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SCSL-2004-15-PT
(6350 – 6354)

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IN THE SPECIAL COURT FOR SIERRA LEONE

THE TRIAL CHAMBER

Before: The Trial Chamber
Judge Bankole Thompson presiding
Judge Benjamin Itoe
Judge Pierre Boutet

Registrar: Mr Robin Vincent

Date filed: 20th May 2004

Case No. SCSL 2004 – 15 – PT

In the matter of:

THE PROSECUTOR

Against

ISSA SESAY
MORRIS KALLON
AUGUSTINE BAO

RESPONSE TO PROSECUTION APPLICATION TO FILE AN INTERLOCUTORY APPEAL AGAINST THE DECISION ON THE PROSECUTION'S 'MOTION FOR CONCURRENT HEARING OF EVIDENCE COMMON TO CASES SCSL-2004-15-PT AND SCSL-2004-16-PT'

Office of the Prosecutor

Luc Côté, Chief of Prosecutions
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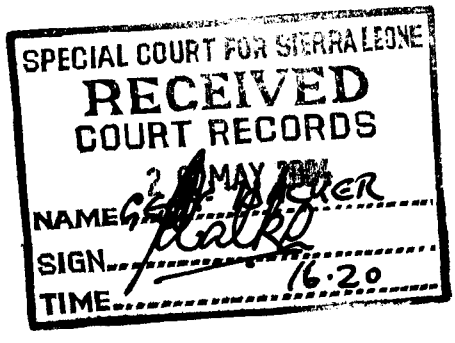
Girish Thanki,
Andreas O'Shea
John Cammegh
Kenneth Carr

Counsel for co-accused

Timothy Clayson and Wayne Jordash for Issa Sessay
Sekou Toure for Morris Kallon



A. Introduction

1. Rule 73(B) only permits the granting of leave to appeal in exceptional circumstances and in order to prevent irreparable prejudice to a party. It is respectfully submitted that the prosecution have failed to establish either exceptional circumstances or irreparable prejudice for the purposes of granting leave to appeal.

B. Prosecution arguments

2. The arguments raised for exceptional circumstances attempt to show the consequences of the Trial Chamber's decision, but do not explain why leave to appeal should be exceptionally granted on this issue as opposed to the range of other issues that the Trial Chamber may have to address. It does not follow from the exceptional nature of the evidence in a case that there are exceptional circumstances in terms of the desirability of allowing an appeal. In any event, it is submitted that the prosecution have failed to establish anything exceptional about a witness giving evidence twice in two separate trials. This is invariably the case where there are a series of trials arising out of the same political conflict. It is difficult to provide concrete examples of this simply because for the protection of witnesses they are frequently given different pseudonyms in different trials. However, common sense dictates that this situation must arise in international criminal cases where the same general factual context gives rise to the trial of a number of individuals in different trials.

3. The argument that the application of Rule 48 (C) would remove the necessity of hearing the evidence twice is, it is submitted, somewhat artificial, since it is only the examination-in-chief which must be given twice, assuming Rule 92*bis* is not applied. The witness will in principle be subjected to about the same amount of cross-examination, whether the defence lawyers conducting such cross-examination are divided into two separate groups or all sit in court as one group. The number of accused entitled to cross-examine that witness

does not change. If anything, the concurrent hearing of evidence, with its attendant risks of mutual recrimination is more likely to complicate and expand cross-examination as lawyers attempt to deal not only with the prosecution case but also with issues raised by other accused from a different political faction. For the same reason, it is suggested that it is not right to say that the anguish arising out of cross-examination would be duplicated. Indeed, it is arguably better for the witness to have the cross-examination broken up into two separate blocks in two separate environments on two different occasions, even if close together.

4. In arguing irreparable prejudice, the prosecution contends that 'there is a high probability, that as a result of the hardships and risks involved, some witnesses will not appear for the second trial to which they are called to testify.' The prosecution have failed to substantiate this so-called 'high probability'. There is always a risk that a witness may not appear to testify. This may occur for a number of reasons. It could just as well occur through a fear of being caught out lying as through a fear of the accused. It could equally occur on the first occasion when a witness is to appear as on the second. This is one of the attendant difficulties with witness testimony on sensitive matters.

5. Further, the prosecution does not adequately justify the contention of 'hardships and risks', since it is clear that protective measures and the protection of the court will be available on both occasions when the witness testifies. In addition, when one is asserting widespread and systematic criminal behaviour across the entire country in public view and claiming that there is a need to call 267 witnesses, it is really hard to see where the irreparable harm to the prosecution case comes in, since there is clearly a large pool of witnesses according to the prosecution and the potential to find more.

6. The prosecution's arguments in their request for leave to appeal the joinder decision have been incorporated by reference. It suffices to say that the Trial Chamber did not grant leave in that case, and indeed the issue is substantially similar for the purposes of this prosecution application.

C. Additional arguments against the appropriateness of granting leave to appeal

7. Quite apart from our submission that the prosecution arguments do not hold up to scrutiny on their own, it is respectfully submitted that there are additional reasons for discounting the contention of exceptional circumstances and irreparable harm. It is submitted that the prosecution can always reapply to have the evidence of particular witnesses heard concurrently if it can show special justification for this course and no prejudice to the accused. Therefore, the situation is not irredeemable from their perspective. It is submitted that this is in any event the proper way to seek the application of Rule 48 (C), rather than bringing a motion for a blanket ruling on more than half the witnesses on the prosecution's initial witness list. This is not a matter, therefore which requires immediate resolution to save irreparable prejudice.

8. There is no indication that granting leave to appeal will expedite these proceedings. In fact, a trial date has been set. It is submitted that the proposal would merely serve to lengthen the trial for these accused and the potential for mutual recrimination would complicate and potentially lengthen both the cross-examination of witnesses and the time spent on legal argument. It is therefore submitted that the potential delays lingering in an appeal and its consequences if successful, and the absence of any concrete argument that proceedings might be expedited provides further reason to deny leave.

9. Finally, there is no suggestion or justification for the view that the prosecution will not be able to prove its case as a result of the Trial Chamber's decision. The suggested procedure is in any event novel and courts have frequently operated and reached properly founded convictions or acquittals without the need for the adoption of such a procedure. This is the case with the war crimes trials conducted under Control Council Law 10 following World War II, the International Criminal Tribunal for the former Yugoslavia and the International Criminal Tribunal for Rwanda. Accordingly, it is therefore submitted that there is no strong foundation for the view that this is a matter which must be addressed on appeal now as opposed to at the finalisation of the trial.

Girish Thanki

Andreas O'Shea

20th May 2004