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SCSL-04-16-T  
(14404-14408)

14404



**SPECIAL COURT FOR SIERRA LEONE**

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**TRIAL CHAMBER II**

**Before:** Judge Teresa Doherty, Presiding Judge  
Judge Richard Brunt Lussick  
Judge Julia Sebutinde

**Registrar:** Robin Vincent

**Date:** 5 August 2005

**PROSECUTOR**                      **Against**                      Alex Tamba Brima  
Brima Bazy Kamara  
Santigie Borbor Kanu  
(Case No.SCSL04-16-PT)

**DECISION ON BRIMA – KAMARA APPLICATION FOR LEAVE TO APPEAL FROM  
DECISION ON THE RE-APPOINTMENT OF KEVIN METZGER AND WILBERT HARRIS  
AS LEAD COUNSEL**

First Respondent:  
Registrar

Defence Counsel for Alex Tamba Brima:  
Kojo Graham  
Glenna Thompson

Second Respondent:  
Principal Defender

Defence Counsel for Brima Bazy Kamara:  
Andrew Daniels  
Pa Momo Fofanah

SPECIAL COURT FOR SIERRA LEONE  
**RECEIVED**  
COURT MANAGEMENT  
05 AUG 2005  
NAME Neil Gibson  
SIGN [Signature]  
TIME 14:51

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

**SEISED** of the Brima-Kamara Application For Leave to Appeal from Decision on the Extremely Urgent Confidential Joint Motion for Re-Appointment of Kevin Metzger and Wilbert Harris as Lead Counsel for Alex Tamba Brima and Brima Bazzy Kamara and Decision on Cross Motion by the Deputy Principal Defender to Trial Chamber II for Clarification of its Oral Order of 12 May 2005, filed 14 July 2005 (“the Motion”);

**CONSIDERING** the Response, filed on 22 July 2005 by the Principal Defender (“the Second Respondent’s Response”);

**CONSIDERING** the Response, filed by the Registrar on 22 July 2005 (“the First Respondent’s Response”);

**CONSIDERING** the Defence’s consolidated Reply to both Responses’s (“the Reply”);

**BEING MINDFUL** of the “Decision on the Extremely Urgent Confidential Joint Motion for Re-Appointment of Kevin Metzger and Wilbert Harris as Lead Counsel for Alex Tamba Brima and Brima Bazzy Kamara and Decision on Cross Motion by Deputy Principal Defender to Trial Chamber II for Clarification of its Oral Order of 12 May 2005”, dated 9 June 2005 (“the impugned Decision”);

**BEING MINDFUL FURTHER** of the “Dissenting Opinion of the Hon. Justice Julia Sebutinde from the Majority Decision on the Extremely Urgent Confidential Joint Motion for Re-Appointment of Kevin Metzger and Wilbert Harris as Lead Counsel for Alex Tamba Brima and Brima Bazzy Kamara, and Decision on Cross Motion by the Deputy Principal Defender to Trial Chamber II for Clarification of its Oral Order of 12 May 2005”, dated 11 July 2005 (“the dissenting Opinion”);

**NOTING** that Rule 73(B) of the Rules 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.*

**NOTING** therefore the general rule that decisions 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 interlocutory appeal;

**CONSIDERING FURTHER** that the Appeals Chamber has recently ruled that

*“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”.<sup>1</sup>*

**NOTING** therefore that the rationale behind the restrictive nature of Rule 73(B) is that the proceedings before the Special Court should not be heavily encumbered and consequently unduly delayed by interlocutory appeals;<sup>2</sup>

<sup>1</sup> *The Prosecutor v. Norman et al.*, Case No. SCSL-2004-14-AR73, Decision on Amendment of the Consolidated Indictment, 16 May 2005, para. 43.

NOTING AND APPLYING therefore the restrictive application of Rule 73(B) as established by Trial Chamber I stating 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;*<sup>3</sup>

CONSIDERING HOWEVER that in the present case the very nature of the application satisfies the conjunctive test of “exceptional circumstances” and “irreparable prejudice” by Rule 73 (B) since it concerns a fundamental right enshrined in Article 17(4) of the Statute;

FOR THE FORGOING REASONS

TRIAL CHAMBER ALLOWS THE APPLICATION and grants the Defence leave to file an interlocutory appeal against the impugned Decision.

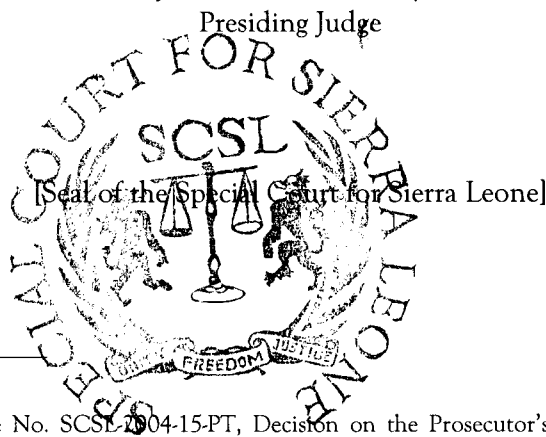
Justice Lussick will give a Separate and Concurring Opinion and Justice Doherty appends a personal comment to this Decision.

Done at Freetown, Sierra Leone, this 5<sup>th</sup> day of August 2005.

Justice Richard Lussick

Justice Teresa Doherty  
Presiding Judge

Justice Julia Sebutinde



<sup>2</sup> *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.

<sup>3</sup> *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.

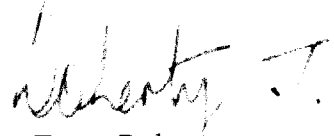
## COMMENT OF JUSTICE DOHERTY

Having read the Dissenting Opinion of the Hon. Justice Sebutinde from the Majority Decision on the Extremely Urgent Confidential Joint Motion for the Re-Appointment of Kevin Metzger and Wilbert Harris as Lead Counsel for Alex Tamba Brima and Brima Bazzy Kamara, and Decision on Cross-Motion by the Deputy Principal Defender to Trial Chamber II for Clarification of its Oral Order of 12 May 2005 [hereinafter "Dissenting Opinion"] I consider some facts stated are incorrect or misleading. I was not given a copy of the Dissenting Decision prior to publication. I consider Rule 29 of the Rules of Procedure and Evidence does not permit any Judge to publish or discuss matters that have been discussed in Chambers however since several matters have been brought into the public arena by the publication of both the Dissenting Opinion and the interoffice memorandum I consider I am entitled to put the following before the Appeal Chamber:

1. At paragraph 29 of the Dissenting Opinion Her Honour states that "Before Ms. Carlton-Hanciles had an opportunity to disclose the contents of a document the Presiding Judge interjected..." thereby implying that this was a sole decision of the Presiding Judge. This implication is erroneous. The document, a copy letter from the accused persons, was given to each of the judges immediately before court was to open on 16 May 2005. We discussed that document, its implications on the ruling of 12 May and the attitude we should adopt. Hon. Justice Sebutinde took a very active part in that discussion and was one of the majority who decided the document should not be read. My notes show three issues were identified by the judges and those three issues are incorporated into the extempore ruling.
2. At paragraph 29 there is a reference to a copy of Ms. Elizabeth Nahamya minute of 17 May 2005 being copied to the Judges. That memorandum was not received by the Judges of Trial Chamber II until the Registrar's annotated copy was given on 18 May 2005 and we had no opportunity to discuss same prior to meeting the Registrar.
3. On 18 May 2005 the Registrar came to Trial Chamber II Chambers at the invitation of the Judges to discuss a matter entirely unrelated to the issues therein. At the end of our discussions he raised the issue of Ms. Nahamya's minute. There was an active discussion and Hon. Justice Sebutinde was there throughout that discussion. The matters recorded in my minute are an ad verbatim record of statements made. Justice Sebutinde did not speak on the matter, neither did she dispute nor resile from the discussions. The Registrar asked for written confirmation the same day as he was leaving for New York.
4. It is correct that I telephoned each of the Judges and read out the draft to each of my judicial colleagues. It was only then that Justice Sebutinde stated she had reservations. I asked her to let me have her views as the Registrar needed a response that day. I waited, sent, then retrieved the minute pending Justice Sebutinde's input. When none was received I again sent the minute prior to Registrar's departure. I dispute the detail Justice Sebutinde gives in paragraph 2 of interoffice memorandum. The detailed memorandum referred to paragraph 30 of the Dissenting Opinion was not received until 19 May 2005 and it was not sent solely to me as Presiding Judge but also disseminated to others. It is correct that, as stated at paragraph 31 that I did not distinguish Justice Sebutinde's views. I did not have those views.
5. I stress that the decision of 16 May 2005 and discussion of 18 May 2005 involved all three judges of the Trial Chamber. We had no knowledge of the pending motion filed on 24 May 2005 and cannot be said to have contributed to controversy as implied in paragraph 41.

6. It is correct I gave Justice Sebutinde a copy of the minute to the Registrar when she asked me for it. I did so stating twice it was a chambers matter subject to Rule 29 and could not be published.

Done at Freetown, Sierra Leone, this 5<sup>th</sup> day of August 2005.



Justice Teresa Doherty  
Presiding Judge

