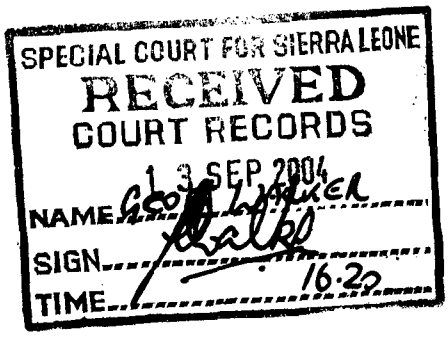
SPECIAL COURT FOR SIERRA LEONE

THE APPEALS CHAMBER

Before: Justice Raga Fernando

Registrar: Robin Vincent

Date: 13 September 2004



THE PROSECUTOR

Against

SAMUEL HINGA NORMAN, MOININA FOFANA and ALLIEU KONDEWA

CASE NO. SCSL-2004-14-AR65

MOININA FOFANA

REPLY TO PROSECUTION'S RESPONSE APPLICATION FOR LEAVE TO APPEAL AGAINST REFUSAL OF BAIL

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Introduction

1. The Defence for Moinina Fofana ("the Defence") hereby files its reply to the "Prosecution's Response to Moinina Fofana Application for leave to Appeal against Refusal of Bail" filed 8 September 2004.

2. On 5 August, more than six months after the filing of the Application for Bail, Judge Itoe rendered his "Decision on Application for Bail pursuant to Rule 65" (the "Decision") dismissing the Application for Bail for wont of merits .

3. In its Application for leave to appeal against refusal of bail, dated 27 August 2004, ("the Application") the Defence showed that there exists good cause for allowing the appeal. The Defence reiterates that in the Decision, Judge Itoe made errors of fact and law and further that the issue of bail is one of public importance and a general principal to be decided for the first time. Accordingly argument and consideration by the Appeals Chamber is warranted in the interests of justice.

4. In this Reply the Defence will not repeat any argument raised earlier in the Application, however the Defence does wish to clarify a few points. Unless expressly admitted the Defence does not concede any arguments raised by the prosecution which are not discussed below.

Errors of Law

5. As explained in the Application, Judge Itoe was incorrectly guided by jurisprudence from the ICTY in applying the "best evidence rule" and thus refusing to admit into evidence a declaration by the Defence witness in support of Mr. Fofana's bail application. The Prosecution submits that Judge Itoe correctly applied this rule.[1]

6. The Defence firmly rejects the Prosecution's support for Judge Itoe's reliance on the best evidence rule which in turn relies on jurisprudence from the ICTY. Such jurisprudence responds to Rule 89(C) of the Rules of Procedure and Evidence for the ICTY, a provision which is clearly different in construction, meaning and implication from that which governs admission of evidence before the Special Court. The Defence submits that such provision, in fact is not "comparable" as the Prosecution claims.[2]

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[1] *The Prosecutor v Fofana* SCSL-04-14-AR65, "Prosecution Response to Moinina Fofana Application for Leave to Appeal Against Refusal of Bail" 8 September 2004 (hereinafter "the Prosecution's Response"), paras 9-14

[2] The Prosecution's Response, para 13.

7. Rule 89(C) of the Rules of Procedure and Evidence at both the ICTY and ICTR provides that "A Chamber may admit any relevant evidence **that it deems has a probative value**." Accordingly, the probative value of a piece of evidence to be admitted into evidence before the ICTY must be established at the admission stage. Contrastingly, Rule 89(C) of the Rules governing procedure at the Special Court provides simply that "A Chamber may admit any relevant evidence". Accordingly the Trial Chamber is not required to establish and assess the credibility of a piece of evidence in deciding to admit evidence. Rather, a Chamber is simply asked to decide whether or not a piece of evidence is **relevant**.

8. The Trial Chamber has indeed admitted unsigned documents into evidence, in accordance with Rule 89(C). For example, during both cross examination and re-examination of witness TF2-159 on 10 September 2004 unsigned witness statements were admitted into evidence. In admitting these documents, the question of whether or not the document was signed, was dealt with summarily as the Trial Chamber correctly recognised that such issue goes to the subsequent question of the evidence's probative value rather than the evidence's relevance.

9. The Defence agrees with the Prosecution's admission that reliability is not a question to be considered at the stage of admitting evidence, rather "the question of the weight to be given to admitted evidence is one for the Judge alone to make".[3]

10. The Trial Chamber of the ICTY has denied that there is a "separate requirement of reliability as a condition for admissibility of a given item into evidence." Accordingly, "it is not required that the evidence be shown to be reliable before it is admitted"[4] as it is:-

> "a cardinal rule of construction of legislation, that where the words of a provision are clear and unambiguous, the task of interpretation does not arise. ... Thus, it is neither necessary nor desirable to add to the provision of Sub Rule 89(C) a condition of admissibility which is not expressly prescribed by that provision."[5]

11. Accordingly, the determination of admitting evidence must be guided by Rule 89(C) and thus **any** evidence that a Chamber deems relevant may be admitted. The Defence submits that this

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[3] Ibid, para 15; and *Prosecutor v Aleksovski* "Decision on Prosecutor's Appeal on Admissibility of Evidence", 16 February 1999, para 15.
[4] Jones, John R.W.D. & Powles, Steven "International Criminal Practice" (3rd ed). (2003) [8.5.657-8] citing the *Prosecutor v Mucić,* "Decision on the Prosecutor's Oral Requests for the Admission of Exhibit 155 into Evidence and for an Order to Compel the Accused, Zdravko Mucić to provide a handwriting sample" 19 January 1998.
[5] Ibid. This was affirmed by the same Chamber ruling in the same case in its "Decision on the Motion of the Prosecution for the Admissibility of Evidence" 19 January 1998 para 19: Jones supra 4, [8.5.689].

discretion should in principle be exercised by the Trial Chamber, unless the admission of the evidence prejudices the rights of the Accused.

General Principle to be decided for the first time

12. The principles of equality and consistency demand that the Application of Mr. Fofana be accorded the same response as the successful applications for leave to appeal against refusal of bail decisions in the cases of Kallon and Sesay.[6] The Prosecution appears to assert that decisions in these two cases have been made and thus that the Fofana Application does not raise a matter of general principle for the first time. Without referencing such claim it is unclear to the Defence how the Prosecution arrived at this conclusion as court records indicate that bail decisions by the Appeals Chamber in these two cases remain pending. Accordingly, the Defence's submission that the Application raises issues to be decided for the first time[7] is warranted.

Conclusion

13. In the Application the Defence showed good cause to allow an appeal challenging the impugned Decision by highlighting errors of fact and law made by Judge Itoe. The Defence further submitting that the issue of bail raises a general principle to be decided for the first time in international law and one of public importance thus consideration by the Appeals Chamber is merited in the interests of justice.

COUNSEL FOR THE ACCUSED

Michiel Pestman

[6] *Prosecutor v Kallon,* "Kallon – Decision on Application for Leave to Appeal Against Refusal of Bail", 23 June 2004, *Prosecutor v Sesay, Kallon and Gbao,* SCSL-04-15T, "Sesay – Decision on Application for Leave to Appeal Against Refusal of Bail", 28 July 2004.
[7] The Application, para 20.

List of Authorities

1. Jones, John R.W.D. & Powles, Steven "International Criminal Practice" (3rd ed). (2003) paras [8.5.657] & [8.5.659]

INTERNATIONAL CRIMINAL PRACTICE

The International Criminal Tribunal for the Former Yugoslavia
The International Criminal Tribunal for Rwanda
The International Criminal Court
The Special Court for Sierra Leone
The East Timor Special Panel for Serious Crimes
War Crimes Prosecutions in Kosovo

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8.5.657 In its Decision, the Chamber rejected the defence argument that the letter could only be admitted into evidence under Rule 89(C) if it had first been found to be *reliable*. Although the *Tadić Hearsay Decision* of 5 August 1996 emphasised the importance of the proferred evidence's reliability, the Trial Chamber ruling in the Mucić case refused to read into Rule 89(C) a separate requirement of reliability as a condition for admissibility of a given item into evidence:

> 32. . . . reliability is the invisible golden thread which runs through all the components of admissibility. Yet, it is a cardinal rule of construction of legislation, that where the words of a provision are clear and unambiguous, the task of interpretation does not arise. So it is with Sub-rule 89(C). Thus, it is neither necessary nor desirable to add to the provisions of Sub-rule 89 (C) a condition of admissibility which is not expressly prescribed by that provision.

8.5.658 In other words, while evidence may be excluded because it is unreliable, it is not required that evidence be shown to be reliable before it is admitted. The evidence need only be shown to be *relevant*, in order for it to be admissible.

8.5.659 This was affirmed by the same Chamber ruling in the same case in its *Decision on the Motion of the Prosecution for the Admissibility of Evidence* of 19 January 1998, para. 19.

8.5.660 Although admitting the letter into evidence, in its Decision of 19 January 1998, the Chamber did not find it established on the facts that Mucić did indeed write the letter:

> The contents of the letter that relate to him, such as his current address, are not facts peculiarly known only to Mucić and Witness P, but are matters of public knowledge. The Trial Chamber is, therefore, not convinced that these factors inexorably link Mucić to the letter. All that can be stated with any certainty at this stage is, thus, that sufficient indicia of reliability have been established of the letter as a document received by Witness P from an unknown third person.

8.5.661 The Chamber also rejected a Prosecution Motion to call an expert witness to testify with regard to the handwriting on the letter (*Order on the Motion to seek leave to call additional expert witness concerning handwriting*, 20 January 1998).

Character Evidence

8.5.662 It is generally inadmissible to adduce evidence of the accused's character in order to show his propensity to act in conformity therewith. See *Decision on evidence of the good character of the accused and the defence of* tu quoque rendered by the Trial Chamber in *Kupreškić* on 17 February 1999:

> (i) generally speaking, evidence of the accused's character prior to the events for which he is indicted before the International Tribunal is not a relevant issue inasmuch as (a) by their nature as crimes committed in the context of widespread violence and during a national or international emergency, war crimes and crimes against humanity may be committed by persons with no prior convictions or his-