SCSL-2004-14-T
(9110 – 9115)

SPECIAL COURT FOR SIERRA LEONE

THE APPEALS CHAMBER

Before: Judge George Gelaga King

Registrar: Robin Vincent

Date: 27 August 2004

THE PROSECUTOR

Against

SAMUEL HINGA NORMAN, MOININA FOFANA and ALLIEU KONDEWA

CASE NO. SCSL-2004-14-T

MOININA FOFANA

APPLICATION FOR LEAVE TO APPEAL AGAINST REFUSAL OF BAIL

Office of the Prosecutor:

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Defence Counsel for Moinina Fofana:

Michiel Pestman

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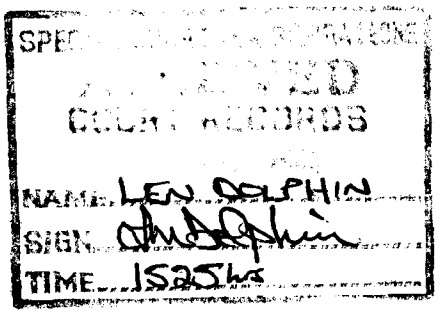

Samuel Hinga Norman

(Quincy Whitaker)

Defence Counsel for Allieu Kondewa:

Charles Margai

Introduction

1. The Defence for Moinina Fofana hereby files its "Application for leave to Appeal against Refusal of Bail" (hereafter the "Application").

2. On 27 January 2004 the Defence filed an "Application for Bail" on behalf of Moinina Fofana pursuant to Rule 65 of the Rules of Procedure and Evidence of the Special Court (hereafter "the Rules"). On 5 August 2004, more than six months after the filing of the Application for Bail, Judge Itoe rendered his "Decision on Application for Bail pursuant to Rule 65" (the "Decision"), in which it dismissed the Application for Bail for wont of merits .

3. In the following, the Defence will show good cause, as required by Rule 65(E), and it therefore respectfully submits that this Application be granted.

The law

4. Rule 65(E) of the Rules with respect to bail provides:

> (E) Any decision rendered under this Rule shall be subject to appeal in cases where leave is granted by a Single Judge of the Appeals Chamber, upon good cause being shown. Applications for leave to appeal shall be filed within seven days of the impugned decision.

5. The test of "good cause" has been held to require the Defence to make out a prima facie case that the Trial Chamber, or a single Judge of that Chamber, has erred in law and/or fact in making the impugned decision.[1]

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[1] *Prosecutor v Kallon,* "Kallon – Decision on Application for Leave to Appeal Against Refusal of Bail", 23 June 2004, para 6, citing *Prosecutor v Brdjanin and Talic* IT-99-36/1, "Decision on Application for Leave to Appeal", 7 September 2000; *Sagahutu v Prosecutor*, ICTR-00-56-I, "Decision on Leave to Appeal Against the Refusal to Grant Provisional Release", 26 March 2003, para 26; *Ndayambaje v Prosecutor*, ICTR-96-A-8, "Decision on Motion to Appeal Against the Provisional Release Decision of Trial Chamber II of 21 October 2002", 10 January 2003, para 29; and *Prosecutor v Simc et al.* IT-95-9, "Decision on Application for Leave to Appeal", 19 April 2000, para 11.

6. However in both the *Prosecutor v Sesay* [2] and *Prosecutor v Kallon* [3] Judge Gelaga King found this test to be too restrictive.[4]

7. In the Sesay Decision, citing an Appeals Chamber decision of the ICTY, [5] Judge Gelaga King went on to state that in some "special cases, 'good cause'" may include situations where there is a need for a full bench of the Appeals Chamber to give an opinion as to issues relating to provisional release.[6] The concept for good cause should, according to Judge Gelaga King,

> "be extended to include those instances where the question in relation to which leave to appeal is sought, is one of general principle to be decided for the first time, or a question of public importance upon which further argument and a decision of the Appeals Chamber would be in the interest of justice paying particular regard to the fact that ordinarily the 'accused may only make one application for bail to the Judge or Trial Chamber'.".[7]

Error of fact

8. In the Application and pursuant to Rule 65(B) of the Rules, the Defence outlined to the Trial Chamber its guarantees that Mr. Fofana will appear for trial and will not pose a danger to any person if he is released on bail.

9. In paragraphs 15 to 20 of the Application, the Defence highlighted Mr. Fofana's strong commitment to both his family and Chiefdom. Further, as Mr. Fofana is not in possession of travel documents or funds necessary to travel, his appearance at trial can be assured. In paragraphs 21 to 23 the Defence explained in detail why Mr. Fofana would not pose a danger to any victim, witness or any other person, if released.

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[2] *Prosecutor v Sesay, Kallon and Gbao,* SCSL-04-15T, "Sesay – Decision on Application for Leave to Appeal Against Refusal of Bail", 28 July 2004 (hereinafter "Sesay Decision"), para 12.
[3] *Prosecutor v Kallon,* "Kallon – Decision on Application for Leave to Appeal Against Refusal of Bail", 23 June 2004 (hereinafter "Kallon Decision").
[4] Sesay Decision para 12; Kallon Decision, para 8.
[5] *Prosecutor v Šćainović and Ojdanic*, Case No IT-99-37-AR65, "Decision Granting Leave to Appeal", 16 July 2002, p 2.
[6] Sesay Decision, para. 12.
[7] Sesay Decision, para. 13.

10. The defence further submits that Mr. Fofana agrees to the imposition of various conditions under Rule 65(D) deemed necessary by the Trial Chamber such as, but not limited to, those set out in paragraph 25 of the Motion.

11. The legal, moral and material guarantees offered by the Defence in support of the Mr. Fofana's bail application are substantial and, in the submission of the Defence, sufficient.

12. The Defence submits that Judge Itoe made an error of fact in paragraphs 68, 81 and 98 of the Decision as to the guarantees offered by the Defence. Aside from summarising the arguments put forward by the Defence and the Prosecution and restating jurisprudence, Judge Itoe only gave limited response, in any, to the specific guarantees raised by Mr. Fofana. These guarantees should have been sufficient to satisfy Judge Itoe that he would appear for trial and, if released, would not pose any danger to victims, witnesses or other persons.

Error of law

13. The Defence submits that Judge Itoe erred in his admission of the presented evidence and thus in the interpretation of Rule 89(C), which provides that "[a] Chamber may admit any relevant evidence".

14. The Defence strongly disagrees with Judge Itoe's reliance on the "best evidence rule" to decide the admissibility of the declaration submitted by the Defence.[8] The Defence submits that the "best evidence rule" advises a Judge as to the prioritisation of evidence. By logical inference the necessity of such process only arises *after* evidence has been admitted to a Chamber. Judge Itoe erred in his application of the "best evidence rule" to determine admissibility, rather than to assess the probative value of evidence once it has been admitted to the Chamber.

[8] Decision, para. 58.

15. The Defence submits that the declaration submitted by the Defence in support of the Application should have been admitted as evidence.[9] An unsigned document is not by definition irrelevant.

16. In addition, the Defence submits that the statement of the Chief Investigator should *not* have been admitted as evidence.[10] This statement of the Chief Investigator, as a party employed by the Prosecutor to carry out investigations for the Prosecutor, does not represent that of an impartial witness. Rather it represents the point of view of the Prosecutor, a party to this proceeding. The statement also seems to be entirely based on hearsay. The Defence submits that for these reasons the probative value of the statement of the Chief Investigator is questionable, at best, and therefore not relevant for any decision to be taken in the bail procedure.

17. With regard to the important issue of the burden of proof, the Defence disagrees with Judge Itoe's concession that in matters relating to bail the burden of establishing the conditions set out in Rule 65(B) of the Rules rests with the accused.[11] This concession cannot be reconciled with the "customary international law principle which consecrates liberty as the rule and detention as the exception", as recognised also by Judge Itoe.[12]

General principles & questions of public importance

18. The Defence submits that the above errors as to law and fact go to issues of grave legal importance that require consideration of the Appeals Chamber.

19. The legal issues raised above touch upon both general principles not dealt with by the Appeals Chamber before, and questions of public importance upon which a decision of that Chamber would serve the interest of justice.

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[9] Upon receipt of the unsigned declaration on filed 9 March 2004, Judge Itoe could also have adjourned the matter and allowed the Defence to file a signed and sworn affidavit as soon as the witness returned from abroad, so as to allow a fair determination of the matter, in accordance with Rule 89(B) of the Rules.
[10] Decision, para. 59.
[11] Decision, para. 95.
[12] Decision, para. 96.

20. The Defence submits that aside from the precise grounds raised in this Application and the question of whether or not Judge Itoe made an error of law or fact in his Decision, good cause exists for granting leave to appeal as the issue of provisional release is *per se* a question of public importance which must be dealt with in the final instance. Here, the Defence fully endorses Judge Gelaga King's reasoning in the Sesay Decision:

> " [the] broader question of whether provisional release can ever be granted to an accused before the Special Court for Sierra Leone and if so, in what circumstances, is one of fundamental importance and a decision of the Appeals Chamber would be in the interests of justice"[13]

Request

21. The Defence submits that, pursuant to Rule 65(E), it has shown the necessary good cause and that, therefore, the leave should be granted.

COUNSEL FOR THE ACCUSED

Michiel Pestman

[13] Sesay Decision, para. 15.