

SCSL-04-15-T
(25938-25943)

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SPECIAL COURT FOR SIERRA LEONE

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TRIAL CHAMBER I

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

Registrar: Mr. Lovemore G. Munlo SC

Date: 2 February 2007

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

Public Document

**DECISION ON APPLICATION FOR LEAVE TO APPEAL THE DECISION ON DEFENCE
MOTION FOR A RULING THAT THE PROSECUTION MOULDING OF EVIDENCE IS
IMPERMISSIBLE**

Office of the Prosecutor:

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Court Appointed Counsel for Augustine Gbao

Andreas O'Shea
John Cammegh

SPECIAL COURT FOR SIERRA LEONE	
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COURT MANAGEMENT	
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NAME	<i>Adura Kallon K</i>
SIGN	<i>Kallon</i>
TIME	<i>09:10</i>

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

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SEIZED of the Application for Leave to Appeal the Decision (1st of August 2006) on Defence Motion to Request the Trial Chamber to Rule that the Prosecution Moulding of Evidence is Impermissible, filed publicly by Counsel for the First Accused, Issa Hassan Sesay, ("Defence") on the 3rd of August 2006 ("Application");

NOTING the Response to the said Application filed by the Office of the Prosecutor ("Prosecution") on the 21st of August 2006 ("Response");

NOTING that no Reply was filed by the Defence within the prescribed time limits;

MINDFUL of this Chamber's Decision on Defence Motion to Request the Trial Chamber to Rule that the Prosecution Moulding of Evidence is Impermissible, filed on the 1st of August 2006 ("Impugned Decision");

PURSUANT TO Rule 73(B) of the Rules of Procedure and Evidence of the Special Court ("Rules");

HEREBY ISSUES THE FOLLOWING DECISION:

I. SUBMISSIONS

A. *The Application*

1. The Defence submits that the Impugned Decision denies the Accused a fair hearing and a reasonable opportunity to present his case.¹ In particular, the Defence submits that this Chamber's refusal in the said Decision to demand that the Prosecution addresses the Defence's allegations that the Prosecution is acting in bad faith in discharging its disclosure obligations is tantamount to acquiescence to, or approval of, both the Prosecution's conduct and its alleged concealment of that conduct.²

2. The Defence submits that the present matter "goes to the heart of the role of the judiciary at the Special Court and International Tribunals in general and to the correct interpretation of

¹ Application, para. 1.

² *Ibid.*, paras 3 and 17.

procedural fairness," and that this Chamber's refusal to require the Prosecution to address serious allegations of misconduct thus constitutes exceptional circumstances.³

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3. The Defence further submits that if this Chamber does not grant leave to appeal, the Accused will suffer irreparable prejudice, namely "the continued concealment of ongoing prohibited and prejudicial misconduct," and "the denial of procedural equality."⁴

B. The Response

4. The Prosecution submits that the Defence has demonstrated neither exceptional circumstances nor irreparable prejudice. In particular, the Prosecution submits that if the Defence's claim has merit, it is amenable to cure by a final appeal against the judgment.⁵

5. Citing previous jurisprudence of this Trial Chamber, the Prosecution asserts that the Impugned Decision does not constitute an error amounting to exceptional circumstances, and that in any case, "the probability of an erroneous ruling by The Chamber does not, of itself, constitute 'exceptional circumstances' for the purpose of an application for leave to appeal."⁶

II. APPLICABLE LAW

6. Rule 73(B) of the Rules establishes the standard which governs appeals on motions for relief. According to this Rule, the Trial Chamber may give leave to appeal in exceptional circumstances and to avoid irreparable prejudice to a party. The standard is conjunctive, as can be deduced from both the plain and literal interpretation of the Rule and this Chamber's settled jurisprudence on the subject.⁷

7. Specifically, the Chamber has consistently held that interlocutory decisions generally cannot be appealed, and that Rule 73(B) requires that a high threshold be met before the Court can grant

³ *Ibid.*, paras 18 and 21.

⁴ *Ibid.*, para. 22.

⁵ Response, paras 4 and 13.

⁶ *Ibid.*, para. 9, quoting *Prosecutor v. Norman, Fofana and Kondewa*, SCSL-04-14-T, Decision on Application by First Accused for Leave to Appeal against the Decision on their Motion for Extension of Time to Submit Documents pursuant to Rule 92bis, 17 July 2006.

⁷ See, for instance, *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 the 9th of December 2004 on Issue of Urgent Concern to the Accused Morris Kallon, 2 May 2005, para. 17; *Ibid.*, Decision on Application for Leave to

leave to appeal,⁸ the rationale behind this Rule being “only to allow appeals to proceed in very limited and exceptional situations. In effect, it is a restrictive provision.”⁹

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8. By way of further guidance, the Chamber has defined “exceptional circumstances” for the purposes of Rule 73(B) in these terms:

“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.¹⁰

9. Suffice it to say that the Chamber has, in regard to the requirement of “irreparable prejudice”, previously held that it “may not be remediable by appropriate means within the final disposition of trial.”¹¹

10. Endorsing the legal standard on granting or refusing applications for interlocutory appeals by this Chamber, the Appeals Chamber had this to say:

The underlying rationale for permitting [interlocutory] appeals is that certain matters cannot be cured or resolved by final appeal against judgement. However, most interlocutory decisions of a Trial Chamber will be capable of effective remedy in a final appeal where the parties would not be forbidden to challenge the correctness of interlocutory decisions which were not otherwise susceptible to interlocutory appeal in accordance with the Rules.¹²

III. DELIBERATIONS

11. In addition to their submissions summarized above, the Defence claims, more specifically, that the Impugned Decision gives rise to exceptional circumstances because this Chamber’s alleged failure “to acknowledge the obvious inference that the Prosecution is seeking to conceal its improper

Appeal the Ruling (2 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, 15 June 2005, para. 15.

⁸ *Ibid.*, Decision on Defence Applications for Leave to Appeal Ruling of the 3rd of February, 2005 on the Exclusion of Statements of Witness TF-141, 28 April 2005, para. 17.

⁹ *Ibid.* at para. 18.

¹⁰ *Ibid.* at para. 26.

¹¹ *Prosecutor v. Norman, Fofana and Kondewa.*, SCSL-04-14-T, Decisions on Motion by the First and Second Accused for Leave to Appeal the Chamber’s Decision on their Motions for the Issuance of a Subpoena to the President of the Republic of Sierra Leone, 28 June 2006, para. 13; See also *ibid.*, Decision on Joint Request for Leave to Appeal against Decision on Prosecution’s Motion for Judicial Notice, 19 October 2004, para. 23.

behaviour" consequently gives rise to "serious issues of procedural fairness of fundamental legal importance to the Special Court for Sierra Leone in particular and international criminal law in general."¹³

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12. The Chamber finds this submission untenable and opines that the Impugned Decision does not involve any novel general principle of international law or any issue of fundamental legal importance to the Special Court or to international law in general which would sustain a finding that exceptional circumstances exist in this case for a grant of leave to appeal. Throughout the course of the trial, when considering the Prosecution's disclosure obligations, this Chamber has consistently held that "any new or supplemental evidence elicited during proofing sessions must be disclosed on a continuing basis pursuant to the Prosecution's obligations under Rules 66 and 68."¹⁴ To this end, the Chamber also recalls the legal standard necessary to establish that the Prosecution has breached its disclosure obligations, namely that "the Defence must make a *prima facie* showing of materiality and that the requested evidence is in the custody or control of the Prosecution."¹⁵

13. Relying on the aforementioned jurisprudence, the Impugned Decision indeed stated that "any direct challenge to the general integrity of the statement-taking process should be substantiated by a *prima facie* showing of foul play, either deliberate or negligent, by the Prosecution in order to justify an inquiry by the Chamber into the said process."¹⁶ We find no evidence impeaching the Prosecution's conduct. The Chamber is of the view that the Defence submissions are merely speculative and, therefore, do not raise any serious issues of fundamental legal importance and, furthermore, they are speculative in so far as they allege that the Impugned Decision will give rise to an irreparable prejudice as the Prosecution will persist in its conduct of "the continued concealment of on-going prohibited and prejudicial misconduct."

¹² *Ibid*, Decision on Prosecution Appeal Against The Trial Chamber Decision of August 2004 Refusing Leave to File An Interlocutory Appeal, Appeals Chamber, 17 January 2005, para. 29.

¹³ Application, para. 18.

¹⁴ For a general review of this Chamber's extensive jurisprudence on issue involving disclosure of evidence by the Prosecution, see, for instance, Impugned Decision, paras 11-15 and footnotes thereof.

¹⁵ *Ibid*. See, in particular, *Prosecutor v. Sesay, Kallon and Gbao*, SCSL-04-15-T, Sesay - Decision on Defence Motion for Disclosure Pursuant to Rules 66 and 68 of the Rules, 9 July 2004, para. 27.

¹⁶ Impugned Decision, para. 16. See also para. 17, in the following terms:

[I]t is absolutely clear that no evidence shall be admissible if obtained by methods which could subsequently cast a substantial doubt on the evaluation of its reliability or if its admission could seriously damage the integrity of the proceedings.

See also *Prosecutor v. Zigiranyirazo*, Case No. ICTR-2001-73-T, Decision on Defence Motion for Disclosure of Exculpatory Information with Respect to Prior Statements of Prosecution Witnesses, 6 July 2006, paras 14-17.

5.

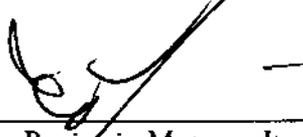
14. It is pertinent in this regard, to note that the Appeals Chamber of the ICTR did observe that, generally, "matters concerning admissibility of evidence are the responsibility of the Trial Chamber, as triers of facts, and therefore the Appeals Chamber may not assume this responsibility"¹⁷ and, furthermore, that it would not intervene in the exercise of the Prosecution's discretion involving disclosure, unless it is shown that the Prosecution abused it and, where there is no evidence to the contrary, will assume that the Prosecution is acting in good faith.¹⁸

15. It is therefore our finding that the Defence has not demonstrated any "exceptional circumstances" to warrant the granting of the Application. Hence, we deem it unnecessary to further examine the merits of the Defence submissions on irreparable prejudice, since both elements must be established and satisfied conjunctively, as we have held elsewhere,¹⁹ for such an application to be granted.

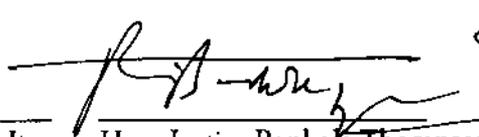
BASED ON THE FOREGOING CONSIDERATIONS, THE CHAMBER

HEREBY DISMISSES the Application in its entirety.

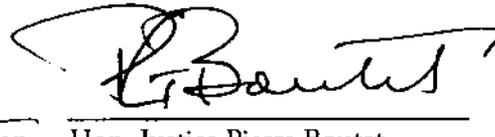
Done at Freetown, Sierra Leone, this 2nd day of February 2007



Hon. Justice Benjamin Mutanga Itoe



Hon. Justice Bankole Thompson
Presiding Judge
Trial Chamber I



Hon. Justice Pierre Boutet

[Seal of the Special Court for Sierra Leone]

¹⁷ See *Prosecutor v. Ndayambaje*, Case No. ICTR-96-18, Decision on Elie Ndayambaje's Motion for Certification to Appeal the Decision on Ndayambaje's Motion for Exclusion of Evidence Issued on 1st September 2006, 5 October 2006, para. 16. See also *Prosecutor v. Ntahobali and Nyiramasuhuko*, Case No. ICTR-98-42-AR73.2, Decision on Pauline Nyiramasuhuko's Appeal on Admissibility of Evidence, 4 October 2004, para. 5. This Decision has been already cited with approval by the Chamber in its Decision on Defence Applications for Leave to Appeal Ruling of the 3rd of February, 2005, on the Exclusion of Statements of Witness TF-141, 28 April 2005. See para. 19.

¹⁸ *Prosecutor v. Nahimana, Barayagwiza and Ngeze*, ICTR-99-52-A, Decision on Appellant Jean-Bosco Barayagwiza's Motion Requesting that the Prosecution Disclosure of the Interview of Michel Bagaragaza be Expunged from the Record, 30 October 2006, para. 6.

¹⁹ See para. 6 above.