SPECIAL COURT FOR SIERRA LEONE
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IN THE APPEALS CHAMBER

Before: Justice George Gelaga King

Registrar: Robin Vincent

Date: 23 June 2004

PROSECUTOR Against Issa Hassan Sesay
Morris Kallon
Augustine Gbao
(Case No.SCSL-04-15-PT)

KALLON - DECISION ON APPLICATION FOR LEAVE TO APPEAL AGAINST REFUSAL OF BAIL

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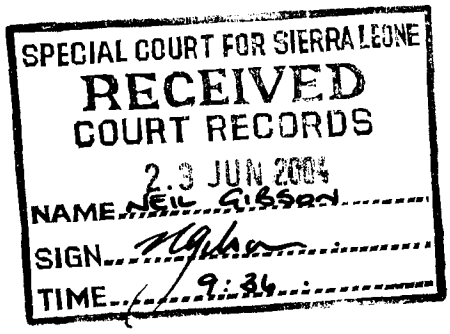

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I, J JSTICE GEORGE GELAGA KING, Single Judge of the Appeals Chamber appointed pursuant to l ule 65(E) of the Rules of Procedure and Evidence ("Rules");

SE ZED of the Defence Application for leave to appeal against the Decision of the Trial Chamber ref sing the application for bail by Morris Kallon ("Accused") filed on 4 May 2004, ("Defence Ap lication");

NC TING the Prosecution Response to 'Defence Application for leave to appeal against the Decision of the Trial Chamber refusing the application for bail by Morris Kallon' filed on 7 May 2004 ("P osecution Response");

NC TING the Defence Reply to Prosecution Response for Leave to Appeal against the Decision of the Trial Chamber refusing the Application for Bail by Morris Kallon filed on 12 May 2004 ("D efence Reply");

I. INTRODUCTION

1. On 29 October 2003 the Defence filed a Confidential Motion for Bail on behalf of the Accused which was dismissed by the Trial Chamber (Judge Boutet) on 23 February 2004.[1] On 27 February 2004 the Defence filed a Motion for Extension of Time for Filing Application for Leave to Appeal Refusal of Bail.[2] The Appeals Chamber on the 19 April 2004 granted an extension of the time limit of an additional 14 days from that date for the filing of an application for leave to appeal.[3] The present Application for leave to appeal was filed by the Defence pursuant to Rule 65(E) of the Rules on 4 May 2004 just within the extension period granted by the Appeals Chamber.

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[1] *Prosecutor v Issa Hassan Sesay, Morris Kallon and Augustine Gbao*, Case No. SCSL-04-15-PT, Decision on the Motion by M orris Kallon for Bail, 23 February 2004, ("Kallon Decision").

[2] *Prosecutor v Morris Kallon*, Case No. SCSL-04-15-PT, Defence Motion for Extension of Time for Filing of Application for Le ave to Appeal against Refusal of Bail, 27 February 2004.

[3] *Prosecutor v Morris Kallon*, Case No. SCSL-04-15-PT, Decision on Defence Motion for Extension of Time for Filing of Ap plication for Leave to Appeal against Refusal of Bail, 19 April 2004.

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II. SUBMISSIONS OF THE PARTIES

A. The Defence Motion

7. The Defence argues that good cause has been shown because the alleged errors of the learned Judge raise substantial issues of grave legal implications which will require the consideration of the Appeals Chamber. The principal submissions of the Defence in support of the Application may be summarised as follows:

a) The learned Judge committed an error of law and fact when he held that the burden of proof in support of the application for bail continues to rest on the Defence and not on the Prosecution even with the elimination of the exceptional circumstances requirement in the equivalent Rule of the International Criminal Tribunal for the Former Yugoslavia ("ICTY"). That by so holding the Learned Judge acted in contravention of a norm of customary international law.

b) The presence of the Court in Sierra Leone should not interfere with the right of the accused to bail.

c) The submissions of the Government of Sierra Leone should not have influenced the judge as they were not objective and were identical in the case of *Prosecutor v Brima*.

d) The judge erred in law and fact by opining that Kallon does not have ties with Freetown.

e) Reliance on the seriousness of the charges meant that Kallon was deprived of an individualised determination of eligibility for bail. Moreover, seriousness of the charges should not be a factor in considering bail as the Court's jurisdiction is restricted to serious charges and the accused should not be denied bail on the basis of his indictment.

f) The judge failed to give reasons for his suggestion that Kallon would undermine his own safety if released into the community. Similarly, the judge failed to consider relevant conditions, such as whether the accused would pose a danger to victims and witnesses or whether he would appear when required to do so.

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B. The Prosecution Response

3. The Prosecution argues that the Defence has failed to show that the Trial Chamber may have erred in not applying the law correctly or failing to take into account and assess all the decisive facts of a case, as follows:

a) Regarding the burden of proof, the Judge was correct in holding that "it is for the Defence to show that further detention of the Accused is neither justified nor justifiable in the circumstances at hand"[4] and there has been no violation of customary international law.

b) The Prosecution submits, with reference to paragraph 38 of the Kallon Decision, that it is clear that the Judge did not consider the presence of the Court in Sierra Leone to have any bearing on the applicable principles and that he was correct in considering it a factor to be taken into consideration in examining the particular circumstances of the case.

c) The fact that the Government of Sierra Leone filed the same submissions in the *Brima* case is not an error of law on the part of the Judge. Moreover, the Judge treated these submissions cautiously and stated that bail was a "matter for the Court and the Court only".[5]

d) The Judge did not say that the Accused had no ties in Freetown but that his ties with Bo were stronger and that this was a valid conclusion on the basis of the evidence.

e) No error of law or fact was made in considering the seriousness of the charges against the Accused as this is a material issue to be taken into consideration. Regarding the comment in paragraph 44 of the Decision that the Accused could undermine his own safety if released, the Judge is not required to give reasons to support every statement in his decision.

f) The test as to whether, if released, the Accused will (a) appear for trial and (b) not pose a danger to any victim, witness or other person, is conjunctive, and if the Accused fails to prove one limb of the test the application fails. The Judge therefore did not err in deciding not to consider the second pre-condition.

C The Defence Reply

4. The Defence maintains that it has shown good cause. What amounts to "good cause", the Defence submits, "is determined by a Trial Chamber, based on the circumstances of a

[4] Prosecution Response, para. 10, referring to Kallon Decision, para. 32.
[5] Prosecution Response, para. 18, referring to Kallon Decision, para. 37.

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particular case and that there is no laid down requirement as to what may amount to good cause for Leave to Appeal."[6] The Defence presents further arguments as follows:

a) Under customary international law, pre-trial detention is the exception and is only permissible in special circumstances.

b) The judge failed to look at the position at the ICTY where there is a history of granting provisional release.

c) The submissions of the Government of Sierra Leone did not reflect the current situation in the country even though the judge relied on them as an important factor in determining the public interest aspect.

d) By opining that the accused does not have community ties in Freetown, the judge failed to make any inquiry on this issue thereby committing a grave procedural error.

e) The seriousness of the offences should not adversely affect the right of the accused to bail.

f) The judge failed to consider the issue of danger to victims and witnesses thereby failing to apply Rule 65(B) properly.

III. DISCUSSION

A. The Principal Question for Determination

i. The principal question in this application for leave to appeal against the refusal to grant bail to the accused is undoubtedly whether the applicant, the Accused, has shown good cause as required by Rule 65(E) of the Rules. The Rule provides:

> 65(E) Any decision rendered under this Rule shall be subject to appeal in cases where leave is granted by a Single Judge of the Appeals Chamber, upon good cause being shown. Applications for leave to appeal shall be filed within seven days of the impugned decision.

It must be said *in limine* that what amounts to "good cause" is for the Single Judge of the Appeals Chamber to determine and NOT the Trial Chamber as contended by the Defence.[7]

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[6] Defence Reply, para. 5.
[7] Ibid.

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B. What is "Good Cause"?

(. The Appeals Chamber in other international jurisdictions has held that in order to show "good cause" the Defence must show that the Trial Chamber may have erred in making the impugned decision.[8]

'. The test, it seems to me, lies in the answer to the question: From the submissions of the Defence, could it be said that the Trial Chamber or the designated Judge of that Chamber may have erred in making the impugned decision? If the answer is in the affirmative then according to these decisions, "good cause" is shown.

3. With respect, it seems to me that that test, while useful and helpful is unnecessarily restrictive. It gives only one instance of "good cause", i.e. where the Defence makes out a *prima facie* case that an error of law and/or fact has been made by the Trial Chamber or a single Judge of that Chamber, as the case may be.

9. In my judgement the concept of "good cause" ought to be extended to include those instances where the question in relation to which leave to appeal is sought, is one of general principle to be decided for the first time, or a question of public importance upon which further argument and a decision of the Appeals Chamber would be in the interests of justice paying particular regard to the fact that ordinarily the "accused may only make one application for bail to the Judge or Trial Chamber."[9]

10. I take cognisance of the fact that "the Judges of the Appeals Chamber of the Special Court shall be guided by the decisions of the Appeals Chamber of the International Tribunals for the former Yugoslavia and for Rwanda."[10] This provision, however, does not deter the newly constituted Special Court for Sierra Leone from developing its own jurisprudence and case law, being guided, of course, by the relevant decisions of the two international tribunals to which I have hereinbefore referred.

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[8] *Prosecutor v. Brdjanin and Talic*, Case No. IT-99-36/1, "Decision on Application for Leave to Appeal", 7 September 2000; *Semanza v. The Prosecutor*, Case No. ICTR-00-56-I, "Decision on Leave to Appeal Against the Refusal to Grant Provisional Release", 26 March 2003, para. 26; *Ndayambaje v. The Prosecutor*, Case No. ICTR-96-A-8, "Decision on Motion to Appeal Against the Provisional Release Decision of Trial Chamber II of 21 October 2002", 10 January 2003, para. 29; and *Prosecutor v. Simic et al.*, Case No. IT-95-9, "Decision on Application for Leave to Appeal", 19 April 2000, para. 11.

[9] Rule 65(c)

[10] Article 20(3) of the Special Court Statute.

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C. Has Good Cause been shown in this Application?

1. Having given the definitive parameters of "good cause", how do I relate it to the instant application? It seems to me that the questions raised by the Defence in its Motion, quite apart from the errors they allege the learned Judge made, are of such importance as to merit further argument and also that a decision of the Appeals Chamber would be in the interests of justice having regard to the circumstances of the application.

IV. DISPOSITION

2. I, therefore, grant the Defence leave to appeal against the decision of Judge Boutet refusing bail to the Accused.

Done at Freetown this twenty-third day of June 2004

The Hon. Justice George Gelaga King

[Seal of the Special Court for Sierra Leone]

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