

SPECIAL COURT FOR SIERRA LEONE

OFFICE OF THE PROSECUTOR
FREETOWN – SIERRA LEONE

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

Registrar: Robin Vincent

Date filed: 15 March 2005

THE PROSECUTOR

Against

**SAMUEL HINGA NORMAN
MOININA FOFANA
ALLIEU KONDEWA**
(Case No. SCSL-2004-14-T)

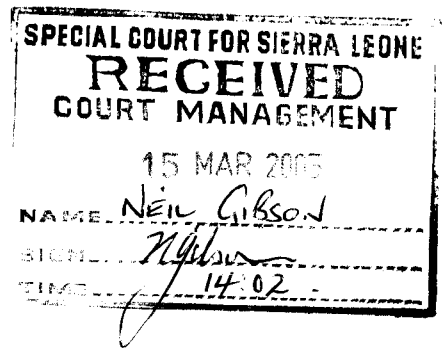
**PROSECUTION RESPONSE TO DEFENCE “REQUEST BY FIRST ACCUSED
FOR LEAVE TO APPEAL AGAINST THE TRIAL CHAMBER’S DECISION ON
PRESENTATION OF WITNESS TESTIMONY ON MOYAMBA CRIME BASE, 1
MARCH 2005”**

Office of the Prosecutor:
Luc Côté
James C. Johnson
Kevin Tavener

Defence Counsel for Sam Hinga Norman
Dr. Bu-Buakei Jabbi
John Wesley Hall, Jr

Defence Counsel for Moinina Fofana
Victor Koppe
Michiel Pestman
Arrow J. Bockarie

Defence Counsel for Allieu Kondewa
Charles Margai
Yada Williams
Ansu Lansana



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I INTRODUCTION

1. The Defence seeks leave to file an interlocutory appeal of the “Decision on Presentation of Witness Testimony on Moyamba Crime Base”¹ (the “**Decision on Moyamba Crime Base**”). The Prosecution files this response to the “Request by the First Accused for Leave to Appeal against the Trial Chamber’s Decision on Presentation of witness testimony on Moyamba Crime Base, 1 March 2005.” (the “**Request for Leave**”).
2. In the Request for Leave, the First Accused argues that there exist exceptional circumstances justifying granting leave to appeal, in particular:
 - a. the “open judicial disagreement on the application of the relevant and material law, principles and/or procedure amongst the learned judges of The Trial Chamber...”;
 - b. the lack of jurisdiction and discretion of the trial Chamber to decide on this matter as the Chamber has already ordered that the Moyamba crime base portions of the Indictment be stayed; and

¹ *Prosecutor v. Norman, Fofana and Kondewa, SCSL-04-14-T, 1 March 2005.*

- c. that the issue is actively on appeal before the Appeals Chamber.

Additionally, the Defence argues that the First Accused would be irreparably prejudiced if leave were not granted.

3. The Prosecution's primary submission is that the Defence cannot appeal a decision to which it agreed, if not *positively supported*. The Defence supported the Prosecution's oral motion to lead evidence on the Moyamba crime base pending the outcome of certain Appeals and a Motion to amend the current Indictment, in respect of the First Accused.
4. Additionally, the Defence has not satisfied the requisite elements required for leave to interlocutory appeal.

II. THE LAW

5. The Rules and jurisprudence of the Court are clear that leave to interlocutory appeal is granted only when exceptional circumstances are shown and, even then, only in order to avoid irreparable prejudice to a party.
6. Rule 73(B) of the Rules states:

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.

7. The Trial Chamber of this Court articulated the test for granting leave in respect of interlocutory appeals as follows:

As a general rule, interlocutory decisions are not appealable and consistent with a clear and unambiguous legislative intent, this rule involves a high threshold that must be met before this Chamber can exercise its discretion to grant leave to appeal. The two limbs to the test are clearly conjunctive, not disjunctive' in other words, they must *both* be satisfied.²

8. In a more recent decision the Trial Chamber held that:

² *Prosecutor v. Sesay, Kallon and Gbao*, SCSL-2004-15-PT, "Decision on Prosecution's Application for Leave to File an Interlocutory Appeal Against the Decision on The Prosecution Motions for Joinder", 13 February 2004 at para. 10.

At this point in time, as the trials are progressing, the Chamber must be very sensitive, and rightly so to any proceedings or processes that will indeed encumber and unduly protract the ongoing trials. For this reason, it is a judicial imperative for us to ensure that the proceedings before the court are conducted expeditiously and to continue to apply the enunciated criteria with the same degree of stringency as in the previous applications for leave to appeal as not to defeat or frustrate the rationale that underlines the amendment of Rule 73 (B).³

9. The Prosecution submits that the reasons provided in support of the Request for Leave fail to establish either exceptional circumstances or irreparable prejudice to the First Accused.

III. ARGUMENT

A. No exceptional circumstances exist that would justify granting leave to appeal

(i) Divergence in opinions amongst the Judges does not automatically create exceptional circumstances

10. The Prosecution submits that the first argument presented by the Defence does not amount to the “exceptional circumstances” required by Rule 73 (B). Contrary to what the Defence asserts, a dissident opinion in a judicial decision does not create automatic grounds for granting leave to appeal. As already expressed by the Trial Chamber in this case:

It would, in our opinion, be erroneous to hold that every legal situation or variable which appears to be novel or unique should for that reason, qualify as “exceptional circumstances” within the meaning of Rule 73 (B). We would only want to observe in this regard, that disagreements amongst Judges on some of the multi-faceted legal and factual issues which constitute the core of legal disputes is a normal judicial feature that is inherent in the exercise by the Judges of judicial independence on which the administration of justice is, and will continue to be, based.⁴

³ *Prosecutor v. Norman et al.*, SCSL-04-14-T, “Majority Decision on the Prosecution’s Application for Leave to File an Interlocutory Appeal Against the Decision on the Prosecution’s Request for Leave to Amend the Indictment Against Samuel Hinga Norman, Moinina Fofana and Allieu Kondewa”, 2 August 2004 at para.25 (hereinafter “**Decision on Leave to Amend, 2 August 2004**”).

⁴ Decision on Leave to Amend, 2 August 2004 at para 28.

11. The Defence has not provided any indication on how the majority Decision on Moyamba Crime Base erred in the application of the law, principles or procedures so as to constitute the exceptional circumstances warranting an intervention of the Appeals Chamber. “Open judicial disagreement” in the impugned decision is not, in this case, an exceptional factor and would be contrary to the test established by Rule 73 (B) and the precedents set by this Trial Chamber, with regards to interlocutory appeals. A majority judicial decision is not an exceptional circumstance.

(ii) The Trial Chamber did not violate or contradict its earlier ruling

12. In the “Decision on the First Accused Motion for Service and Arraignment on the Consolidated Indictment” 29 November 2004⁵ (“**Decision on Service and Arraignment**”), the Trial Chamber ordered that certain portions contained in the Consolidated Indictment be stayed against the First Accused. It further ordered the Prosecution to either expunge from the Indictment the said portions or to seek an amendment in relation to the relevant portions; currently, the Prosecution is seeking an amendment in relation to the relevant portions. The impugned sections related mainly to the Moyamba crime base.

13. Accordingly, the Prosecution brought an oral motion requesting the Trial Chamber’s permission to proceed with the evidence on the Moyamba crime base, as it was not able to sufficiently adjust the production of witnesses and given the absence of prejudice to the accused.⁶ In its response, the Defence not only agreed to, but *positively supported* the Prosecution’s application, stressing the need to proceed with the trial as expeditiously as possible.

14. The Trial Chamber granted the Prosecution’s oral motion in its Moyamba Crime Base Decision rendered on 1 March 2005.

15. Contrary to the Defence assertion in its Request to Appeal, the Prosecution submits that the Trial Chamber was not *functus officio* to entertain the Prosecution’s Oral Motion and to grant its application. The Prosecution submits

⁵ *Prosecutor v. Norman, Fofana and Kondewa*, SCSL-04-14-T.

⁶ *Prosecutor v. Norman, Fofana and Kondewa*, SCSL-04-14-T, Transcript, 25 February 2005.

there is a material difference in the intended scope and effect of the subject decisions. The Trial Chamber did not contradict its previous ruling but ruled on a request brought by the Prosecution and supported by the Defence, to enable the trial to proceed in a timely way.

16. As mentioned above, the Decision on Service and Arraignment of the Indictment settles that certain portions of the Consolidated Indictment should be stayed and the Prosecution should either expunge them from the Consolidated Indictment or the Prosecution must seek to amend the Consolidated Indictment in respect of those portions.
17. The Decision on Moyamba Crime Base, on the other hand, deals with a procedural matter necessary to ensure continuity of the trial in a fair and expeditious manner. The Prosecution respectfully submits that the Trial Chamber is best placed to assess how the trial should be conducted with respect to its own proceedings.
18. The ruling of the Trial Chamber in the first decision did not foreclose the broad power conferred to the Trial Chamber by Rule 54 to decide on a matter related to the conduct of the trial.
19. As expressed in the *Delalic* case:

There is, expressly vested in the Trial Chamber a general power to regulate the conduct of the trial. That application may be made by either party or the Trial Chamber proprio motu. The power may be exercised if the Trial Chamber is satisfied that the order sought is necessary for the purposes of investigation, or for the preparation or conduct of trial. The Trial Chamber regards this element of “necessary for...the conduct of trial”, as the litmus test in this application. Accordingly where the Trial Chamber is satisfied that the order sought is necessary for the conduct of the trial the application will be granted.⁷

20. As such, in view of the Prosecution’s limited ability to call other witnesses and the Defence agreement to proceed with the Moyamba crime base, the Trial

⁷ *Prosecutor v. Delalic*, IT-96-21, “Decision on the Prosecution’s Motion for an Order Requiring Advance Disclosure of Witnesses by the Defence”, 4 February 1998 at para. 41. (hereinafter “**Delalic-Decision on Motion on Disclosure, 4 February 1998**”)

Chamber rightfully ruled that “*it is in the interests of justice and judicial economy to continue the trial and hear the testimony of witnesses who will give evidence on the Moyamba crime base*”.

21. The Prosecution submits that the Decision on Moyamba Crime Base does not hamper the rights of the First Accused to a fair trial; rather it avoided a potential deferral of the proceedings, an issue to which the First Accused was alert and expressed his concerns through counsel.
22. The Trial Chamber’s decision allowed the trial to proceed, once being satisfied that no substantial prejudice was occasioned to the First Accused. Even though this ruling touches touch on issues related to those in the Decision on Service and Arraignment, it is not in violation or contradiction of the Decision on Service and Arraignment as its scope and effect are clearly different.⁸
23. Based on the above arguments the Prosecution submits that the Trial Chamber was not *functus officio* with respect to the determination of the order in which the Moyamba crime base testimonies should proceed and Defence’s argument should be rejected.

(iii) The Trial Chamber did not rule on an issue already before the Appeals Chamber in violation of Rule 73(C)

24. Relying on Rule 73(C), the Defence further contends that the Trial Chamber lacked jurisdiction to hear and determine the Prosecution’s oral motion of 25 February 2005, alleging that the same issue is currently before the Appeals Chamber.
25. Rule 73 (C) states:

Whenever the Trial Chamber and the Appeals Chamber of the Court are seized of the same Motion raising the same or similar issue or issues, the Trial Chamber shall stay proceedings on the said Motion before it until a final determination of the said Motion by the Appeals Chamber.

⁸ See generally Delalic-Decision on Motion on Disclosure, 4 February 1998.

26. The Trial Chamber's decision does not unconditionally apply to the Moyamba crime base to the First Accused. The Trial Chamber decided, as agreed to by both the Prosecution and the Defence, to hear the evidence in the interest of expediency, accepting that it may, in retrospect, not be relevant to the current indictment against the First Accused. Any irrelevant evidence would then not be applied against the accused, an issue which can be dealt with by an informed Trial Chamber.

B. The Decision on Moyamba Crime Base does not cause irreparable prejudice to the First Accused

27. The Prosecution submits that the Trial Chamber's Moyamba Crime Base Decision does not in any way violate the rights of the First Accused. The evidence in relation to the Moyamba crime base has been disclosed for some time.

28. The First Accused received further affirmation of the Prosecution's intention to lead that evidence since its inclusion in the Consolidated Indictment.

29. The Defence has had adequate time to investigate and prepare for cross-examination and has done so. Indeed, Counsel for First Accused said in its response to the Oral Motion that the Defence was ready to proceed with the testimony of the Moyamba witnesses.

30. Finally, the Prosecution notes that it has made significant changes and adjustments in the ordering of witnesses to be called in the trial, in view of the decisions pending before the Appeals Chamber. The Prosecution submits that under the circumstances and with the concurrence of the Defence, the calling of the Moyamba witnesses best served the proper administration of justice.

IV. CONCLUSION

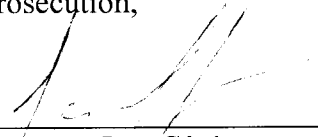
31. The Defence supported the oral motion which was granted by the Trial Chamber in the Moyamba Crime Base Decision; it cannot now appeal a Decision which reflected its stated position before the Trial Chamber.

32. Additionally, the Defence has not established either the ground of exceptional circumstances or irreparable prejudice, required for the granting of leave to interlocutory appeal.


33. In all of the circumstances, the Prosecution seeks that the Leave Application be denied.

Freetown, 15 March 2005.

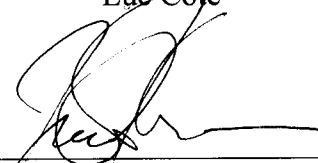
For the Prosecution,



Luc Côté



Kevin Tavener



James C. Johnson

ANNEX A
PROSECUTION INDEX OF AUTHORITIES

1. *Prosecutor v. Norman, Fofana and Kondewa*, SCSL-04-14-T, “Decision on Presentation of Witness Testimony on Moyamba Crime Base,” 1 March 2005.
2. *Prosecutor v. Sesay, Kallon and Gbao*, SCSL-2004-15-PT, “Decision on Prosecution’s Application for Leave to File an Interlocutory Appeal Against the Decision on The Prosecution Motions for Joinder”, 13 February 2004.
3. *Prosecutor v. Norman, Fofana and Kondewa*, SCSL-04-14-T, “Majority Decision on the Prosecution’s Application for Leave to File an Interlocutory Appeal Against the Decision on the Prosecution’s Request for Leave to Amend the Indictment Against Samuel Hinga Norman, Moinina Fofana and Allieu Kondewa”, 2 August 2004.
4. *Prosecutor v. Norman, Fofana and Kondewa*, SCSL-04-14-T, “Decision on Leave to Amend,” 2 August 2004 at para 28.
5. *Prosecutor v. Norman, Fofana and Kondewa*, SCSL-04-14-T, “Decision on the First Accused Motion for Service and Arraignment on the Consolidated Indictment,” 29 November 2004.
6. *Prosecutor v. Norman, Fofana and Kondewa*, SCSL-04-14-T, Transcript, 25 February 2005.
7. *Prosecutor v. Delalic*, IT-96-21, “Decision on the Prosecution’s Motion for an Order Requiring Advance Disclosure of Witnesses by the Defence”, 4 February 1998.

<http://www.un.org/icty/kordic/appeal/decision-e/00922EV313611.htm>