THE SPECIAL COURT FOR SIERRA LEONE

THE APPEALS CHAMBER

BEFORE: Justice Emmanuel Ayoola, Presiding
Justice Renate Winter,
Justice George Gelaga King
Justice Raja Fernando

Registrar: Mr Robin Vincent

Date filed: 4th August 2004

The Prosecutor

-v-

Issa Hassan Sesay

Case No: SCSL - 04– 15 – PT

Appeal against refusal of bail

Office of the Prosecutor
David Crane
Desmond de Silva
Luc Cote,

Defence

Wayne Jordash
Serry Kamal
Sareta Ashraph

1. On the 28th July 2004 Justice Gelaga – King granted the Defence leave to appeal against the decision of Judge Boutet refusing bail to the Accused. The basis of the leave so granted was, "apart from the question of whether errors were made by the Learned Judge, good cause exists for granting leave to appeal, as it seems to me that the question of this balance in applications regarding provisional release is of such importance as to merit further argument. Apart from the precise grounds as characterised and raised by the Defence in its Motion, the broader question whether provisional release can ever be granted to an accused before the Special Court 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".

APPEAL SUBMISSIONS

2. In the section of the decision on the application for provisional release ("the Decision") entitled *"Will the Accused, Issa Hassan Sesay, appear for trial if granted Bail"* (para 46 – 54) and in the section Learned Judge Boutet observes (in support of the decision to refuse the application):

   (i) that the Accused relied upon numerous pieces of evidence "with the intent to demonstrate his general character, trustworthiness and willingness to face his trial". The Prosecution did not present evidence in rebuttal of the assertions. (para. 46).

   (ii) that the Accused submitted that he had previous knowledge of the establishment of the Special Court and because of the position he occupied as interim leader of the RUF, he knew that he would be the subject of investigations but the Learned Judge noted (as per the Prosecution submissions) that investigative activity against the accused had been largely conducted confidentially (para. 47)

   (iii) that the Special Court is unable to directly perform any arrest on the territory of Sierra Leone (para. 49)

(iv) that the national authorities have a "diminished capability to promptly and efficiently provide any police supervision or intervention in case of flight of the Accused, as presented by the Government of Sierra Leone in its submission in relation to this Motion" (para. 49)

(v) that whilst the internal security of Sierra Leone "remains calm... the potential continues to exist for an extremist reaction to the Special Court (as per the Government of Sierra Leone's submission) and additionally that the trials of the Special Court were "a potential source of instability" for Sierra Leone (as per a Report of the Secretary General of the United Nations on the UNAMSIL mission) (para.49)

(vi) that the seriousness of the crimes brought against the Accused influences an objective evaluation of the risk of flight (para. 50)

(vii) that the Accused's participation in the peace process was irrelevant (para. 51)

(viii) that he was not satisfied, upon a review of the evidence, that Mr Sesay was aware of the existence of an indictment against him or that he would have then surrendered to the Special Court. In addition and more importantly., the Accused had not satisfied the Judge that prior to his arrest he was informed and aware of the extreme seriousness of the crimes falling within the jurisdiction of the Special Court (para 48.)

(ix) In the present circumstances and in particular, in consideration of the proximity of the trials, the lack of police enforcement capability by the Government of Sierra Leone and the potential threat to stability with the associated risk of affecting the public order would

lead me to conclude that the public interest requirements in this case outweigh the Accused's right to be released on bail (para.57.)

SUBMISSIONS

The essential balancing exercise

3. It is accepted that as a general rule, a decision to release an accused should be based on an assessment of whether public interest requirements, demonstrated by the Prosecution, outweigh the need to ensure respect for an accused's right to liberty (see para. 40 of the Decision). The Learned Judge's approach should therefore have been to conduct a balancing exercise in which the various interests (both public and individual) were weighed and conclusions drawn from a balancing of those interests. Instead the approach as exemplified by the above reasoning was to either attach no weight to the individual interests of the accused or alternatively to make findings adverse to the accused without explanation as to the reasons for the finding[1] which consequently meant that they were not properly (or at all) balanced with the public interests (competing or otherwise).

4. This was an error of law, which it is submitted ought to invalidate the decision, as it demonstrates that the whole approach to the application was flawed and inevitably, in the absence of a balancing of interests, led to the decision.

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[1] As the European Court in Letellier v France (No.1) (1992) 14 EHRR 83 at para 35. observed, the task of a court considering bail is to, "examine all the facts arguing for or against the existence of a genuine requirement of public interest justifying, with due regard to the principle of the presumption of innocence, a departure from the rule of respect for individual liberty and set them out in their decisions on applications for release". In all cases, reasons should be given; a point emphasised in Tomasi v France (1993) 15 EHHR 1. and in Yagci and Sargin v Turkey (1995) 20 EHHR 505. where the Court was very sceptical of stereotyped reasons for refusing bail. It is the respectful submission of the defence that Judge Boutet's decision at no stage addresses why Mr Sesay should not be granted provisional release but instead details why an accused in the present circumstances of Sierra Leone should not (and could not) be granted provisional release.

5. The Learned Judge instead elevated both the public interest and other factors outside the control of the accused to the status of determining factors unencumbered by considerations which might have placed them into context or might properly have led to differing conclusions. It is respectfully submitted that this approach inevitably led to the rejection of the accused's application.

6. It is the defence contention that the Learned Judge's approach to Mr Sesay's application for provisional release demonstrates both in fact and law, an accused at the Special Court could never be granted provisional release. It is the submission of the defence that the facts relied upon by Mr Sesay, as demonstrating his individual circumstances, provided powerful proof of his commitment to attend his trial. That evidence outweighed public considerations which only should have become determining in the event that those considerations, when balanced, were *clearly* outweighed.

7. In particular the Learned Judge had an obligation pursuant to Rule 65(B) of the Rules to hear from the Sierra Leone Government on the question of release. The Governments view[2] was adverse to the accused and highlighted the fragile security situation in Sierra Leone. The obligation to hear should have been prescribed by both the wording of the rule ("hear" rather than "accept") and the requirement that this view (and other public interest requirements) be balanced with individual interests which would necessarily compete. This might conceivably in a given case lead to a finding that, notwithstanding the view of the Government of Sierra Leone, an individual had demonstrated that in his case his individual interests and his individual circumstances outweighed the public interest concerns of security and stability within Sierra Leone.

[2] In all three applications thus far at the Special Court the view has been identical both in terms of the assessment of the situation in Sierra Leone and as regards the accused.

8. An accused could not, in the circumstances, have provided more evidence of his commitment to the Court or to the process in which the Court is engaged than that provided by Mr Sesay. The defence accepted, as it had to, following the ruling in the Decision on the Motion for bail for Kallon (para. 32) that it was "for the Defence to show that further detention of the Accused is neither justified nor justifiable under the circumstances at hand". The fact that (i) the evidence was apparently largely ignored or given little or no weight and (ii) that the evidence of the Sierra Leone Government was elevated, explicitly or implicitly, to that of a determining factor demonstrates that the approach was fundamentally flawed and wrong in fact and law.

ERRORS OF FACT AND LAW

9. It is submitted The Learned Judge failed to make a finding concerning the evidence relied upon to demonstrate his character, trustworthiness and willingness to face his trial (para 45. of the Decision). This was a particularly important omission given the evidence relied upon by the defence was not only cogent but was not rebutted by Prosecution evidence. Moreover it was crucially important that the Learned Judge should have made a finding in relation to these issue since a finding in his favour would have provided valuable evidence to counterbalance any competing public interest findings (for example the need for an effective police force within Sierra Leone to effect the arrest of an accused who has failed to attend trial might well be less pressing in the case of an accused who has been found to be trustworthy and honest in his dealings with the authorities).

10. The Learned Judge failed to fairly deal with the evidence which was relied upon to show that Mr Sesay had been aware of the Special Court prior to his arrest. In paragraph 48 of the decision the Learned Judge concludes that he is "not satisfied that the Accused was aware of any indictment against him or that he would have then surrendered to the Special Court. In addition and

more importantly the Accused has not satisfied me that prior to his arrest he was informed and aware of the extreme seriousness of the crimes falling within the Jurisdiction of the Special Court". The Learned Judge erred in that:

(i) no reasonable tribunal could have concluded that the absence of knowledge of a sealed indictment could be relevant to the question of whether the Accused would attend his trial;

(ii) no reasonable tribunal could have concluded that the accused was not aware of the extreme seriousness of the crimes falling within the Jurisdiction of the Special Court nor in any event to have expected him to have this knowledge to be able to resolve the issue pursuant to Rule 65(B) in his favour. It is submitted that the Learned Judge's approach to this issue was fundamentally flawed insofar as he ignored relevant evidence and took into consideration matters which were at best peripheral and at worst irrelevant.

(iii) In particular Mr Sesay relied upon evidence from General Opande, Ex – Force Commander, UNAMSIL, who confirmed that Mr Sesay had spoken to him about the Special Court and Mr Sesay had informed him that he would not flee. This was powerful and incontrovertible evidence of Mr Sesay's intended conduct. Moreover the Special Court is a court set up by ostensibly under the auspices of the United Nations and was outside the jurisdiction of the Sierra Leone judicial system. In the circumstances it would be logical to conclude that Mr Sesay had sufficient notice of the intended work of the Special Court and yet had chosen to remain in Sierra Leone. It is difficult to regard General Opande's evidence as anything but strong support for his provisional release application (even if it was not to be regarded as a decisive factor).

(iv) No reasonable tribunal could have reached the conclusion that Mr Sesay would not have voluntarily surrendered to the Special Court. There was no evidence to support this conclusion. Whilst the

position, in the absence of direct evidence either way, might have been unclear the evidence relied upon by the defence (as to character, conduct during disarmament, and knowledge of the Special Court) could have supported an inference that he might have voluntarily surrendered. The available evidence did not support in any way the contrary conclusion as reached by the Learned Judge.

11. The Learned Judge failed to address the significance of the role that the accused played in bringing the RUF through the disarmament process and thereby helping to bring to an end the conflict. The Learned Judge concluded that the Accused's participation in the peace process was irrelevant (para. 51) to the issue of whether he would appear for trial. It is submitted that the evidence relied upon by the accused was more than evidence of previous good conduct but was evidence of character which went directly to the issue of whether Mr Sesay could be trusted to abide by the authority of the court, for example the evidence of General Opande, who stated inter alia that, "I have had peace keeping experience in Namibia and in Liberia and can say that Mr. Sesay kept his word in distinction to other experiences I have had". This observation, arising from the conduct of Mr Sesay during the disarming of the RUF to disarmament, was probative of Mr Sesay's attitude and ability to abide by the rule of law and was a relevant consideration that ought to have weighed into the Learned Judge's balancing exercise.

CONCLUSION

12. The Learned Judge erred by failing, in the first instance, to properly assess the evidence which related directly to Mr Sesay and his individual circumstances. Moreover the Learned Judge failed to explain the reasoning behind the approach taken in regard to the issues aforementioned. At no stage does the Learned Judge explain why it is Mr Sesay's **individual circumstances** do not

outweigh the public interest but instead simply dismisses the application by reference only to public interest requirements.[3]

13. It was crucially important, given the balancing exercised to be conducted (an assessment of whether public interest requirements, demonstrated by the Prosecution, outweigh the need to ensure respect for an accused's right to liberty (see para. 40 of the Decision)) that theses issues were properly assessed and explained. It was particularly important because without a proper explicit analysis and assessment of the individual aspects of the application there was little or nothing to place into the balance against the public interest requirements which militated against the granting of provisional release.

14. Thus it was inevitable that the accused (or any accused whose individual circumstances were not properly assessed or regarded as irrelevant) would not be granted provisional release. In other words, unless the individual circumstances of the accused were assessed and balanced properly the obligation pursuant to Rule 65(B) to hear from the Sierra Leonean Government became, by default, the determining factor in the application.

15. It is respectfully submitted that the accused appeal should be granted the appeal and bail ordered. In the alternative, if the Appeal Chamber considers that there are no errors of law or fact on the face of the decision but that the reasons given are inadequate, the defence requests that the Learned Judge be requested to provide reasons to support the decision. The defence reserve the right to make further submissions accordingly.

16. The defence respectfully request that the appeal not be dismissed without oral argument at a date to be fixed by the Appeal Chamber..

Wayne Jordash

[3] See para. 48, 49 & 50 of the Decision.

Serry Kamal
Sareta Ashraph

4th August 2004.

BOOK OF AUTHORITIES

1. Letellier v. France (No. 1)(1992) 14 EHRR 83
2. Tomasi v. France (1993) 15 EHHR 1
3. Yagci and Sargin v. Turkey (1995) 20 EHHR 505