

SPECIAL COURT FOR SIERRA LEONE
OFFICE OF THE PROSECUTOR
Freetown – Sierra Leone

Before: Justice Pierre Boutet, Presiding
Justice Bankole Thompson
Justice Benjamin Itoe

Registrar: Mr. Robin Vincent

Date filed: 12 July 2005

THE PROSECUTOR

Against

Samuel Hinga Norman
Moinina Fofana
Allieu Kondewa

Case No. SCSL-04-14-T

**REPLY TO JOINT DEFENCE RESPONSE TO PROSECUTION REQUEST FOR
LEAVE TO APPEAL DECISION ON PROSECUTION MOTION FOR A RULING ON
THE ADMISSIBILITY OF EVIDENCE**

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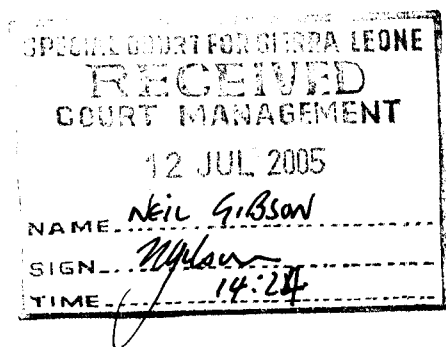
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I. INTRODUCTION

1. The Prosecution files this Reply to the “Joint Defence Response to Prosecution Request for Leave to Appeal Decision on Prosecution Motion for a Ruling on the Admissibility of Evidence”, filed on 7 July 2005 (“Response”).
2. In the Response, the Defence argues that the Prosecution’s motion should be denied on the following grounds:
 - a. The alleged errors of law do not amount to exceptional circumstances;
 - b. The disagreement amongst Judges does not amount to an exceptional circumstance; and
 - c. The Prosecution has failed to demonstrate irreparable prejudice.
3. The Prosecution reiterates its submissions in its initial request and submits that it has met the test of exceptional circumstances and irreparable prejudice under Rule 73(B).

II. ARGUMENTS

4. The Defence argues that Rule 73(B) does not confer a *right* to appeal and has been interpreted restrictively before the SCSL. In support of this argument, the Defence refers to the fact that the court has granted leave to appeal on only two occasions in the CDF case, both of which raised “issues of broad procedural importance whose impact was likely to be felt beyond the confines of this trial.”¹
5. The Prosecution, by filing a request for leave to appeal, recognizes that the Trial Chamber has a discretion to determine whether or not to grant leave and that there is no appeal as of right in these circumstances. However, it is argued that the situation at hand is precisely the type of situation that meets the stringent requirements of Rule 73(B), and that given the totality of the circumstances, the Trial Chamber ought to exercise its discretion in favour of granting leave.

¹ SCSL-04-14-T, “Joint Defence Response to Prosecution Request for Leave to Appeal Decision on Prosecution Motion for A Ruling on the Admissibility of Evidence”, 7 July 2005, para. 10 (“Defence Response”).

6. As noted by this Trial Chamber, the restrictive nature of the provision does not suggest that “the Trial Chamber will remain indifferent to an application where deserving and meritorious grounds that meet the test laid down in Rule 73(B) have been advanced by the party seeking leave to file an interlocutory appeal.”² Without more, the restrictive nature of the provision cannot be the decisive factor in determining the application.
7. The Prosecution submits that its request raises issues of broad procedural and evidentiary importance to trials governed by international criminal law, namely, the extent to which uncharged conduct may be used as evidence in proof of charged conduct. The Defence acknowledges that these types of issue may meet the requirements of Rule 73(B).

A. Exceptional Circumstances

8. The Prosecution notes that the Court has rendered no fixed and authoritative definition of “exceptional circumstances” under Rule 73(B). The Court’s approach so far has been to decide applications on a case by case basis depending on the issues at stake.³ It should be emphasized that in making this determination, the Learned Justices have considered various factors in combination and not, as indicated in the Defence Response, the individual grounds standing alone.
9. In describing the scope of exceptional circumstances, this Trial Chamber stated in its “Decision on Defence Applications for Leave to Appeal Ruling of the 3rd of February, 2005 on the Exclusion of Statements of Witness TF1-141” of 28 April 2005 in *Prosecutor v Sesay, Kallon and Gbao*, that:

“Exceptional circumstances” may exist depending upon the particular facts and circumstances, where, for instance the question in relation to which leave to appeal is sought is one of general principle to be decided for the first time, or is a question of public international law importance upon which further argument or decision at the appellate level would be conducive to the interests of justice, or where the cause of justice might be interfered with, or is one that raises serious issues of fundamental legal

² SCSL-04-14-T, “Majority Decision on the Prosecution’s Application for Leave to File An Interlocutory Appeal Against the Decision on the Prosecution’s Request for Leave to Amend the Indictment Against Sam Hinga Norman, Moinina Fofana and Allieu Kondewa,” 2 August 2004, para. 25 (“Decision on Amendment”).

³ Decision on Amendment, para. 22.

importance to the Special Court for Sierra Leone, in particular, or international criminal law, in general, or some novel and substantial aspect of international criminal law for which no guidance can be derived from national criminal law systems.⁴

The alleged errors of law do not amount to exceptional circumstances

10. The Defence argues that the alleged errors of law do not constitute exceptional circumstances and that a request for leave to appeal is “not a vehicle for re-litigating substantive arguments formerly rejected by a Trial Chamber.”⁵ However, the present appeal does not seek to re-litigate decided issues. It will be recalled that the issue raised by the Prosecution Motion to Amend the Indictment⁶ was substantively different from the issues raised in this application. The question in the former was whether the accused persons could be *charged* with acts of sexual violence under Article 2.g of the Special Court Statute – a substantive matter. The issue that arises in the latter is an *evidentiary* matter which was addressed for the first time in the “Reasoned Majority Decision on Prosecution Motion on A Ruling on the Admissibility of Evidence.”⁷ The Trial Chamber was called upon to decide whether acts of sexual violence could be adduced as proof of allegations contained in the indictment, including non-sexual offences and command responsibility.⁸ The issue of re-litigation of determined issues does not arise.
11. The Defence argues further that “errors of law – to the extent any have been made – may be corrected by the Appeals Chamber in due course.”⁹ This argument assumes that the correction of an error of law by the Appeals Chamber automatically remedies any harm caused regardless of its nature. The SCSL Rules of Procedure and Evidence recognize that certain kinds of prejudice cannot be cured at the close of the trial and that it is only by a successful Rule 73(B) application that the interests of justice will be served.¹⁰ Therefore, to the extent that errors of law may cause irreparable harm, they constitute grounds for an

⁴ SCSL-04-15-T, “Decision on Defence Applications for Leave to Appeal Ruling of the 3rd of February, 2005 on the Exclusion of Statements of Witness TF1-141”, 28 April 2005, para. 26.

⁵ Defence Response, para. 12.

⁶ SCSL-04-14-T, “Prosecution Request to Amend the Indictment”, 9 February 2004.

⁷ SCSL-04-14-PT, 24 May 2005. The written decision was filed on 22 June 2005.

⁸ See for e.g. testimony of TF2-189, TF2-187 and TF2-135. SCSL-04-14-T, Transcript, 7-8 June 2005.

⁹ Defence Response, para. 12.

¹⁰ This is inherent in Rule 73(B) itself.

interlocutory appeal. The inability of the Prosecution to call evidence at this time to establish ingredients of the alleged offences, particularly individual criminal responsibility, cannot be fully and adequately corrected on appeal at the end of the trial.¹¹ The opportunity to recall witnesses to testify to the impugned evidence at that stage of the trial would be lost.

12. The Response claims that an appeal at this stage would “encumber and unduly protract the ongoing trials.”¹² While the potential impact of interlocutory appeals may be a factor to be considered in determining this application, it cannot override the need to ensure a fair trial. The fair trial guarantees apply equally to the Accused as to the Prosecution.
13. The Prosecution does not wish to protract the proceedings. Neither does it seek mere vindication through the creation of Appeals Chamber jurisprudence.¹³ There is no reason why the application should protract the trials given that a Rule 73(B) application does not operate as a stay of proceedings. Moreover, if leave were to be granted, the Appeals Chamber could make appropriate orders having regard to the circumstances of the case.
14. The Defence argues that granting leave would “necessitate granting a stay of the proceedings to obviate the need for a subsequent motion for acquittal should the Prosecution ultimately be permitted to present the contested evidence”.¹⁴ However, the Prosecution submits that adducing the evidence would not impact upon anything that can reasonably be expected to be canvassed in Rule 98 submissions. Thus, the Rule 98 procedure remains unaffected and would not require a stay of proceedings.
15. The request for an opportunity to adduce evidence in support of material factual allegations cannot be described as a mere pursuit of vindication or an “unjustified academic exercise.” At this stage of proceedings there is still the possibility of curing the harm occasioned if there is a ruling in favour of the adduction of the impugned evidence. On the other hand, the Prosecution would derive no significant benefit should this happen after the conclusion of the trial when the evidence will be rendered immaterial. Thus, what is at this stage of the proceedings crucial to the Prosecution and inherently practical, will be nothing more than an academic exercise if left until a final appeal against judgment.

¹¹ SCSL-04-14-T, Request for Leave to Appeal Decision on Prosecution Motion for a Ruling on the Admissibility of Evidence, 27 June 2005, para. 17.

¹² Defence Response, para. 13.

¹³ Defence Response, para. 13.

¹⁴ Defence Response, para. 13.

Disagreement between judges

16. The Defence, while recognizing that dissent amongst judges could be a relevant factor in granting leave, argues that the Prosecution has not established why the disagreement amounts to exceptional circumstances. Dissenting opinions do not necessarily amount to exceptional circumstances. Nevertheless, they are significant in the assessment of whether exceptional circumstances have been demonstrated where the divergence of opinion is fundamental or where it is one of several factors constituting exceptional circumstances. In addition, dissenting opinions may be highly indicative of the controversial and unsettled nature of the issues in question, calling for the intervention of the Appeals Chamber.
17. That the divergent views of judges are an important factor to be considered in determining leave to appeal is recognized by this Trial Chamber.¹⁵ In the Norman Arraignment Decision the fact that there was a majority decision, a separate concurring opinion and a dissenting opinion was significant in the decision to grant leave. The Trial Chamber opined that “...it does not conduce to the overall interests of justice and the preservation of the integrity of the proceedings to leave the law on such important issues in international criminal adjudication unsettled and in a state of uncertainty.”¹⁶ In this case too, the three separate opinions expressed by the Learned Justices of the Trial Chamber, coupled with the consistently differing opinions on questions linked to the current matter, calls for appellate resolution. It was further held in the Norman Arraignment Decision that the application raised serious issues that concern the charges against the Accused, and that it may impact on the right of the accused to a fair trial and *the presentation of the Prosecution case*.¹⁷ Similarly, not only does the decision of the Trial Chamber impact on the presentation of the Prosecution’s case, it is of fundamental importance in that it implicates fair trial guarantees as they relate to the Prosecution’s presentation of its case. The denial of the opportunity to adduce relevant evidence in support of material facts is of fundamental importance.
18. Reference is made by the Defence to the fact that the bulk of the Prosecution’s submissions is based on the dissent among the Learned Justices. However, the Prosecution’s request

¹⁵ SCSL-04-14-T, “Decision on Prosecution Application for Leave to Appeal ‘Decision on the First Accused’s Motion for Service and Arraignment on the Consolidated Indictment’”, 15 December 2004, p. 3. (“Norman Arraignment Decision”).

¹⁶ Norman Arraignment Decision, p. 3.

¹⁷ Emphasis added.

merely highlighted some of the significant diverse conclusions reached by the Learned Justices which warrant a resolution by the Appeals Chamber. Nowhere in the Prosecution's application is it argued that the sole basis for the request is the divergent opinions. The divergent opinions together with the other reasons mentioned in the Prosecution's application constitute exceptional circumstances.

19. The Defence alleges that the Prosecution does not provide any indication as to the "nature and significance" of the matters sought to be appealed. The Prosecution reiterates arguments in its Request that it would suffer incurable harm should the matter be left until the close of the case. The nature and significance of the application lies in the fact that relevant evidence has been excluded as a result of errors of law made by the Trial Chamber. Irreparable harm has been caused to the Prosecution given that the inability to adduce the said evidence cannot be cured at the conclusion of the trial.¹⁸

B. Irreparable Prejudice

20. The Defence claims that the Prosecution has failed to establish the irreparable prejudice arm of the test for granting leave due to a lack of specificity. The Prosecution refers to paragraph 33 of its application where it states: "The Prosecution has been precluded from adducing relevant evidence in support of the charges contained in the Consolidated Indictment, in particular, evidence proving individual criminal responsibility of the accused persons. This harm cannot be remedied at the close of the trial." This is a clear indication of the irreparable harm that has been occasioned by the Majority Decision.
21. The Defence further argues that "it is disingenuous to argue that the exclusion of irrelevant evidence has caused the Prosecution irreparable prejudice. Surely the Prosecution, in its adversarial zeal, does not hope to secure convictions on charges not properly pleaded in the Indictment."¹⁹ Indeed, this assertion, which appears to find support in the Majority Decision, sums up the fundamental error of law alleged by the Prosecution. The Defence seems to erroneously equate uncharged acts to "irrelevant evidence". The Prosecution maintains its

¹⁸ SCSL-04-14-T, "Request for Leave to Appeal Decision on Prosecution Motion for a Ruling on the Admissibility of Evidence," 27 June 2005, para. 33.

¹⁹ Defence Response, para. 19.

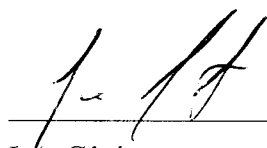
position that uncharged misconduct is not devoid of relevance simply because it is not pleaded in an indictment. The Defence also fails to distinguish between facts which ought to be pleaded in the indictment and the evidence by which those facts may be proved. The latter does not have to appear on the face of the indictment to be adduced at trial. In any event, the fact that the Trial Chamber denied the Prosecution's request to *charge* the accused persons with sexual offences does not strip those acts of evidentiary value.

III. CONCLUSION

22. For all the reasons discussed above, the Prosecution prays the Trial Chamber to grant it leave to appeal the Majority Decision.
23. The Prosecution submits that given the overall circumstances of the case and the fact that the adduction of the impugned evidence could not be cured at the close of the trial, the Trial Chamber should exercise its discretion in granting the application.

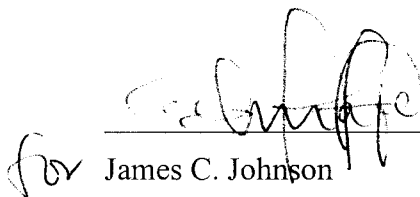
Freetown, 12 July 2005

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