SPECIAL COURT FOR SIERRA LEONE
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IN THE APPEALS CHAMBER

Before: Justice Raja Fernando

Registrar: Robin Vincent

Date: 5 November 2004

PROSECUTOR Against Sam Hinga Norman
Moinina Fofana
Allieu Kondewa
(Case No.SCSL-04-14-AR65)

FOFANA - DECISION ON APPLICATION FOR LEAVE TO APPEAL BAIL DECISION

Office of the Prosecutor:

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I, JUSTICE RAJA FERNANDO, Single Judge of the Appeals Chamber appointed pursuant to Rule 65(E) of the Rules of Procedure and Evidence ("Rules");

SEIZED of the Application by Moinina Fofana ("Accused") for Leave to Appeal against Refusal of Bail ("Defence Application") filed on 27 August 2004;

NOTING the Prosecution Response to Moinina Fofana Application for Leave to Appeal against Refusal of Bail ("Prosecution Response") filed on 8 September 2004;

NOTING the Defence Reply to Prosecution's Response Application for Leave to Appeal against Refusal of Bail ("Defence Reply") filed on 13 September 2004;

NOTING the Decision on Application for Bail pursuant to Rule 65 by Hon. Judge Itoe ("Bail Decision") of 5 August 2004;

HEREBY DECIDE:

I. SUBMISSIONS OF THE PARTIES

A. The Defence Application

1. The Defence submits that Judge Itoe made an error of fact in failing to give sufficient consideration to the specific guarantees put forward that the Accused would appear for trial and would not pose a danger to any person, including his agreement to the imposition of conditions.

2. It is further argued that Judge Itoe made an error of law in relying on the 'best evidence rule' to decide the admissibility of the declaration adduced by the Defence as this rule relates to the assessment of the probative value of evidence once admitted and not to the determination of admissibility as such. The Defence argues that the declaration should have been admitted and that an unsigned document is not by definition irrelevant, while the statement of the Chief Investigator should not have been admitted being of questionable probative value, irrelevant and based on hearsay.

3. The Defence contests that in matters relating to bail the burden of establishing the conditions set out in Rule 65(B) of the Rules rests with the Accused.

4. Finally, the defence argues that the matters raised amount to general principles not dealt with before by the Appeals Chamber and questions of public importance in relation to which a decision of that Chamber would serve the interests of justice. Furthermore, it is argued that the issue of provisional release is per se a question of public importance which must be dealt with in the final instance.

B. The Prosecution Response

5. According to the Prosecution, Judge Itoe duly considered all the material facts, including the specific guarantees furnished by the Accused and appropriately balanced and rejected them. Moreover, under Rule 65(B) the Judge was not compelled to accept what the Defence considered to be sufficient guarantees and could exercise his discretion as to whether to grant bail notwithstanding such guarantees.

6. The Prosecution makes the following arguments:

   a) That Judge Itoe correctly exercised his discretion in applying the 'best evidence rule' to the admissibility of evidence as this approach is supported in the jurisprudence and practice of the International Criminal Tribunal for the Former Yugoslavia ("ICTY") and by Rule 89 of the Rules which provides that the Special Court is not bound by national rules of evidence and may apply rules which will best favour a fair determination of the matter before it. Further, the Prosecution argues that even if the Judge was wrong in his application of the best evidence rule the error was not fatal to the conclusions reached.

   b) That the Defence wrongly assumes that all relevant evidence is admissible while the correct position is that the judge has a discretion as to whether or not to admit relevant evidence and in any case Judge Itoe did not opine that the unsigned declaration was not relevant, but found it to be unreliable and therefore inadmissible.

   c) In relation to the declaration of the Chief Investigator, that the admissibility of a statement is not dependent on the impartiality of the witness. It is argued further that the declaration is not based on hearsay, but even if it were, it would not make it per se inadmissible.

7. In relation to the burden of proof, the Prosecution submits that the Judge's decision that the onus of establishing the conditions under Rule 65(B) rests on the person seeking to benefit

from the exercise of the Court's discretion is in accordance with current jurisprudence in international criminal law.

8. The Prosecution argues that no error of law or fact has been raised and that in the light of similar applications in the Kallon[1] and Sesay[2] cases, the Defence Application does not raise a matter of general principle for the first time. The Prosecution submits that good cause would be demonstrated only if the Defence Application established that a decision of the Appeals Chamber in the instant case would be in the interests of justice, paying particular regard to the fact that ordinarily an accused may only make one application for bail.

9. The Prosecution concludes that no discernible error on the facts or law, or a question of general principle has been raised and that the application should therefore be dismissed.

C. The Defence Reply

10. The Defence clarifies certain points in its Reply without repeating earlier arguments. In relation to the 'best evidence rule', the Defence argues that the ICTY provision relied upon is different in construction, meaning and implication from the rule governing the admission of evidence before the Special Court as it allows the admission of any relevant evidence deemed to have probative value as opposed to any relevant evidence.

11. Commenting on the admission of unsigned statements into evidence, the Defence points out that in admitting such statements into evidence during trial, the Trial Chamber has correctly recognised that the issue of whether or not the document is signed goes to the subsequent question of its probative value rather than its relevance. Furthermore, the Defence argues with reference to ICTY jurisprudence that reliability of evidence is not a prerequisite for admission and the Chamber may admit any evidence deemed to be relevant and should do so unless the admission of the evidence prejudices the rights of the Accused.

12. The Defence submits that the principles of equality and consistency demand that the current Application be accorded the same response as the successful applications for leave to appeal

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[1] See *Prosecutor v Sesay, Kallon and Gbao*, Case No. SCSL-04-15-PT, Kallon - Decision on Application for Leave to Appeal against Refusal of Bail, 23 June 2004.

[2] See *Prosecutor v Seasy, Kallon and Gbao*, Case No. SCSL-04-15-PT, Sesay - Decision on Application for Leave to Appeal against Refusal of Bail, 28 July 2004.

bail decisions in the Sesay and Kallon cases and that since decisions on these appeals are still pending, the Application does raise issues to be decided for the first time.[3]

II. APPLICABLE LAW

13. Rule 65(E) of the Rules provides:

> (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.

14. The jurisprudence of the ICTY,[4] the International Criminal Tribunal for Rwanda ("ICTR")[5] and the Special Court[6] states that good cause is shown where the Defence makes out a prima facie case that the Trial Chamber or a single Judge thereof has erred in law and/or in fact in making the impugned decision. According to ICTY jurisprudence, good cause may also be shown if it is demonstrated that the impugned decision is inconsistent with other decisions of the Tribunal on the same issues.[7] Special Court jurisprudence adds that good cause may be shown where the issue raised in the appeal 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.[8] In other words, good cause may be shown where a substantial issue is raised. The 'good cause test' defines and limits the judge's discretion to grant leave to appeal.

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[3] A Decision on the Kallon appeal was rendered on 17 September 2004. See *Prosecutor v Sesay, Kallon and Gbao*, Case No. SCSL-04-15-AR65, Decision on Appeal against the Decision of the Trial Chamber refusing the Application for Bail by Morris Kallon.

[4] *Prosecutor v. Brdjanin and Talic*, Case No. IT-99-36/1, Decision on Application for Leave to Appeal, 7 September 2000; *Prosecutor v. Simic et al.*, Case No. IT-95-9, Decision on Application for Leave to Appeal, 19 April 2000, para. 11.

[5] *Sagahutu 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

[6] *Prosecutor v Sesay, Kallon and Gbao*, Case No. SCSL-04-15-PT, Kallon - Decision on Application for Leave to Appeal against Refusal of Bail, 23 June 2004; *Prosecutor v Seasy, Kallon and Gbao*, Case No. SCSL-04-15-PT, Sesay – Decision on Application for Leave to Appeal against Refusal of Bail, 28 July 2004.

[7] *Prosecutor v Čermak and Markač*, Case No. IT-03-73-AR65.1, Decision on Joint Motion for Leave to Appeal Decision on Provisional Release, 13 October 2004, para. 4.

[8] See *Prosecutor v Sesay, Kallon and Gbao*, Case No. SCSL-04-15-PT, Kallon - Decision on Application for Leave to Appeal against Refusal of Bail, 23 June 2004, para. 9.

III. DISCUSSION

15. The question to be determined is whether the Accused has shown good cause in accordance with Rule 65(E) of the Rules as interpreted in the jurisprudence.

A. Errors of Fact

16. In addressing the question whether the Accused, if released, would appear for trial, the Judge pointed to the character of the Accused, his home, occupation and assets as being relevant factors. Having identified these elements, however, the Judge may have erred in failing to give sufficient consideration to them in relation to the individual Accused and instead focussing on more general considerations such as the gravity of the alleged offences. Similarly, without considering in depth the individual guarantees put forward by the Accused that were specific to his case, the Judge may have erred in concluding that they were unconvincing.

17. I am therefore satisfied that good cause has been shown in relation to the alleged errors of fact.

B. Errors of Law

18. As regards the alleged error of law relating to the use and interpretation of the 'best evidence rule' I am satisfied that the Defence has put forward a case that the Judge may have erred. The correct interpretation of Rule 89 in these circumstances requires clarification and a decision of the Appeals Chamber to ensure consistency of application would be in the interests of justice. The question whether, as a consequence, the Judge erred in failing to admit the unsigned declaration adduced by the Defence and in admitting the statement of the Chief Investigator will also need to be decided.

19. The question of the burden of proof in matters relating to bail was raised in the Kallon Application[9] as well and appears to be an area of contention which has not so far been finally resolved by the Appeals Chamber of the Special Court. I am therefore unable to rule out the possibility that the Judge may have erred in holding that the burden of establishing that the conditions laid down in Rule 65(B) have been fulfilled rests on the Accused.

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[9] *Prosecutor v Sesay, Kallon and Gbao*, Case No. SCSL-04-14-PT, Defence Application for Leave to Appeal against the Decision of the Trial Chamber refusing the Application for Bail by Morris Kallon, 4 May 2004, paras 11-12.

20. In relation to the legal arguments raised by the Defence I am satisfied that good cause has been shown.

C. Interests of Justice

21. At the time of this Application there is no decision on the merits of a bail appeal by the Appeals Chamber. Thus, the argument that the Application raises matters of general principle to be decided for the first time is a valid one, and a decision of the Appeals Chamber in the instant case would be in the interests of justice, paying particular regard to the fact that ordinarily an accused may only make one application for bail.

IV. DISPOSITION

22. For these reasons the Defence Application for leave to appeal against refusal of bail is granted.

Done at Freetown this 5th day of November 2004

Justice Raja Fernando

[Seal of the Special Court for Sierra Leone]