

TRIAL CHAMBER II (“Trial Chamber”) of the Special Court for Sierra Leone (“Special Court”), composed of Justice Teresa Doherty, presiding, Justice Richard Lussick and Justice Julia Sebutinde;

SEISED of the Joint Defence Application for Leave to Appeal from Decision on Joint Defence Motion to Exclude All Evidence from Witness TF1-277 Pursuant to Rule 89C and/or Rule 95 issued on 24 May 2005, filed on 26 May 2005 on behalf of Brima, Kamara and Kanu (“Motion”);

NOTING the Decision on Joint Defence Motion to Exclude All Evidence from Witness TF1-277 Pursuant to Rule 89C and/or Rule 95 issued on 24 May 2005, (“the impugned Decision”);

CONSIDERING the Prosecution Response to the Motion, filed on 6 June 2005;

CONSIDERING ALSO the Defence Reply, filed on 9 June 2005;

HEREBY DECIDES this Motion solely on the written submissions.

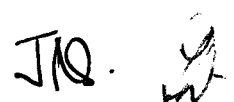
I. SUBMISSIONS OF THE PARTIES

1. Defence Counsel submit that the admission of hearsay evidence of witness TF1-277 who has been confronted with a prior inconsistent statement on the same issue is a fundamental matter that will affect the trial and this creates both exceptional circumstances and irreparable prejudice to the accused.
2. They submit the hearsay was “indirect hearsay” and admission of “indirect hearsay” has not, as yet, been considered by the Appeal Chamber. Further admission of “indirect hearsay” instead of hearing the direct evidence of the person making the statement, may lead to a violation of the “right” to cross-examine the “original sources”. They refer to the decision at paragraph 22.
3. The Prosecution refer to the ruling and submit hearsay evidence is admissible. They refer to the high threshold that must be met before leave to appeal can be granted and submit it has not been met.
4. In reply Defence Counsel joins issue on the Prosecution response on both issues of irreparable prejudice and exceptional circumstance.

II. DELIBERATIONS

5. The arguments put forward by the Defence in the instant application are the same arguments as submitted in the original motion viz. Joint Defence Motion to Exclude All Evidence from Witness TF1-277. The decision thereon makes it clear that admission of evidence is not indicative of a finding as to its probative value.¹

¹ Para. 15 of the impugned Decision.

6. As stated in the impugned decision, “[T]he probative value of hearsay evidence is something to be considered by the Trial Chamber at the end of the trial when weighing and evaluating the evidence as a whole, in light of the context and nature of the evidence itself, including the credibility and reliability of the relevant witness.”² In other words, evidence may be excluded because it is unreliable, but it is not necessary to demonstrate the reliability of the evidence before it is admitted. Therefore, there is no merit in the present claim of the accused that they have suffered any prejudice.

7. The Defence supports its submission of “exceptional circumstances” by submitting that the Trial Chamber accepted the “interview notes as having a form of substantive validity”.³ The submission by Defence stressing the importance of the actual document containing the statement attributed to the witness, is in our view irrelevant. The pertinent issue is that the witness made a pre-trial statement on which the Defence were afforded the opportunity to challenge him in cross-examination.

8. We consider and apply Rule 73(B) of the Rules of Procedure and Evidence for the Special Court for Sierra Leone (“the Rules”) which provides that:

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 stay of proceedings unless the Trial Chamber so orders.

The general rule is that decisions on motions brought under Rule 73 are without interlocutory appeal, and that only if the conjunctive conditions of exceptional circumstances and irreparable prejudice to the accused in Rule 73(B) are satisfied, a Trial Chamber may grant leave to appeal;

9. We adopt and apply the decision of Trial Chamber I that Rule 73(B):

*“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, not disjunctive: in other words, they must both be satisfied”;*⁴

10. We hold that neither exceptional circumstances nor irreparable prejudice to the Accused persons has been shown to the satisfaction of the Trial Chamber.

FOR THE FOREGOING REASONS WE HEREBY DISMISS the Motion.

² Para. 15 of the impugned Decision.

³ Para. 10 of the Defence Motion.

⁴ *Prosecutor v. Sesay et al.*, Case No. SCSL-2004-15-PT, Decision on the Prosecutor’s Application for Leave to File an Interlocutory Appeal against the Decision on the Prosecution Motion for Joinder, 13 February 2004; *Prosecutor v. Brima et al.*, Decision on the Prosecutor’s Application for Leave to File an Interlocutory Appeal against the Decision on the Prosecution Motion for Joinder, 13 February 2004.

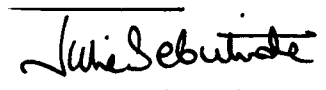
Done at Freetown, Sierra Leone, this 2nd day of August 2005.



Justice Richard Lussick



Justice Teresa Doherty
Presiding Judge



Justice Julia Sebutinde



[Seal of the Special Court for Sierra Leone]