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SCSL-2004-16-PT  
(267-272)

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**SPECIAL COURT FOR SIERRA LEONE**

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**THE TRIAL CHAMBER**

**Before:** Judge Bankole Thompson, Presiding Judge  
Judge Benjamin Mutanga Itoe  
Judge Pierre Boutet

**Registrar:** Robin Vincent

**Date:** 13 February 2004

**PROSECUTOR**                      **Against**                      **Alex Tamba Brima**  
**Brima Bazzy Kamara**  
**Santigie Borbor Kanu**  
(Case No.SCSL-2004-16-PT)

**DECISION ON PROSECUTION' S APPLICATION FOR LEAVE TO FILE AN  
INTERLOCUTORY APPEAL AGAINST THE DECISION ON THE PROSECUTION  
MOTIONS FOR JOINDER**

**Office of the Prosecutor:**

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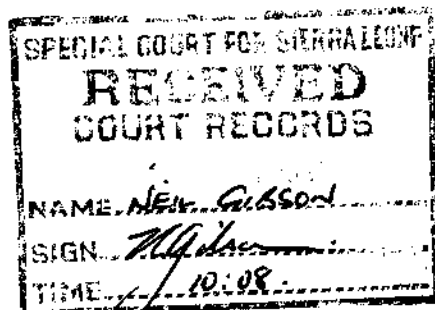
Terence Terry  
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**Defence Counsel for Santigie Borbor Kanu:**

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**Defence Counsel for Brima Bazzy Kamara:**

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THE TRIAL CHAMBER ("the Chamber") of the Special Court for Sierra Leone ("the Special Court") composed of Judge Bankole Thompson, Presiding Judge, Judge Pierre Boutet and Judge Benjamin Mutanga Itoe;

SEIZED of the Application for Leave to File an Interlocutory Appeal against the Decision on the Prosecution Motion for Joinder filed on 3 February 2004 by the Office of the Prosecutor ("Prosecution") in the case SCSL-2004-16-PT ("the Motion") pursuant to Rule 73(B) of the Rules of Procedure and Evidence of the Special Court ("the Rules");

NOTING the Response filed on behalf of Santigie Borbor Kanu on 6 February 2004 to which the Prosecution filed a Reply on 9 February 2004, the Response filed on behalf of Alex Tamba Brima on 9 February 2004 to which the Prosecution filed a Reply on 11 February and the Response filed on behalf of Brima Bazzy Kamara on 9 February 2004 to which the Prosecution filed a Reply on 12 February (singularly and collectively "the Defence Responses" and "the Prosecution Replies");

CONSIDERING THE SUBMISSIONS AND ARGUMENTS OF THE PARTIES

I. THE MOTION

A. The Prosecution Submissions:

- 1. Pursuant to Rule 73(B) of the Rules, the Prosecution seeks leave to file an interlocutory appeal in respect of the Decision on the Prosecution's Motion for Joinder, dated 27 January 2004 ("the Joinder Decision"), in which the Chamber ordered the joint trial of Issa Hassan Sesay, Morris Kallon, and Augustine Gbao of the RUF, and a separate joint trial of Alex Tamba Brima, Brima Bazzy Kamara and Santigie Borbor Kanu of the AFRC.<sup>1</sup>
- 2. The Prosecution submitted as follows:
  - a) That since it intends to lead essentially the same evidence against each accused person, all Prosecution witnesses, with the possible exception of strictly biographical ones, would be required to testify twice to the exact same events, which might cause some witnesses to refrain from testifying.<sup>2</sup>
  - b) That Prosecution witnesses with first hand knowledge of the actions of the accused would not be in the position to testify twice because of credible security concerns.<sup>3</sup>
  - c) That by forcing the appearance of the same witnesses twice, the Chamber's decision means a prolonged stay of the witnesses in the protection program, which will increase the financial costs significantly.<sup>4</sup>
  - d) That having two separate trials on essentially the same evidence and by the same panel of judges will jeopardize the principle of a fair trial, as the same panel of Judges assess the credibility of witnesses and the weight of their testimony in both trials.<sup>5</sup>

<sup>1</sup> Decision and Order on Prosecution Motions for Joinder, 27 January 2004, SCSL-2003-05-PT; SCSL-2003-06-PT; SCSL-2003-07-PT; SCSL-2003-09-PT; SCSL-2003-10-PT; SCSL-2003-13-PT.

<sup>2</sup> Motion, para. 15.

<sup>3</sup> Motion, para. 16.

<sup>4</sup> Motion, para. 17.

<sup>5</sup> Motion, para. 19.

- e) That in the event of a second Trial Chamber being constituted and a separate bench of Judges sitting on the second trial, the Judges will hear essentially the same trial as the first, but may render contradictory or inconsistent decisions regarding the credibility and weight of the same witnesses in the first trial.<sup>6</sup>
  - f) Furthermore, the Prosecution submitted that two separate trials will compromise the principle of equality of arms, as it will place the Prosecution at a substantial disadvantage vis-à-vis the Defence in whichever trial proceeds second. As the Joinder Decision forces the Prosecution to call its witnesses to testify twice, they are subject to cross-examination twice on the same evidence.<sup>7</sup>
3. In light of the above, the Prosecution submitted that the requirements for granting leave are met as the Joinder Decision, if allowed to stand, would cause "irremediable" prejudice to the Prosecution that could not be cured by the final disposal of the trial, including post-judgment appeal.<sup>8</sup>

**B. The Defence Responses:**

- 4. In the Response filed on behalf of Alex Tamba Brima, the Defence submitted that the Chamber should refuse the Motion on the basis that it was filed outside the three-day time limit for filing applications for leave to appeal.
- 5. The Defence for Brima Bazy Kamara and Santigie Borbor Kanu submitted that the Prosecution failed to satisfy the test laid down in Rule 73(B) with regard to the existence of "exceptional circumstances."<sup>9</sup>
- 6. On the question of "irreparable prejudice", the Defence for Santigie Borbor Kanu argued that only procedural ramifications were referred to by the Prosecution and therefore no substantive rights of the Prosecution had been shown to be endangered by the Joinder Decision.<sup>10</sup> The Defence for Alex Tamba Brima stated that the reasons given by the Prosecution for "irreparable prejudice" are without merit and merely speculative.<sup>11</sup>
- 7. In addition, the Defence for Brima Bazy Kamara and Santigie Borbor Kanu respectively stressed the fact that the Joinder Decision from which the Prosecution seeks leave to appeal shows careful deliberation and takes into account the factions and their respective command structures. They submit that Rule 82(B) on "Joint and Separate Trials" was correctly interpreted and applied by the Trial Chamber.<sup>12</sup> On behalf of Kamara, the Defence further submitted that there should be a demonstration by the Prosecution that that the Chamber's discretion has not been properly or judicially exercised.<sup>13</sup>

<sup>6</sup> Motion, para. 20.

<sup>7</sup> Motion, para. 21.

<sup>8</sup> See Motion, para. 12.

<sup>9</sup> Responses filed on behalf of Brima Bazy Kamara para. 15 and on behalf of Santigie Borbor Kanu, para. 3.

<sup>10</sup> Response filed on behalf of Santigie Borbor Kanu, para. 6.

<sup>11</sup> Response filed on behalf of Alex Tamba Brima, p. 5-6.

<sup>12</sup> Responses filed on behalf of Brima Bazy Kamara, para. 8, and on behalf of Santigie Borbor Kanu, para. 5.

<sup>13</sup> Responses filed on behalf of Brima Bazy Kamara para. 3.

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C. The Prosecution Replies:

- 8. The Prosecution reiterated in its Replies that its submissions clearly show that the Joinder Decision would cause "irreparable prejudice" for the Prosecution if allowed to stand.<sup>14</sup> It noted that the test required under Rule 73(B) for leave to appeal to be granted is for the Prosecution to show the Court that it will suffer irreparable prejudice as a result of its decision, not any demonstration of a miscarriage of justice.<sup>15</sup>
- 9. The Prosecution disputed in its Reply to the Response on behalf of Alex Tamba Brima the Defence contention that the reasons advanced by the Prosecution to show it will suffer irreparable prejudice are merely speculative. It stated that the security concerns and the consequent unwillingness of witnesses to testify, as well as the strain and hardship on the witness protection program, are factual and realistic.<sup>16</sup>

HAVING DELIBERATED THE CHAMBER DECIDES AS FOLLOWS

II. THE PROCEDURAL ASPECT OF TIME LIMITS

- 10. Rule 73(B) of the Rules states:

"Decisions rendered on such motions are without interlocutory appeal. However, in exceptional circumstances and to avoid irreparable prejudice to a party, the Trial Chamber may give leave to appeal. Such leave should be sought within 3 days of the decision and shall not operate as a stay of proceedings unless the Trial Chamber so orders." (Emphasis added)

- 11. It might be useful to first dispose of the defence objection by Alex Tamba Brima that the Motion was filed out of time. The Joinder Decision was delivered orally in court on 27 January 2004. However, the published reasons and order were not filed and served on the parties until 28 January 2004. As a result, this Chamber issued a Corrigendum to the Joinder Decision that amended one of the orders as follows:

"DECIDES AND ORDERS that the second consequential order of the Decision shall be changed in the following manner:

- 1. That the said consolidated indictments be filed in the Registry within ten (10) days of the date of delivery of this Decision;

Shall read:

- 2. That the said consolidated indictments be filed in the Registry within ten (10) days of the date of service of this Decision;"<sup>17</sup>

<sup>14</sup> Prosecution's Reply to Defence Response filed on behalf of Santigie Borbor Kanu, para. 8, Prosecution's Reply to Defence Response filed on behalf of Alex Tamba Brima, para. 9, and Prosecution's Reply to Defence Response filed on behalf of Brima Bazzy Kamara, para. 4.

<sup>15</sup> Prosecution's Reply to Defence Response filed on behalf of Brima Bazzy Kamara, para. 3.

<sup>16</sup> Prosecution's Reply to Defence Response filed on behalf of Alex Tamba Brima, para. 13.

<sup>17</sup> SCSL-03-05-PT-097, SCSL-03-06-PT-089, SCSL-03-07-PT-152, SCSL-03-09-PT-079, SCSL-03-10-PT-060, SCSL-03-13-PT-043, Corrigendum "Decision and Order on Prosecution Motions for Joinder", 28 January 2004.

Similarly, the Chamber holds that for the purpose of interpreting the time limit in Rule 73(B), the time began to run from the date of *service* of the Joinder Decision, which was 28 January 2004. Pursuant to Rule 7 of the Rules, the time for filing any application for leave to appeal expired at the end of 3 February 2004, given that 2 February 2004 was a Public Holiday in Sierra Leone and no documents were accepted for filing that day. As such, the Motion was filed within time.

III. THE TEST UNDER RULE 73(B)

- 12. In addressing the key aspects of Rule 73(B), the Chamber wishes to emphasise at the outset that the first part of Rule 73(B) contains a clear statement of the general position in relation to interlocutory appeals. The second part of that Rule creates an extremely limited exception to this general position.
- 13. As a general rule, interlocutory decisions are not appealable and consistent with a clear and unambiguous legislative intent, this rule involves a high threshold that must be met before this Chamber can exercise its discretion to grant leave to appeal. The two limbs to the test are clearly conjunctive, not disjunctive; in other words, they must *both* be satisfied.
- 14. This interpretation is unavoidable, given the fact that the second limb of Rule 73(B) was added by way of an amendment adopted at the August 2003 Plenary. This is underscored by the fact that prior to that amendment no possibility of interlocutory appeal existed and the amendment was carefully couched in such terms so as only to allow appeals to proceed in very limited and exceptional situations. In effect, it is a restrictive provision.
- 15. The Chamber also notes that the amendment to Rule 73(B) created a novel test for granting leave to interlocutory appeal, as the requirement of "exceptional circumstances" does not feature in similar provisions in the Rules of the International Criminal Tribunal for the former Yugoslavia ("ICTY") and the International Criminal Tribunal for Rwanda ("ICTR"). The relevant provision in the Rules of those Tribunals states that:

"Decisions on all motions are without interlocutory appeal save with certification by the Trial Chamber, which may grant such certification if the decision involves an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, and for which, in the opinion of the Trial Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings."<sup>18</sup>

This Chamber must apply an entirely new and considerably more restrictive test than the one applied by the ICTR or the ICTY. Furthermore, the only relevant decision of the Special Court to date applied the earlier version of Rule 73(B).<sup>19</sup> There is therefore the need for an authoritative statement by the Chamber on the implication and effect of the amended rule. Nevertheless, this restriction is in line with the trend and our determination to tighten the test for granting leave in respect of interlocutory appeals in the interests of expeditiousness.

<sup>18</sup> ICTY Rules of Procedure and Evidence, adopted 11 February 1994, as amended 17 July 2003 and ICTR Rules of Procedure and Evidence, adopted 29 June 1995, as amended 27 May 2003, common Rule 73 (B) [Other Motions]. This certification procedure was added in 2002 in the ICTY, (prior to which leave applications were decided by a bench of 3 Appeal Chamber judges on the basis of incurable prejudice or "if the issue in the proposal appeal is of general importance to proceedings before the Tribunal or in international law generally"), and in the ICTR in May 2003 (prior to which there was no interlocutory appeal on Motions).

<sup>19</sup> *Prosecutor v Morris Kallon*, Decision on the Defence Application for Leave to Appeal, 10 Dec. 2003.

The further restriction is appropriate and acceptable in the peculiar circumstances of the Special Court whose mandate, we must observe, is limited in its duration.

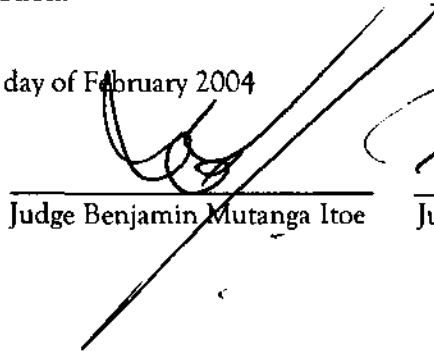
- 16. It is clear then from a plain reading of Rule 73(B) that granting leave is an exceptional option. As this is an exclusionary rule, if the two-limb test has been complied with, the Prosecution must demonstrate that there is something to justify the exercise of this discretion by the Chamber in its favour.
- 17. In the Motion before the Chamber, the Prosecution submissions focus primarily on the question of "irreparable prejudice to a party", which is only the second limb of the test in Rule 73(B) which the Chamber must apply. The Prosecution has failed to make substantive references to "exceptional circumstances", and the Chamber has no basis to conclude that any exceptional circumstances have been established.
- 18. Based on the foregoing, and having found that no exceptional circumstances have been articulated by the Prosecution to warrant additional comments, it would not be necessary to address the question of irreparable prejudice given that the test is conjunctive. The Chamber, however, notes that the main submissions of the Prosecution on this point relate mostly to questions such as cost and security of witnesses, the order in which the trials commence, and the fairness of the trials if they are heard before a single Trial Chamber. It has been suggested by the Prosecution that there might be some added difficulties in the management of the Prosecution case, some additional work and possibly problems if this application for leave to appeal were turned down, but nothing that has been shown in our view to constitute "irreparable prejudice".

**FOR THESE REASONS**

- 19. The Chamber refuses the Prosecution application for leave to file an interlocutory appeal and accordingly dismisses the Motion.

Done at Freetown this thirteenth day of February 2004

  
\_\_\_\_\_  
Judge Bankole Thompson

  
\_\_\_\_\_  
Judge Benjamin Mutanga Itoe

  
\_\_\_\_\_  
Judge Pierre Boutet

Presiding Judge,  
Trial Chamber

