384) SCSL-04-16-T (14728 – 14731) 14728

SPECIAL COURT FOR SIERRA LEONE
JOMO KENYATTA ROAD • FREETOWN • SIERRA LEONE
PHONE: +1 212 963 9915 Extension: 178 7000 or +39 0831 257000 or +232 22 295995
FAX: Extension: 178 7001 or +39 0831 257001 Extension: 174 6996 or +232 22 295996

TRIAL CHAMBER II

Before: Justice Teresa Doherty, Presiding Judge
Justice Richard Lussick
Justice Julia Sebutinde

Registrar: Robin Vincent

Date: 14 September 2005

PROSECUTOR Against Alex Tamba Brima
Brima Bazzy Kamara
Santigie Borbor Kanu
(Case No.SCSL-04-16-T)

SEPARATE AND CONCURRING OPINION OF JUSTICE R.B. LUSSICK ON BRIMA - KAMARA APPLICATION FOR LEAVE TO APPEAL FROM DECISION ON THE RE-APPOINTMENT OF KEVIN METZGER AND WILBERT HARRIS AS LEAD COUNSEL

First Respondent
Registrar

Second Respondent
Principal Defender

Defence Counsel for Alex Tamba Brima:
Kojo Graham
Glenna Thompson
Defence Counsel for Brima Bazzy Kamara:
Andrew Daniels
Mohamed Pa-Momo Fofanah

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I. INTRODUCTION

I agree with the majority decision (delivered on 5 August 2005, just before the judicial recess) that the application for leave to appeal should be granted. However, I am appending this separate concurring opinion because I am of the view that a different reasoning ought to have been applied to arrive at that outcome. In my opinion, the application for leave to appeal was brought out of time, and the Trial Chamber ought therefore to have considered the effect of the applicants' non-compliance with the Rules before arriving at a decision.

The impugned majority decision was delivered on 9 June 2005. The dissenting opinion was delivered on 11 July 2005 and the application for leave to appeal was filed on 14 July 2005. For the reasons which follow, I hold that the application for leave should have been filed by 13 June 2005 at the latest.

II. DELIBERATIONS

Leave to appeal a decision on a motion must be sought within 3 days of the decision.

Rule 73 (B) provides as follows:

> 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.

The meaning of "decision" was considered by Trial Chamber I in the case of *Prosecutor v. Sam Hinga Norman et al., Decision on Prosecution Application for Leave to Appeal 'Decision on the First Accused's Motion for Service and Arraignment on the Consolidated Indictment'*, dated 15 December 2004. In that case, two concurring opinions were delivered on 29 November 2004 and a dissenting opinion was delivered on 3 December 2004. The motion for leave to appeal was filed 3 days after that on 6 December 2004.

Trial Chamber I, deliberating the correct time limit for the filing of an interlocutory appeal, held as follows: "Considering that the Prosecution filed the Application within the time limits prescribed in Rule 73 (B) of the Rules and in conformity with Rule 7 (A) of the Rules and paragraph 8 of the Practice Direction for Certain Appeals Before the Special Court, and that the time limits for filing of an interlocutory appeal run from the day after the filing of the complete Decision of the Trial Chamber, which includes in this instance, a Separate and Concurring Opinion and a Dissenting Opinion."

I note that, although Trial Chamber I was of the view that its "complete" decision included a separate concurring opinion and a dissenting opinion, it qualified that description by the words "in this instance". However, if Trial Chamber I meant that, as a general proposition, the time limit for filing an interlocutory appeal runs from the day after the filing a dissenting opinion rather than the date of the delivery of the majority decision, then, with the greatest respect to my colleagues in that Trial Chamber, I beg to disagree with them.

The *Practice Direction for Certain Appeals Before the Special Court*, which was referred to by Trial Chamber I, was issued by the President pursuant to Rule 107 and Rule 117 and after consultation with the Vice-President. It establishes a procedure for the filing of notice of appeal, grounds of appeal

and written submissions in appeal proceedings under (inter alia) Rule 73 (B). The following provisions (emphasis added) make it clear that a dissenting opinion is not taken into account for the purposes of bringing an appeal.

Paragraph 6 of the Practice Direction states:

> 6. *A party wishing to appeal from a decision of a Trial Chamber which may be appealed only with the leave of the Trial Chamber, or a Single Judge of the Appeals Chamber, or the Appeals Chamber, shall file and serve on the other parties in accordance with the Rules, an application for leave to appeal accompanied by a copy of* ***the ruling or judgment appealed*** *and containing:*
>
> a. *the precise title and date of filing of the* ***decision sought to be appealed;***
>
> b. *a summary of the proceedings before the Trial Chamber relating to the* ***decision sought to be appealed*** *including an identification of all relevant documents in the proceedings before the Trial Chamber, clearly stating the title and date of filing of each document or the page number of a transcript;*
>
> c. *the specific provision of the Rules under which leave to appeal is sought;*
>
> d. *a concise statement as to why it is contended that the applicable criteria for the granting of leave to appeal under the provision relied upon have been met.*

Paragraph 7 states:

> 7. *Unless otherwise provided in the Rules, the application shall be filed within seven days of the* ***impugned decision.***

Paragraphs 10 sets out certain requirements concerning the **appealed decision.**

A dissenting opinion is not an "impugned decision", nor is it a "decision sought to be appealed". In fact, a court delivering a majority decision is not even obliged to append a dissenting opinion, although it may do so. Rule 88 (C) states: *The judgement shall be rendered by a majority of the Judges. It shall be accompanied by a reasoned opinion in writing. Separate or dissenting opinions may be appended.*

It is only a majority decision that a party can appeal. A dissenting opinion obviously cannot be regarded as part of a majority decision, whether for the purpose of determining the time for bringing an appeal or otherwise.

It is true that a dissenting opinion might be helpful in supporting the submissions of a party on appeal. However, a party cannot ignore the time limit set by Rule 73 (B) merely to await the dissenting opinion. At the stage of seeking leave to appeal, the party need only argue the test of

"exceptional circumstances" and "irreparable prejudice"[1]. It is not necessary to view the dissenting opinion before arguing those requirements. However, once leave to appeal has been granted, the party may seek additional time from the Appeals Chamber to wait for the dissenting opinion in order to support its arguments on the appeal. It is only at that later stage that a dissenting opinion may become important to a party, not at the Rule 73 (B) stage.

As mentioned earlier, the impugned decision was delivered on 9 June 2005 but the application for leave to appeal was not brought until 14 July 2005. Accordingly, I hold that it was brought out of time in contravention of Rule 73 (B).

There was no motion for an extension of time. On the other hand, neither of the Respondents have objected to the Applicants' non-compliance with the Rules.

Furthermore, I take into account that the application for leave to appeal was filed in accordance with a precedent established by Trial Chamber I and that this is the first time that this particular issue has come before this Trial Chamber.

In the circumstances, I hold that it would not be in the interests of justice to dismiss the application because of the late filing.

III. DISPOSITION

Having adjudicated on the Applicants' contravention of the Rules, I would ALLOW the application for leave to appeal for the reasons set out in the majority decision.

Done at Freetown this 14th day of September 2005.

Justice Richard Lussick

[Seal of the Special Court for Sierra Leone]

[1] The Appeals Chamber has recently ruled that the test in Rule 73 (B) is not "satisfied merely by the fact that there has been a dissenting opinion on the matter in the Trial Chamber", see Prosecutor v. Norman et al., Case No. SCSL -04-14-AR73, Decision on Amendment of the Consolidated Indictment, 16 May 2005, para. 43.