr Harrison, it is our disposition to know how many
14 witnesses the Prosecution will be calling. If you can give us
15 number at this time and also the order of these witnesses, how
16 they will testify, and any other useful information so that
17 Court can efficiently and expeditiously dispose of the voir
18 procedure next week.

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dire

be

19 MR HARRISON: As I am speaking to you now, there would
20 four witnesses. Gilbert Morissette --

21 JUDGE BOUTET: In that order?

22 MR HARRISON: If I can just qualify that. Certainly the
23 intention is to call Gilbert Morissette as the first witness.

24 The preference would be to call John Berry as the second
witness

25 and if we can make the availability of others, possible there
is

26 a person name Lamin Lethol, you may recall that he was the
person

27 who signed the document that had to do with the transfer of
the

28 accused, and the fourth person is Joseph Saffa.

29 The difficulty we are having is that the most serious

be

Saffa

Monday

that

is

what

preference.

1 problem is the availability of Mr Berry. The preference would
2 to have Mr Morissette go first, then Mr Berry. Then, if the
3 Prosecution deems it necessary, the latter two, probably Mr
4 and then Mr Lethol. But if Mr Berry cannot be made available
5 then we would have to shift the order so that Mr Berry goes to
6 the end of the list. All of that we'll try to clarify by
7 but it's a little bit difficult right now because of other
8 pressures that are on these people.

9 JUDGE ITOE: Mr Harrison, what if we indicated our
10 preference to hear Mr Berry and then -- I am sorry, Mr
11 Morissette, and then Mr Berry before the other witnesses and
12 you do everything you can, you know, to ensure that that order
13 followed?

14 MR HARRISON: Yes. That's what I indicated. That's
15 we are trying to do.

16 JUDGE ITOE: Unless, of course, there are some other
17 circumstances which --

18 MR HARRISON: Yes.

19 JUDGE ITOE: Otherwise I think that will be our

He

20 MR HARRISON: There is no problem with Mr Morissette.

21 could be here Monday if the Court wishes.

to

22 JUDGE ITOE: Because yesterday, you did tell us that you
23 were in touch with Berry and Morissette and that they were
24 around. You wanted a timetable, an indication from us so that
25 they can plan their schedules. I hope that they would be able

obligation,

26 plan their schedules and take into consideration the
27 the judicial and legal obligation to come and assist us here.

28 MR HARRISON: Yes.

to

29 PRESIDING JUDGE: Mr Touray, do you have any objection

Tuesday?

1 the application by the Prosecution for an adjournment to

2 MR TOURAY: I don't see any.

3 PRESIDING JUDGE: Mr Cammegh, do you?

4 MR CAMMEGH: No, nothing to say. Thank you.

5 PRESIDING JUDGE: The application is granted. The Court
6 will adjourn to Tuesday the 12th of June at 9.30 a.m.

p.m.

7 [Whereupon the hearing adjourned at 3.27

8 to be reconvened on Tuesday, the 12th day of
9 June, 2007, at 9.30 a.m.]

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SCSL - TRIAL CHAMBER I