

(12112 - 12119)



SPECIAL COURT FOR SIERRA LEONE

JOMO KENYATTA ROAD • FREETOWN • SIERRA LEONE

PHONE: +1 212 963 9915 Extension: 178 7000 or +39 0831 257000 or +232 22 295995

FAX: Extension: 178 7001 or +39 0831 257001 Extension: 174 6996 or +232 22 295996

TRIAL CHAMBER I

Before: Hon. Justice Pierre Boutet, Presiding Judge
 Hon. Justice Bankole Thompson
 Hon. Justice Benjamin Mutanga Itoe

Registrar: Robin Vincent

Date: 15th of June 2005

PROSECUTOR **Against** **ISSA HASSAN SESAY**
MORRIS KALLON
AUGUSTINE GBAO
 (Case No. SCSL-04-15-T)

**DECISION ON APPLICATION FOR LEAVE TO APPEAL THE RULING (2ND MAY 2005)
 ON SESAY - MOTION SEEKING DISCLOSURE OF THE RELATIONSHIP
 BETWEEN GOVERNMENTAL AGENCIES OF THE UNITED STATES OF AMERICA
 AND THE OFFICE OF THE PROSECUTOR**

Office of the Prosecutor:

Luc Côté
 Lesley Taylor
 Peter Harrison

Defence Counsel for Issa Hassan Sesay:

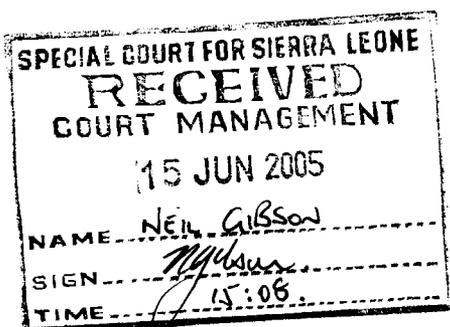
Wayne Jordash
 Sareta Ashraph

Defence Counsel for Morris Kallon:

Shekou Touray
 Melron Nicol-Wilson

Defence Counsel for Augustine Gbao

Andreas O'Shea
 John Cammegh



TRIAL CHAMBER I (“Trial Chamber I”) of the Special Court for Sierra Leone (“Special Court”) composed of Hon. Justice Pierre Boutet, Presiding Judge, Hon. Justice Bankole Thompson, and Hon. Justice Benjamin Mutanga Itoe;

MINDFUL of the *Decision on Sesay - Motion Seeking Disclosure of the Relationship Between Governmental Agencies of the United States Of America and the Office of the Prosecutor* rendered on the 2nd of May 2005 (“Decision”);

MINDFUL also of the *Partially Dissenting Opinion of Justice Pierre Boutet on the Decision on Sesay - Motion Seeking Disclosure of the Relationship Between Governmental Agencies of the United States of America and the Office of the Prosecutor* filed on the same day (“Partially Dissenting Opinion”);

SEIZED of the *Application for Leave to Appeal – Ruling (2nd May 2005) on Motion Seeking Disclosure of the Relationship Between Governmental Agencies of the United States of America and the Office of the Prosecutor* (“Application”) filed by Counsel for Issa Hassan Sesay on the 10th of May 2005;

MINDFUL of the *Prosecution Response to Sesay Defence “Application for Leave to Appeal – Ruling (2nd May 2005) on Motion Seeking Disclosure of the Relationship Between Governmental Agencies of the United States of America and the Office of the Prosecutor”* filed by the Office of the Prosecutor (“Prosecution”) on the 20th of May 2005 (“Response”);

NOTING the Defence Reply to the Prosecution Response filed on the 26th of May 2005 which stated that the Defence did not intend to reply to the Prosecution Response;

PURSUANT to the provisions of Article 17 of the Statute of the Special Court (“Statute”) and Rules 66 and 73(B) of the Rules of Procedure and Evidence of the Special Court (“Rules”);

HEREBY ISSUES THE FOLLOWING DECISION:

I. SUBMISSIONS OF THE PARTIES

A) *The Defence Application*

1. The Defence submits that the *Decision on Sesay - Motion Seeking Disclosure of the Relationship Between Governmental Agencies of the United States Of America and the Office of the Prosecutor* erred in law

in finding that “there is no legal basis for a disclosure order to be directed to the Prosecution to disclose any information relating to assistance given by the Prosecution or its agents to General Tarnue in respect of his asylum claim or relocation”.¹

2. The Defence submits that the Partially Dissenting Ruling of Justice Boutet, which would have ordered disclosure on this point, contains the correct application of law.²

3. With regard to the first prong of the test to grant leave, the Defence asserts that the Application satisfies the criteria of “exceptional circumstances”. In particular, the Defence submits that the Majority Decision places the threshold for a “*prima facie* case” under Rule 68 so high as to require the Defence to establish *mala fides* on the part of the Prosecution. Defence argues that this issue relates to the entire disclosure regime, is significant to public international law and is of fundamental importance to the Special Court.³

4. The Defence highlights that there is a clear dispute between the Decision and the Partially Dissenting Opinion regarding whether the Defence has sufficiently identified the material sought and have demonstrated their exculpatory nature on a *prima facie* basis.⁴

5. With regard to the second prong of the test for leave to appeal, the Defence submits that an error of law that leads to the non-disclosure of material which could affect the credibility of all Prosecution evidence could lead to irreparable prejudice as this material may be lost, destroyed or unavailable at the time of a final appeal against judgement.⁵

6. The Defence also seeks permission to apply for leave to appeal out of time. They note that the Decisions were served electronically on the 3rd of May 2005 but were not received by Counsel until the 8th of May 2005 since they had travelled to Kono and Kailahun during the unexpected adjournment in the RUF trial proceedings.⁶

B) The Prosecution Response

7. The Prosecution submits that no exceptional circumstances have been demonstrated by the Defence. It asserts that the difference between the Decision and the Partially Dissenting Opinion

¹ Application, para. 1.

² *Id.*, para. 2.

³ *Id.*, para. 5.

⁴ *Id.*, paras 6-7.

⁵ *Id.*, para. 9.

relates not to the interpretation of the disclosure obligation under Rule 68 but merely to whether the Defence had in fact established that the Prosecution had exculpatory material it had not disclosed. The Prosecution submits that there is already substantial jurisprudence relating to Rule 68 and the test of a *prima facie* case.⁷

8. The Prosecution submits that a difference of opinion between a majority and a dissenting judgement does not, without more, constitute exceptional circumstances. Neither, according to the Prosecution, does the assertion that the impugned ruling is erroneous constitute exceptional circumstances.⁸

9. The Prosecution disagrees with the Defence submission that irreparable prejudice has been established since the error could affect the credibility of all Prosecution evidence. Rather, the Prosecution submits that information about the relocation and asylum claim of General Tarnue can potentially affect the credibility of only his evidence. The Prosecution asserts that they will continue to have an obligation to disclose exculpatory evidence in their possession under Rule 68 and that the Chamber will grant relief in the future if the Defence establishes a *prima facie* case.⁹

10. In conclusion, the Prosecution submits that the Defence Application has failed to satisfy either the requirement of exceptional circumstance or irreparable prejudice under Rule 73(B) and should be dismissed in its entirety.¹⁰

I. THE MERITS OF THE APPLICATION

A) *Issues for Determination*

11. As regards the disposition of the present Motion, this Chamber opines that three key issues arise for determination. The first is whether the fact of a dissenting opinion in respect of the issue or issues which are the subject of the intended appeal justifies a finding of “exceptional circumstances” for the purposes of leave for interlocutory appeal within the meaning of Rule 73(B). In effect, in Counsel’s own formulation, whether the Partially Dissenting Opinion herein bears a direct

⁶ *Id.*, paras 10-12.

⁷ Response, paras 11-13.

⁸ *Id.*, paras 14-16.

⁹ *Id.*, paras 17-19.

¹⁰ *Id.*, para. 20.

relationship to “the criteria of exceptionality which governs the grant of leave to appeal pursuant to Rule 73(B).”

12. The second issue is whether the Defence submission that the interpretation given to the formula “*prima facie* case” implicit in the Decision places the threshold of proof pursuant to Rule 68 unreasonably high and constitutes a significant issue of public international law or a serious issue of fundamental importance for the Special Court in the context of its entire disclosure regime.

13. The third issue is the extent, if any, to which it is a valid factor in the “exceptional circumstances” and “irreparable damage” equation under Rule 73(B) that the Partially Dissenting Opinion did identify specific evidentiary material qualifying, in Counsel’s submission, as exculpatory, disclosure in respect of which, again in Counsel’s opinion, the Defence was entitled to, but which were not identified by the Decision.

B) Applicable Law

14. The subject of leave for interlocutory appeal, as the Chamber has frequently noted, is governed by Rule 73(B) which states as follows:

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.

15. In all its decisions so far on the issue of interlocutory appeal, the Chamber has emphasized not only the restrictive nature of Rule 73(B) but also the centrality of the principle that “the applicant’s case must reach a level of exceptional circumstances and irreparable prejudice” to satisfy the conjunctive criteria provided by the Rule.¹¹

¹¹ See *Prosecutor v. Sesay, Kallon and Gbao*, SCSL-04-15-PT, and *Prosecutor v. Brima, Kamara and Kanu*, SCSL-04-16-PT, *Decision on Prosecution Application for Leave to File an Interlocutory Appeal Against Decision on Motion for Concurrent Hearing of Evidence Common to Cases SCSL-2004-15-PT and SCSL-2004-16-PT*, 1 June 2004, para 21:

“[T]he 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 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.”

16. In our *Decision on Defence Applications for Leave to Appeal Ruling of the 3rd of February, 2005 on the Exclusion of Statements of Witness TF1-141*,¹² we went the length of indicating inclusively what may amount to “exceptional circumstances” for the purpose of the rule. We stated that:

“Exceptional circumstances” may exist depending upon the particular facts and circumstances, where, for instance the question in relation to which leave to appeal is sought is one of general principle to be decided for the first time, or is a question of public international law importance upon which further argument or decision at the appellate level would be conclusive to the interests of justice, or where the cause of justice might be interfered with, or is one that raises serious issues of fundamental legal importance to the Special Court for Sierra Leone in particular, or international criminal law, in general, or some novel and substantial aspect of international criminal law for which no guidance can be derived from national criminal law systems.¹³

17. The Chamber also recalls that in its recent *Decision on Application by the Second Accused for Leave for Interlocutory Appeal Against the Majority Decision of the Trial Chamber of 9th December 2004 on Issue of Urgent Concern to the Accused Morris Kallon*,¹⁴ it summarised the principles of law governing the granting of leave to file interlocutory appeals within the jurisdiction of the Special Court as follows:

- “(i) As a general rule, interlocutory decisions are not appealable;
- (ii) Rule 73(B) involves a high threshold that must be met before the Chamber can exercise its discretion to grant leave to appeal;
- (iii) Rule 73(B) specifically requires that an application for leave to appeal must show “exceptional circumstances” and “irreparable prejudice”;
- (iv) The two-pronged test prescribed under the aforesaid Rule 73(B) is conjunctive and not disjunctive;

¹² *Prosecutor v. Sesay, Kallon and Gbao*, SCSL-04-15-T, *Decision on Defence Applications for Leave to Appeal Ruling of the 3rd of February, 2005 on the Exclusion of Statements of Witness TF1-141*, 28 April 2005.

¹³ *Id.*, para. 26.

¹⁴ *Prosecutor v. Sesay, Kallon and Gbao*, SCSL-04-15-T, *Decision on Application by the Second Accused for Leave for Interlocutory Appeal Against the Majority Decision of the Trial Chamber of 9th December 2004 on Issue of Urgent Concern to the Accused Morris Kallon*, 2 May 2005.

(v) The rationale behind Rule 73(B) is to avoid international criminal trials becoming encumbered by a multiplicity of interlocutory appeals thereby causing protracted delays in such trials.”¹⁵

C) Evaluation of Merits of Application

18. Guided by these principles, the question for determination by the Chamber is whether the Defence’s case herein for leave, based entirely on the submissions set out in the Application, reaches the level of exceptional circumstances and irreparable prejudice within the meaning and contemplation of Rule 73(B).

19. As already noted, Counsel for the First Accused submits forcefully that the Partially Dissenting Opinion from the Decision bears a direct relationship to “the criteria of exceptionality which governs the grant of leave to appeal pursuant to Rule 73(B).” The Chamber’s response to this submission is threefold. First, that, analytically, the precise legal meaning of this assertion seems incomprehensible. Second, the submission lacks lucidity as to the presumed legal or logical nexus between the notion of “exceptional circumstances” as stated in the Rule and the Partially Dissenting Opinion in terms of its thrust and focus. Third, the Chamber has ruled before that the fact that there is a dissenting opinion on the issue or issues forming the subject matter of the intended appeal does not, of itself, constitute “exceptional circumstances” within the letter and spirit of Rule 73(B). This finding was recently confirmed by the Appeals Chamber.¹⁶

20. On the merit or otherwise of the Defence argument that the Decision places the threshold for a “*prima facie* case” under Rule 68 so high as to require the Defence to establish *mala fides* on the part of the Prosecution, and that this issue is significant to public international law and is of fundamental importance to the Special Court, the Chamber reiterates “that the probability of an erroneous ruling by the Trial Chamber does not, of itself constitute “exceptional circumstances” for the purposes of a Rule 73(B) application.”¹⁷

21. Guided by the above-stated principles, this Chamber holds that the instant application for leave to appeal its *Decision on Sesay - Motion Seeking Disclosure of the Relationship Between Governmental Agencies of the United States Of America and the Office of the Prosecutor* of the 2nd of May 2005 in this

¹⁵ *Id.*, para. 17.

¹⁶ *Prosecutor v. Norman, Fofana and Kondewa*, SCSL-04-14-AR73, *Decision on Amendment of the Consolidated Indictment*, 16 May 2005, para. 43.

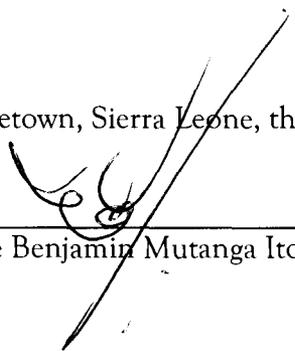
¹⁷ *Prosecutor v. Sesay, Kallon and Gbao*, *supra* note 14, para. 20.

matter is meretricious in that it falls far short of showing "exceptional circumstances" for granting leave to appeal within the meaning of Rule 73(B). Having so found, it is not necessary for the Chamber to address the issue of "irreparable prejudice" as submitted by the Defence.

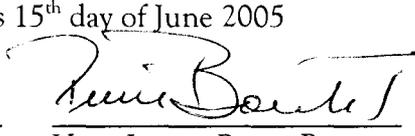
FOR THE ABOVE REASONS,

22. The Chamber accordingly dismisses the said Application.

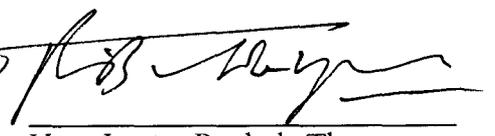
Done at Freetown, Sierra Leone, this 15th day of June 2005



Hon. Justice Benjamin Mutanga Itoe



Hon. Justice Pierre Boutet
Presiding Judge
Trial Chamber I



Hon. Justice Bankole Thompson

