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SCSL-2004-14-T

11136

(11136 - 11143)

**SPECIAL COURT OF SIERRA LEONE**

**The Trial Chamber**

**Case No. SCSL-04-14-T**

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

Registrar: Robin Vincent

Date: December 8, 2004

**PROSECUTOR**

**Against**

**Sam Hinga Norman  
Moinina Fofana  
Allieu Kondewa**

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**First Accused Response to "Prosecution Application for Leave to Appeal Decision on the First Accused's Motion for Service and Arraignment on the Consolidated Indictment"**

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**Office of the Prosecutor**

Luc Cote  
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**Court Appointed Counsel for Sam**

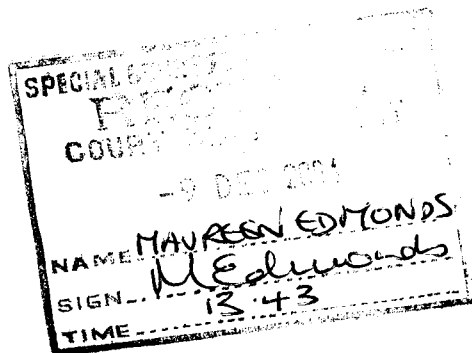
**Hinga Norman**  
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**Court Appointed Counsel for Moinina**

**Fofana**  
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**Kondewa**  
Charles Margai  
Yada Williams  
Ansu Lansana



## I. INTRODUCTION

1. Pursuant to Rule 73(B) of the Rules of Procedure and Evidence of the Special Court for Sierra Leone (“Rules”), the Prosecution seeks leave to file an interlocutory appeal in respect of the “Decision on the First Accused’s Motion for Service and Arraignment on the Consolidated Indictment”, dated 29 November 2004 (“Decision”). The First Accused files this response to the “Prosecution Application for Leave to Appeal Decision on the First Accused’s Motion for Service and Arraignment on the Consolidated Indictment” filed on 6 December 2004 (the “Application for Leave”).
2. In the Application for Leave, the Prosecution argues that the differences of legal opinions expressed by the majority, concurring and dissenting opinions that constituted the Decision gives rise to exceptional circumstances justifying granting leave to appeal. In addition, it is argued that the Prosecution and the Second and Third Accused would be irreparably prejudiced if the Decision is allowed to stand because it impedes a continuation of the current trial proceedings against all three accused based upon a single consolidated Indictment.
3. In this Response, the First Accused submits that the requirements for the grant of leave to appeal under Rule 73(B) of the Rules have not been met. Not only did the Prosecution fail to seek leave within the 3 day time limit as set out in the Rules (see paragraphs 4-17 below hereof), the Prosecution has also failed to demonstrate irreparable prejudice if leave were not granted (see paragraphs 18-22 below hereof).

## II. ARGUMENT

### Untimely submission by the Prosecution of its Application for Leave to Appeal

4. The Prosecution seeks leave to appeal the “Decision on the First Accused’s Motion for Service and Arraignment on the Consolidated Indictment”. The First Accused submits that, this Decision having been delivered and filed on 29 November 2004, the Prosecution’s application filed on 6 December 2004 for leave to appeal against the said Decision is clearly out of time as stipulated in the enabling Rule 73(B) of the Rules.
5. Rule 73(B) of the Rules states:

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 on proceedings unless the Trial Chamber so orders.
6. The Rule clearly states that applications for Leave to Appeal must be brought within three days of the decision. The Decision for which leave is sought is the “Decision on the First Accused’s Motion for Service and Arraignment on the Consolidated Indictment” which was given on 29 November 2004 and filed on that same day.
7. With respect to the calculation of time Rule 7(A) states:

Unless otherwise ordered by a Chamber or by a Designated Judge, or otherwise provided by the Rules, where the time prescribed by or under the Rules for the doing of any act shall run from the day after the notice of the occurrence of the event has been received in the normal course of

transmission by the Registry, counsel for the Accused or the Prosecutor as the case may be.<sup>1</sup>

8. In this instance the “occurrence of the event” is the date that the “Decision on the First Accused’s Motion for Service and Arraignment on the Consolidated Indictment” was received by the Registry, counsel for the Accused or the Prosecution, which was 29 November 2004.

9. Further, paragraph 18 of the “Practice Direction for Certain Appeals Before the Special Court” adopted on 30 September 2004 states:

In accordance with the Rules, the time-limits prescribed under this Practice Direction shall run from, but shall not include, the day upon which the relevant document is filed...<sup>2</sup>

10. Again in this instance the “relevant document” is the document which the Prosecution now applies for leave to appeal, namely the “Decision on the First Accused’s Motion for Service and Arraignment on the Consolidated Indictment” filed on 29 November 2004.

11. Therefore, accordance with the Rules, the Prosecution had until 2 December to file its application for leave to appeal. This Application for Leave was filed on 6 December 2004. Accordingly, the Trial Chamber should disregard the Prosecution’s untimely Application for Leave.

12. The First Accused notes that the “Consequential Order to Decision on the First Accused’s Motion for Service and Arraignment on the Consolidated Indictment” states:

Any Application that the Prosecution should seek to make in accordance with the Trial Chamber’s Order, namely, “that the Prosecution is hereby put to its election either to expunge completely from the Consolidated Indictment such identified portions or seek an amendment of the said Indictment in respect of those identified portions, and that either option is

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<sup>1</sup> Special Court of Sierra Leone, *Rules of Procedure and Evidence*, Rule 7 “Time Limits” (amended 1 August 2003) (emphasis added)

<sup>2</sup> Special Court of Sierra Leone, *Practice Direction for Certain Appeals Before the Special Court*, adopted 30 September 2004, para. 18

to be exercised with leave of the Trial Chamber”, should be filed with the Trial Chamber within seven days of the filing of the Trial Chamber’s Decision.<sup>3</sup>

13. In Footnote 1 of the Consequential Order, the “Trial Chamber’s Decision” is said to include the Separate Concurring Opinion on Hon. Judge Bankole Thompson and the Dissenting Opinion of Hon. Judge Benjamin Mutanga Itoe.
14. This definition has application only with respect to any application that the Prosecution should seek to make for leave to amend the Consolidated Indictment or expunge specific portions from it in accordance with the Trial Chamber’s Order. Therefore, any application the Prosecution chooses to make regarding expunging or seeking an amendment to the indictment would have to be filed within seven days of the filing of the last component of the “Decision”, as per the definition set out in the footnote. In this instance that would be the Dissenting Opinion of Hon. Judge Benjamin Mutanga Itoe, filed on 3 December 2004. On 8 December 2004 the Prosecutor filed its “Request for Leave to Amend the Indictment Against Norman” in accordance with the Trial Chamber’s Order.
15. This definition cannot be said to apply to any other application that the Prosecution might elect to make, outside the bounds of the consequential order, such as this said Application for Leave to Appeal.
16. Further, nowhere in the Rules or in Practice Directions is the definition of a “Decision” said to include the decision and separate and dissenting opinions and that the time limit starts from the last filing date of any of those components. Logically this cannot be the case because one does not seek leave to Appeal a Separate Opinion, nor does a party seek leave to appeal a dissenting Opinion. Applications for leave to appeal are with respect to the Decision itself and the time limits must naturally start from the filing of the Decision. There is no

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<sup>3</sup> Prosecutor v. Norman, Fofana and Kondewa, SCSL-04-14-PT, “Consequential Order to Decision on the First Accused’s Motion for Service and Arraignment on the Consolidated Indictment”, 30 November 2004, paragraph 2 (emphasis added)

evidence to support that this has been the practice of this Court at any time in the past or any documentation to suggest that this has been determined to be the practice of this Court.

17. Therefore, the First Accused submits that the Prosecution has not met the requirements of Rule 73 (B) of the Rules because this application for leave to appeal was not filed within the required three day time limit.

**Prosecution has failed to demonstrate irreparable prejudice if leave were not granted**

18. The Trial Chamber's Decision on Prosecution's Application for Leave to File An Interlocutory Appeal Against the Decision on The Prosecution Motions for Joinder"<sup>4</sup> (the "Decision on Interlocutory Appeal") provides that:

As a general rule, interlocutory decisions are not appealable and consistent with a clear and unambiguous legislative intent, 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 to the test are clearly conjunctive, not disjunctive, in other words they must *both* be satisfied. [emphasis in original]

[P]rior to the amendment no possibility of interlocutory appeal existed and the amendment was carefully couched in such terms so as only to allow appeals to proceed in very limited and exceptional situations. In effect, it is a restrictive provision.

It is clear from the plain reading of Rule 73(B) that granting leave is an exceptional option. As this is an exclusionary rule, if the two-limb test has been complied with, the [applicant] must demonstrate that there is something to justify the exercise of this discretion by the Chamber in its favour.

19. Accordingly, the Application for Leave must establish both exceptional circumstances and irreparable prejudice harm. The Defence submits that the reasons provided in support of the Application for Leave fail to establish irreparable prejudice to the Prosecution.

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<sup>4</sup> Prosecutor v. Sesay, Kallon and Gbao, SCSL-2004-15-PT, 13 February 2004, at para 8-15

20. The Prosecution submits that the presentation of the case of the Prosecution, including witness selection and ordering of crime bases, has been predicated on the Consolidated Indictment and that the Decision impedes a continuation of the trial proceedings. Further, the Prosecution states that irreparable prejudice would be occasioned to the Prosecution case and may affect the outcome of the trial due to the resulting inability to accurately present matters for which the First Accused is alleged to bear responsibility.
21. The Accused submits that the Prosecution has consistently contended since 9 October 2003 when it requested that the Indictments against the three Accused be consolidated into a Single Indictment, that the Consolidated Indictment was a “mere putting together” of the initial three Indictments. The Prosecution has also stated that the consolidated indictment would contain no change “in the substance of the original indictments”.<sup>5</sup> Given these statements by the Prosecution, one can assume that the presentation of the case of the Prosecution, the witness selection and the ordering of crime bases that the Prosecution would have proceeded with on the first Indictment, should not have substantially changed with the granting of the Consolidated Indictment. The Prosecution’s Application for Leave does not make any substantive references to the manner in which the Prosecution has been irreparably prejudiced in the presentation of its case under the Consolidated Indictment but merely states that it has been predicated on the Consolidated Indictment.
22. Further, there is no irreparable harm to the Prosecution as it is in a position to amend the Consolidated Indictment in accordance with Rule 50 of the Rules and in accordance with the Consequential Order to Decision on the First Accused’s Motion for Service and Arraignment on the Consolidated Indictment, of 30 November 2004.

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<sup>5</sup> Prosecution Motion for Joinder, para. 10

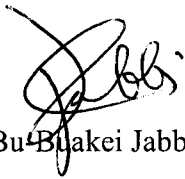
### III. CONCLUSION

23. The Prosecution has failed to submit a timely Application for Leave to Appeal in accordance with Rule 73 (B) of the Rules.

24. The First Accused submits that the reasons provided in support of the Application for Leave fail to establish irreparable prejudice to the Prosecution and, as a result, the conjunctive test that must be established in order for leave to be granted has not been made out; and therefore, the Prosecution's Application for Leave should be dismissed.

Done in Freetown, on this 8 day of December 2004.

Court Appointed Counsel for the First Accused,



Dr. Buakei Jabbi