SCSL-2004-15-PT

010

(293-302)

293A

SPECIAL COURT FOR SIERRA LEONE

JOMO KENYATTA ROAD • FREETOWN • SIERRA LEONE

Court Management Section – Court Records

CS6 – OUT OF TIME FILING FORM

Date:	10th February 2004	Case Name: Case No.:	The Prosecutor v. Sesay, Kallon & Gbao SCSL-2004-15-PT
To:	**Luc Cote,** **Chief of Prosecution** **DEFENCE** Wayne Jordash Timothy Clayson Serry Kamal Sylvain Roy		
From:	Mr Neil Gibson Court Management		
CC:	Γ Judge B. Thompson, Presiding Γ Judge Boutet Γ Judge Itoe Γ Co-ordinator		Γ Judge G. Robertson, President Γ Judge Winter Γ Judge King Γ Judge Jallow Γ Judge Ayoola Γ Co-ordinator
Subject	The following documents were filed out of time:		

Document(s): Defence Response to the Prosecutions Application for Leave to file an Interlocutory Appeal Against the decision on the Prosecution motion for Joinder

Dated: Not Dated, Filed 10th February 2004

Reason(s):

The above document has been filed one day late by the Defence. An order was made by the Trial Chamber on the 4th of February 2004 for expedited filing, I mistakenly thought the order had not been served until the 5th of February 2004 and informed Mr. Sylvain Roy that the expiry date for any Responses was 5:00pm on the 10th of February 2004. I only discovered today that the order was correctly served on the 4th which meant Responses should have been filed by 5:00pm on the 9th of February 2004. I understand from speaking to Mr. Sylvain Roy he forwarded the email I sent him onto Defence Counsel which has resulted in this document being filed today instead of yesterday. I respectfully ask you consider this error on my part when considering the late filing, by one day, of this document.

Mr. Neil Gibson 10/2/04.
Deputy Chief, Court Management
Ext 7251.

No. of pages transmitted including this cover sheet In case of transmission difficulties, please contact: Fax Room Tel: _____ Fax: _____ Email: _____

CS6 FORM

Document1

010 SCSL-2004-15-PT (293-302) 293

In the Special Court for Sierra Leone
The Trial Chamber

Special Court for Sierra Leone

The Prosecutor

Against

Issa Hassan Sesay also known as Issa Sesay

Morris Kallon also known as Bilai Karim

And

Augustine Gbao also known as Augustine Bao

Case No.SCSL – 2004 – 15 – PT

ISSA SESAY
Defence response to the Prosecutions Application for Leave to file an interlocutory Appeal Against the decision on the Prosecution motion for Joinder

---

Office of the Prosecutor
Mr Luc Cote, Chief of Prosecutions
Mr Robert Petit

Counsel for Issa Sesay
Mr Tim Clayson
Mr Wayne Jordash
Mr Serry Kamal
Ms Sareta Ashraph

INTRODUCTION

1. On the 3rd February 2004 the Prosecution, pursuant to Rule 73(B) of the Rules of Procedure and Evidence of the Special Court (the Rules) submitted an application for leave to file an interlocutory appeal in respect of the decision on the Prosecution's motion for Joinder.

RESPONSE - Submissions

2. The defence submit that the Prosecution have failed to comply with Rule 73(B) insofar as they seek leave to file an interlocutory appeal outside the 3 day limit specified therein and are therefore barred from making this application. Alternatively it is submitted that the Chamber ought to take account of that non – compliance for which no explanation was proffered. A party which seeks to rely upon this Rule ought to comply with the time limit. This failure, whilst perhaps not fatal to the Prosecution application, indicates to the Appeal Chamber the weight which should properly be attached to the merits of their arguments.

EXCEPTIONAL CIRCUMSTANCES/IRREPARABLE PREJUDICE

3. It is submitted that the Prosecution application for leave fails to satisfy the requirements of Rule 73(B) which is a condition precedent of the granting of leave for an interlocutory appeal, in that the matters identified by the Prosecution in para 13 – 21 of their application for leave do not amount to either "exceptional circumstances" nor do the arguments raised demonstrate that they will suffer "irreparable prejudice".

4. For these reasons the defence submit the application ought therefore to be refused pursuant to Rule 73(B).

SECURITY

5. In particular it is submitted that it is insufficient for the Prosecution to simply state in paragraph 14 – 16 of their application that they have "genuine concerns that many of its witnesses.... will not be willing to testify in a subsequent trial" and "particularly highly placed individuals with first hand knowledge of the actions of the accused, would not be in a position to testify twice". It is submitted that broad generalised assertions such as this amount to no more than anecdotal speculation. Assertions of this nature are inherently unreliable and potentially a source of real unfairness as they are not amenable to independent verification or evaluation.

6. It must be assumed that the Court through the Witness and Victims Support Unit is able to offer witnesses the protection necessary to enable witnesses to attend two trials. In the absence of proper verifiable evidence it is submitted that the Court can and will provide sufficient security for the prosecution witnesses.

7. The defence would respectfully remind the court that there are many reasons (aside from the present circumstances) why a particular witness may have to give evidence twice (for example because the witness is recalled or because of a re – trial). The court process through its witness protection programme and other security measures ought to therefore provide for those eventualities. Whilst the security of witnesses is a concern for both Prosecution and defence alike it can not be assumed, in the absence of cogent evidence, that witness safety will be compromised merely by the giving of evidence on two occasions.

COST IMPLICATIONS

8. The defence acknowledge that there are always difficulties for International Tribunals in terms of the financial costs and logistical implications (see para. 17 of the Prosecution application). However this is neither exceptional or in any way prejudicial to the Prosecution.

CONTRADICTORY DECISIONS

9. The defence submits that contrary to the Prosecution submission in paragraph19 of their application, two trials in front of professional judges will not present particular difficulties for the Trial Chamber(s). The Judges of the Trial chamber will no doubt be able to properly consider the evidence in any second trial without having regard to the conclusions reached previously.

10. In the case of Delalic[1] relied upon by the Prosecution [2] the court was concerned that the defence application for separate trials, if acceded to, would have given rise to four trials. It is in this context that the court expressed its concern about the issue of contamination.

11. The Prosecution overstate the risk of contradictory or inconsistent decision making by the Trial Chamber. It is submitted that the benefits in terms of the interests of justice[3] far outweigh any perceived risk that two separate trial chambers will render contradictory or inconsistent decisions.

EQUALITY OF ARMS

12. The prosecution submit that the fact that their witnesses will give evidence twice will place them at a disadvantage when presenting their case. The advantage gained, if any, is negligible, since it must be assumed that the witness statements disclosed by the Prosecution ought to contain the salient parts of their evidence.

13. In any event in this context (that is prior disclosure of the Prosecution case) it should not be assumed that any difference between the Prosecution and Defence is impermissible.[4] The burden is placed firmly on the Prosecution to disclose their case in its totality. It is difficult to see therefore what could be exceptional or cause irreparable damage to the Prosecution from the reliance by the defence on the disclosure of their evidence in the context of a trial.

---

[1] See Prosecutor v Delalic, IT – 96 – 21, Decision on Motions for Separate Trial filed by the Accused Zejnil Delalic and the Accused Zdravaco Mucic, 25th September 1996, para 7.
[2] See Para 19 of the Prosecution application.
[3] See Para 46 of the Joinder decision.
[4] See for example Rule 66 and Rule 67 which places differing disclosure requirements on the Prosecution and Defence.

14. For the reason given above the defence submit that the Prosecution have failed to demonstrate that the matters raised would cause irreparable prejudice or that the circumstances are exceptional.

"ERRORS COMMITTED BY THE TRIAL CHAMBER"[5]

15. It is submitted that the Prosecution have failed to properly interpret the "Decision and Order on Prosecutions Motions for Joinder"[6]. In particular it is submitted that their interpretation of the decision as merely reflecting the concern of the Trial Chamber that there would be "the possibility of conflicting defence strategies and the possibility of mutual recriminations" is an overly restrictive reading of the Trial Chambers reasoning and decision. In short the Trial Chamber appears to have had regard to much wider considerations of the interests of justice[7].

16. The defence further adopt the submissions made by the defence team representing Augstine Gbao.[8] Further, a joint trial of the scale envisaged by the Prosecution would almost certainly be of grossly unmanageable proportions and would expose all accused persons to a trial of such length and complexity that all possible steps should be taken to avoid such an eventuality.

17. The defence therefore submits that the Prosecution ought not to be granted leave to appeal.

---

[5] See para. 3 – 10 of the Prosecution application for Leave to appeal.
[6] See para. 3 – 1o of the Prosecution application for Leave to appeal
[7] See particularly para. 38, 40, 42, 43, 44, 45, 46 & 47
[8] See the Response to Prosecution's application for Leave to Appeal against the decision on the Prosecution's Motions for Joinder: in particular paras. 5 – 7.

298

Tim Clayson

Wayne Jordash

Serry Kamal

Sareta Asraph

BOOK OF AUTHORITIES

1. Prosecutor v Delalic, IT – 96 – 21, Decision on Motions for Separate Trial filed by the Accused Zjnil Delalic and the Accused Zdravaco Mucic, 25th September 1996

299

IN THE TRIAL CHAMBER

Before: Judge Gabrielle Kirk McDonald, Presiding

Judge Ninian Stephen

Judge Lal C. Vohrah

Registrar: Mrs. Dorothee de Sampayo Garrido-Nijgh

Decision of: 25 September 1996

PROSECUTOR

v.

ZEJNIL DELALIC
ZDRAVKO MUCIC also known as "PAVO"
HAZIM DELIC
ESAD LANDZO also known as "ZENGA"

DECISION ON MOTIONS FOR SEPARATE TRIAL FILED BY THE ACCUSED ZEJNIL DELALIC AND THE ACCUSED ZDRAVKO MUCIC

The Office of the Prosecutor:

Mr. Eric Ostberg Ms. Teresa McHenry

Counsel for the Accused:

Ms. Edina Residovic, for Zejnil Delalic

Mr. Branislav Tapuskovic, for Zdravko Mucic

Mr. Salih Karabdic, for Hazim Delic

Mr. Mustafa Brakovic, for Esad Landzo

I. INTRODUCTION

Pending before this Trial Chamber of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of Former Yugoslavia since 1991 ("International Tribunal") is a Preliminary Motion filed pursuant to Rules 72 and 73 of the Rules of Procedure and Evidence of the International Tribunal ("Rules") on behalf of one of the accused, Zdravko Mucic, on 24 May 1996, seeking a separate trial from two of the co-accused, Hazim Delic and Esad Landzo. On 5 June 1996 the co-accused Zejnil Delalic also filed a Motion for A Separate Trial (together referred to as "the Motions"). The Office of the Prosecutor ("Prosecution") filed its Responses to the Motions on 6 and 28 June 1996. On 18 June 1996 the Trial Chamber ordered the two co-accused, Hazim Delic and Esad Landzo, to respond to the Motions and Replies were filed on 18 and 16 July 1996, respectively. The Prosecution responded to these Replies on 19 July 1996.

On 2 August 1996 the Trial Chamber heard oral argument from counsel for the four accused and for the Prosecution on the Motions. The Decision on those Motions was reserved to a later day.

THE TRIAL CHAMBER, HAVING CONSIDERED the written and oral submissions of the parties,

HEREBY ISSUES ITS DECISION.

II. DISCUSSION

1. The Rules relevant to these Motions are Rule 48, read in the light of the definition of "transaction" in Rule 2, and Rule 82, in particular, Sub-rule (B). These provisions read as follow:

Rule 48

Joinder of Accused

> Persons accused of the same or different crimes committed in the course of the same transaction may be jointly charged and tried.

Rule 82

Joint and Separate Trials

> . . .
>
> (B) The Trial Chamber may order that persons accused jointly under Rule 48 be tried separately if it considers it necessary in order to avoid a conflict of interests that might cause serious prejudice to an accused, or to protect the interests of justice.

2. The accused properly have been jointly charged with a variety of crimes in the one indictment in accordance with Rule 48, since the acts that were alleged to have to have been committed are part of the same transaction within the meaning of Rule 2. Only if this Trial Chamber considers that under Sub-rule 82(B) it is "necessary in order to avoid a conflict of interests that might cause serious prejudice to an accused, or to protect the interests of justice" may it order that persons accused jointly be tried separately. There is no provision in the Rules for separate trial of distinct issues arising in the one indictment.

3. Neither in written submissions nor in oral argument has it been established that any conflict of interests such as is referred to in the first limb of Sub-rule 82(B) will arise if the accused are tried together in one joint trial, still less that, as a result of any such conflict, there might be caused serious prejudice to any accused. Before referring to the second limb in Sub-rule 82(B), the protection of the interests of justice, the submissions, written and oral, of the accused may be summarised as follow:

(a) The accused Zejnil Delalic

In his motion reliance was placed upon the principle of individual responsibility and on an accused's right to equality before the International Tribunal. It was said that the presentation at his trial of evidence against other accused charged as direct perpetrators will result in serious prejudice to him. In addition, much was said regarding the appropriateness of a separate trial of this accused concerned solely with the question of whether he was ever in a position of superior authority such as would involve him in command responsibility.

However, neither in the written motion nor in oral argument was any question of conflict of interests established, though in argument the fact that all accused would be obliged to be present when evidence that did not concern all of them was given was said to give rise to a conflict of interests. Whatever degree of inconvenience this may involve is no such matter of conflict of interests with which Sub-rule 82(B) is concerned.

As it developed in argument, what this accused was seeking was not so much a separate trial on the present indictment but rather a preliminary and separate trial confined to the sole issue of command responsibility, a procedure which, as stated above, is not contemplated in the Rules of this International Tribunal.

(b) The accused Zdravko Mucic

In his written motion no conflict of interests was alleged and in oral argument his counsel did not in fact oppose a joint trial.

(c) The accused Hazim Delic

Having initially stated that he did not seek a separate trial, this accused in his motion now seeks not one separate trial but, like the accused Zejnil Delalic, a preliminary and separate trial confined to the question of his command responsibility and a second trial concerned with acts allegedly committed by him personally.

In argument this was elaborated on and counsel added that there was no objection to this accused being jointly tried with the accused Esad Landzo in the second of the two trials proposed. Neither in argument nor in the written motion is any question of conflict of interest suggested.

(d) The accused Esad Landzo

This accused also initially did not seek a separate trial but in his motion now does so and in argument objected to being tried jointly with Zejnil Delalic and Zdravko Mucic, though not with Hazim Delic. Neither in the motion nor in oral argument was any question of conflict of interests established.

4. In view of the foregoing and the absence of any conflict of interests, the only remaining ground upon which any separate trial might be ordered in accordance with Sub-rule 82(B) would be that of it being necessary to do so in order to protect the interests of justice.

5. In fact, to grant separate trials would be contrary to the interests of justice. Were each of the motions of Zejnil Delalic, Hazim Delic and Esad Landzo granted, the result would be at least three, perhaps more, distinct trials: one or perhaps two (depending on the outcome of the first) for Zejnil Delalic, one for Hazim Delic and perhaps a second (depending again on the outcome of the first) jointly with Esad Landzo and one for Zdravko Mucic, which could perhaps be a joint trial with some other accused.

6. It was said on behalf of the accused that there would be great delay and complexity involved in a joint trial; in fact the separate trials which have been sought would *in toto* be likely to involve much greater delay, at least for those unfortunate enough not to be the first to be tried. They would also mean considerable repetition of evidence, not only in the trials of different accused but even, according to the Prosecution, in cases where two distinct trials of the same accused became necessary as a possible outcome of the orders sought by both Zejnil Delalic and Hazim Delic. What all this would involve for witnesses, for the Prosecution and, indeed, for the functioning of the International Tribunal and the disposition of other cases, is so obvious as to need no exposition.

7. However, these considerations apart, the interests of justice are in any event clearly best served by one joint trial. The Prosecution submits that the evidence of almost all the witnesses it intends to call will be relevant to the case against each of the four accused; this may also prove to be so in the case of witnesses called by the several accused, should they chose to offer evidence. Accordingly, separate trials would involve much duplication of testimony and great hardship for already traumatised witnesses. Moreover, separate trials would, in this International Tribunal, where a bench of three Judges are triers of both fact and law, present especial difficulties. The Judges would have to hear the same witnesses giving the same testimony on at least two, and probably more, occasions and on each occasion would have to try to consider the evidence with minds unaffected by their prior conclusions regarding that evidence reached on earlier occasions. In sum, to grant the separate trials that are sought would, in the opinion of this Trial Chamber, be distinctly adverse to the interests of justice.

8. Although Sub-rule 82(B) entitles accused who have been jointly charged to separate trials upon a proper showing, and provides for no other alternative, some reference should be made to the quite different proposal urged on behalf of several of the accused that there be preliminary separate trials confined to the single issue of command responsibility. Perhaps this would result in a speedier outcome than will a joint trial, at least for the first two accused who might be tried in this way, but only if they were to succeed in establishing the absence of command

responsibility. It might, however, even in that event, mean greater delay in the trial of the other accused and would certainly mean very considerably greater delay, not to mention extraordinary hardship and disruption to witnesses, were command responsibility established.

9. This apart, the arguments of the accused proceed very much upon the footing that the issues involved in command responsibility may be disposed of relatively simply and hence speedily. This the Prosecution contests. Only the outcome of such trials would determine in retrospect who was right; but if, as the Prosecution asserts, most of the intended prosecution witnesses will give evidence going to both command responsibility and to direct liability, the likelihood of speedy disposition of the command responsibility issue seems slight. It must be appreciated that the issue of command responsibility is unlikely to turn upon mere proof of the holding or not holding of some particular office.

10. In all the circumstances this Trial Chamber concludes that, for the foregoing reasons, it should refuse to make any orders for separate trial pursuant to Sub-rule 82(B); the accused have been properly joined and no showing of a conflict of interests has been made nor any prejudice to the interests of justice. It also concludes, for the reasons stated, that it should not make any orders for some form of preliminary determination of the issue of command responsibility.

III. DISPOSITION

FOR THE FOREGOING REASONS,

THE TRIAL CHAMBER, PURSUANT TO RULE 82,

HEREBY UNANIMOUSLY DENIES the Motions.

Done in English and French, the English text being authoritative.

Gabrielle Kirk McDonald

Presiding Judge

Dated this twenty-fifth day of September 1996

At The Hague

The Netherlands

[Seal of the Tribunal]