SCSL-2004-15-PT
(313 - 318)

SPECIAL COURT FOR SIERRA LEONE
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THE TRIAL CHAMBER

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| Before: | Judge Bankole Thompson, Presiding Judge<br>Judge Benjamin Mutanga Itoe<br>Judge Pierre Boutet |
| Registrar: | Robin Vincent |
| Date: | 13 February 2004 |

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| PROSECUTOR | Against | Issa Hassan Sesay<br>Morris Kallon<br>Augustine Gbao<br>(Case No.SCSL-2004-15-PT) |

# DECISION ON PROSECUTION' S APPLICATION FOR LEAVE TO FILE AN INTERLOCUTORY APPEAL AGAINST THE DECISION ON THE PROSECUTION MOTIONS FOR JOINDER

Office of the Prosecutor:

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Defence Counsel for Issa Hassan Sesay:

Timothy Clayson
Wayne Jordash
Abdul Serry Kamal

Defence Counsel for Augustine Gbao:

Girish Thanki
Andreas O' Shea
Ken Carr

Defence Counsel for Morris Kallon:

James Oury
Steven Powles
Melron Nicol-Wilson

**THE TRIAL CHAMBER** ("the Chamber") of the Special Court for Sierra Leone ("the Special Court") composed of Judge Bankole Thompson, Presiding Judge, Judge Pierre Boutet and Judge Benjamin Mutanga Itoe;

**SEIZED** of the Application for Leave to File an Interlocutory Appeal against the Decision on the Prosecution Motions for Joinder filed on 3 February 2004 by the Office of the Prosecutor ("Prosecution") in the case SCSL-2004-15-PT ("the Motion") pursuant to Rule 73(B) of the Rules of Procedure and Evidence of the Special Court ("the Rules");

**NOTING** the Response filed on behalf of Augustine Gbao on 9 February 2004 ("the Response") to which the Prosecution filed a Reply on 11 February 2004 ("the Reply");

**NOTING ALSO** that no Response was filed within time on behalf of Issa Hassan Sesay nor Morris Kallon;

## CONSIDERING THE SUBMISSIONS AND ARGUMENTS OF THE PARTIES

## I. THE MOTION

### A. The Prosecution Submissions:

1. Pursuant to Rule 73(B) of the Rules, the Prosecution seeks leave to file an interlocutory appeal in respect of the Decision of the Special Court on the Prosecution's Motion for Joinder, dated 27 January 2004 ("the Joinder Decision"), in which the Chamber ordered the joint trial of Issa Hassan Sesay, Morris Kallon, and Augustine Gbao of the RUF, and a separate joint trial of Alex Tamba Brima, Brima Bazzy Kamara and Santigie Borbor Kanu of the AFRC.[1]

2. The Prosecution submitted as follows:

   (a) That since it intends to lead essentially the same evidence against each accused person, all Prosecution witnesses, with the possible exception of strictly biographical ones, would be required to testify twice to the exact same events, which might cause some witnesses to refrain from testifying.[2]

   (b) That Prosecution witnesses with first hand knowledge of the actions of the accused would not be in the position to testify twice because of credible security concerns.[3]

   (c) That by forcing the appearance of the same witnesses twice, the Chamber's decision means a prolonged stay of the witnesses in the protection program, which will increase the financial costs significantly.[4]

   (d) That having two separate trials on essentially the same evidence and by the same panel of judges will jeopardize the principle of a fair trial, as the same panel of Judges assess the credibility of witnesses and the weight of their testimony in both trials. [5]

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[1] Decision and Order on Prosecution Motions for Joinder, 27 January 2004, SCSL-2003-05-PT; SCSL-2003-06-PT; SCSL-2003-07-PT; SCSL-2003-09-PT; SCSL-2003-10-PT; SCSL-2003-13-PT.
[2] Motion, para. 15.
[3] Motion, para. 16.
[4] Motion, para. 17.

(e) That in the event of a second Trial Chamber being constituted and a separate bench of Judges sitting on the second trial, the Judges will hear essentially the same trial as the first, but may render contradictory or inconsistent decisions regarding the credibility and weight of the same witnesses in the first trial.[6]

(f) Furthermore, the Prosecution submitted that two separate trials will compromise the principle of equality of arms, as it will place the Prosecution at a substantial disadvantage vis-à-vis the Defence in whichever trial proceeds second. As the Joinder Decision forces the Prosecution to call its witnesses to testify twice, they are subject to cross-examination twice on the same evidence.[7]

3. In light of the above, the Prosecution submitted that the requirements for granting leave are met as the Joinder Decision, if allowed to stand, would cause "irremediable" prejudice to the Prosecution that could not be cured by the final disposal of the trial, including post-judgment appeal.[8]

**B. The Defence Response:**

4. The Defence submitted that the Prosecution failed to demonstrate both "exceptional circumstances" and "irreparable prejudice".

5. In relation to the first of these two criteria, the Response noted that the question of whether "exceptional circumstances" had been made out was not addressed by the Prosecution in its submissions. The Defence submitted that in determining the existence of exceptional circumstances relevant considerations included the following:

(a) the extent to which an appeal would expedite or delay the proceedings;

(b) whether these circumstances were distinguishable from other situations in order to "be faithful to the principle" contained in Rule 73(B);

(c) would the appeal raise issues of great public significance to the development of international criminal law and to other trials before the Special Court;

(d) would an appeal avoid future dispute over similar issues;

(e) is there a reasonable possibility of wrongful conviction as a result of the alleged error.[9]

6. The Defence further submitted that an appeal on this issue would cause unnecessary delay in the commencement of the trials, since this issue would necessarily require determination before separate trials could begin;[10] that the issue of joinder is "essentially a matter of organisation of a trial"[11]; that the issue was not of particular significance and was not likely to recur, and that there was no demonstration of a reasonable possibility of a wrongful conviction.

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[5] Motion, para. 19.
[6] Motion, para. 20.
[7] Motion, para. 21.
[8] See Motion, para. 12.
[9] Response, para. 3.
[10] Response, para. 5.
[11] Response para 8.

C. The Prosecution Reply:

7. The Prosecution noted that the Response was mistakenly addressed to the Appeals Chamber rather than the Trial Chamber. The Prosecution also submitted in its Reply that the considerations raised in the Response are irrelevant to the application of Rule 73(B) and without any basis or authority. Rather, the Prosecution reiterated that exceptional circumstances are present in conjunction with irreparable prejudice. It submitted that the Motion "demonstrates serious prejudice in terms of substantive and procedural law".[12] In addition, the Defence has improperly interpreted the test required under Rule 73(B).

HAVING DELIBERATED THE CHAMBER DECIDES AS FOLLOWS

## II. THE TEST UNDER RULE 73(B)

8. 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 of proceedings unless the Trial Chamber so orders." (Emphasis added)

9. In addressing the key aspects of Rule 73(B), the Chamber wishes to emphasise at the outset that the first part of Rule 73(B) contains a clear statement of the general position in relation to interlocutory appeals. The second part of that Rule creates an extremely limited exception to this general position.

10. 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.

11. This interpretation is unavoidable, given the fact that the second limb of Rule 73(B) was added by way of an amendment adopted at the August 2003 Plenary. This is underscored by the fact that prior to that 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.

12. The Chamber also notes that the amendment to Rule 73(B) created a novel test for granting leave to interlocutory appeal, as the requirement of "exceptional circumstances" does not feature in similar provisions in the Rules of the International Criminal Tribunal for the former Yugoslavia ("ICTY") and the International Criminal Tribunal for Rwanda ("ICTR"). The relevant provision in the Rules of those Tribunals states that:

> "Decisions on all motions are without interlocutory appeal save with certification by the Trial Chamber, which may grant such certification if the decision involves an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the

[12] Reply para 9.

> trial, and for which, in the opinion of the Trial Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings."[13]

This Chamber must apply an entirely new and considerably more restrictive test than the one applied by the ICTR or the ICTY. Furthermore, the only relevant decision of the Special Court to date applied the earlier version of Rule 73(B).[14] There is therefore the need for an authoritative statement by the Chamber on the implication and effect of the amended rule. Nevertheless, this restriction is in line with the trend and our determination to tighten the test for granting leave in respect of interlocutory appeals in the interests of expeditiousness. The further restriction is appropriate and acceptable in the peculiar circumstances of the Special Court whose mandate, we must observe, is limited in its duration.

13. It is clear then from a 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 Prosecution must demonstrate that there is something to justify the exercise of this discretion by the Chamber in its favour.

14. In the Motion before the Chamber, the Prosecution submissions focus primarily on the question of "irreparable prejudice to a party", which is only the second limb of the test in Rule 73(B) which the Chamber must apply. The Prosecution has failed to make substantive references to "exceptional circumstances", and the Chamber has no basis to conclude that any exceptional circumstances have been established.

15. Based on the foregoing, and having found that no exceptional circumstances have been articulated by the Prosecution to warrant additional comments, it would not be necessary to address the question of irreparable prejudice given that the test is conjunctive. The Chamber, however, notes that the main submissions of the Prosecution on this point relate mostly to questions such as cost and security of witnesses, the order in which the trials commence, and the fairness of the trials if they are heard before a single Trial Chamber. It has been suggested by the Prosecution that there might be some added difficulties in the management of the Prosecution case, some additional work and possibly problems if this application for leave to appeal were turned down, but nothing that has been shown in our view to constitute "irreparable prejudice".

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[13] ICTY Rules of Procedure and Evidence, adopted 11 February 1994, as amended 17 July 2003 and ICTR Rules of Procedure and Evidence, adopted 29 June 1995, as amended 27 May 2003, common Rule 73 (B) [Other Motions]. This certification procedure was added in 2002 in the ICTY, (prior to which leave applications were decided by a bench of 3 Appeal Chamber judges on the basis of incurable prejudice or "if the issue in the proposal appeal is of general importance to proceedings before the Tribunal or in international law generally"), and in the ICTR in May 2003 (prior to which there was no interlocutory appeal on Motions).

[14] *Prosecutor v Morris Kallon*, Decision on the Defence Application for Leave to Appeal, 10 Dec. 2003.

FOR THESE REASONS

16. The Chamber refuses the Prosecution application for leave to file an interlocutory appeal and accordingly dismisses the Motion.

Done at Freetown this thirteenth day of February 2004

Judge Bankole Thompson | Judge Benjamin Mutanga Itoe | Judge Pierre Boutet

Presiding Judge,
Trial Chamber

[Seal of the Special Court for Sierra Leone]