SPECIAL COURT FOR SIERRA LEONE

OFFICE OF THE PROSECUTOR

FREETOWN – SIERRA LEONE

Before: Judge Bankole Thompson, Presiding Judge
Judge Benjamin Mutanga Itoe
Judge Pierre Boutet

Registrar: Mr. Robin Vincent

Date filed: 14 May 2004

THE PROSECUTOR

Against

ALEX TAMBA BRIMA

BRIMA BAZZY KAMARA

SANTIGIE BORBOR KANU

Case No. SCSL – 2004 – 16 – PT

PROSECUTION'S APPLICATION FOR LEAVE TO FILE AN INTERLOCUTORY APPEAL AGAINST THE DECISION ON THE "PROSECUTION'S MOTION FOR CONCURRENT HEARING OF EVIDENCE COMMON TO CASES SCSL-2004-15-PT AND SCSL-2004-16-PT"

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I. INTRODUCTION

1. Pursuant to Rule 73(B) of the Rules of Procedure and Evidence of the Special Court (the Rules), the Prosecutor submits this application for leave to file an interlocutory appeal in respect of the decision on the Prosecutor's motion for concurrent hearing of common witnesses, dated 11 May 2004.
2. In the decision, the Trial Chamber denied the Prosecution's Motion for a concurrent presentation of evidence common to both the case of *Prosecutor v. Sesay, Kallon and Gbao* (SCSL-2004-15-PT) and the case of *Prosecutor v. Brima, Kamara and Kanu* (SCSL-2004-16-PT), filed pursuant to Article 17 of the Statute of the Special Court and Rules 48(C), 54 and 73 of the Rules. The Chamber found the notion of 'concurrent hearing of evidence' to be conceptually irreconcilable with the notion of 'joint separate

trials'. Hence, in light of its decision on the Prosecution's joinder motion, it denied the Prosecutor's concurrent hearing motion.

II. ERRORS COMMITTED BY THE TRIAL CHAMBER

3. If granted leave to appeal, the Prosecution will argue the following:
4. The Chamber based the decision on the paramount nature of the rights of the Accused. It failed, however, to clarify how these rights will be infringed by holding a concurrent hearing. Merely mentioning the concepts 'potential recriminations' and 'conflicts in defence strategies' cannot replace a proper assessment of the possible detriment to the Accused, particularly when the common witnesses who will testify in the concurrent hearing will present only 'crime base' evidence which does dot directly implicate the Accused in the commission of crimes.
5. The Chamber erred in considering that granting the requested concurrent hearing would have the effect of conducting a joint trial. A concurrent hearing and a joint trial are two completely different measures, provided for by two distinct and separate Rules. Hence, the Chamber's refusal to jointly try RUF and AFRC members, under Rule 48(B), does not bar the Chamber from applying Rule 48(C), in contrast to the view held in the decision.
6. The suggestion made in paragraph 33 of the decision, that the notions of judicial economy, consistency in jurisprudence and credibility of the judicial process are not well established principles of law, is a complete misconception. Based on this misconception, the Chamber incorrectly failed to give sufficient consideration to these principles in determining whether to grant the Prosecution Motion. Furthermore, it was incorrect to consider the notion of judicial economy as extrinsic to the right of the Accused to a fair trial.[1] Accordingly, the Chamber mistakenly interpreted the Prosecution Motion as requiring it to take into account considerations other than the law and to sacrifice the rights of the Accused in favour of economic or political considerations.

[1] See A. Cassese, *International Criminal Law* (N.Y., Oxford University Press, 2003), p. 398: "One of the obvious requirements of a fair trial is that trial proceedings be as speedy as possible. Plainly, as the accused enjoys the presumption of innocence until found guilty, it is only rational and appropriate to establish whether he is innocent or guilty as rapidly as possible."

7. The view expressed in paragraph 38 of the decision, that the Prosecution's argument regarding possible inconsistencies in the evaluation of the same evidence if heard twice challenges the objectivity of the judges, is mistakenly held. The Prosecution merely asked to give weight to the principle of judicial consistency, and to consider the possibility that twice assessing the same evidence presented by the same witnesses, may entail some inconsistencies, particularly since this evidence will be evaluated by two different trial chambers.
8. The Chamber failed to properly consider Prosecution's argument that hearing the same witnesses twice will involve considerable hardships and risks to these witnesses. Interestingly, the decision clearly states in paragraph 41, that this issue will be addressed in the concluding section. Nonetheless, this was not done.
9. The Chamber also erroneously failed to give proper consideration to the possibility that as a result of the hardships and risks involved, some witnesses will not show up the second time, thus clearly underestimating the gravity of such loss of evidence and the impact on to the judicial process.
10. Contrary to the view expressed in the decision, the use of 'back-up' witnesses and the submission of written statements under Rule 92*bis* do not constitute adequate remedies to the possible risks and hardships witnesses will face as a result of having to testify twice and, in any event, should not outweigh granting a concurrent hearing.

III. ARGUMENTS FOR INTERLOCUTORY APPEAL

The legal standard

11. Rule 73(B) provides for interlocutory appeals "in exceptional circumstances and to avoid irreparable prejudice to a party". The Chamber, in its decision denying the Prosecution's leave to file an interlocutory appeal against the joinder decision, dated 13 February 2004, established that Rule 73(B) sets out two conditions which must be met in order to grant a leave for interlocutory appeals, namely, the existence of exceptional circumstances and the possibility of irreparable prejudice to a party if such a leave is not granted.[2]

[2]*Prosecutor v. Sesay, Kallon and Gbao*, SCSL-2004-15-PT, Decision on Prosecution's Application for Leave to File an Interlocutory Appeal Against the Decision on the Prosecution Motion for Joinder, 13 Feb. 2004; *Prosecutor v. Brima, Kamara and Kanu*, SCSL-2004-16-PT, Decision on Prosecution's Application for Leave to File an Interlocutory Appeal Against the Decision on the Prosecution Motion for Joinder, 13 Feb. 2004.

Exceptional circumstances

12. The Prosecution submits that over one hundred and fifty (150) witnesses will have to testify twice, in two separate trials, in a relatively short period of time, to the exact same facts which constitute the most atrocious violations of international criminal law, to which they were victims or which they have witnessed, before a court which is located in the country where these violations took place. Applying Rule 48(C) will eliminate the need to hear them twice.
13. Furthermore, all these witnesses, who are to a large extent still subject to fear and trauma, will not only re-live their trauma by testifying to dreadful violations, but will also undergo cross examination on their experiences. This huge corpus of witnesses includes women and children who were subject to sexual abuses and mutilations. This anguish will be unnecessarily duplicated if Rule 48(C) is not applied in this case.
14. The Prosecution therefore submits that the details describe in paragraphs 13-14 constitute exceptional circumstances, justifying the granting of the requested leave for appeal.

Irreparable prejudice

15. The Prosecution submits that allowing the decision to stand and not holding a concurrent hearing, will cause irreparable prejudice to the Prosecution.
16. The Prosecution reasserts that there is a high probability, that as a result of the hardships and risks involved, some witnesses will not appear for the second trial to which they are called to testify. Such loss of evidence will not only entail great detriment to the ascertainment of truth and to the fairness of the judicial process, but will also clearly cause irreparable prejudice to the Prosecution.
17. The Prosecution reaffirms all its arguments as stated in paragraphs 13-21 of its application for leave to file an interlocutory appeal against the Trial Chamber's decision of 27 January 2004, filed on 3 February 2004.[3]

[3] Application for Leave to file an Interlocutory Appeal Against the Trial Chamber's decision of 27 January 2004, 3 February 2004, filed both in *Prosecutor v. Sesay, Kallon and Gbao*, SCSL-2004-15-PT and in *Prosecutor v. Brima, Kamara and Kanu*, SCSL-2004-16-PT ("Application for Leave to file an Interlocutory Appeal, 3 Feb. 2004").

IV. CONCLUSION

18. The Prosecution emphasizes that protecting the fundamental rights of Accused individuals, includes conducting and concluding the criminal proceedings against them in a timely manner. Moreover, concluding the trials in a fair and expeditious manner will meet the aims of the international community and above all bring justice in a reasonable time scale to the people of Sierra Leone. Justice is not done in a vacuum.
19. For the foregoing reasons the Prosecution respectfully prays that the Trial Chamber grants the requested leave to file an interlocutory appeal against its decision on the matter of the concurrent hearing of common witnesses.

Freetown, 14 May 2004

For the Prosecution,

Luc Cote

Robert Petit