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SPECIAL COURT FOR SIERRA LEONE

IN THE APPEALS CHAMB ER

BEFORE: JUSTICE AYOOLA – PRESIDENT
JUSTICE A. RAJA N. FERNANDO – VICE PRESIDENT
JUSTICE WINNER
JUSTICE GELAGA KING

REGISTRAR: MR. ROBIN VINCENT

SPECIAL COURT RECORDS
- 6 AUG 2004
NAME LEN DOLPHIN
SIGN
TIME 4:20pm

DATE: 6TH AUGUST 2004

THE PROSECUTOR

AGAINST

MORRIS KALLON

CASE NO. SCSL -04-15-PT

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

Office of the Prosecutor:

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Wanda Akin

Prosecutor v. Sesay, Kallon and Gbao (SCSL -2004-15-PT)

The Defence for Kallon files this reply to the objection and response by the Prosecution to the Defence Appeal against the Decision of the Trial Chamber refusing the application for Bail by Morris Kallon.

BACKGROUND

1. On the 23rd of June 2004 Justice George Gelaga King of the Appeals Chamber of the Special Court granted the Defence Leave to Appeal against the Decision of Judge Boutet refusing Bail to the Accused Kallon.

2. On the 23rd of July 2004 the Defence filed an Appeal against the decision of the Trial Chamber refusing the application for Bail by Morris Kallon.

3. On the 4th of August 2004, the Prosecution filed an objection and response to the Defence Appeal against the Decision of the Trial Chamber refusing the application for Bail by Morris Kallon.

PROSECUTION SUBMISSIONS

4. The Prosecution in it response submits that the Defence Appeal should be rejected by the Trial Chamber, since the Defence should have, pursuant to Rule 108, filed a notice of Appeal within 7 days after the Decision granting Leave to Appeal, was issued.

5. The Prosecution further argued that the Defence Appeal should be denied for the following additional reasons:

   a. That the Learned Trial Judge did not commit an error of law and fact when he held that the elimination of the exceptional circumstances requirement does not eliminate the burden of proof required of the Defence.

b. That the Defence submission, that the presence of the Special Court in Sierra Leone should not interfere with the right of the Accused to Bail, point to no error of law or fact on the part of the Trial Judge.

c. That the Defence complaint that the Government of Sierra Leone filed the exact same submission in the Kallon case as it did in the case of the Prosecutor V Tamba Alex Brima is not an error of law or fact on the part of the learned Judge.

d. That the learned Trial Judge made no error of law or fact in considering the seriousness of the charges against the Accused.

e. That the Defence submission that the Learned Judge did not give reasons for suggesting that the detainee if released within the local community of Sierra Leone will undermine his own safety, is not correct.

f. That Bail should not be granted once a Trial has begun.

g. That the Defence Appeal should be denied since risk of flight is particularly high, due to possible non-recognition by the Accused of the Court's legality.

ARGUMENTS

The Defence notice of Appeal should not be dismissed due to lateness of its filing.

6. The Defence for Kallon apologises to the Appeals Chamber and the office of the Prosecutor for its lateness in the filing of its Appeal against the Decision of the Trial Chamber refusing the application for Bail by Morris Kallon. This was due to the fact no time limit within which the Appeal should be filed was stated in the Decision and Counsel for Kallon did not avert their minds to the provisions of Rule 108.

7. The Defence for Kallon submits that its lateness in filing the Appeal ,should not affect a consideration by the Appeals Chamber of the substance of the application for Bail by Morris Kallon.

Burden of proof rest on the Prosecution

8. The Prosecution in paragraph 22 of its response[1] postulated that by overwhelming jurisprudence and the established practice of Ad hoc Tribunals, detention is the rule and Bail the exception.

9. The Defence submits that in the case of Prosecutor v. *Momcilo Krajisnik* and *Biljana Plavsic*[2], Judge 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 customary rule is also reflected in Article 5(3) of the European Convention on Human Right[3]. And Article 7 of the American Convention on Human rights[4]. Their 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]"

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[1]ICTY, IT-OL-46-PT, Order on Motion for Provisional Release, 20 February 2002.

[2]Decision on Momcilo Krajisnik Notice of Motion for Provisional release, Case No. IT-00-39&40-PT.

[3]The European Convention 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 pending trial. Release may be conditional by guarantees to appear for trial.

[4]The American Convention on Human Rights 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 presence of the Special Court in Sierra Leone should not affect the granting of Bail.

10. The Prosecution in paragraphs 27 of its response cited the portion of the Decision of the Trial Chamber in which the Judge stated that "granting bail to an Accused before the Special Court entails that he will be released in the Country where it alleged to have committed the crimes for which he has been indicted." In this respect reference can be more properly made to the ICTR, the judicial history of which, it has to be noted, has never granted an application for provisional release. I would suggest that it could be argued that the particular situation of the Special Court of Sierra Leone and its direct presence in the territory of Sierra Leone makes it more important, difficult, critical and sensitive situation than that of the ICTR which sits in Tanzania, a harbouring country of Rwanda".

11. The Defence submits that its opinion, that the Learned Judged erred in Law, is further buttressed by 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.

The Submission of the Government of Sierra Leone stero-typed and does not reflect current situation in Sierra Leone.

12. The Prosecution in paragraph 33 of its response respectfully submits that the Defence Complaint that the Government of Sierra Leone filed the exact same submission in this case is not an error of law or fact.

13. The Defence submits that in the Decision of the Learned Judge, he stated the following:

"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".

14. 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's 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.

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

15. The Prosecution in paragraph 36 of its response submits that the Learned Trial Judge made no error of the 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 thee offences although relevant 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 Witnesses.

17. The Prosecution in paragraph 40 on its response submitted that the learned Judge applied two-pronged test, namely, (a). the Accused will appear for Trial and (b). if release, the Accused will not posed a danger to any victim, witness or other person, conjunctively and not disjunctively.

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.

Bail can be granted at any time .

19. The Prosecution in paragraph 41 on its response submitted that the fact that the trial of the Accused has already begun, and that accused is confronted with witnesses who are testifying against him on a daily basis, creates a stronger incentive to flee than before. Hence the granting of bail could undermine the ongoing proceedings. The Prosecution further submitted in paragraph 42 of its response that neither the ICTY nor the ICTR has granted bail to any Accused whiles the Trial was taking place except for the case of *Momir Talic*, who was granted bail for humanitarian reasons.

20. The Defence submits that the fact that the Trial has commenced, should not limit the right of the Accused to be granted bail and the fact that he is now confronted with witnesses would not create a stronger incentive to flee.

21. The Defence further submits that bail can be granted at anytime before the completion of a case.

The Accused recognises the legality of the Court.

22. The Prosecution in paragraph 47 on its response submitted that the Accused Kallon and his two co-Accused on the 11th of June 2004 sent a letter to their respective Defence Counsel in which they threatened that will not attend proceedings before the Special Court until the Motion before Sierra Leone's Supreme Court challenging the legality before the Special Court is decided upon. The Prosecution further submits

that in the light of such an indication, the Accused may not recognised the legitimacy of the Special Court and that the risk of flight seems particularly high.

23. The Defence submits that the Accused Kallon was coerced by his two co-accused to sign a letter in which they threatened not to attend proceedings before the Special Court until the Motion before Sierra Leone Supreme Court is decided upon. The Defence further submits that this was an issued between the Accused Kallon and his legal representatives and not between the Accused Kallon and the Special Court. As such the Defence for Kallon did not put forward the matter to the Trial Chamber of the Special Court.

24. The Defence further submits that Kallon recognises the legitimacy of the Special Court and has been attending its proceedings since the commencement of his Trial. The risk of flight does not exist.

CONCLUSION

25. The Defence respectfully request the Appeal Chamber to dismiss the response of the prosecution and to rule expeditiously on the Appeal and scheduled a hearing to enable any necessary evidence to be given and further submissions to be made.

Shekou Touray

Melron Nicol-Wilson

Dated: 6th August 2004