

THE SPECIAL COURT FOR SIERRA LEONE

CASE NO.: SCSL-04-15-T
TRIAL CHAMBER I

THE PROSECUTOR
OF THE SPECIAL COURT
V.
ISSA HASSAN SESAY
MORRIS KALLON
AUGUSTINE GBAO

MONDAY, 26 JULY 2004
10.41 A.M.
CONTINUED TRIAL

Before the Judges:

Benjamin Mutanga Itoe, Presiding
Bankole Thompson
Pierre Boutet

For the Registry:

Mr. Geoff Walker

For the Prosecution:

Ms. Lesley Taylor
Mr. Alain Werner
Ms. Sharan Parmar

For the Principal Defender:

Ms. Haddijatou Kah-Jallow

For the Accused Issa Hassan Sesay:

Mr. Wayne Jordash
Ms. Sareta Ashraph

For the Accused Morris Kallon:

Mr. Raymond Brown
Mr. Melron Nicol-Wilson

For the Accused Augustine Gbao:

Professor Andreas O'Shea
Mr. John Cammegh

Court Reporter:

Ms. Susan G. Humphries

1 [Monday, 26 July 2004]

2 [Open Session]

3 [The accused Kallon present]

4 [The accused Gbao and Sesay not present]

5 [Upon commencing at 10.41 a.m.]

6 MR. PRESIDENT:

7 Yes, counsel, is there any special -- because we have been told that Mr. Sesay is slightly indisposed.

8 How does counsel intend to proceed?

9 MR. JORDASH:

10 Well, I would respectfully invite Your Honours to adjourn these proceedings for today. When I saw
11 Mr. Sesay, he was dripping with perspiration, he looked extremely unwell and complained of heart -- a
12 pain around the heart region. As soon as I saw him it was quite clear he was ill. He doesn't think it is
13 malaria, but as Your Honours will probably be aware, he is seeing medical staff at the moment and we
14 are expecting some type of diagnosis prognosis later on. My concern about continuing in his absence
15 would be that --

16 MR. PRESIDENT:

17 We don't -- we don't intend to continue in his absence, we do not at all, we don't -- we don't intend to.

18 MR. JORDASH:

19 I am grateful for the indication.

20 MR. PRESIDENT:

21 It is his statutory right, you know, unless special circumstances were established, that he be tried in
22 his presence.

23 MR. JORDASH:

24 Thank you.

25 MR. PRESIDENT:

26 So we don't intend to. But this said, we would -- the Chamber would like to deliver its ruling, just the
27 ruling, and then to adjourn to some time this afternoon at about 3.00 o'clock, so as to give him enough
28 time or, rather, to give the treating medical authorities enough time to look after him.

29
30 So we will be delivering our ruling which was adjourned for today and Judge -- Honourable
31 Judge Boutet will read the ruling of the Court on this matter.

32 [Ruling]

33 JUDGE BOUTET:

34 The Trial Chamber of the Special Court for Sierra Leone, composed of Honourable Judge Benjamin
35 Mutanga Itoe, Presiding Judge, and Honourable Judge Bankole Thompson and I, Judge Pierre
36 Boutet; seized of an oral application by the defence counsel for Augustine Gbao during the
37 proceedings on 23 July 2004 for the exclusion of part of the testimony of Witness TF1-199 and the

1 Prosecution's oral response thereto; considering Rules 66 and 67 of the Rules and Article 17 of the
2 Statute of the Special Court, after deliberation hereby issues the following ruling:

3
4 Introduction: Witness TF1-199 testified before this Court on 19th July 2004. The Prosecution had
5 previously disclosed the redacted written statement for this witness on different dates between
6 November 2003 and December 2003, while its unredacted version had been disclosed in accordance
7 with the witness protection orders.

8
9 Based on Rule 89(C) of the Rules and Article 17 of the Statute, the Defence submits that the part of
10 the testimony of Witness TF1-199 pertaining to the kidnapping of UNAMSIL personnel in Makeni
11 should be excluded on the grounds that it is fresh evidence and it has not been given notice of this
12 event from the disclosure referred to above and that as a result it cannot properly cross-examine this
13 witness. The Defence claims that evidence which cannot be properly tested by the Defence cannot
14 be given probative value and therefore should be excluded.

15
16 The Prosecution submitted that it acted diligently in disclosing the witness statement for this witness
17 and that, in addition to such statements, the amended consolidated indictment and the pre-trial brief
18 provide sufficient notice to the Defence on the specific allegations on the kidnapping of UNAMSIL
19 personnel. Further, the Prosecution contends that the impugned testimony is not fresh evidence, but
20 rather an expansion of the evidence presented by this witness in open court, consistent with the
21 principle of orality. The Defence, therefore, did not suffer any prejudice and, if any, it will be given the
22 chance to test the probative value of this evidence in cross-examination.

23
24 Deliberation: This Chamber is called upon to determine whether the Defence has demonstrated that
25 the Prosecution is in breach of its disclosure obligations under Rule 66 and Rule 67 of the Rules and
26 Article 17(4) of the Statute on the rights of the Accused on the alleged grounds that it has not
27 diligently disclosed, in a timely manner, evidence by Witness TF1-199 on the kidnapping of UNAMSIL
28 personnel in Makeni. Further, this Chamber should also determine whether the evidence being
29 challenged, as it arose during the testimony in court, is new evidence for which the Defence has not
30 been given sufficient time to investigate and to prepare for cross-examination, and whether this
31 consequently warrants its exclusion.

32
33 In particular, this Chamber notes that the written statement in question states the following on this
34 point: "When the RUF attacked the UN peacekeepers, they left Lunsar and went to Freetown. There
35 was a heavy attack on Gbari junction. [Witness] saw UN vehicles drive by [sic] with RUF soldiers as
36 drivers. They were wearing the UN caps."

1 Furthermore, the interview notes of 31 February 2004 states the following, and I quote: "I heard about
2 the attacks on the UN peacekeepers when I was at an interim care centre. I saw rebels wearing UN
3 caps and driving UN vehicles. We knew that the rebels had attacked the UN. At this time the rebels
4 were still mixed with AFRC and RUF."

5
6 This Chamber has repeatedly addressed various issues regarding disclosure of evidence. In the
7 *Norman* decision, the Chamber observed that, and quote: "It is evident that the premise underlying the
8 disclosure obligation is that the parties should act *bona fides* at all times. There is authority from the
9 evolving jurisprudence of the International Criminal Tribunals that any allegation by the Defence as to
10 a violation of the disclosure rules by the Prosecution should be substantiated with *prima facie* proof of
11 such a violation."

12
13 Further, taking due cognisance of the importance of Article 17(4) of Statute in ensuring ample
14 protection of the right of an accused to have time and adequate facilities for the preparation of his
15 case, and also to examine or have examined the witnesses against him, the Trial Chamber
16 emphasised its role to enforce disclosure obligations in the interests of a fair trial, "Where evidence
17 has not been disclosed, or is disclosed so late as to prejudice the fairness of the trial." In this regard,
18 the Chamber indicated that this judicial option in such an eventuality would be, "to apply appropriate
19 remedies which may include the exclusion of such evidence."

20
21 With reference to the evaluation of the novelty of evidence presented in court during testimony, this
22 Chamber already considered that it may not be possible to include every matter that a witness will
23 testify upon at trial in a witness statement of whichever nature. Pursuant to the principle of orality,
24 witnesses shall be ideally heard directly in open court. In the *Norman* decision, this Chamber held
25 that, "While there is a duty for the Prosecution to diligently disclose witness statements that identify
26 matters that witnesses will testify about at trial, thereby providing the Defence with essential
27 information for the preparation of its case, it is foreseeable that witnesses, by the very nature of oral
28 testimony, will expand on matters mentioned in their witness statements, and respond more
29 comprehensively to questions asked at trial."

30
31 Where a witness has testified at trial to matters not directly or expressly contained in the witness
32 statement, an opposing party might well wish to highlight any such discrepancy and further enquire on
33 this point by means of cross-examination.

34
35 Further, an assessment of whether material disclosed or evidence adduced orally in court is new
36 requires a comparative assessment of the allegedly new evidence, the original witness statement as
37 well as the indictment and the pre-trial brief, combined with the period of notice to the Defence that

1 the particular witness will testify on that event and the extent to which the alleged new evidence alters
2 the evidence the Defence already has notice of. If the evidence is not new, but merely supplements
3 evidence which has previously been disclosed in accordance with the Rules, it is then admissible.
4

5 The Chamber has carefully reviewed the original statements of Witness TF1-199, as well as the
6 indictment and the Prosecution pre-trial briefs, in order to determine if there has been any breach in
7 its disclosure obligations, pursuant to Rule 66 by the Prosecution, and if the allegations on the
8 kidnapping of UNAMSIL personnel in Makeni amounts in these circumstances to new evidence.
9

10 In light of the foregoing considerations and our specific findings, the Chamber is of the opinion that the
11 Defence has not substantiated by a *prima facie* showing the allegations of negligence or lack of
12 diligence by the Prosecution. Furthermore, we also find that the Defence has been sufficiently put on
13 notice and given adequate time to prepare on the allegations concerning the kidnapping of UNAMSIL
14 personnel in Makeni from both the indictment and pre-trial brief and, in the instant case, from the
15 disclosed written statements of Witness TF1-199.
16

17 Disposition: Accordingly, the application for exclusion of the evidence of Witness TF1-199 on the
18 kidnapping of UNAMSIL personnel is dismissed and the Defence may proceed with its cross-
19 examination of the said witness.
20

21 Done at Freetown this 26th day of July 2004.
22

23 That concludes this decision.

24 MR. PRESIDENT:

25 Yes.

26 MR. O'SHEA:

27 I'm grateful, Your Honours.

28 MR. PRESIDENT:

29 Yes, Mr. O'Shea, you rose on your feet, yes?

30 MR. O'SHEA:

31 I just said we are grateful, Your Honours.

32 MR. PRESIDENT:

33 All right, okay. All the Chamber wants to indicate at this stage is that this afternoon when we do
34 resume the session, you may wish to, if you so desire, proceed and conclude the cross-examination
35 of that witness on issues raised in the contending -- the statement which you contested, and on other
36 issues which you may wish to raise. So the witness will be available, I suppose.
37

1 MS. TAYLOR:

2 Yes, the witness is available.

3 MR. PRESIDENT:

4 The witness is available?

5 MS. TAYLOR:

6 Yes.

7 MR. PRESIDENT:

8 Right. The witness will be available and will be placed before you for purposes of rounding up your
9 cross-examination before we proceed, of course, you know, to taking the evidence of other witnesses.

10 We may well -- we should envisage calling on the Prosecution to envisage having on stand-by maybe
11 two witnesses.

12 MS. TAYLOR:

13 They are already available, Your Honour.

14 MR. PRESIDENT:

15 In addition -- with the one whose cross-examination is going to be done, there should be three
16 standing by because we never know how fast you may proceed on your end and how expeditiously
17 the Defence may also proceed from their end.

18 MS. TAYLOR:

19 Yes, what I can say is that there are witnesses available, Your Honour.

20 MR. PRESIDENT:

21 Right. Well, learned counsel, this said, the session is adjourned to 3.00 o'clock today. The Court will
22 rise.

23 [Whereupon the proceedings adjourned at 10.55 a.m. to be
24 reconvened on Tuesday, the 27th day of July at 10.00 a.m.]

25 [Pages 1 to 5 by Susan G. Humphries]

26

27

28

29

30

31

32

33

34

35

36

37

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28
29
30
31
32
33
34
35
36
37

CERTIFICATE

I, Susan G, Official Court Reporter for the Special Court for Sierra Leone, do hereby certify that the foregoing proceedings in the above-entitled cause were taken at the time and place as stated; that it was taken in shorthand (*machine writer*) and thereafter transcribed by computer; that the foregoing pages contain a true and correct transcription of said proceedings to the best of my ability and understanding.

I further certify that I am not of counsel nor related to any of the parties to this cause and that I am in nowise interested in the result of said cause.

Susan G. Humphries