SCSL-2004-15-PT
(6174 - 6180)

IN THE SPECIAL COURT FOR SIERRA LEONE
DEFENCE OFFICE
FREETOWN-SIERRA LEONE

THE APPEALS CHAMBER

BEFORE:

REGISTRAR: Mr. Robin Vincent

DATE: 12th May 2004

PROSECUTOR against **MORRIS KALLON**
(Case NO. SCSL 2004-15-PT)

KALLON – DEFENCE REPLY TO PROSECUTION RESPONSE FOR LEAVE TO APPEAL AGAINST THE DECISION OF THE TRIAL CHAMBER REFUSING THE APPLICATION FOR BAIL BY MORRIS KALLON

OFFICE OF THE PROSECUTOR:

Luc Cote, Chief of Prosecutions
Robert Petit, Senior Trial Attorney
Paul Flynn
Abdul Tejan-Cole
Leslie Taylor
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DEFENCE:

Shekou Touray
Raymond M. Brown
Wanda Akin
Melron Nicol-Wilson
Wilfred Bola Carrol

The Defence files this "Reply" to the "Response" of the Prosecution to Defence Application for Leave to Appeal against the decision of the Trial Chamber refusing the application for Bail by Morris Kallon.

BACKGROUND

1. On the 4th of May 2004, the Defence filed a Motion for Leave to Appeal against the decision of the Trial Chamber refusing the application for Bail by Morris Kallon.[1]

2. On the 7th of May 2004, the Prosecution filed a Response to the Defence Motion for Leave to Appeal.

PROSECUTION SUBMISSIONS

3. The Prosecution in its response argued that the Defence failed to show "*good cause*"; that the Learned Judge was right in his analysis of the Law in rubic B headed "*The Burden of Proof*" – Paragraph 22-35 of the decision of the Trial Chamber refusing Morris Kallon Bail; that the Learned Judge made no error in Law or fact on the issue of the Presence of the Special Court in Sierra Leone; that the Learned Judge did not base his decision on the Submission of the Government of Sierra Leone; that the Learned Judge made no error of fact or Law on the issue of Community ties; and that the Learned Judge made no error of Law or fact in considering the Seriousness of the charges against the Accused;

4. The Prosecution further argued that the Learned Judge applied the two-pronged test, namely (a) the accused will appear for trial and (b) if released the accused will not pose a danger to any Victim, Witness or other person conjunctively and not disjunctively.

[1] Decision on the Motion by Morris Kallon for bail. Dated 24th February 2004, SCSL-2004-15-PT

ARGUMENTS

The Defence has shown good cause

5. The Prosecution in paragraph 6 of its Response submits that in order to show "*good cause*" the Defence must show that the Trial Chamber may have erred in making the Impugned Decision. The Defence submits that what amounts to "*good cause*", is determined by a Trial Chamber, based on the circumstances of a particular case and that there is no laid down requirement as to what may amount to good cause for Leave to Appeal; the approach it is submitted is based on a case by case basis.

6. The Defence further submits that it showed good cause in its Motion for Leave as exhibited in the various points submitted.

The Burden of Proof rests on the Prosecution.

7. The Prosecution in paragraph 11 of its Response relying on the ICTY Trial Chamber's decision postulated that there is nothing in Customary International Law to prevent the placing of the Burden of Proof where the Accused is charged with a serious offence.

8. The Defence submits that in the case of Prosecutor v. Momcilo Krajisnik and Biljana Plavsic[2], George Patrick Robinson in a dissenting opinion in paragraph 6 said, *"The customary rule, from which Rule 65(B) in its original form derogated, is the principle established in Article 9(3) of the ICCPR that it shall not be the general rule that persons awaiting trial shall be detained in custody. This*

[2] Decision on Momcilo Krajisnik Notice of Motion for provisional release, Case No. IT-00- 39 & 40-PT, date 8 October 2001.

customary rule is also reflected in Article 5(3) of the European Convention on Human Rights[3]
and Article 7 of the American Convention on Human rights[4]*. There can be little doubt that the effect of this customary norm is to make pre-trial detention an exception, which is only permissible in special circumstances. Again, the foundation for this customary norm is the presumption of innocence. This is the way the European Court of Human Rights ("European Court"), in considering the question of bail, puts it:*

> Shifting the burden of proof to the detained person in such matters
> is tantamount to overturning the rule of Article 5 of the Convention, a provision which makes detention an exceptional departure from the right to liberty and one that is only permissible in exhaustively enumerated and strictly defined cases.[5]"

The Presence of the Special Court in Sierra Leone should not affect the granting of bail.

9. The Prosecution in paragraph 14 of its Response quoted the Portion of the Decision of the Trial Chamber in which the Learned Judge mentioned that in the Judicial History of the ICTR an application for Provisional Release has never been granted.

10. The Defence submits that its opinion, that the Learned Judge erred in Law, is further buttressed with the fact that while the Judge took the ICTR position into consideration, he did not look at the position in the ICTY were there is a Judicial history of the granting of Provisional Release.

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[3] The European Covnetion on Human Rights was signed in Rome on 4 November 1950 and entered into force on 3 September 1953. The relevant provision state: "Everyone arrested or detained in accordance with the provisions of paragraph 1(c) of this Article [...] shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditional by guarantees to appear for trial.

[4] The American Convention on HumanRights entered into force on 18 July 1978. The relevant provisions state: "Any person detained [...] shall be entitled to trial within a reasonable time or to be released without prejudice to the continuation of the proceedings. His release may be subject to guarantees to assure his appearance for trial."

[5] *Ilijkov v. Bulgaria*, ECHR, Judgement of 26 July 2001 *("Ilijkov v. Bulgaria")*, para. 85 (emphasis added).

The Submissions of the Government of Sierra Leone is stereo-typed and does not reflect current situation in Sierra Leone.

11. The Prosecution in paragraph 17 of its Response submitted that there is no error of Law or fact on the Submissions of the Government of Sierra Leone. The Prosecution went further to mention the Portion of the Judge's Decision in which he said:

"Nevertheless, it is important to stress the fact that the present submission have been given due consideration in so far as they provide very valuable and Substantial Information on the Current situation in Sierra Leone, and is, in this respect, an Important factor in determining the Public Interest aspect".

12. The Defence maintains that from the Portion of the decision of the Learned Judge cited above, the Learned Judge erred in his assessment of the Government submissions in that he gave due consideration, to a stereo-typed submission which is not reflective of the current situation in Sierra Leone at the time of the application for Bail by Kallon, even though it may have been reflective of the situation in Sierra Leone at the time of the application for bail by Tamba Alex Brima.

Morris Kallon has community ties in Freetown, which is the seat of the Court

13. The Prosecution in paragraph 21 of their Response submits that the Defence in its Motion did not complain that the Learned Judge arrived at the wrong conclusion based on the evidence in dealing with the issue of community ties.

14. The Defence submits that its is reasonably implied in its Motion that by opining that the Accused does not have community ties in Freetown, the Learned Judge failed to make any inquiry on this issue before arriving at that conclusion and thereby committed a grave procedural error prejudicial to the Accused.

The Seriousness of the charges should not prevent the Accused from being granted Bail.

15. The Prosecution in paragraph 24 of its response submits that the Learned Trial Judge made no error of Law or fact in considering the seriousness of the charges against the Accused.

16. The Defence submits that the Learned Judge committed a serious error in Law as all the Accused persons including Morris Kallon are charged with serious violations of International Humanitarian Law. The seriousness of the offences although relevant but should not adversely affect the Right of the Accused to Bail having regard to the requirements of Rule 65 (B) of the Rules of Procedure and Evidence.

The Judge did not consider the issue of danger to Victims and Witness

17. The Prosecution in paragraph 27 of its Response mentioned that the Learned Judge stated in his decision that he found it unnecessary to examine in detail the question whether the Accused will pose a danger to any Victim, Witness or other persons if granted bail as he was not satisfied that the Accused will appear for trial if granted Bail.

18. The Defence submits that pursuant to the provisions of 65(B) of the Rules, the Judge failed adequately or at all to consider the element of danger under the Rule, and thereby reneged on his obligation to apply the Rule properly to the facts in issue in respect of the right of the Accused to Bail.

CONCLUSION

19. The Defence submits that it has shown sufficient good cause for Leave to appeal pursuant to the Provisions of Rule 65(E) of the Rules of Procedure and Evidence of the Special Court and that what amounts to good cause is for the Chamber to

determine taking into consideration the totality of the issues raised in the Defence Motion.

20. The Defence submits that for the foregoing reasons, the Appeals Chamber should dismiss the Response of the Prosecution and grant the Defence Leave to appeal against the decision of the Trial Chamber refusing the application for Bail by Morris Kallon.

Shekou Touray, Lead Counsel
Raymond M. Brown, Co-Counsel
Melron Nicol-Wilson, Co-Counsel

12th May 2004.