SPECIAL COURT FOR SIERRA LEONE
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TRIAL CHAMBER II

Before:	Judge Teresa Doherty, Presiding Judge Judge Richard Brunt Lussick Judge Julia Sebutinde
Registrar:	Robin Vincent
Date:	5 August 2005

PROSECUTOR	Against	**Alex Tamba Brima** **Brima Bazzy Kamara** **Santigie Borbor Kanu** (Case No.SCSL-04-16-PT)

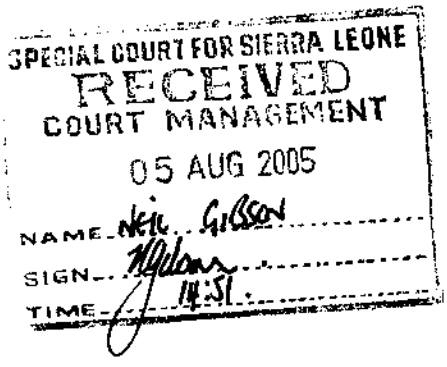
DECISION ON BRIMA – KAMARA APPLICATION FOR LEAVE TO APPEAL FROM DECISION ON THE RE-APPOINTMENT OF KEVIN METZGER AND WILBERT HARRIS AS LEAD COUNSEL

First Respondent:
Registrar

Second Respondent:
Principal Defender

Defence Counsel for Alex Tamba Brima:
Kojo Graham
Glenna Thompson

Defence Counsel for Brima Bazzy Kamara:
Andrew Daniels
Pa Momo Fofanah



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

SEISED of the Brima-Kamara Application For Leave to Appeal from Decision on the Extremely Urgent Confidential Joint Motion for Re-Appointment of Kevin Metzger and Wilbert Harris as Lead Counsel for Alex Tamba Brima and Brima Bazzy Kamara and Decision on Cross Motion by the Deputy Principal Defender to Trial Chamber II for Clarification of its Oral Order of 12 May 2005, filed 14 July 2005 ("the Motion");

CONSIDERING the Response, filed on 22 July 2005 by the Principal Defender ("the Second Respondent's Response");

CONSIDERING the Response, filed by the Registrar on 22 July 2005 ("the First Respondent's Response");

CONSIDERING the Defence's consolidated Reply to both Responses's ("the Reply");

BEING MINDFUL of the "Decision on the Extremely Urgent Confidential Joint Motion for Re-Appointment of Kevin Metzger and Wilbert Harris as Lead Counsel for Alex Tamba Brima and Brima Bazzy Kamara and Decision on Cross Motion by Deputy Principal Defender to Trial Chamber II for Clarification of its Oral Order of 12 May 2005", dated 9 June 2005 ("the impugned Decision");

BEING MINDFUL FURTHER of the "Dissenting Opinion of the Hon. Justice Julia Sebutinde from the Majority Decision on the Extremely Urgent Confidential Joint Motion for Re-Appointment of Kevin Metzger and Wilbert Harris as Lead Counsel for Alex Tamba Brima and Brima Bazzy Kamara, and Decision on Cross Motion by the Deputy Principal Defender to Trial Chamber II for Clarification of its Oral Order of 12 May 2005", dated 11 July 2005 ("the dissenting Opinion");

NOTING that Rule 73(B) of the Rules provides that

> *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 stay of proceedings unless the Trial Chamber so orders.*

NOTING therefore the general rule that decisions are without interlocutory appeal, and that only if the conjunctive conditions of exceptional circumstances and irreparable prejudice to the accused in Rule 73(B) are satisfied, a Trial Chamber may grant leave to interlocutory appeal;

CONSIDERING FURTHER that the Appeals Chamber has recently ruled that

> *"In this Court, the procedural assumption is that trials will continue to their conclusion without delay or diversion caused by interlocutory appeals on procedural matters, and that any errors which affect the final judgment will be corrected in due course by this Chamber on appeal".*[1]

NOTING therefore that the rationale behind the restrictive nature of Rule 73(B) is that the proceedings before the Special Court should not be heavily encumbered and consequently unduly delayed by interlocutory appeals;[2]

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[1] *The Prosecutor v. Norman et al.*, Case No. SCSL-2004-14-AR73, Decision on Amendment of the Consolidated Indictment, 16 May 2005, para. 43.

NOTING AND APPLYING therefore the restrictive application of Rule 73(B) as established by Trial Chamber I stating that

> *[Rule 73(B)] 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;*[3]

CONSIDERING HOWEVER that in the present case the very nature of the application satisfies the conjunctive test of "exceptional circumstances" and "irreparable prejudice" by Rule 73 (B) since it concerns a fundamental right enshrined in Article 17(4) of the Statute;

FOR THE FORGOING REASONS

TRIAL CHAMBER ALLOWS THE APPLICATION and grants the Defence leave to file an interlocutory appeal against the impugned Decision.

Justice Lussick will give a Separate and Concurring Opinion and Justice Doherty appends a personal comment to this Decision.

Done at Freetown, Sierra Leone, this 5th day of August 2005.

Justice Richard Lussick | Justice Teresa Doherty, Presiding Judge | Justice Julia Sebutinde

[Seal of the Special Court for Sierra Leone]

[2] *Prosecutor v. Sesay et al.*, Case No. SCSL-2004-15-PT, Decision on the Prosecutor's Application for Leave to File an Interlocutory Appeal against the Decision on the Prosecution Motion for Joinder, 13 February 2004.

[3] *Prosecutor v. Sesay et al.*, Case No. SCSL-2004-15-PT, Decision on the Prosecutor's Application for Leave to File an Interlocutory Appeal against the Decision on the Prosecution Motion for Joinder, 13 February 2004; *Prosecutor v. Brima et al.*, Decision on the Prosecutor's Application for Leave to File an Interlocutory Appeal against the Decision on the Prosecution Motion for Joinder, 13 February 2004.

COMMENT OF JUSTICE DOHERTY

Having read the Dissenting Opinion of the Hon. Justice Sebutinde from the Majority Decision on the Extremely Urgent Confidential Joint Motion for the Re-Appointment of Kevin Metzger and Wilbert Harris as Lead Counsel for Alex Tamba Brima and Brima Bazzy Kamara, and Decision on Cross-Motion by the Deputy Principal Defender to Trial Chamber II for Clarification of its Oral Order of 12 May 2005 [hereinafter "Dissenting Opinion"] I consider some facts stated are incorrect or misleading. I was not given a copy of the Dissenting Decision prior to publication. I consider Rule 29 of the Rules of Procedure and Evidence does not permit any Judge to publish or discuss matters that have been discussed in Chambers however since several matters have been brought into the public arena by the publication of both the Dissenting Opinion and the interoffice memorandum I consider I am entitled to put the following before the Appeal Chamber:

1. At paragraph 29 of the Dissenting Opinion Her Honour states that "Before Ms. Carlton-Hanciles had an opportunity to disclose the contents of a document the Presiding Judge interjected..." thereby implying that this was a sole decision of the Presiding Judge. This implication is erroneous. The document, a copy letter from the accused persons, was given to each of the judges immediately before court was to open on 16 May 2005. We discussed that document, its implications on the ruling of 12 May and the attitude we should adopt. Hon. Justice Sebutinde took a very active part in that discussion and was one of the majority who decided the document should not be read. My notes show three issues were identified by the judges and those three issues are incorporated into the extempore ruling.

2. At paragraph 29 there is a reference to a copy of Ms. Elizabeth Nahamya minute of 17 May 2005 being copied to the Judges. That memorandum was not received by the Judges of Trial Chamber II until the Registrar's annotated copy was given on 18 May 2005 and we had no opportunity to discuss same prior to meeting the Registrar.

3. On 18 May 2005 the Registrar came to Trial Chamber II Chambers at the invitation of the Judges to discuss a matter entirely unrelated to the issues therein. At the end of our discussions he raised the issue of Ms. Nahamya's minute. There was an active discussion and Hon. Justice Sebutinde was there throughout that discussion. The matters recorded in my minute are an ad verbatim record of statements made. Justice Sebutinde did not speak on the matter, neither did she dispute nor resile from the discussions. The Registrar asked for written confirmation the same day as he was leaving for New York.

4. It is correct that I telephoned each of the Judges and read out the draft to each of my judicial colleagues. It was only then that Justice Sebutinde stated she had reservations. I asked her to let me have her views as the Registrar needed a response that day. I waited, sent, then retrieved the minute pending Justice Sebutinde's input. When none was received I again sent the minute prior to Registrar's departure. I dispute the detail Justice Sebutinde gives in paragraph 2 of interoffice memorandum. The detailed memorandum referred to paragraph 30 of the Dissenting Opinion was not received until 19 May 2005 and it was not sent solely to me as Presiding Judge but also disseminated to others. It is correct that, as stated at paragraph 31 that I did not distinguish Justice Sebutinde's views. I did not have those views.

5. I stress that the decision of 16 May 2005 and discussion of 18 May 2005 involved all three judges of the Trial Chamber. We had no knowledge of the pending motion filed on 24 May 2005 and cannot be said to have contributed to controversy as implied in paragraph 41.

6. It is correct I gave Justice Sebutinde a copy of the minute to the Registrar when she asked me for it. I did so stating twice it was a chambers matter subject to Rule 29 and could not be published.

Done at Freetown, Sierra Leone, this 5th day of August 2005.

Justice Teresa Doherty
Presiding Judge

[Seal of the 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:	14 September 2005

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

SEPARATE AND CONCURRING OPINION OF JUSTICE R.B. LUSSICK ON BRIMA – KAMARA APPLICATION FOR LEAVE TO APPEAL FROM DECISION ON THE RE-APPOINTMENT OF KEVIN METZGER AND WILBERT HARRIS AS LEAD COUNSEL

First Respondent
Registrar

Second Respondent
Principal Defender

Defence Counsel for Alex Tamba Brima:
Kojo Graham
Glenna Thompson
Defence Counsel for Brima Bazzy Kamara:
Andrew Daniels
Mohamed Pa-Momo Fofanah

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COURT MANAGEMENT
14 SEP 2005
NAME Geoff Walker
SIGN
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I. INTRODUCTION

I agree with the majority decision (delivered on 5 August 2005, just before the judicial recess) that the application for leave to appeal should be granted. However, I am appending this separate concurring opinion because I am of the view that a different reasoning ought to have been applied to arrive at that outcome. In my opinion, the application for leave to appeal was brought out of time, and the Trial Chamber ought therefore to have considered the effect of the applicants' non-compliance with the Rules before arriving at a decision.

The impugned majority decision was delivered on 9 June 2005. The dissenting opinion was delivered on 11 July 2005 and the application for leave to appeal was filed on 14 July 2005. For the reasons which follow, I hold that the application for leave should have been filed by 13 June 2005 at the latest.

II. DELIBERATIONS

Leave to appeal a decision on a motion must be sought within 3 days of the decision.

Rule 73 (B) provides 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.

The meaning of "decision" was considered by Trial Chamber I in the case of *Prosecutor v. Sam Hinga Norman et al., Decision on Prosecution Application for Leave to Appeal 'Decision on the First Accused's Motion for Service and Arraignment on the Consolidated Indictment'*, dated 15 December 2004. In that case, two concurring opinions were delivered on 29 November 2004 and a dissenting opinion was delivered on 3 December 2004. The motion for leave to appeal was filed 3 days after that on 6 December 2004.

Trial Chamber I, deliberating the correct time limit for the filing of an interlocutory appeal, held as follows: "Considering that the Prosecution filed the Application within the time limits prescribed in Rule 73 (B) of the Rules and in conformity with Rule 7 (A) of the Rules and paragraph 8 of the Practice Direction for Certain Appeals Before the Special Court, and that the time limits for filing of an interlocutory appeal run from the day after the filing of the complete Decision of the Trial Chamber, which includes in this instance, a Separate and Concurring Opinion and a Dissenting Opinion."

I note that, although Trial Chamber I was of the view that its "complete" decision included a separate concurring opinion and a dissenting opinion, it qualified that description by the words "in this instance". However, if Trial Chamber I meant that, as a general proposition, the time limit for filing an interlocutory appeal runs from the day after the filing a dissenting opinion rather than the date of the delivery of the majority decision, then, with the greatest respect to my colleagues in that Trial Chamber, I beg to disagree with them.

The *Practice Direction for Certain Appeals Before the Special Court*, which was referred to by Trial Chamber I, was issued by the President pursuant to Rule 107 and Rule 117 and after consultation with the Vice-President. It establishes a procedure for the filing of notice of appeal, grounds of appeal

and written submissions in appeal proceedings under (inter alia) Rule 73 (B). The following provisions (emphasis added) make it clear that a dissenting opinion is not taken into account for the purposes of bringing an appeal.

Paragraph 6 of the Practice Direction states:

> 6. *A party wishing to appeal from a decision of a Trial Chamber which may be appealed only with the leave of the Trial Chamber, or a Single Judge of the Appeals Chamber, or the Appeals Chamber, shall file and serve on the other parties in accordance with the Rules, an application for leave to appeal accompanied by a copy of* ***the ruling or judgment appealed*** *and containing:*
>
> a. *the precise title and date of filing of the* ***decision sought to be appealed;***
>
> b. *a summary of the proceedings before the Trial Chamber relating to the* ***decision sought to be appealed*** *including an identification of all relevant documents in the proceedings before the Trial Chamber, clearly stating the title and date of filing of each document or the page number of a transcript;*
>
> c. *the specific provision of the Rules under which leave to appeal is sought;*
>
> d. *a concise statement as to why it is contended that the applicable criteria for the granting of leave to appeal under the provision relied upon have been met.*

Paragraph 7 states:

> 7. *Unless otherwise provided in the Rules, the application shall be filed within seven days of the* ***impugned decision.***

Paragraphs 10 sets out certain requirements concerning the **appealed decision.**

A dissenting opinion is not an "impugned decision", nor is it a "decision sought to be appealed". In fact, a court delivering a majority decision is not even obliged to append a dissenting opinion, although it may do so. Rule 88 (C) states: *The judgement shall be rendered by a majority of the Judges. It shall be accompanied by a reasoned opinion in writing. Separate or dissenting opinions may be appended.*

It is only a majority decision that a party can appeal. A dissenting opinion obviously cannot be regarded as part of a majority decision, whether for the purpose of determining the time for bringing an appeal or otherwise.

It is true that a dissenting opinion might be helpful in supporting the submissions of a party on appeal. However, a party cannot ignore the time limit set by Rule 73 (B) merely to await the dissenting opinion. At the stage of seeking leave to appeal, the party need only argue the test of

"exceptional circumstances" and "irreparable prejudice"[1]. It is not necessary to view the dissenting opinion before arguing those requirements. However, once leave to appeal has been granted, the party may seek additional time from the Appeals Chamber to wait for the dissenting opinion in order to support its arguments on the appeal. It is only at that later stage that a dissenting opinion may become important to a party, not at the Rule 73 (B) stage.

As mentioned earlier, the impugned decision was delivered on 9 June 2005 but the application for leave to appeal was not brought until 14 July 2005. Accordingly, I hold that it was brought out of time in contravention of Rule 73 (B).

There was no motion for an extension of time. On the other hand, neither of the Respondents have objected to the Applicants' non-compliance with the Rules.

Furthermore, I take into account that the application for leave to appeal was filed in accordance with a precedent established by Trial Chamber I and that this is the first time that this particular issue has come before this Trial Chamber.

In the circumstances, I hold that it would not be in the interests of justice to dismiss the application because of the late filing.

III. DISPOSITION

Having adjudicated on the Applicants' contravention of the Rules, I would ALLOW the application for leave to appeal for the reasons set out in the majority decision.

Done at Freetown this 14th day of September 2005.

Justice Richard Lussick

[Seal of the Special Court for Sierra Leone]

[1] The Appeals Chamber has recently ruled that the test in Rule 73 (B) is not "satisfied merely by the fact that there has been a dissenting opinion on the matter in the Trial Chamber", see Prosecutor v. Norman et al., Case No. SCSL -04-14-AR73, Decision on Amendment of the Consolidated Indictment, 16 May 2005, para. 43.