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SCSL-2004-16-T

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(9341 – 9348)

SPECIAL COURT FOR SIERRA LEONE
OFFICE OF THE PROSECUTOR
Freetown – Sierra Leone

Before: Justice Teresa Doherty, Presiding Judge
Justice Richard Lussick
Justice Julia Sebutinde

Registrar: Mr. Robin Vincent

Date filed: 6 June 2005

THE PROSECUTOR

- v. -

ALEX TAMBA BRIMA
BRIMA BAZZY KAMARA
SANTIGIE BORBOR KANU

Case No. SCSL – 2004 – 16 – T

PROSECUTION RESPONSE TO JOINT DEFENCE APPLICATION FOR LEAVE TO APPEAL FROM DECISION ON DEFENCE MOTION TO EXCLUDE ALL EVIDENCE FROM WITNESS TF1-277

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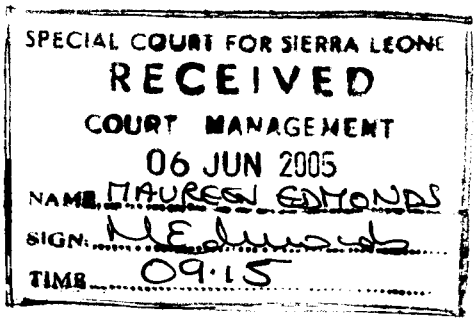

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I. INTRODUCTION

1. On 11 March 2005 Defence Counsel for all three accused filed a "Confidential and Under Seal – Joint Defence Motion to Exclude All Evidence From Witness TF1-277 Pursuant to Rule 89(C) and/or Rule 95".

2. On 6 April 2005 the Prosecution filed its "Confidential and Under Seal – Prosecution Response to Joint Defence Motion to Exclude All Evidence from Witness TF1-277 Pursuant to Rule 89(C) and/or Rule 95" (the "Prosecution Response to Joint Defence Application").

3. On 24 May 2005 the Trial Chamber issued its "Decision on Joint Defence Motion to Exclude All Evidence from Witness TF1-277 Pursuant to Rule 89(C) and/or Rule 95" (the "Decision"). The Chamber held, *inter alia*:
   a) That it is beyond doubt that relevant hearsay evidence is admissible in international criminal proceedings.

b) That Rule 89(C) is to be interpreted broadly, so as to avoid artificial and technical rules regarding the admissibility of evidence.

c) That evidence is admissible if it is relevant; with the question of reliability to be determined thereafter.

d) That evidence of what witness TF1-277 heard said in his presence is not "indirect hearsay", notwithstanding the fact that he did not participate in the conversation.

e) That the Prosecution need not establish that the persons engaged in the conversation heard by witness TF1-277 were not available to give evidence.

f) Any inconsistency with respect to the evidence of witness TF1-277 was not between the prior written statement and the sworn testimony, but between the statement (Exhibit D1) and an Interview Note (Exhibit D1A).

g) That the evidence of the conversation heard by witness TF1-277 was so clearly relevant that to exclude it would bring the administration of justice into disrepute.

4. On 27 May 2005 Defence Counsel for all three accused filed a "Joint Defence Application for Leave to Appeal from Decision on Defence Motion to Exclude All Evidence from Witness TF1-277" (the "Application"). The Application argues (as summarised by the Prosecution) that:

   a) The Accused would suffer irreparable prejudice if leave to appeal was denied because:

      i. The question whether "indirect hearsay" should be admitted absent a test of reliability when a witness has been confronted with prior inconsistent statements will influence the future conduct of proceedings.

      ii. The non-calling of the participants of the conversation violates the right of the Accused to cross examine the evidence against him.

   b) Exceptional circumstances are demonstrated because:

      i. The issue of the admission of hearsay in combination with a prior inconsistent statement has yet to be decided upon by the Appeals Chamber.

ii. The Decision accepts interview notes as having a form of substantive validity.

5. The Prosecution submits that the Application fails to satisfy the twin criteria of Rule 73(B) and, accordingly, should be dismissed in its entirety.

II. ARGUMENT

The Test for Granting Leave to Appeal

6. Rule 73(B) of the Rules of Procedure and Evidence reads:

> Decisions rendered on such motions are without interlocutory appeal. However, in exceptional circumstances and to avoid irreparable prejudice to a party, the Trial Chamber may give leave to appeal. Such leave should be sought within 3 days of the decision and shall not operate as a stay of proceedings unless the Trial Chamber so orders.

7. A previous decision of Trial Chamber I established that this Rule:

> "involves a high threshold that must be met before this Chamber can exercise its discretion to grant leave to appeal. The two limbs of the test are clearly conjunctive and not disjunctive; in other words they must both be satisfied."[1]

8. A more recent decision observed that:

> "At this point in time, as the trials are progressing, the Chamber must be very sensitive, and rightly so, to any proceedings or processes that will indeed encumber and unduly protract the ongoing trials. For this reason, it is a judicial imperative for us to ensure that the proceedings before the court are conducted expeditiously and to continue to apply the enunciated criteria with the same degree of stringency as in previous applications for leave to appeal so as not to defeat or frustrate the rationale that underlies the amendment of Rule 73(B)."[2]

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[1] *Prosecutor v. Issa Hassan Sesay* and others , Case No. SCSL-04-15-T, "Decision on Prosecution's Application for Leave to File an Interlocutory Appeal Against the Decision on the Prosecution Motions for Joinder", 13 February 2004

[2] *Prosecutor v. Norman* and others, Case No. SCSL-04-14-T, "Majority Decision on the Prosecution's Application for Leave to File an Interlocutory Appeal Against the Decision on the Prosecution's Request for Leave to Amend the Indictment Against Norman, Fofana and Kondewa", 2 August 2004, para.25

9. In two recent decisions Trial Chamber I has considered the exceptional circumstances requirement in Rule 73(B).[3] In particular, the *Sesay Exclusion of Statements Decision* held that:

> ""Exceptional circumstances" may exist depending upon the particular facts and circumstances, where, for instance the question in relation to which leave to appeal is sought is one of general principles to be decided for the first time, or is a question of public international law importance upon which further argument or decision at the appellate level would be conducive to the interests of justice, or where the cause of justice might be interfered with, or is one that raises serious issues of fundamental legal importance to the Special Court for Sierra Leone, in particular, or international criminal law, in general, or some novel and substantial aspect of international criminal law for which no guidance can be derived from national criminal systems."[4]

No Exceptional Circumstances Demonstrated

10. The Prosecution submits that the issue of the admission of hearsay evidence is one that has been unequivocally resolved by international jurisprudence. There is little doubt that hearsay evidence is admissible; the critical factor being the evidence's relevance, as provided for in Rule 89(C), and *not* its reliability.

11. The Decision refers in significant detail to the well-established and accepted jurisprudence from the ICTY and ICTR and the Appeals Chamber of the Special Court permitting the admission of hearsay evidence.[5]

12. Contrary to the findings in the Decision, the Application asserts that the hearsay evidence was "indirect" and that the prior inconsistency was between the sworn testimony and the prior written statement. The Prosecution submits it is not. In particular, the Decision found that the assertion about the nature of the hearsay

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[3] *Prosecutor v. Sesay* and others, Case No. SCSL-04-15-T, "Decision on Defence Applications for Leave to Appeal Ruling of the 3rd February, 2005 on the Exclusion of Statements of Witness TF1-141", 28 April 2005 and *Prosecutor v. Sesay* and others, Case No. SCSL-04-15-T, "Decision on Application by the Second Accused for Leave for Interlocutory Appeal Against the Majority Decision of the Trial Chamber of 9th December 2004 on the Motion on Issues of Urgent Concern to the Accused Morris Kallon", 2 May 2005.

[4] The 28 April 2005 Decision, para.26

[5] See Decision paras. 12-20

evidence "defies all logic"[6], and that the assertion about the nature of the documents was contrary to the definition of "statement" established by Trial Chamber I.

13. Even if the Decision was wrong (and the Prosecution submits it is not) that fact would not amount to exceptional circumstances. The fact that an issue is "interesting or important for the development of international criminal law"[7] or, by extension, has not yet been decided upon by the Appeals Chamber of this Court, is insufficient to found the granting of leave pursuant to Rule 73(B).

No Irreparable Prejudice

14. Given the widespread acceptance and extensive utilisation of hearsay evidence in international criminal tribunals, the Prosecution submits that the Defence has suffered no prejudice, let alone irreparable prejudice by the admission of the hearsay testimony of witness TF1-277. The Appeals Chamber has recently said:

> "In this Court, the procedural assumption is that trials will continue to their conclusion without delay or diversion caused by interlocutory appeals on procedural matters, and that any errors which affect the final judgment will be corrected in due course by this Chamber on appeal."[8]

15. There has been no violation of the right to cross examine the evidence against the Accused: witness TF1-277 has been cross examined. There is no obligation on the Prosecution to call every single witness to an alleged incident and no corresponding right of an Accused to cross examine every single witness to an alleged incident. If the only evidence about an alleged incident is hearsay evidence, that fact will be considered by the Trial Chamber when considering the probative value of the evidence in its context and character.

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[6] See Decision para. 18.
[7] *Prosecutor v Norman* and others, SCSL-040140AR73, "Decision on Amendment of the Consolidated Indictment", 16 May 2005, para 43.
[8] Ibid.

16. The reference in the Application to *Prosecutor v Aleksovksi*[9] is misleading. In that decision, the reference to Rule 90(A) and "that witnesses shall in principle be heard directly by Chambers" was made in the context of considering the admission into evidence in a later trial the testimony of a witness, including the video recording of it and exhibits, given in a previous trial. It had nothing to do with an obligation to call, and a right to cross examine, the maker of a statement about which another witness had given hearsay evidence.

III. CONCLUSION

17. The Prosecution submits that the Application has failed to satisfy either of the conjunctive requirements of Rule 73(B) and should be dismissed in its entirety.

Dated this 6th day of June 2005.

In Freetown.

Luc Côté
Chief of Prosecutions

Lesley Taylor
Senior Trial Counsel

[9] See Application para. 7. *Prosecutor v Aleksovksi*, Case No. IT-95-14/1, "Decision on Prosecutor's Appeal on Admissibility of Evidence", 16 February 1999, para. 17.

PROSECUTION INDEX OF AUTHORITIES

Prosecutor v. Sesay, Kallon and Gbao, Case No. SCSL-04-15-T, "Decision on Application by the Second Accused for Leave for Interlocutory Appeal Against the Majority Decision of the Trial Chamber of 9th December 2004 on the Motion on Issues of Urgent Concern to the Accused Morris Kallon", 2 May 2005.

Prosecutor v. Sesay, Kallon and Gbao, Case No. SCSL-04-15-T, "Decision on Defence Applications for Leave to Appeal Ruling of the 3rd February, 2005 on the Exclusion of Statements of Witness TF1-141", 28 April 2005.

Prosecutor v. Sam Hinga Norman et al, Case No. SCSL-04-14-AR65, "Fofana – Appeal against Decision Refusing Bail", 11 March 2005.

Prosecutor v. Norman and others, Case No. SCSL-04-14-T, "Majority Decision on the Prosecution's Application for Leave to File an Interlocutory Appeal Against the Decision on the Prosecution's Request for Leave to Amend the Indictment Against Norman, Fofana and Kondewa", 2 August 2004.

Prosecutor v. Sesay, Morris Kallon and Augustine Gbao, Case No. SCSL-04-15-T, "Decision on Prosecution's Application for Leave to File an Interlocutory Appeal Against the Decision on the Prosecution Motions for Joinder", 13 February 2004.

Prosecutor v Norman and others, SCSL-040140AR73, "Decision on Amendment of the Consolidated Indictment", 16 May 2005.