

(9412 - 9416)



SPECIAL COURT FOR SIERRA LEONE

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TRIAL CHAMBER II

Before: Justice Teresa Doherty, Presiding Judge  
Justice Richard Lussick  
Justice Julia Sebutinde

Registrar: Robin Vincent

Date: 15 June 2005

PROSECUTOR

Against

Alex Tamba Brima  
Brima Bazzy Kamara  
Santigie Borbor Kanu  
(Case No.SCSL-04-16-T)

DECISION ON JOINT DEFENCE APPLICATION FOR LEAVE TO APPEAL  
AGAINST THE RULING OF TRIAL CHAMBER II OF 5 APRIL 2005

Office of the Prosecutor:

Luc Côté  
Lesley Taylor

### Defence Counsel for Alex Tamba Brima:

Glenna Thompson  
Kojo Graham

Defence Counsel for Brima Bazzy Kamara:

Mohamed Pa-Momo Fofanah

Defence Counsel for Santigie Borbor Kanu:

Carry Knoops  
Abibola E. Manley-Spaine

J18. 

**TRIAL CHAMBER II** ("Trial Chamber") of the Special Court for Sierra Leone ("Special Court"), composed of Justice Teresa Doherty, presiding, Justice Richard Lussick and Justice Julia Sebutinde;

**RECALLING** the Oral Ruling of the Trial Chamber given in open Court on 5 April 2005;

**SEISED** of the Joint Defence Application for leave to Appeal against the Ruling of Trial Chamber II of 5 April 2005 filed on 8 April 2005 on behalf of Brima, Kamara and Kanu ("Motion");

**CONSIDERING** the Defence Confidential Index Record I and II to the Motion, filed on 8 April 2005;

**NOTING** the Prosecution Response to the Motion, filed on 14 April 2005;

**NOTING ALSO** the Defence Reply to the Prosecution Response, filed on 19 April 2005;

**DECIDES AS FOLLOWS.**

## **I. SUBMISSION OF THE PARTIES**

### *Defence Motion:*

1. In this Motion, the Defence teams on behalf of the Accused Alex Tamba Brima, Santigie Borbor Kanu and Brima Bazzy Kamara apply to the Trial Chamber to grant them Leave to Appeal an Oral Ruling of 5 April 2005, and further request a stay of proceedings until the Report of the Independent Counsel regarding potential contempt of Court has been issued to the Defence and until an appeal against interim measures ordered by Trial Chamber II has been dealt with.
2. The Defence states that it is unable to provide copies of the Oral Decision of the Chamber as required by the Practice Directions<sup>1</sup> for certain Appeals before the Special Court because the Decision was oral and the Defence had not yet been provided with the transcripts of the said Decision.
3. The Defence submit that there are exceptional circumstances and that irreparable prejudice would be caused to the Accused if the leave is not granted.
4. The Defence submit that irreparable prejudice is caused since the Brima Defence team is not able to properly prepare and conduct its cross examination of Prosecution Witnesses as a result of the absence of its Investigator. They are handicapped in choosing an investigator with quality and trustworthiness from the list provided. The Defence further submit that their cross-examination is made difficult because an Investigator to the Kamara case has just recently been appointed. The presence of a new, different Investigator may affect the fairness of the proceedings.
5. The Defence further submit that the mere fact that an Investigator is subjected to an investigation is in itself an exceptional circumstance, and that the participation of an accused in an international tribunal would depend to a greater extent on the investigative capabilities of the Defence team. The Defence further states this notion also relates of the principle of equality of arms and thus affects the rights of the accused as set out in Article 17 of the Statute.

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<sup>1</sup> See Article 6 of the Practice Directions for Certain Appeals before the Special Court

## Prosecution Response

6. The Prosecution as a preliminary matter notes that the original application for an adjournment was made by Counsel for Brima and Kamara. Counsel for Kanu did not join in that application. The Prosecution submits that neither of the two limbs of exceptional circumstances and irreparable prejudice required under Rule 73 (B) has been demonstrated by the Defence.

7. The Prosecution further submits that the decision of the Brima Defence Team not to select an investigator is entirely of its own choosing and therefore they must be taken to intend the consequences that follow from that choice. "As such, the circumstances are not exceptional and no prejudice [...] can arise".

8. The Prosecution submits that the new assertion of the Defence that the quality, trustworthiness and efficiency of potential replacement investigators has had an impact upon the choices available to Brima Defence Team is made without explanation or evidentiary foundation, and that no irreparable prejudice can arise in refusing leave to file an interlocutory appeal on a ground not raised in the argument preceding the impugned Ruling.

9. In reaction to the Defence assertion of its inability to investigate Prosecution Witnesses both prior to and after examination in chief, the Prosecution reminds the Chamber that the Defence and the Brima defence team were already in possession of the redacted statements of the Prosecution Witness since 2003 and January 2005 respectively.

10. In relation to the Kamara Defence assertion they could not cross examine Witness TF1-023; the Prosecution submits that Counsel for Kamara had previously cross examined witnesses TF1-024 and TF1-277 without indicating any difficulty due to a lack of an investigator.

## Defence Reply

11. In response to the Prosecution assertion that the position of the Defence team with respect to the non-use of an investigator is entirely of its own making, the Defence replies that it has only a restricted choice of its investigator from the list of investigators provided by the Defence office.

12. The Defence states that its decision not to have a new investigator other than the suspended one is because the suspended investigator is far more efficient than its previous investigator and reiterates the importance of an investigator in the composition of the Defence team.

## II. DELIBERATIONS

13. We note that Counsel for Kanu was not a party to the original application, but has joined in the application on a later date.

14. The Chamber recalls Rule 73(B) which reads:

*(B) 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.*

14. It is evident from this Rule that an interlocutory appeal is an exception before this Court. As stated by Trial Chamber I in *the Prosecutor v. Sesay et al.*:

*"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".<sup>2</sup>*

15. The Defence submits the following are exceptional circumstances:

- (1) the absence of the original investigator, Brima Samura, (now under suspension) may affect the fairness of these proceedings, even though a new investigator was offered to the Defence Team;
- (2) the effective participation of an Accused in an international criminal trial depends to a large extent on the investigative capabilities and capacities of the Defence team and that such an absence clearly also relates to the principle of equality of arms and thus affects the rights as set out in Article 17 of the Statute".

16. From this submission and other statements at trial it is factually clear that the Accused Alex Tamba Brima is not prepared to accept any alternative investigator offered. Whilst we do not refute the need for an investigator, we do not consider non-availability of personal choices of investigators an exceptional circumstance sufficient to bring about an indefinite stay of proceedings of a trial.

17. They further submit that the mere fact that their Investigator is subjected to any investigation is in itself an exceptional circumstance. The investigation of events in which Brima Samura was allegedly involved is the subject of a report by an Independent Counsel. Rule 77(C) (iii) provides that the investigator informs the Chamber. There is no obligation on the Independent Counsel to report to any other persons and in particular no right or obligation to inform persons who are not subject to the investigation or allegation.

18. In their oral and written submissions, Defence seek to adjourn the hearing pending the outcome of the Investigating Counsel's report. We re-state our view that the possible contempt proceedings have no bearing on this trial. None of the accused has been the subject of investigation for alleged contempt.

19. The Defence, on the ground of irreparable prejudice, submits that proceedings against Mr. Brima "have been continued without an option to investigate Prosecution's witnesses brought both prior to and after examination-in-chief, and thus have not been able to properly prepare and conduct cross-examination". Again this relates to the choice of investigator.

20. There are further submissions cited above on "quality" and "trustworthiness of an efficient investigator or otherwise", but no facts are submitted to impugn the capability, trustworthiness or efficiency of those offered that leads the Trial Chamber to find the persons offered as investigators are of such a calibre that their appointment would cause irreparable prejudice to the accused.

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<sup>2</sup> *Prosecutor v. Sesay, Kallon and Gbao*, Case No. SCSL-2004-15-PT, Decision on Prosecution's Application for Leave to File an Interlocutory Appeal Against the Decision on the Prosecution's Motion for Joinder, 13 February 2004, para. 10; See also, *Prosecutor v. Brima et al.*, Case No. SCSL-04-16-PT, Kanu - Decision on Application for Leave to File and Interlocutory Appeal against Decision on Motion for Exclusion of Prosecution Witness Statements and Stay of Filing of Prosecution Statements, 4 February 2005.

21. We also recall the duty of the Trial Chamber in Rule 26bis of the Rules of Procedure and Evidence.

*"The Trial Chamber and the Appeals Chamber shall ensure that the trial is fair and expeditious and that proceedings before the Special Court are conducted in accordance with the Agreement, the Statute and the Rules, with full respect for the rights of the accused and due regard for the protection of victims and witnesses."*

22. A stay of proceedings of the Trial "until a final decision has been taken on this issue", (by which we assume Counsel means a hearing of an appeal) would lead to considerable delay and be prejudicial to the accused's right to an expeditious trial.

#### FOR THESE REASONS

We find there are no grounds of exceptional circumstance and irreparable prejudice are made out and Leave is refused.

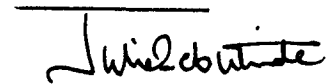
Done at Freetown, Sierra Leone, this 15<sup>th</sup> day of June 2005



Justice Richard Lussick



Justice Teresa Doherty  
Presiding Judge



Justice Julia Sebutinde

[Seal of the Special Court for Sierra Leone]

