

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

NOTING the Decision on the Prosecution Motion for Concurrent Hearing of Evidence Common to Cases SCSL-2004-15-PT and SCSL-2004-16-PT ("Decision") of 11 May 2004;

SEIZED of the Application for Leave to File an Interlocutory Appeal against the Decision on the "Prosecution's Motion for Concurrent Hearing of Evidence Common to Cases SCSL-2004-15-PT and SCSL-2004-16-PT ("Application") filed by the Office of the Prosecutor ("Prosecution") on 14 May 2004;

RECALLING the Court's Decision and Order on Prosecution Motions for Joinder dated 27 January 2004 in respect of Accused Issa Hassan Sesay, Alex Tamba Brima, Morris Kallon, Augustine Gbao, Brima Bazzy Kamara and Santigie Borbor Kanu ("Joinder Decisions") in which it ordered the joint trial of Issa Hassan Sesay, Morris Kallon and Augustine Gbao of the RUF ("RUF Case") and a separate joint trial of Alex Tamba Brima, Brima Bazzy Kamara and Santigie Borbor Kanu of the AFRC ("AFRC Case");

NOTING the Order for Expedited Filing of 17 May 2004;

NOTING the Response to the Application filed by Defence Counsel for Morris Kallon on 19 May 2004 ("Kallon Response");

NOTING the Response to the Application filed by Defence Counsel for Augustine Gbao on 20 May 2004 ("Gbao Response");

NOTING the Response to the Application filed by the Defence Counsel for Issa Hassan Sesay on 21 May 2004 ("Sesay Response");

NOTING the Consolidated Reply to the responses filed by the Prosecution on 24 May 2004 ("Consolidated Reply");

NOTING THE SUBMISSIONS OF THE PARTIES:

Case No. SCSL04-15-PT

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01 June 2004

A. The Prosecution Motion

1. Pursuant to Rule 73(B) of the Rules of Procedure and Evidence ("Rules"), the Prosecution seeks leave to appeal against the Decision of this Chamber denying the Prosecution's Motion for Concurrent Hearing of Evidence in the RUF and AFRC Cases on the basis of exceptional circumstances and irreparable prejudice. The Prosecution states that if granted leave, it will argue that the Decision contains errors and misconceptions in law by the Trial Chamber.¹
2. On the issue of exceptional circumstances, the Prosecution argues that pursuant to the Decision over one hundred and fifty witnesses will have now to testify twice in court, in separate trials, to exactly the same facts, and that this will happen in a relatively short period of time and before a court which is located in the country where the violations that such witnesses will be called to give testimony about took place. The Prosecution further contends that all these witnesses, including women and children subjected to sexual abuses and mutilations, will hence re-live their trauma and undergo additional cross-examinations of their experiences.²
3. In addition, the Prosecution submits that the Decision will cause irreparable prejudice to its case. As a result of the hardships and risks involved in testifying before the court, the Prosecution contends that some witnesses will then refuse to appear for the second trial for the purposes of testifying. This, the Prosecution concludes, will cause loss of evidence that will not only entail great detriment to the ascertainment of the truth and the fairness of the judicial process, but, indeed, will also cause irreparable prejudice to the Prosecution's case.³

B. The Defence Responses

4. In their responses, each of the Defence Counsel submits that the Application should be rejected on the grounds that it does not meet the test provided for in Rule 73(B) of the Rules, namely, exceptional circumstances and irreparable prejudice to the Prosecution's case.

¹ Application, paras 3-10.

² *Id.*, paras 12-14.

³ *Id.*, paras 15-17. In addition, the Prosecution reaffirms its arguments as stated in its Application for Leave to File an Interlocutory Appeal against the Trial Chamber's Decision of 27 January 2004, 3 February 2004.

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The Kallon Response

5. The Defence submits that the trial of the AFRC Case is separate and distinct from the trial of the RUF Case, for which a date for the commencement of the trial has already been set. The Prosecutor is therefore obliged to show exceptional circumstances and irreparable prejudice in respect of each case and separately from each other, which it failed to do in the Application.⁴
6. Further, the Defence submits that the Decision is based on the Trial Chamber's exercise of discretion based on an assessment of the practical effect of the possibility of a concurrent hearing of evidence and a resolution of such discretion by the Appeals Chamber will not materially advance the proceedings.⁵
7. Finally, the Defence also submits that the Prosecution has not advanced any new arguments in its Application, but rather has barely reaffirmed arguments upon which the Trial Chamber has already deliberated in its Decision.⁶

The Gbao Response

8. With particular reference to the Prosecution's arguments on exceptional circumstances, the Defence submits that the Prosecution has failed to establish the exceptionality of the case of a witness called to give evidence twice in two separate trials. The Defence in fact submits that this is invariably the case where there are a series of trials arising out of the same political conflict and, albeit protective measures for witnesses cannot provide for a specific figure on the identity of the various witnesses, this situation must arise in international criminal cases where the same general factual context gives rise to a number of individuals in different trials.⁷
9. In addition, the Defence contests the argument that the witnesses will now, following the Decision, have to be cross-examined again, because the total number of cross-examinations will not increase by proceeding with a separate hearing of evidence but rather always

⁴ Kallon Response, para. 9.

⁵ *Id.*, paras 11 and 13.

⁶ *Id.*, para. 12.

⁷ Gbao Response, para. 2.

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corresponds to the total number of the accused involved in the trials and entitled to examine a witness.⁸

10. In the case of irreparable prejudice to its case, the Defence contests any prejudice to the Prosecution due to the large number of witnesses to be called and due to the system of witness protection that should ensure the security of the witnesses whenever call to testify.⁹

11. In addition, the Defence submits that the Prosecution can always apply to seek the specific evidence of particular witnesses to be heard concurrently if it can show special justification, rather than applying for a blanket ruling on more than half of the witnesses contained in their initial witness list.¹⁰

The Sesay Response

12. Defence Counsel for Sesay asserts that the Application simply reiterates the Prosecutions arguments presented in connection with the Joinder Decisions and with the Decision itself and does not provide any further evidentiary detail or arguments that might allow proper adjudication.

C. The Consolidated Reply

13. In its Reply, the Prosecution rebuts the Defence assertions that the Application does not satisfy the requirement of exceptional circumstances and irreparable prejudice of Rule 73(B) of the Rules.

14. In particular, the Prosecution also reasserts that for both the RUF and the AFRC Cases there will be over a hundred and fifty witnesses, subjected to extraordinary security and mental conditions and due to testify in the same environment were the alleged crimes were committed. The denial of the possibility to hear such witnesses concurrently, in its view, will require witnesses to appear in court twice and might increase the risk of refusals from certain

⁸ *Id.*, para. 3.

⁹ *Id.*, paras 4-5.

¹⁰ *Id.*, para. 7.

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witnesses to testify for a second time. According to the Prosecution these amount to exceptional circumstances.¹¹

15. In addition, the Prosecution submits that the previous resolution of the Trial Chamber of the Motion for leave to appeal the Joinder Decision is irrelevant for the Application as joinder and concurrent hearings of evidence are two completely different issues and measures.¹²

16. With particular reference to the submissions made in the Gbao Response on the possibility for the Prosecution to seek specific applications for the concurrent hearing of particular witnesses, the Prosecution submits that such an "ad hoc" approach is undesirable, as "would frustrate an orderly organization of the trial process and would be against the interest of judicial economy" as the Prosecution would have to submit individual motions for over one half of its witnesses.¹³

HAVING DELIBERATED THE CHAMBER DECIDES AS FOLLOWS:

Introduction

17. This Motion once more confronts the Court with the vexed question of one of the criminal law's recurring themes, both nationally and internationally, namely, interlocutory appeals.

Order Requested

18. In more specific terms, as anticipated in the section above dedicated to the Prosecution submissions, the present Application seeks leave of this Trial Chamber to appeal against its Decision on the Prosecution Motion for Concurrent Hearing of Evidence Common to Cases SCSL-2004-15-PT and SCSL-2004-16-PT of 11 May 2004.

Legal Basis For the Motion

19. The Prosecution's Motion is filed pursuant to Rule 73(B) of the Rules. Rule 73(B) is in these terms:

¹¹ Consolidated Reply, paras 8-12.

¹² *Id.*, para. 13.

¹³ *Id.*, para. 17.

“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.”

Applicable Jurisprudence

20. In its twin seminal Decisions on the subject of interlocutory appeals in the RUF Case and in the AFRC Case¹⁴ where the Prosecution sought leave of the Trial Chamber to appeal interlocutorily against its Joinder Decisions in respect of the aforementioned cases, this Chamber took the opportunity to articulate the principles governing applications of this nature.
21. Emphasising that Rule 73(B) of the Rules generally does not confer a right of interlocutory appeal but only grants leave to appeal in exceptional cases, the Chamber opined as follows:

“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 of the test are clearly conjunctive, not disjunctive; in other words, they must *both* be satisfied.”

Explaining the rationale behind this Rule, the Court had this to say:

“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 an 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.”

In essence, the purport of our Decisions of 13 February 2004 can be put this way: that the overriding legal consideration in respect of an application for leave to file an interlocutory appeal is that the applicant’s case must reach a level of exceptional circumstances and

¹⁴ Decision on Prosecutor’s Application for Leave to File and Interlocutory Appeal against the Decision on the Prosecution Motions for Joinder, 13 February 2004 (“Decisions of 13 February 2004”);

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irreparable prejudice. Nothing short of that will suffice having regard to the restrictive nature of Rule 73(B) of the Rules and the rationale that criminal trials must not be heavily encumbered and consequently unduly delayed by interlocutory appeals.

22. As we noted in those Decisions, our test for granting leave to file interlocutory appeals is more restrictive in comparison with that applied by International Criminal Tribunal for the former Yugoslavia and the International Criminal Tribunal for Rwanda in the interest of expeditiousness and the peculiar circumstances of this Court's limited mandate. Based on the foregoing restatement of the applicable principles of law, we now proceed to address the key question for determination that is, whether the Prosecution's case for leave to file an interlocutory appeal reaches the level of exceptional circumstances and irreparable prejudice. This goes to the merit of the application.

Evaluation of Application's Merit

23. It is significant to note that the Prosecution's case in support of the "exceptional circumstances" prong of the test is predicated upon two averments or assumptions, namely, (i) that over one hundred and fifty witnesses will have to testify twice in two separate trials in a relatively short duration to the same facts, and (ii) that of the witnesses re-living trauma during cross-examination. The Chamber fails to see how the fact that one hundred and fifty witnesses will have to testify in two separate trials in a relatively short period of time to the exact same facts which constitute the most atrocious violations of international criminal law to which they were victims or witnesses, as alleged by the Prosecution, before a court located in the country where the violations, allegedly took place coupled with, as the Prosecution submits, the likelihood of re-traumatization do constitute "exceptional circumstances" for the purposes of Rule 73(B) of the Rules especially in the light of the Chamber's analysis at paragraphs 34-39 of the Decision in question. In what lies the exceptionality, considering the entitlement in law of each accused to a separate trial barring a joinder decision? These contingencies may create some inconveniences and hardships but do not, singly or cumulatively, amount to "exceptional circumstances" in the context of Rule 73(B) of the Rules, taking into account the

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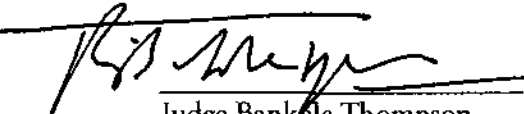
Orders for witnesses' protective measures¹⁵ and the expert services of the Victims and Witnesses Unit of the Special Court including the psychological counselling component of such services. The claim of "exceptional circumstances" by the Prosecution is legally unsustainable, and therefore fails.

24. Consistent with our Decisions of 13 February 2004 on the issue of leave to file an interlocutory appeal, we do not think it necessary or appropriate to examine the merits of the Prosecution's submissions on "irreparable prejudice", having found that there has not been a showing of "exceptional circumstances" especially since the test is conjunctive and not disjunctive.

DISPOSITION


25. For the foregoing reasons and considerations, the Trial Chamber hereby denies the Application.

Done at Freetown this 1st day of June 2004


Judge Bankole Thompson

Presiding Judge,
Trial Chamber


Judge Benjamin Mutanga Itoe


Judge Pierre Boutet



¹⁵ *Prosecutor v. Issa Hassan Sesay*, SCSL-2003-05-PT, Decision on the Prosecutor's Motion for Immediate Protective Measures for Witnesses and Victims and for Non-Public Disclosure, 23 May 2003; *Prosecutor v. Morris Kallon*, SCSL-2003-07-PT, Decision on the Prosecutor's Motion for Immediate Protective Measures for Witnesses and Victims and for Non-Public Disclosure, 23 May 2003; *Prosecutor v. Augustine Gbao*, SCSL-2003-09-PT, Decision on the Prosecution Motion for Immediate Protective Measures for Witnesses and Victims and for Non-Public Disclosure, 10 October 2003.