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SCSL-03-01-T
(24686-24689)

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SPECIAL COURT FOR SIERRA LEONE

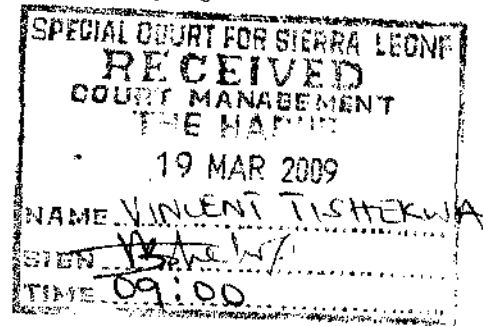
TRIAL CHAMBER II

Before: Justice Richard Lussick, Presiding Judge
Justice Teresa Doherty
Justice Julia Sebutinde
Justice El Hadji Malick Sow, Alternate Judge

Registrar: Herman von Hebel

Case No.: SCSL-03-1-T

Date: 18 March 2009



PROSECUTOR

v.

Charles Ghankay TAYLOR

**DECISION ON DEFENCE APPLICATION FOR LEAVE TO APPEAL THE DECISION ON URGENT
DEFENCE MOTION REGARDING A FATAL DEFECT IN THE PROSECUTION'S SECOND
AMENDED INDICTMENT RELATING TO THE PLEADING OF JCE**

Office of the Prosecutor:

Brenda J. Hollis
Nicholas Koumjian
Kathryn Howarth

Defence Counsel for Charles G. Taylor:

Courtenay Griffiths, Q.C.
Terry Munyard
Andrew Cayley
Morris Anyah

TRIAL CHAMBER II ("Trial Chamber") of the Special Court for Sierra Leone ("Special Court");

SEISED of the "Defence Application for Leave to Appeal the Decision on Urgent Defence Motion Regarding a Fatal Defect in the Prosecution's Second Amended Indictment Relating to the Pleading of JCE", filed on 2 March 2009 ("Motion"),¹ wherein the Defence seeks leave to appeal the Trial Chamber's "Decision on Urgent Defence Motion Regarding a Fatal Defect in the Prosecution's Second Amended Indictment Relating to the Pleading of JCE", rendered on 27 February 2009 ("Impugned Decision")² submitting that exceptional circumstances and irreparable prejudice exist pursuant to Rule 73(B) of the Rules of Procedure and Evidence ("Rules") on the grounds:

- i) that the majority of the Trial Chamber erred in fact and law in concluding that no defect is to be found in the pleading of the joint criminal enterprise when the text of the Second Amended Indictment is considered as a whole and therefore sufficient details have been provided to place the Accused on notice of the case against him;
- ii) that the majority of the Trial Chamber erred in law and in the application of the law, when finding that a campaign to terrorise the civilian population of the Republic of Sierra Leone was the common purpose of the joint criminal enterprise;
- iii) that the Impugned Decision constitutes an error of law when it considered only some factors in favour of finding that the mode of joint criminal enterprise liability was adequately pleaded and failed to consider other relevant factors in the analytical process, which is tantamount to shifting the burden or onus regarding the sufficiency of pleading of joint criminal enterprise in the Second Amended Indictment from the Prosecution to the Accused;
- iv) that the majority of the Trial Chamber erred in law when it opined that "taken together [paragraphs 5, 9, 14, 22, 23, 28, 33 and 34 of the Second Amended Indictment] fulfil the requirements for pleading JCE and serve to put the Defence on notice that the Prosecution intended to charge the Accused with having participated in a Joint Criminal Enterprise";³
- v) that the Impugned Decision is not capable of effective remedy in a final appeal;⁴

NOTING the "Prosecution Response to Public with Annexes Defence Application for Leave to Appeal the Decision on Urgent Defence Motion Regarding a Fatal Defect in the Prosecution's Second Amended Indictment Relating to the Pleading of JCE", filed on 13 March 2009 ("Response"),⁵ wherein the Prosecution argues that the Defence has failed to meet the threshold for granting leave to appeal pursuant to Rule 73(B) of the Rules and that therefore the Motion should be denied;⁶

¹ SCSL03-01-T-754.

² SCSL03-01-T-752.

³ Motion, paras 6, 7.

⁴ Motion, paras 11-13.

⁵ SCSL03-01-T-762.

⁶ Response, para. 25.

NOTING FURTHER the “Defence Reply to the Prosecution’s Response to the Defence Application for Leave to Appeal the 27 February Majority Decision Regarding the Pleading of JCE in the Second Amended Indictment”, filed on 18 March 2009 (“Reply”), wherein the Defence reiterates its submission to grant leave to appeal the Impugned Decision;⁷

RECALLING the Impugned Decision where the Trial Chamber by a majority held as follows:

Reading the Indictment as a whole, the Trial Chamber is satisfied that the Prosecution has adequately fulfilled the pleading requirements of the alleged Joint Criminal Enterprise in the Indictment, and that it has provided sufficient details to put the Accused on notice of the case against him.⁸

MINDFUL of Article 17 of the Statute of the Special Court for Sierra Leone (“Statute”) and Rules 26bis, 47, 50, 54, 72, 73(B);

NOTING that the conditions that must pertain for the Trial Chamber to grant leave to appeal are set out in Rule 73(B), which 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 a stay of proceedings unless the Trial Chamber so orders.

NOTING therefore that (i) as a general rule, interlocutory decisions are not subject to appeal; (ii) that Rule 73(B) involves a high threshold that must be met before the Trial Chamber can exercise its discretion to grant leave to appeal; (iii) a party seeking leave to appeal against an interlocutory decision must show “exceptional circumstances” and “irreparable prejudice”; (iv) the two prong test prescribed under Rule 73(B) is conjunctive and not disjunctive;⁹

CONSIDERING that the overriding legal consideration in respect of an application of this nature is that the applicant’s case must reach a level nothing short of exceptional circumstances and irreparable prejudice, having regard to the restrictive nature of Rule 73(B) and the rationale that criminal trials must not be heavily encumbered and, consequently, unduly delayed by interlocutory appeals;¹⁰

RECALLING the Appeals Chamber ruling 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 judgement will be corrected in due course by this Chamber on appeal;¹¹

⁷ SCSL-03-01-T-763.

⁸ *Prosecutor v. Taylor*, SCSL-03-01-T-752, Decision on Urgent Defence Motion Regarding a Fatal Defect In The Prosecution’s Second Amended Indictment Relating to the Pleading of JCE, 27 February 2009.

⁹ *Prosecutor v. Brima, Kamara, Kanu*, SCSL-04-16-T, Decision on Joint Defence Request for Leave to Appeal from Decision on Defence Motions for Judgement of Acquittal Pursuant to Rule 98 of 31 March 2006, 4 May 2006.

¹⁰ See *Prosecutor v. Sesay, Kallon, Gbao*, 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.

¹¹ See *Prosecutor v. Norman, Fofana, Kondewa*, SCSL-2004-14-AR73, Decision on Amendment of the Consolidated Indictment, 16 May 2005, para. 43.

CONSIDERING that the Impugned decision raises a fundamental issue, namely whether paragraphs 5, 9, 14, 22, 23, 28, 33 and 34 of the Second Amended Indictment, when taken together fulfil the requirements for pleading of joint criminal enterprise and put the Defence on notice of the charges against the Accused;¹²

FINDING that a continuous erroneous reading of the Indictment on the issue of joint criminal enterprise as a form of liability, could result in irreparable prejudice to the Accused who is entitled to know the nature of the case against him as enshrined in Article 17(4)(a) of the Statute and that the complex nature of the case where pleading of a joint criminal enterprise is a central issue, constitute exceptional circumstances;¹³

FINDING FURTHER that, in the instant case, it is in the interests of justice that leave to appeal be granted notwithstanding the provisions of Rules 72(A) and (D);

SATISFIED BY MAJORITY, Justice Sebutinde dissenting, that the Defence has met the conjunctive conditions of exceptional circumstances and irreparable prejudice as prescribed by Rule 73(B);


NOTING that Justice Sebutinde dissents in so far that the Defence has not, in her opinion, met the conjunctive conditions of exceptional circumstances and irreparable prejudice, but has merely argued out the alleged errors of the Impugned Decision;

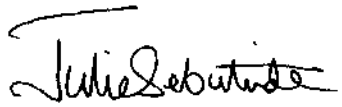
FOR THE ABOVE REASONS

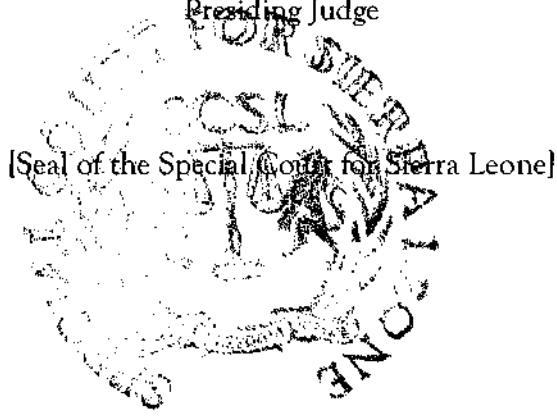
GRANTS the Motion.

Done at The Hague, The Netherlands, this 18th day of March 2009.


Justice Teresa Doherty


Justice Richard Lussick
Presiding Judge


Justice Julia Sebutinde



¹² Impugned Decision, para. 70.

¹³ *Prosecutor v. Brima, Kamara, Kanu*, SCSL-04-16-T-414, Decision on Prosecution Application for Leave to Appeal Decision on Oral Application for Witness TF1-150 to Testify without being Compelled to Answer Questions on Grounds of Confidentiality, 12 October 2005.