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SPECIAL COURT FOR SIERRA LEONE
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IN THE APPEALS CHAMBER

Before: Justice Emmanuel Ayoola, Presiding
Justice Raja Fernando
Justice Geoffrey Robertson

Registrar: Robin Vincent

Date: 11 March 2005

PROSECUTOR Against **Samuel Hinga Norman**
Moinina Fofana
Allieu Kondewa
(Case No.SCSL-04-14-AR65)

FOFANA – APPEAL AGAINST DECISION REFUSING BAIL

Office of the Prosecutor
(Respondent):
David Crane
Luc Côté
Desmond de Silva

Defence Counsel for Sam Hinga Norman:
Bu-Buakei Jabbi

Defence Counsel for Moinina Fofana (Appellant):
Michiel Pestman
Arrow J. Bockarie
Victor Koppe

Defence Counsel for Allieu Kondewa:
Charles Margai

SPECIAL COURT FOR SIERRA LEONE
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11 MAR 2005
NAME NEIL GIBSON
SIGN
TIME 9:00

THE APPEALS CHAMBER of the Special Court for Sierra Leone ("Special Court" or "Court"), composed of Justice Emmanuel Ayoola, Presiding Judge, Justice Raja Fernando and Justice Geoffrey Robertson;

SEIZED of the Appeal against Refusal of Bail filed on behalf of Moinina Fofana ("Motion") on 12 November 2004 pursuant to Rule 65(H) of the Rules of Procedure and Evidence of the Special Court ("Rules");

NOTING the Submissions of the Prosecution in response to the Appeal against Refusal of Bail filed on 18 November 2004 and the Defence Reply thereto filed on 23 November 2004;

NOTING the Fofana Decision on Application for Bail filed on 5 August 2004 ("Fofana Bail Decision") and the decision by Justice Fernando granting leave to Fofana to apply against Bail Decision filed on 5 November 2004 ("Leave to Appeal Decision");

HEREBY DECIDES:

1. Introduction and Background

1. This is an appeal, by leave of Justice Raja Fernando, against a decision of Judge Itoe rendered on 5 August 2004 to deny bail to Moinina Fofana, who faces serious charges which accuse him of responsibility for crimes alleged to have been committed in the course of the conflict in Sierra Leone in the late 1990s. The application was brought under Rule 65(B) which provides that:

> Bail may be ordered by a Judge or a Trial Chamber after hearing the State to which the accused seeks to be released and only if it is satisfied that the accused will appear for trial and, if released, will not pose a danger to any victim, witness or other person.

2. Mr Fofana, who was arrested on 29 May 2003 and has been held in custody ever since, filed a written application for bail on 27 January 2004, several months before his trial actually commenced.[1] He argued at first before Trial Chamber I that the Prosecution must show that reasonable suspicion still exists that he committed the crimes charged before any burden shifts to the defendant to satisfy the bail conditions in Rule 65(B). Subsequently, he has argued that the burden does not in fact shift, and that the Prosecution must prove either that he is unlikely to appear for trial or is likely to interfere with witnesses. He asserted his determination to stand trial and referred to his roots in the local community in and around Ghap Village – his chiefdom commitments and his family of four wives and eighteen children – as a guarantee that he would not

[1] *Prosecutor v Moinina Fofana(et. al.)* (Case No.SCSL-2003-11-PT), Application for Bail Pursuant to Rule 65, 27 January 2004.

flee from trial or judgement. He said he had never left Sierra Leone and that he did not possess the funds to travel abroad, having no bank account in Sierra Leone or anywhere else. He had no idea of the identity of witnesses likely to testify against him, so that there was no risk that he would interfere with them. He offered to abide by bail conditions requiring him to live in the precincts of Ghap Village, abide by a curfew and report twice daily to the local police station.

3. The Prosecution filed its response on 9 February 2004.[2] It denied that it bore any onus in respect of bail: on the contrary the applicant bore a "substantial burden" of satisfying the court that the Rule 65(B) conditions were fulfilled. Here, the burden had not been discharged. The offences were very serious and likely to incur a long prison sentence if proved. There was evidence from a deputy commander of the Sierra Leone police force, to the effect that its resources were limited and were certainly not adequate to keep checks on the applicant were he granted bail or to re-arrest him in the event that he went to ground. Most seriously, alleged the Prosecution, he had misled the court: his claim never to have left the country was false because he had travelled on previous occasions to Liberia and to Guinea. Moreover, he had before his arrest participated in a Civil Defence Forces ("CDF") exercise allegedly designed to intimidate witnesses. These last two rather serious and very relevant allegations were made by way of a declaration by Mr Alan White, Chief of Investigations in the Office of the Prosecutor.

4. The applicant filed a reply on 16 February 2004 which argued that pre-trial custody should be the exception rather than the rule, even (or especially) in international courts, by virtue of the presumption of innocence.[3] Understandably, it sought disclosure of Mr White's declaration which had not been annexed to the Prosecution Response although it was obviously critical to it. Also understandably, an oral hearing was requested.

5. On 23 February 2004 there was filed in the court registry, marked "Confidential" (although it contained no confidential information) a document headed: "Submissions Made by the Government of the Republic of Sierra Leone under Rule 65(B) of the Rules of Procedure and Evidence".[4] It explained that police resources were inadequate to maintain surveillance on the appellant were he granted bail, and claimed that there would be adverse implications for public

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[2] *Prosecutor v. Moinina Fofana* (et. al.) (Case No.SCSL-2003-11-PT), Prosecution Response to Defence Application for Bail Pursuant to Rule 65 , filed on 9 February 2004

[3] *Prosecutor v. Moinina Fofana* (et. al.) (Case No.SCSL-2003-11-PT), Defence Reply to the Prosecution Response to the Application for Bail Pursuant to Rule 65 , paragraph 4.

[4] *Prosecutor v. Moinina Fofana* (Case No.SCSL-2004-14-PT), Confidential Submissions made by the Government of the Republic of Sierra Leone under Rule 65(B) of the Rules of Procedure and Evidence, filed on 23 February 2004.

order in the country if he were set at liberty. These submissions were subscribed, at beginning and end,

> "The Government of Sierra Leone
>
> Joseph Kobba, Senior State Council
>
> For the Attorney General and Minister of Justice of the Government of the Republic of Sierra Leone."

However, they bore no signature.

6. On 1 March 2004 the application for an oral hearing was granted and an oral hearing was set down for 5 March 2004. That hearing was attended by Ms Frances Fortune, regional director of a non-government organisation, who offered herself as a form of surety, in the sense that she was prepared for the applicant to stay at her family home as a condition of his bail and to contact the court if he failed to keep his bail conditions. Ms Fortune was ready and willing to give evidence on oath on that day and to face cross-examination[5], but the Prosecution insisted on seeing her evidence in statement form first and the judge directed that it be placed on affidavit.[6] The application was postponed until 17 March – a date when she was abroad. The application went ahead in her absence, the defence having tendered on the applicant's behalf a typed statement purporting to have been made by her, dated 7 March 2004. It was not signed.

7. It was not until 5 August 2004, almost five months later, that the Bail Decision was delivered rejecting the application.[7] However, it does not appear that either his counsel or the Defence Office, throughout this period, did anything to obtain from Ms Fortune either her signature on the statement filed with the court or an affidavit from her as the judge had ordered. Equally surprising, there appears to have been no step taken by the Prosecution or by the court registry to contact Mr Joseph Kobba or the Attorney General's office to obtain some simple authentication of the unsigned document filed on the government's behalf.

8. In brief, in the Bail Decision Judge Itoe refused to admit into evidence both the unsigned statement of Ms Fortune and the unsigned submission of the government of Sierra Leone. In reliance upon "the best evidence rule" he held that these important documents were

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[5] *Prosecutor v Fofana*, Transcript of hearing, 5 March 2004: Mr Pestman for Fofana stated "My request is to hear Ms Frances Fortune so that she can be heard and asked some questions" (p2, line 8-9; see also p3, lines 28-30; p4, line 30).
[6] *Ibid*, p6.
[7] *Fofana Bail Decision*.

"unauthenticated and therefore unreliable". He did, however, admit the signed declaration of Mr White. He dealt at some length with the facts and submissions before finding that there was a likelihood that the applicant would escape and/ or would pose a danger to witnesses. He dealt contentiously with the burden of proof in three paragraphs (95 to 97) that we discuss below.

9. Mr Fofana applied for leave to appeal to this court.[8] His leave application was granted by Justice Raja Fernando on 5 November 2004.[9] At that time the Judge was minded to give leave in the interests of justice because this Appeal Chamber had not yet had the opportunity of giving a merits decision on a bail application. (Our first such decision, that of *Sesay*, was not delivered until 14 December 2004.)[10] Justice Fernando was satisfied that "good cause" had been shown on the burden of proof issue and that the "best evidence rule" decision should be tested in relation to Rule 89 of the Rules. He accepted that there were arguable issues of fact as to whether the Judge gave sufficiently close attention to the guarantees offered by the applicant and to his family connections.

2. Grounds of Appeal

10. Exchanges of the fully argued Appellant's Submissions, Prosecution Response and Appellant's Reply have served to narrow the issues and marshal the contending arguments. There are essentially three issues, two of law and one of fact, namely:

    a. The correctness of the Judge's application of the "best evidence rule" to reject the unsigned Fortune statement but to admit the White declaration.

    b. The correctness of the Judge's approach to the burden of proof in a bail application, and

    c. Whether in weighing the factual evidence the Judge ignored or paid too little regard to what the applicant chooses to call his "guarantee" of trial attendance and good behaviour.

(a) The Best Evidence Rule

11. In relation to the refusal to admit the unsigned Fortune statement, the appellant argues:

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[8] *Prosecutor v Sam Hinga Norman, Moinina Fofana and Alliu Kondewa*, (Case No.SCSL-2004-14-T), Moinina Fofana Application for Leave to Appeal against Refusal of Bail, filed on 27 August 2004.
[9] *Prosecutor v Sam Hinga Norman, Moinina Fofana and Alliu Kondewa*, (Case No.SCSL-2004-14-T), Fofana - Decision on Application for Leave to Appeal Bail Decision, filed on 5 November 2004.
[10] *Prosecutor v. Issa Hassan Sesay, Morris Kallon and Augustine Gbao*, (Case No.SCSL-2004-15AR65), Sesay - Decision on Appeal against Refusal of Bail, filed on 14 December 2004 (*"Sesay Bail Appeal"*).

a. under Rule 89(C) a judge or chamber must decide only whether a piece of evidence is relevant and is not required to establish or assess its credibility. The declaration submitted by the defence was relevant evidence as it touched upon the core issues raised by an application for bail, so it was an error of law to deny admission.

b. The declaration should not have been found inadmissible on the basis that it was unsigned. The Judge could have adjourned the application to allow the defence to file a signed and sworn affidavit. An unsigned document is not by definition irrelevant and rigid formalism is inconsistent with Rule 89(C).

12. The Prosecution, however, argues that Ms Fortune's declaration was both unreliable and of limited probative value and that Rule 89(C) allows the Judge to take these factors into account when deciding whether evidence is relevant and consequently admissible. The Prosecution points to jurisprudence of the International Criminal Tribunal for the former Yugoslavia which states that reliability is an implicit component of admissibility and argues that although in contrast to Rule 89(C) the equivalent rules in the ICTY Statute explicitly require a finding that the proposed evidence is probative as the threshold for admissibility, the requirement that the evidence be relevant and that it carry probative value are essentially the same. In any event, the Prosecution argues further that Ms Fortune's declaration does not demonstrate that she has any actual influence over the accused to ensure that he appears for trial and no one else has been put forward to vouch for his credibility. Thus the Judge committed no error of law in excluding the declaration from having an impact on his determination of the merits.

13. In relation to the admission of the declaration by the Chief of Investigations, the defence argues that Mr White as Chief Investigator was not an impartial witness and his statement represents merely the point of view of the prosecutor. Moreover, it is entirely based on hearsay and therefore its probative value is questionable.

14. The Prosecution responds that there is no rule prohibiting the admission of hearsay evidence or evidence proffered by a party in support of its own position. Moreover, it contends that Mr White's declaration was highly probative and based on information from reliable sources and so was properly admitted into evidence.

(b) *Burden of Proof*

15. The appellant argues that the Judge erred in stating that the burden of establishing the condition set out in Rule 65(B) rests with the accused because this position contradicts the customary law principle which consecrates liberty as the rule and detention as the exception. This follows from the repudiation of the requirement of "exceptional circumstances" as an element of an application for bail in the ICTY Statute, prior to the establishment of the Special Court.

16. The Prosecution responds that the burden of proof clearly rests on an accused under Rule 65(B) and this is confirmed by ICTY jurisprudence. It does not result in a regime wherein detention is the rule and bail the exception: a Trial Chamber should proceed on a case by case basis. There is no breach of the principle of the presumption of innocence and there is nothing in customary international law to prevent the placing of the burden on the accused in certain circumstances. The Prosecution relies on the majority decision in the ICTY case of *Krajisnik* to the effect that the presumption of innocence is a procedural safeguard of fair trial which is not infringed because the question of whether bail conditions are met does not go to the ultimate finding of guilt or innocence.[11]

(c) *Factual Errors*

17. The defence argues that the Judge erred in disregarding the evidence that the accused had satisfied the criteria for a grant of bail. It makes reference to the appellant's strong ties to his family and chiefdom and the fact that he does not possess travel documents or funds necessary for travel. These factors, it claims, the Judge ignored. His summary dismissal of valid submissions amounted to an abuse of judicial discretion.

18. The Prosecution responds that the judge was not required to articulate every step of his reasoning; that adequate consideration to the guarantees offered by the accused was given, and that these guarantees were rightly found to be unsatisfactory. It makes particular reference to the evidence that the appellant had, contrary to his own assertion, travelled to Guinea and to Liberia. Moreover, he owned no bank account or property in Sierra Leone and had no clear material ties to the country. He had been involved in threatening CDF members not to cooperate with the Special Court and these threats emphasised the possibility that he would be involved in reprisals against witnesses. In addition (and this is a new matter), it now urges that the appellant's failure to attend

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[11] *Prosecutor v. Momcilo Krajisnik and Biljana Plavsic*, Case No. IT-00-39&40-PT, Decision on Momcilo Krajisnik's Notice of Motion for Provisional Release, filed on 8 October 2001.

trial proceedings must cast doubt on the credibility of his claim in his original application that he respects the process of the court and would comply with bail conditions.

19. In its reply, the appellant urges this Appeal Chamber to grant an oral hearing, at which we can assess an affidavit newly produced from Ms Fortune (it was belatedly filed on 12 November 2004 and does no more than confirm her original unsigned statement). This, too, would involve the court in consideration of evidence that was not before the Judge whose decision is under appeal.

3. The Role of this Court

20. By virtue of Rule 65 it is primarily the function of a Judge or Trial Chamber to grant bail to an accused. It is therefore not appropriate for this court to hear first instance evidence with a view to granting bail to an accused who has been denied bail by a Judge or Trial Chambers. If new facts emerge or changed circumstances justify a fresh exercise of discretion, the application for such exercise of fresh discretion is to the Trial Chamber. Where the Judge or Trial Chamber has exercised his or their discretion to grant or refuse bail the Appeals Chamber will not substitute its own discretion for that of the Judge or Trial Chamber. It is for them to assess submissions from the government of Sierra Leone and to take the primary decision as to whether the bail pre-conditions in that Rule – namely that the defendant will attend at and during trial and will not interfere with witnesses – have been fulfilled. As the ICTY has noted, "[a] Trial Chamber's exercise of discretion will be overturned if the challenged decision was (i) based on an incorrect interpretation of governing law; (ii) based on a patently incorrect conclusion of fact; or (iii) so unfair or unreasonable as to constitute an abuse of the Trial Chamber's discretion." [12] If we are satisfied that there has been such a serious misunderstanding of the facts that the decision must be overturned, the case will still have to be remitted to the Trial Chamber Judge to hear evidence concerning bail conditions and to decide whether they satisfy the Rule 65(B) tests and if so to set and supervise appropriate conditions. In determining whether the Trial Chamber has erred in its appreciation of the facts in bail appeals we do not sit to re-hear the application: we adopt a judicial review standard and will only quash the decision if satisfied that it is logically perverse or evidentially unsustainable.

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[12] *Slobodan Milosevic v Prosecutor*, Decision on Interlocutory Appeal of the Trial Chamber's Decision on the Assignment of Defence Counsel, ICTY, Case No. IT-02-54-AR73.7, 1 November 2004, para10.

3. The Best Evidence Rule

21. Any decision to grant or deny bail will involve the most anxious consideration of questions which are not susceptible of proof but rather turn on substantial grounds for belief. Whether there is a real risk that the defendant will flee or intimidate witnesses or commit further offences calls for a calculation of odds based on all the inferences, arguments and evidential materials that the parties can muster. Frequently they will produce hearsay statements, or speculative opinion by persons who know the defendant or are involved with the Prosecution or its witnesses. The weight accorded to such evidential material will vary and will often depend on whether it can be tested by cross-examination or at least by forensic argument. But strict rules of evidence are inherently inappropriate to a court which must decide whether there are substantial grounds for believing something.[13]

22. Rule 89 of the Rules, which is not restrictive in its provisions, is applicable in an application for bail as it is in a trial by the Trial Chamber. That rule provides:

    A. The rules of evidence set forth in this Section shall govern the proceedings before the Chambers. The Chambers shall not be bound by national rules of evidence.

    B. In cases not otherwise provided for in this Section a Chamber shall apply rules of evidence which will best favour a fair determination of the matter before it and are consonant with the spirit of the Statute and the general principles of law.

    C. A Chamber may admit any relevant evidence.

23. The evidence which best favours the fair determination of a bail application is evidence of guarantees offered by the defendant that he will attend trial and pose no danger to others. All relevant evidential material should be considered so the court can build up the fullest possible picture of the defendant's conduct and intentions if released. Although the probative value of particular items in isolation may be minimal, the very fact that they have some relevance means that they must be available for counsel to weave into argument and for the Judge to have before him in deciding what to make of the overall factual matrix.

24. The so-called "best evidence rule" is an anachronism. It was developed in a pre-industrial age when copying was done by hand and, given the risk of transcription errors, the courts required to see the handwritten originals. The rule has no modern application other than to require a party in

[13] See *R E Moles*, 1981, Crim Law LR 170 and *R v Mansfield Justices Ex Parte Sharkey* (1985) QB613.

possession of the original document to produce it.[14] If the original is unavailable then copies may be relied upon – the rule has no bearing at all on the question of whether an unsigned statement or submission is admissible. If relevant, then under Rule 89(C) they may (and in bail applications, should) be admitted, with their weight to be determined thereafter. There is no rule that requires, as a precondition for admissibility, that relevant statements or submissions must be signed. That may be good practice, but it is not a rule about admissibility of evidence. Evidence is admissible once it is shown to be relevant: the question of its reliability is determined thereafter, and is not a condition for its admission.[15]

25. It follows that the Judge made an error of law in refusing to admit the statement of Ms Fortune, who had attended court to give evidence on the previous hearing but had been unable to sign her statement because she was overseas. The Judge held in terms that both the Fortune statement and the Sierra Leone government submission were relevant but;

> I am not minded to favourably invoke the provisions of Rule 89(C) to accept these two documents which are unauthenticated and therefore unreliable. I accordingly exclude them from impacting on the substantive determination of this matter.[16]

The fact that a statement is unauthenticated does not make it necessarily unreliable – especially where the identity of its maker and the fact that she made it are not in dispute. The fact that both documents were relevant meant that they should both have been admitted, for what they were worth when their probative value could be assessed in the context of all the other evidential material.

26. Rule 89(C) ensures that the administration of justice will not be brought into disrepute by artificial or technical rules, often devised for jury trial, which prevent judges from having access to information which is relevant. Judges sitting alone can be trusted to give second hand evidence appropriate weight, in the context of the evidence as a whole and according to well-understood forensic standards. The Rule is designed to avoid sterile legal debate over admissibility so the court can concentrate on the pragmatic issue of whether there is a real risk that the defendant will not attend the trial or will harm others.

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[14] See Richard May, *Criminal Evidence*, 3rd Edition (1995), p24; *Garton v Hunter* 1969 (2QB 37); Sapinka et al *The Law of Evidence in Canada*, 2nd Edition (Butterworths 1999), Chapter 18.6.

[15] See *Prosecutor v Zejnil Delalic, Zdravko Mucic et. al*, Decision on the Motion of the Prosecutor for the Admissibility of Evidence, International Criminal Tribunal for Yugoslavia (ICTY), para 19: "it is neither necessary or desirable to add to the provisions of sub-Rule 89(C) a condition of admissibility which is not expressly prescribed by that provision."

[16] Bail Decision, Paragraph 58.

27. The Judge said –

> "...even though Rule 89(C) enlarges the scope of admissibility of evidence which, under the rigid conventional evidential rules would ordinarily not be admissible, this door of a liberalised concept of admissibility which has been thrown so widely open in International Criminal Tribunals should be left open but at varying degrees and with a lot of caution and scrutinous (*sic*) control of all incoming facts so as to avoid admitting in evidence, facts and documents which, *prima facie*, are clearly inadmissible and which, if admitted, could lead to abuse and the violation of established norms, principles and processes, thereby inevitably bringing the administration of justice and the entire judicial process into disrepute." [17]

This is to argue in a circle. Relevant evidence is not "clearly inadmissible". By virtue of Rule 89(C), it is clearly admissible. There is no judicial norm violated in admitting for curial consideration of a bail application information that is relevant: the judicial process would be brought into disrepute by excluding it. In any event, it is inappropriate to release into the community pending or during trial a defendant facing charges of this gravity merely on the strength of a written witness statement, whether or not made on affidavit: sureties for his attendance and good behaviour must attend court and be examined, and the court must at the end of the day be satisfied that they fully understand the heavy obligations which they undertake.

28. The error was compounded – although not to the appellant's detriment – by excluding for the same reason the written submission of the Sierra Leone government. A hearing (by written or oral submission) must be accorded to the State of Sierra Leone (being the state to which the defendant seeks to be released) under 65(B) before bail can be ordered, and the refusal to admit the Attorney General's submissions had the unintended and unrecognised result that bail could in no circumstances have been ordered, because the rejection of this evidence denied a "hearing" to the State of Sierra Leone. It was open to the judge to invite Mr Kobba to present the State's submission in person: if he required further "authentication" the Judge could have instructed his court clerk to telephone Mr Kobba and establish that the submissions were authentic. It is surprising that the Prosecution did not take this simple step in any event. In consequence, submissions which the court was obliged to consider before it could make any order for bail were held to be inadmissible by reference to a "best evidence rule" which did not apply to them.

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[17] *Ibid.*, paragraph 57

29. The Judge was correct to admit under Rule 89(C) the declaration of the Chief of Investigations, having found it relevant. Once admitted, the weight to be attached was a matter for him. The appellant's objections, that the declaration was both partisan and hearsay, are not objections to admissibility – they go to weight. There is no bar on a party adducing evidence in support of its position from its own employees and there is no bar on hearsay evidence. Questions of partiality and reliability go to the assessment of the weight of evidence that has been admitted. It was open to the defence to ask Mr White to be called and to cross-examine him or to controvert his evidence by calling their own witnesses or by arguing that it was speculative or rumour-based, in order to undermine its weight.

30. In the result, we find that the Judge erred in law to the detriment of the appellant by refusing to admit the unsigned declaration of Ms Fortune. But the admission of this document could not have secured bail for the appellant, even had the facts alleged in her unsigned statement been placed on affidavit. There are many issues, as the Prosecution points out, that would need to be explored with her in person. For example, it was not clear that she would be in the country, let alone in the home where the appellant if given bail would reside, for much of the time. Moreover, rectifying the Judge's error would mean that the government submission would also be admitted, which presented a number of security-related reasons against granting bail to this appellant. Given the other factual findings by the Judge (see below) which are unassailable, we find that his error of law in respect to the application of the "best evidence rule" to exclude Ms Fortune's statement could not have affected the result.

3. Burden of Proof

31. International criminal law takes cognisance only of the most heinous crimes known to humankind – namely genocide, crimes against humanity and the most serious of war crimes. In this early stage of its development, the courts with jurisdiction to try persons accused of international crimes have few enforcement powers or procedures to ensure that indictees attend for trial: there is no international police-force, and co-operation between States in respect to the return of fugitives is inadequate. In Sierra Leone, as we pointed out in *Sesay*, attention must be paid by both the tribunal and the parties to the reality on the ground, such as the overall security situation and the lack of local police facilities to enforce or monitor conditions of bail.[18] Given the practical difficulties facing international criminal justice at this time, courts must demonstrate a resolve to

[18] *Sesay Bail Appeal*, para 28, 36-7.

ensure that those suspects who have been arrested do in due course face trial, and are not given bail in circumstances where there is a real risk that they would flee or intimidate Prosecution witnesses or resume the conduct for which they have been indicted. To do so would mock the victims of the heinous crimes they are accused of perpetrating - in this Special Court, that means the heinous crimes for which they are accused of bearing "greatest responsibility".

32. That said, international human rights law, upon which international criminal law is premised in part, gives full force to the principle (also reflected in the common law of Sierra Leone) that any person deprived of liberty should have the right both to contest the legality of that detention and additionally, in the event that the detention is lawful, to apply for provisional liberty pending the conclusion of the trial. This latter right is not, in international human rights law, a "right to bail" in the sense that the defendant is entitled to be freed unless the prosecuting authorities can prove particular allegations against him; it is a right to apply for bail, to a court which is open to persuasion that pre-trial detention of that defendant is not necessary to secure the efficacy of the trial or for any other public interest reason. But international human rights law does not dictate procedures or the evidential rules for bail applications, which will vary from jurisdiction to jurisdiction. Bail procedures in respect of minor charges in small, well-policed communities will obviously differ from those in post-conflict courts in respect to international crimes.

33. So far as this court is concerned, the rules of evidence and procedure in relation to bail are set forth in plain language in Rule 65(B), namely

> *B.* Bail may be ordered by a Judge or a Trial Chamber after hearing the state to which the accused seeks to be released and **only** if it is satisfied that the accused will appear for trial and, if released, will not pose a danger to any victim, witness or other person. (emphasis added)

In other words, it is a precondition to any grant of bail that the applicant must satisfy the court that he will appear for trial and will not endanger witnesses or any other potential victim (including himself). Absent legislation to the contrary, the burden of proving a proposition in a court room rests upon the party obliged to assert it, and the language of Rule 65(B) (note the force of "only") confirms that the burden lies squarely on the applicant. It is, no doubt, a civil rather than a criminal burden, but as Judge David Hunt observed in *Sainovic:*

> "The more serious the matter asserted or the more serious the consequences flowing from a particular finding, the greater the difficulty there will be in satisfying the relevant

tribunal that what is asserted is more probably true than not. That is only commonsense."[19]

34. Rule 65(B) requires the applicant to satisfy the court that in all the circumstances there can be no real risk that setting him at liberty before or during his trial will have deleterious consequences for the court or for others. Proving that there is no reasonable cause to apprehend such a risk will rarely be accomplished just by legal argument or promises on paper, even if made on affidavit. There should, for example, be sureties for the appellant's good behaviour, taken in court, after examination to ensure they are properly conscious of their responsibility for the applicant's behaviour if released and of the forfeiture they may suffer if he misbehaves. Bail applications should not be decided by mechanistic application of the burden of proof: the court must feel fully satisfied that the Rule 65(B) conditions will be met and that there are effective means of recalling the applicant if they are not.

35. The appellant asks us to reject this approach and indeed the plain meaning of Rule 65(B), on the basis that there is a "consecrated" principle of customary international law that "liberty is the rule and detention is the exception". This follows, it is said, from the repudiation of the ICTY requirement to prove "exceptional circumstances" and from the "presumption of innocence" which is enshrined in the special court statute.

36. This argument must be rejected. True it is that prior to 1999 the ICTY rules required an accused to prove "exceptional circumstances" before being admitted to bail, with the practical consequence that bail was only granted in cases of serious illness. The removal of that requirement, so that the ICTY (and subsequently ICTR) rules are much the same as our Rule 65(B), has meant that the court in The Hague has been satisfied in several cases that defendants can be trusted with liberty in Serbia after guarantees by sureties and by the host authority. But the ICTY has held repeatedly that the probative burden under the changed rule still rests with the applicant. As the ICTY Trial Chamber said in *Brdanin and Talic*, "the wording of the Rule squarely places the onus at all times on the accused to establish his entitlement to provisional release."[20]

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[19] *Prosecutor v Nikola Sainovic & Dragoljub Ojdanic*, ICTY Appeals Chamber, Dissenting Opinion of Judge David Hunt on Provisional Release, 30 October 2002, paragraph 29

[20] *Prosecutor v Radoslav Brdanin & Momir Talic*, ICTY Trial Chamber, IT-99-36, Decision on Application for Leave to Appeal, 7 September 2000. See also *Prosecutor v Fatmir Limaj, Haradin Bala & Isak Musliu*, ICTY Appeals Chamber, IT-03-66-AR65, 31 October 2003 ("*Limaj Appeal*"), para 38; *Prosecutor v Rahim Ademi*, ICTY Trial Chamber, IT-01-46-PT, Order on Motion For Provisional Release; *Prosecutor v Krajisnik*, ICTY Trial Chamber, IT-00-39 & 40 PT, Decision on Momcilo Krajisnik's Notice of Motion for Provisional Release, 8 October 2001 ("*Krajisnik*"), para 11.

We understand that the ICTR has, like this court, yet to accede to any bail application. That does not mean, as we explained in *Sesay*, that no bail application can ever succeed. It does mean that it is idle to talk in terms of bail being the exception rather than the rule, or (the position the defendant contends for) that now bail should be the rule rather than the exception. There is no presumption one way or the other: the only fundamental principle, as we pointed out in paragraph 37 of our *Sesay* decision, is that "each case must be decided on its own merit".

37. The presumption of innocence is a principle to which this court's statute and customary international law both require adherence. The "presumption of innocence" is no more (but no less) than the principle that the Prosecution must prove beyond reasonable doubt the guilt of the defendant. It is a fundamental right directed to serving the overriding end that the trial itself is fair.[21] This principle has felicitously been described as the golden thread that runs through the criminal law: in effect, its governing principle.[22] But for all its resonance at criminal trials and appeals to put the Prosecution to proof of the elements of the offence charged, it has no application or relevance to the preconditions for bail which must be established under Rule 65(B). Whether a defendant will turn up for trial or intimidate witnesses cannot logically be affected by the burden or standard of proof that will prevail at his trial, nor by presuming him innocent or guilty of the offences charged (since innocent defendants may nevertheless try to avoid a lengthy trial or to threaten those who have made statements against them). As the US Supreme Court has noted, "the presumption of innocence is a doctrine that allocates the burden of proof in criminal trials... but it has no application to a determination of the rights of a pre-trial detainee during confinement before his trial has even begun."[23]

38. The appellant, faced with a number of persuasive ICTY decisions which all recognise that the burden of proving bail pre-conditions rests upon the applicant, have chosen to rely on the dissenting judgement in *Krajisnik*, and upon European Court of Human Rights decisions striking down laws that make pre-trial detention mandatory for certain classes of offences – an issue which does not arise here. We consider that the majority decision of Judge May and Judge Fihri in *Krajisnik* reflects the repeated decisions of ICTY panels and the plain meaning of Rule 65(B).[24]

39. The international instruments cited by the appellant do not have the meaning for which he contends. The International Covenant on Civil and Political Rights, for example, provided by

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[21] See *Sheldrake v DPP* (2005) I ALL ER 237 at 251 (para 21) per Lord Bingham.
[22] *Viscount Sankey, in Woolrington v DPP*, (1935) AG 462 at 481.
[23] *Bell v Wolfish* (1979) 441 U.S. 520, 533.
[24] See *Prosecutor v Krajisnik and Plavsic*, Decision on provisional release, 8 October 2001.

Article 9(3) that those arrested on criminal charges are entitled to release if they cannot be tried within a reasonable time. This refers not to bail but to unconditional release when prolonged delays amount to an abuse of process. The Article further provides:

> "It shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings, and, should occasion arise, for execution of the judgement"

Again, this principle strikes at laws which provide for mandatory detention of persons charged with certain classes of offence. But Rule 65(B) does not require mandatory detention, it simply makes release subject to guarantees to appear for trial. A guarantee is only a "guarantee" if the applicant can establish it, at least to the court's satisfaction.

40. Article 5 of the European Convention on Human Rights is of even less assistance to the appellant. It provides merely that detainees "*shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial.*" This gives the somewhat outdated impression that the right to apply for bail only arises when trials cannot be held within a reasonable time. International human rights law has moved on since the Convention, which came into operation in 1953. In any event, Article 5 permits bail to be conditioned by "guarantees", a word which implies that the applicant has produced firm assurances of the matters requiring guarantee.

41. The appellant complains that the Judge in paragraphs 95-97 of his decision articulated opinions that contradicted his allocation of the burden of proof. He stated that the Prosecution does bear "an equally formidable burden of negating the facts advanced by the defence" and that "the liberty of the individual, which is a very sacred, long-standing, consecrated right, is and should continue to be and remain the rule, and detention the exception". However, we do not consider that it can be correct to state that the Prosecution has "an equally formidable burden of negativing the facts advanced by the defence" on an issue on which the legal burden of proof falls squarely on the defence. Nor is it helpful, for reasons we have already explained, to speak of liberty as a "sacred" or "sacrosanct" right which is the rule, as against the exception of pre-trial detention. Each case, as this court explained in *Sesay*, must turn on its own facts and circumstances, with the ultimate question being whether the applicant for bail has produced sufficient (i.e. sufficiently convincing) guarantees for his attendance at trial and for his good conduct while on provisional release. The Judge's comments were over-favourable to the defence.

4. Alleged Factual Errors

42. The role of the Appeals Chamber is to review the Trial Chamber's decision only to the extent of determining whether its discretion was properly exercised. In undertaking this review, the question for the Appeals Chamber is not whether it agrees with the Trial Chamber's conclusion but whether the Trial Chamber correctly exercised its discretion in reaching that decision.[25]

43. There was nothing unfair or unreasonable in the Judge's painstaking analysis of the facts and the arguments presented to him. He was struck (as are we) by the discrepancy between the applicant's assertion that he had never left Sierra Leone and the Prosecution allegation that in 1997 he had in fact visited Guinea and Liberia. This discrepancy has, so far as we are aware, not been explained, and no bail application can prosper if it contains assertions about the applicant which are known to be false. The Judge was also concerned by Prosecution allegations that the applicant was involved in CDF plans to threaten witnesses who might assist the Prosecution, and his concerns were not sufficiently allayed by the appellant's lawyers. They now criticise him for not paying sufficient attention to the applicant's "guarantees" that he would live in his chiefdom village, observe a curfew and report to the police. But these were offered without further details – without sureties, for example, and against a background of police claims that they would be unable to monitor his behaviour notwithstanding the proffered reporting conditions.

44. There is only one respect in which the Judge's detailed factual analysis could be sensibly criticised and that was in suggesting that the fact that the defendant had no assets, and not even a bank account, within the jurisdiction might of itself be a ground for expecting him to abscond.[26] The defence had argued, on the contrary, that Mr Fofana's lack of assets meant that he would not have the money to fund an escape. As it happens, neither argument seems to us particularly persuasive as an *a priori* deduction from the fact of his impoverishment. But the court should not give the impression that a rich man will obtain bail more readily than a poor man. Roots in a community may be forged by good works as well as by accumulating assets: the question should not be whether the appellant has assets in Sierra Leone but whether he has assets anywhere else. This criticism does not detract from the care and detail with which the Judge weighed the other factors and it did not determine his decision, which was neither unfair nor unreasonable and was not based on a patently incorrect conclusion of facts.

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[25] See the discussion above at paragraph 20.
[26] Fofana Bail Decision, 5 August 1004, para 67.

5. Conclusion

45. This appeal is rejected. Although we find that the Judge erred in law in refusing to admit the statement of Ms Fortune, its admission into evidence could not have affected the result given a) the fact that it needed further elucidation, b) the Judge's concerns about the other 65(B) pre-conditions and c) the inevitable admission with it of the submission by the government of Sierra Leone, which was adverse to the application. The Judge made no appealable error in placing the burden of proving the bail pre-conditions on the appellant or in his appreciation of the facts.

46. For these reasons the Appeal is dismissed.

Done at Freetown this 11th day of March 2005

Justice Emmanuel Ayoola
Presiding

Justice Raja Fernando

Justice Geoffrey Robertson

[Seal of the Special Court for Sierra Leone]