241) SCSL-2004-15-T (8088-8108) 8088

IN THE SPECIAL COURT FOR SIERRA LEONE

THE APPEAL CHAMBER

Before: Judge Emmanuel Ayoola, Presiding
Judge Renate Winter
Judge George Gelaga King
Judge Raja Fernando

Registrar: Mr Robin Vincent

Date filed: 15th September 2004

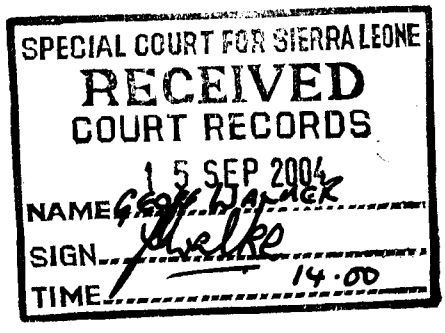
Case No. SCSL 2004 – 15 – T

In the matter of:

THE PROSECUTOR

Against

ISSA SESAY
MORRIS KALLON
AUGUSTINE BAO



APPEAL FROM DECISION ON WITHDRAWEL OF COUNSEL OF 6 JULY 2004

Office of the Prosecutor

Mr Desmond de Silva QC, Deputy Prosecutor
Mr Luc Cote, Chief of Prosecutions

Mrs Leslie Taylor

For Morris Kallon

Mr Sekou Touray
Mr Raymond Brown
Mrs Wanda Brown

For Augustine Gbao

Girish Thanki
Andreas O'Shea
John Cammegh
Kenneth Carr

For Issa Sesay

Timothy Clayson
Wayne Jordash

Procedural background

1. This is an appeal brought in terms of Rule 73(B) from the Trial Chamber's *Gbao-Decision on Application to Withdraw Counsel* of 6th July 2004, leave to appeal having been granted on 4th August 2004, His Honour Judge Bankole Thompson dissenting. From the time of his initial appearance until 6th July 2004, when he announced his wish to dispense with lawyers, he has been represented by counsel. On the date of his initial appearance he signed a power of attorney for Andreas O'Shea and TNT solicitors. The assigned counsel, Andreas O'Shea, has remained constant throughout the proceedings, as have other members of the legal team including Mr Girish Thanki and Mr Ben Holden of TNT solicitors.

2. The joint trial of Issa Sesay, Morris Kallon and Augustine Bao began on 5 July 2004, at which Andreas O'Shea announced his appearance on behalf of Augustine Bao, together with Mr John Cammegh, Mr Ben Holden and Ms Glenna Thompson. On the first day of the trial, counsel for Bao indicated to the Trial Chamber that Mr Bao wished to make a brief statement to the Trial Chamber, not as an opening statement under Rule 84, but as a matter of grace, counsel inviting the Trial Chamber to exercise its general power under Rule 54 of the Rules of Procedure and Evidence.

3. The following day on the 6th July 2004, counsel again indicated to the Trial Chamber that the accused wished to make a statement. The Trial Chamber made it clear that the accused could only make an opening statement under Rule 84, complying with the constraints upon opening statements as set out in that Rule. It warned the accused accordingly. However, when the accused began making his statement, it became clear that he wished to state his objection to the legitimacy of the Special Court for Sierra Leone. The Trial Chamber regarded this as a purely political statement which was impermissible in terms of Rule 84 of the Rules and His Honour Judge Thompson interrupted Mr Bao on several occasions repeatedly affording him the opportunity to confine his statement to matters permitted under Rule 84.

After several interventions and Mr Bao not modifying his approach, the Trial Chamber eventually disallowed Mr Bao from saying anything further.

4. As the proceedings that day progressed, the President noted that Mr Bao had his hand raised and invited counsel to take instructions. Upon the taking of instructions, counsel informed the Trial Chamber that Mr Bao had a statement to make, not under Rule 84 on this occasion, but regarding his legal representation in terms of Article 17 of the Statute. After a brief continuation with other matters in the proceedings, the Trial Chamber permitted Mr Bao to speak. At this point, the following interchange took place between the accused and the learned judge President Benjamin Itoe:

Mr Bao

Thank you Your Honour. My position in this case is very simple and since my right under Article 17 had been denied, I have decided not to recognise this Court. And henceforth no lawyer should appear here, should represent me should defend me in this Court until the African Union, European Union and Commonwealth of Nations interfere into this matter so as to define –

Judge President

Thank you Mr Bao. Thank you very much

Mr Bao

--what took place in this country

Judge President

Thank you. Thank you. Thank you

Mr Bao

Thank you very much sir

Judge President

Yes we heard you.

Mr Gbao. Could you please stand up. Stand up please. You have made an application to this court, you say you do not recognise the Court, you say you do not recognise the Court and you don't want any lawyer to appear for you here any more. That is the application you have made.

Mr Bao

Yes

Judge President

The Court will give you a ruling on this application this afternoon at three o'clock. This afternoon at three o'clock

Mr Bao

Yes Sir. I wish to make a further application

Will you-

Mr Bao

I wish to make a short statement about my standing before Your Lordship.

Judge President

Yes, yes. What statement? Yes, go ahead

Mr Bao

My standing before your Lordship as well as my co-accused does not bind does not bind me in any way from taking any independent action deemed proper for my defence in the interests of transparent justice

Judge President

I hope he is the records have got Mr Gbao in what – so you think they can defend you in any way, your other colleagues in the interests of justice.

Mr Bao

In the interests of justice if they want to go any way let them go.

Judge President

Yes

Mr Bao

I stand to defend myself, I wish to fight my – to fight this case anyhow I see proper. I will bring total justice.

Okay, we will be ruling on your application this afternoon at...

5. The Court then attempted to adjourn, at which point, counsel for the prosecution, Mr Luc Côte, stood up and indicated that he did not understand the exact nature of Mr Bao's application. He said:

> With your permission, Your Honour. I just want to understand clearly. You said you are going to Rule on the application of the accused. Is this an application from the accused to replace his lawyer, to have no lawyer, to represent himself? If this is such a case I would have some representation to

> make, but I don't clearly understand what is the application as Your Honours consider it made by the Accused.

The learned Judge President replied:

> He says he does not want any lawyer to represent him here because he does not recognise the Court.

After further brief interchanges between His Honour Judge Thompson, prosecution counsel and the judge President, the Trial Chamber adjourned affording no opportunity to any counsel for the defence to be heard on this matter.

6. When the Court resumed, it gave its ruling, again without first hearing from any counsel for the defence. The following morning, the 7th July 2004, the accused absented himself from court and did not attend for the remainder of the trial session.

Ground 1: Application of the incorrect rule and test

7. It is respectfully submitted that the Trial Chamber erred in addressing the issue before it as one of withdrawal of counsel rather than an issue of the right of the accused to choose whether to have counsel. In particular, it erred in making a ruling in terms of Rule 45(E) in deciding upon Mr Bao's application to dispense with the services of his lawyers and/or defend himself, since this provision addresses the situation where counsel has applied to withdraw from the proceedings, rather than the situation where the accused applies not to have counsel. Rule 45(E) therefore deals with the right of counsel to withdraw, and is limited in its scope of regulation of the relationship between counsel and the Court, and is not concerned with the rights of the accused, which are addressed in Article 17 of the Statute and Rules 26 *bis*, 42 and 61 of the Rules of Procedure and Evidence. Accordingly, the case referred to in the decision of

the Trial Chamber, *Prosecutor v Barayagwiza*,[1] does not assist in the present case because that case involved a decision on an application from counsel to withdraw and the Trial Chamber in that case held that it was not clear that the client had terminated the mandate of counsel. Another case, *Prosecutor v Nzirorera*, involved an application from the accused, but this was an application under Rule 45(H) of the Rules of Procedure and Evidence of the International Criminal Tribunal for Rwanda, which at the relevant time concerned applications to request the replacement, as opposed to abandonment, of counsel and expressly permitted such applications from the accused. This case is therefore also of little assistance in this case.

8. It is submitted that the tests to be applied when considering the question whether counsel may withdraw from a case or whether an accused may choose to have or not to have counsel are necessarily and should be quite different. In the case of counsel withdrawing the Court must determine whether there are 'the most exceptional circumstances' which justify that withdrawal. The ability for counsel to choose to withdraw is therefore the rare and limited exception rather than the rule. This is understandable since counsel is under a professional duty to his client and the court. It would therefore be unjust to allow counsel to withdraw from a case where it may prejudice the interests of the client without proper justification. A decision to dispense with counsel may constitute exceptional circumstances for the purposes of an application by counsel to withdraw, but this issue does not even arise in this case in the absence of an application by counsel to withdraw.

9. It is respectfully submitted that the test for permitting an accused person to decide whether to have or not to have counsel is inevitably different. An accused, unlike counsel, owes no professional duty to counsel or the court. It is his own interests which are most affected by the trial. Further, it has been recognised that the right to choose whether to have counsel is a minimum guarantee. In these circumstances it is submitted that it would make no sense to apply the same test to a request to dispense with counsel as to an application

[1] *Prosecutor v Barayagwiza*, Case No ICTR-97-19-T, Decision on Defence Counsel Motion to Withdraw of 2 November 2000

by counsel to withdraw. It would further be strange to on the one hand describe the right as a minimum guarantee and on the other to require exceptional circumstances before the accused could exercise that right.

10. Therefore, it is submitted that Rule 45(E) was not designed to and does not address the issue faced by the court, but may only be applied when faced with an application by counsel to withdraw. Accordingly, it is submitted that Trial Chamber's decision not to withdraw counsel under Rule 45(E) was an invalid exercise of discretion since the discretion under that Rule may only be exercised if there is an application by counsel to withdraw.

11. Further and or in the alternative, the Court wrongly applied the test contained in Rule 45 (E) when reaching its decision. In the absence of a specific Rule to deal with the situation where an accused opts to dispense with his counsel, the Chamber should, it is submitted, afforded its own interpretation to article 17 of the Statute providing for the right to have or not have counsel, and devised a test based on general principles of law and the object of the right.

12. Even if it were clear that Mr Bao did not intend to actively appear and defend himself, this would not affect the analysis since the fact that no rule specifically caters for this situation does not justify relying on a rule which is not designed to cover the situation. The Chamber should have rather relied directly on the Statute and given it an interpretation to determine the appropriate test. Even if the Statute does not provide sufficient detail, in the absence of an applicable rule, the court can provide that detail.

Ground 2: Failure to take into account the right not to have counsel and/or the right to defend oneself.

13. Further, it is respectfully submitted that the Trial Chamber erred in not having regard to the right not to have counsel and/or the right to defend oneself, as

well as the fundamental nature of that right(s). The Trial Chamber referred to the right to have counsel, but did not acknowledge that this right clearly and necessarily implied the right not to have counsel. Further, it failed to have any regard to the preceding sentence of Article 17 which refers to the right to defend oneself. In the alternative the Trial Chamber makes no finding on whether it is dealing with a case of self-representation and/or wrongly and silently premised its decision on a misunderstanding of the meaning and import of the right to self-representation.

14. It is submitted that the right to have counsel is the right of the accused and no-one else. Further, it is a right which may be waived by the accused. Accordingly, it is submitted that it is as much his right not to have counsel as to have counsel. This must in principle be a matter of decision for the accused himself. The Trial Chamber did not take into account or gave insufficient weight to the fact that it is the right of the accused and therefore should not in principle be imposed upon him, except in the most exceptional circumstances. In the alternative, it did not take into account or gave insufficient weight to the right not to have counsel which necessarily follows from the right to have counsel. To this extent, the question whether Mr Bao wished to *actively* defend himself is an independent question which does not affect his right not to be represented by lawyers. Accordingly, in so far as the Trial Chamber did not feel that it was faced with a situation where an accused wished to defend himself, this does not alter the position that he did not wish to have lawyers, and the Chamber should therefore, it is submitted have given due regard to the fact that this decision is the right of the accused.

15. Further, it is in any event respectfully submitted that the right to self-representation is not conditional on appearance in court or active participation while in court. It is submitted that it should be understood as essentially the same as the right not to have counsel. Non-appearance or non-participation relate rather to the manner of self-representation than the fact of self-representation. Self-representation, it is submitted, in itself refers to nothing more than the opposite of having legal representation. It is effectively a right to choose between two alternatives, representation or no representation. It is

submitted that for all practical purposes a situation where an unrepresented accused does not appear, a situation where the unrepresented accused attends Court but remains silent or the situation where he takes part in the proceedings but in a manner which does not advance his defence in any way are all indistinguishable for present purposes. In each case the accused does not have a lawyer and his defence is not being advanced. There is therefore no magic in the fact of appearance for an unrepresented accused and therefore no reason to consider that an accused has the right to defend himself actively in court, but not to defend himself inactively or while absenting himself. Such a position would be inconsistent with the right to silence and operate on the false premise that an accused who actively defends himself is necessarily in a better position than one who does not. If he does not take active part in the proceedings, this is a matter which the Court can address in other ways which do not infringe upon the accused legitimate choice not to be legally represented and to remain silent through the proceedings though his absence or otherwise. Arguably, such measures may be necessary in any event where an accused actively defends himself incompetently.

16. Further and or in the alternative, the Trial Chamber failed to properly investigate and determine the import of the statements of the accused including that of 'taking any independent action deemed proper for my defence in the interests of transparent justice' and that 'I stand to defend myself, I wish to fight my – to fight this case anyhow I see proper. I will bring total justice'. The Trial Chamber does not in its Decision on the withdrawal of counsel make any factual finding with regard to whether Mr Bao wishes to defend himself. Mr Bao clearly made a statement which could at least be interpreted as a wish to defend himself or a raise an inquiry thereof. While the accused generally appeared not to wish to participate in the proceedings which he viewed as illegal and has now manifested an intention to boycott the proceedings entirely, at the time of his statement that he wished to dispense with his lawyers, he had not yet absented himself from Court but was attending, and these statements about self-defence raised doubts about his true intentions with regard to future proceedings. Mr Bao's motive for such a statement appeared to be his non-recognition of the Court and/or the Trial Chamber's

interventions preventing him from making a statement to the Court in these terms. However internally inconsistent or illogical this position might seem to the Court, the statement was made and needed to be factored into its decision. This required the Trial Chamber to clarity what the accused meant before rendering a decision and in the event that he indeed did intend to actively defend himself, take this into account in its decision. Indeed, prosecution counsel had indicated that he was not clear as to exactly what position the accused was taking and wished for clarification. The Trial Chamber therefore erred in not inquiring further from the accused as to what he meant and what his intentions were with regard to self-representation, and consequently in the event that Mr Bao really did intend to defend himself in some manner also in failing to take such intention into account in rendering its decision.

17. Further and/or in the alternative, it is submitted that the right to choose whether to have representation is a fundamental right and therefore subject to the most exceptional limitation only in order to put into place measures to protect the ends of justice. This right is enshrined in major international human rights instruments.[2] It is submitted that the Trial Chamber failed to have any regard to the fundamental nature of the right or even to consider the extent to which the right was fundamental or a minimum guarantee. This is evident from the failure to refer to the right not to have counsel at all or its fundamental nature, the failure to refer to the fundamental nature of the right to counsel or the right to self-representation, and the treatment of the test for affording such right as equivalent to the test for withdrawal of counsel under Rule 45(E).

[2] Article 14(3)(d) of the International Covenant on Civil and Political Rights of 1966; Article 7(1)(c) of the African Charter on Human and Peoples' Rights of 1981; Article 6(3)(c) of the European Convention on Human Rights and Fundamental Freedoms of 1950.

Ground 3: Failure to apply the principles of necessity and proportionality in deciding on the appropriate measure to protect the proceedings

18. Measures for the protection of a fair trial and the integrity of the proceedings should only interfere with the rights to choose whether to have legal assistance and/or to self-representation to the extent necessary to protect the fairness of the trial and the integrity of the proceedings, but in no case should deny the accused his freedom to dispense with representation. It would be sufficient, it is submitted to appoint counsel to act on behalf of the court in the interests of preserving the fairness of the trial rather than imposing a lawyer on the accused. In such circumstances, the lawyer would be acting for the court and not the client. His or her duty would be primarily to the court to act in a manner that assists the defence of the accused to the extent necessary to protect the fairness of the trial. His only duty to the accused would be to advance the interests of the defence in so far as possible. Such a solution would be proportional to the need to preserve the fairness of the trial and integrity of the proceedings without nullifying the accused right to choose whether to have counsel.

19. Imposing counsel on an accused has several unnecessary and potentially damaging consequences. First, it means that the Court operates on the assumption that the accused is properly represented, an assumption which is fictitious, since the lawyer may not be receiving instructions or assistance from his client, or even obstruction. The Court then has no need to actively ensure the rights of the accused are being protected in the way it might where an accused in unrepresented. Further, the Court may assume that acts on the part of counsel such as admissions, or failure to put issues to witnesses are properly done and hold them against the accused. If counsel is only getting sporadic instructions because of the accused hostility to the imposition of counsel, the combination of privilege and the duty of confidentiality may prevent any clarity on where counsel is and where he is not acting with instructions or authority. Where counsel is imposed, the Court must assume a normal lawyer client relationship and prejudice to the accused may result. So

the Court is both totally unclear of the extent of cooperation from the client and insufficiently proactive in the proceedings.

20. Second, it places counsel in a fictitious position where he is expected to act on behalf of the accused in a manner which is inconsistent with his lack of instructions and cooperation from the accused. His duty remains indistinguishable from that when he is properly instructed and in endeavouring to perform that duty he may cause damage not only to the defence of the accused, but also to that of co-accused.

21. Third, it is capable of creating such a hostile relationship between the client and the lawyer, because the client wishes are being ignored that in the event that the accused decides to have representation, the person best placed to represent him may not be able to do so or do so effectively.

22. Fourth, it opens the door to the accused playing the lawyer off against the court by virtue of the fiction that the lawyer may be acting on instructions.

23. Fifth, counsel has complete control over the case.[3] This prevents the accused from challenging the acts and omissions of counsel or taking his own active part in the proceedings such that no-one is in a position to put the accused defence to the court.

24. It is submitted that all these undesirable consequences can be avoided by appointing a lawyer on behalf of the court directly rather than directly on behalf of the accused, so that the lawyer's role is more clearly defined for all concerned, the lawyer himself, the court, the accused and the prosecution. All parties are then clear that the lawyer is acting on behalf of the court to protect the interests of the accused, and the role can be appropriately refined and limited accordingly to avoid unnecessary prejudice to the defence caused by

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[3] See further *Swinfen v Lord Chelmsford* (1860) 5 H & N 890; *Lynch v Cowell* (1865) 12 LT 548; *Strauss v Francis* (1866) 1 QB 379 at 381, 383; *Earl of Beauchamp v Madresfield* (1872) LR 8 CP 245 at 253 per Brett J; *R v Greenwich County Court Registrar* (1885) 15 QBD 54 at 58, CA; *Matthews v Munster* (1887) 20 QBD 141, CA.

the false assumption that the lawyer is operating under the normal conditions required for a defence to be mounted.

Ground 4: Failure to hear counsel for the accused before ruling on the issue

25. The Trial Chamber erred in ruling on Mr Bao's application before hearing from counsel for the accused on the appropriate course to be taken having regard to Mr Bao's statement that he did not wish legal representation. While counsel had invited the Trial Chamber to hear the nature of the complaint with regard to legal representation directly from the accused, once the accused had informed the court of his wish to dispense with legal representation, it was then incumbent on the Trial Chamber to seek the views of all the parties before proceeding to the delivery of a decision on the question. Counsel for Mr Bao must be heard both because they continue to represent the interests of the accused until otherwise ordered by virtue of the principle of regularity, and because they are personally affected by the Order of the Court. Counsel for co-accused must be heard because the interests of their clients are affected by the manner of representation for the co-accused.

26. It is respectfully submitted that the Chamber cannot assess what is effectively in the best interests of the trial without hearing counsel for the accused since there are relevant factors peculiarly within the knowledge of counsel. For instance, only counsel can advise the court of his position under his national code of conduct. While the Court may attempt to force counsel to continue, this may be unrealistic in a situation where the counsel would be in breach of his or her national code of conduct. Counsel faced with such a conflict may have to decide between a rock and a hard place: exclusion from proceedings before the Court for contempt of an Order and exclusion from the practice of law altogether having breached his or her national code.

27. In this case counsel had taken the view that the Trial Chamber's decision did not necessarily conflict with their national code of conduct, but the potential

difficulties created in other cases emphasises the importance of seeking guidance from counsel as to where the Trial Chamber's decision would place them personally. While it is recognised that the Court's rules take precedence over national rules in the international domain, it is submitted that both professional courtesy and practical expediency make the personal constraints of counsel a relevant consideration which must be taken into account in deciding where the interests of justice lie. This is the case for the sake of the accused and that of counsel whose professional interests are personally affected by such a decision.

Ground 5: Imposition or dismissal of counsel not properly primarily within the judicial province

28. It is respectfully submitted that the issue of the appointment, assignment, or dismissal of counsel to an accused is not in principle a matter within the judicial province. It is a question of a relationship and agency as between the client and the lawyer. It is therefore, a matter first of all within the discretion of the accused, second a matter for the discretion of counsel having regard to his professional duties and ethics, and finally for the principal defender. This decision of counsel is subject to the supervisory jurisdiction of the court, applying the criteria set out in Rule 45(E). Further, the Trial Chamber is not prevented from taken other measures for the maintenance of the integrity of the proceedings such as the appointment of amicus or stand-by counsel, or the removal of rights of audience of counsel for inappropriate and contemptuous behaviour. In the English case of *R v Shaw* it was stated that:

> It is not however within his province to dismiss counsel from the case, or order him to remain if counsel is required by etiquette of the Bar to withdraw. In the latter event, the most that the judge can do is to invite counsel to assist the court in the manner contemplated by the ruling of the Council of the Bar.[4]

[4] *R v Shaw* [1980] 2 All ER 433, at 435

29. It is respectfully submitted that the lawyer client relationship is no more a matter within the judicial province than the appointment and dismissal of prosecution counsel within the Prosecutor's Office. It would be contrary to the principle of equality of arms for the judges to purport to have power over the relationship between client and lawyer, but not over the relationship between Prosecutor and prosecution counsel.

30. Rule 45 (E) does not alter the position that it is primarily a matter for counsel and the Principal Defender and not for the Court to determine the appointment, continuation and dismissal of counsel in a case. This provision effectively allows for a supervisory jurisdiction to be exercise to the extent necessary to protect the integrity of the proceedings. It is in the first instance for counsel and the Principal Defender to determine whether there are exceptional circumstances requiring withdrawal from the case. The Court should, it is submitted, exercise a review over such decisions, but it is not a matter which should properly be considered to be primarily within the province of the Court. While Rule 45(E) impliedly grants the Court the power to make orders in this respect, it simply lays down the standard to be applied by counsel and the Principal Defender without requiring either to apply to the Court for permission and a decision permitting counsel to withdraw.

31. Furthermore, this principle of defence counsel's prerogative applies *a fortiori* in cases where counsel is dismissed by the client, for in such cases the relationship is terminated by the client's dismissal and not by the lawyer's withdrawal. In such cases therefore, as submitted above, Rule 45(E) has no application at all. Other than in the case of replacement, there is no express provision in the Rules prohibiting the client from terminating the relationship or laying down conditions as to when such termination can be effected by the client. The Court would have to rely on Rule 54, its general powers with a view to controlling the integrity of the proceedings through measures designed to minimise the damage caused by such a decision from the accused. It is submitted that while it is within the discretion of a judge whether to allow an accused to dismiss his counsel, that this discretion is more a matter of review of the client's decision than the Court's prerogative. Accordingly, an exercise

of discretion which does not permit the client to dismiss counsel should be exercised exceptionally and only in circumstances where there is no reasonable alternative for preserving the integrity of the proceedings and the fairness of the trial. Where no evidence has been heard and counsel has not begun to address his arguments to the Court, the client should not be obstructed in his decision, subject to other protective measures being taken. It is noted in Halsbary's Law of England:

> If during the course of a hearing a litigant wishes to dispense with the services of his counsel and conduct his own case, it is a matter for the discretion of the judge whether to allow him to do so; but no one ought to have counsel forced upon him against his will, and such an application should normally be allowed, at any rate if made before all the evidence has been heard and before counsel has begun to address his closing arguments.[5]

Ground 6: Irrationality and inequality of treatment in departing from decision in case of another accused

32. The Trial Chamber erred in making an Order which provides for a solution to Mr Bao's request to represent himself which differed significantly from the Order made in response to Mr Hinga Norman's request to represent himself in the CDF Trial,[6] without setting out its basis for distinguishing between the two situations. In one case, that of Norman, the right to self-representation was accorded with qualification. In the other case, that of Bao, the right to self-representation was denied. In both cases the accused had indicated that they did not wish to be represented by counsel and in both cases the constitutionality or legality of the Special Court for Sierra Leone respectively was raised by the accused in their purported opening statements. In both cases, the issue of representation was being raised by the accused rather than a

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[5] Halsbary's Laws of England, volume 3(1), Paragraph 517.

[6] *Prosecutor v Sam Hinga Norman, Moinina Fofana and Allieu Kondewa*, Case No SCSL-04-14-T, Decision on the Application of Samuel Hinga Norman for Self Representation under Article 17(4)(d) of the Statute of the Special Court of 8th June 2004.

formal application from counsel to withdraw. It is therefore respectfully submitted that the Trial Chamber's Order at a minimum fails to take into account its approach in the case of Norman and at its highest violates Article 17(1) of the Special Court Statute which provides for the equality of accused before the Special Court for Sierra Leone, as well as compromises the consistency of the jurisprudence without express justification, such essential to the fairness of the trial and the effective preservation of the principle of legality.

33. The absence of Mr Bao from the proceedings was not raised by the court as a distinction in its decision on withdrawal, but this cannot in any event constitute a legitimate distinction from the case of Norman. Mr Bao did not take the position of absence until the delivery of the decision of the Chamber with regard to his counsel. It is therefore unknown whether the accused would have absented himself from the proceedings had he been granted his request to dispense with counsel. The fact that Mr Norman had written a letter clearly setting out his position that he did not wish to be legally represented is also not a valid distinction. Mr Bao also made this request, although the construction of his sentence and surrounding circumstances may have indicated a high degree of ambibuity. The Chamber was in a position to clear up this ambiguity by further questioning the accused, which it did not do, despite the indication from the prosecution counsel that he did not understand exactly what Mr Bao was requesting. In any event, it is respectfully submitted that even if Mr Bao was not representing to the Chamber that he wished to conduct his own defence, this was not a valid distinction from the case of Norman. In both cases, the accused did not wish to be legally represented or provide instructions to a lawyer. In those circumstances, Mr Bao cannot be treated as if he is properly represented, while Mr Norman is not. There does not appear to be any reason why Mr Bao should not have had stand-by counsel as opposed to legal representation, in the same manner as Mr Norman. In neither case can the counsel effectively represent to the Court the defence of the accused. Indeed, if Mr Norman were to represent himself with complete incompetence, there would be no real distinction at all between him and an accused who takes no active part in the proceedings.

34. Even if it were clear that Mr Bao did not intend to defend himself, this would not affect the analysis since it would not affect his stance of not providing instructions to the lawyers. In such a case, whether he defends himself or not, the lawyers cannot present his defence or effectively challenge the prosecution evidence.

Ground 7: Irrationality in requiring the impossible

35. It is submitted that the notion of representation necessarily entails authority and instructions.[7] Without either, counsel cannot be said to be representing an accused person. The idea of representation is that the court is appraised of the defence through the representative and this assumes the capacity to undertake this tack. The Order to counsel to continue to represent the accused even in the absence of authority and instructions to do so from the client is therefore requiring counsel to do the impossible. Counsel cannot, it is submitted, be said to be representing an accused in circumstances where he cannot effectively know the accused line of defence to prosecution witness testimony. Further, it is submitted that it is inherent in the notion of representation that the accused does not need to personally confront the allegations in court when counsel is doing it on his behalf. Yet without authority, cooperation or instructions, there cannot be representation of the interests of the accused in a meaningful sense. This is even more so where the accused is absent from court, since active fictional representation can lead to situations where counsel acts in a manner which the accused is not in a position to challenge, but which the court can hold against him in the determination of guilt or innocence.

36. If the court had taken the position that the accused may dispense with the services of his counsel, but that counsel would be appointed to act on behalf of

[7] See Halsbary's Laws of England, volume 3(1), par 517: 'a barrister's authority to appear in an action is conferred by his instructions'. See further *Ahetbol v Benedetto* (1810) 3 Taunt 225; *Doe d Crake v Brown* (1832) 5 C & P 315.

the court as stand-by counsel or amicus, then it would have given counsel a mandate which is not impossible and meets with reality.

37. First it puts counsel into a clearer position as to the nature and extent of his role. It enables counsel to make decisions as to what is ethical and not ethical, what is appropriate and what is not appropriate in the context of a real as a opposed to a fictional mandate. Second, it leaves the court in no doubt that the accused is still unrepresented and therefore still more vulnerable than a properly represented accused. It prevents the court from holding the actions of counsel against the accused. It forces the court to take a more proactive role where appropriate in ensuring the interests of a fair trial. It enables the accused to take an active part in proceedings, if he so chooses at any stage. It further provides more scope for cooperation between counsel and the accused, since counsel is not purporting to be acting as the accused representative against his express consent and instructions. Finality, it prevents an impression that the accused is in an equal position to co-accused in terms of his ability to conduct a defence.

38. Further, it is significant to note that justice must not only be done but also seen to be done. This is a public trial attracting great interest in the community. The pretence that the accused is properly represented pulls a mask over the reality of the situation to the general public. If counsel acts as stand-by or amicus, this is a public acknowledgment and permits public recognition of the factual reality that the accused is in fact unrepresented, with the Chamber merely assisting the fairness of the trial through a court appointed lawyer acting on behalf of the court rather than on behalf of the accused.

Ground 8: Failure to have regard to the misleading impression which might be created for the public

39. 'Justice must not only be done but must manifestly and undoubtedly be seen to be done.'[8] It is respectfully submitted that since the accused is entitled to a public hearing, the mere imposition of counsel without consent, authority or instructions from the accused creates the misleading impression to the public that the accused is properly represented and that his interests are being fully protected. It is submitted that this is a situation which needs to be avoided and a relevant factor to be taken into consideration when determining the accused wish to dispense with lawyers. The Trial Chamber failed to have any regard to this in reaching its decision.

RELIEF SOUGHT

It is hereby requested that the Appeals Chamber order:

(1) that the accused be accorded his right not to have counsel representing him
(2) that the Trial Chamber be ordered to consider alternative measures for the protection of the integrity of the proceedings and the fairness of the trial such as the appointment of amicus or stand-by counsel.

In the alternative:

(1) that the Trial Chamber reconsider its decision having heard counsel for the defence and prosecution and in the light of the findings of the Appeals Chamber.

pp:
Andreas O'Shea
Counsel for Augustine Bao
15th September 2004

[8] See *R v Sussex Justices, ex parte McCarthy* (1923) 1 KB, per Lord Hewett CJ

INDEX OF DOCUMENTS

1. Decision on Withdrawal of Counsel of 6th July 2004
2. Transcripts of trial for 5, 6 and 7 July 2004
3. Power of Attorney, April 2003
4. Exhibit 1: Declaration of Augustine Bao, dated 7th July 2004