

007

SCSL-2004-16-PT
(87-90)

87

**SPECIAL COURT FOR
SIERRA LEONE**

Case No. SCSL-2004-16-PT

Before: Judge Bankole Thompson
Judge Benjamin Itoe
Judge Pierre Boutet

Registrar: Mr. Robin Vincent

Date filed: February 5, 2004

THE PROSECUTOR

against

SANTIGIE BORBOR KANU

**DEFENSE RESPONSE TO PROSECUTION'S APPLICATION FOR LEAVE
TO FILE AN INTERLOCUTORY APPEAL AGAINST THE DECISION ON THE PROSECUTION
MOTIONS FOR JOINDER**

Office of the Prosecutor:

Mr. Luc Coté
Mr. Robert Petit
Mr. Christopher Santora

Defense Counsel:

Mr. Geert-Jan Alexander Knoops, Lead Counsel
Mr. Joseph Cole, Co-Counsel



I INTRODUCTION

1. Pursuant to the “Trial Chamber’s Decision and Order on Prosecution Motions for Joinder” of January 27, 2004 (“**Trial Chamber Decision and Order**”), the “Prosecution’s Application for Leave to File an Interlocutory Appeal against the Decision on the Prosecution Motions for Joinder” (“**Prosecution’s Application**”) dated February 3, 2004, and pursuant to the Trial Chamber “Order for Expedited Filing,” dated February 4, 2004, the Defense of Mr. Kanu (“**Defense**”) herewith files its “Defense Response to the Prosecution’s Application for Leave to File an Interlocutory Appeal against the Decision on the Prosecution Motions for Joinder.”

II NO EXCEPTIONAL CIRCUMSTANCES NOR IRREPARABLE PREJUDICE

2. First, in the Prosecution’s Application, leave to appeal is requested on the basis of Rule 73(B) of the Rules of Procedure and Evidence (“Rules”). This Rule indicates that *“[d]ecisions 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.”*
3. The Defense holds that the Prosecution has not proved that the outcome of the Trial Chamber Decision and Order creates an exceptional circumstance and that it creates irreparable prejudice to the Prosecution. Therefore, the strict requirement of Rule 73(B) of the Rules has not been met, and the Prosecution should not be granted leave to appeal for the reasons as set out below.

III NOT IN THE INTEREST OF JUSTICE

4. Secondly, Rule 82(B) of the Rules indicates that *“[t]he Trial Chamber may order that persons accused jointly under Rule 48 be tried separately if it considers it necessary in order to avoid a conflict of interests that might cause serious prejudice to an accused, or to protect the interests of justice.”* The Defense is of the opinion that this Rule was correctly interpreted and applied by the Trial Chamber.

5. In para. 45 of the Trial Chamber Decision and Order, it is mentioned that, taking into account the factors enumerated in para. 44 thereof, the Trial Chamber expresses its sensitiveness to the need for adequate judicial protection within the compass of a joint trial, within which the rights of the accused should be respected. Ultimately, the overall interest of justice and the rights of the accused herein, should be the decisive factor within Rule 82(B) of the Rules (see para. 46 of the Trial Chamber Decision and Order). In view of these balanced arguments, the argument that the Trial Chamber “*abused its discretion by giving undue weight to these factors,*” as mentioned in para. 10 of the Prosecution’s Application, seems to have no factual bearing. Furthermore, it cannot be denied that the danger of the possibility of conflicting defense strategies and the possibility of mutual recriminations, referred to by the Trial Chamber in para. 41 of its Decision and Order, forms part of the protection and respect for the legal rights stipulated under Article 6(1) and 17 of the Statute, accorded and guaranteed to accused persons both as individuals and as a group (see para. 48 of the Trial Chamber Decision and Order). Although it may be correct that the separation of the accused persons in two groups for purposes of trial, does not in itself preclude conflicting defenses, it may certainly limit this risk. Accordingly, the Trial Chamber came to a balancing outcome whereby the interests of justice were taken into account from the perspective of both the Prosecution and the Defense.
6. Finally, the Prosecution’s Application does not clearly and specifically set out the reasons for the existence of “*serious prejudice*” to the Prosecution, other than potential procedural ramifications, as mentioned in para. 15 – 21 of the Prosecution’s Application. The Defense holds that the criterion of “*serious prejudice*” should be interpreted with respect to potential consequences for the position of the Prosecution in terms of substantive law issues, and not as much as procedural issues. In this sense, the substantive rights of the Prosecution may not effectively be endangered by the Trial Chamber Decision and Order.
7. The Defense is of the opinion that the Trial Chamber Decision and Order should be upheld, and the Defense therefore requests the Trial Chamber to reject the Prosecution’s Application.

IV DISCRETIONARY ASSESSMENT

8. Thirdly, in para. 2 of the Prosecution's Application, mention is made of the decisive argument of the Trial Chamber, namely that "*the Chamber exercised its discretion in denying the request for a single trial of all six accused persons on the basis that it was against the interest of justice to do so, stating that there would be a conflict of interest in trying together members of the RUF and the AFRC who might have conflicting defences.*" The Prosecution therefore seems to acknowledge that the Trial Chamber has discretionary power to apply said Rule, which power therefore only leaves limited judicial leeway as to the proper application of 82(B) of the Rules. Therefore, the alleged errors to be argued by the Prosecution, when granted leave to appeal, are likely to have no bearing in terms of adjudicatory assessment in appeal. In para. 38 of the Trial Chamber Decision and Order, it is rightly mentioned that the question whether it is in the interest of justice to order a joinder, is a matter that is pre-eminently discretionary.

V CONCLUSION

9. In view of the aforementioned arguments, the Defense respectfully prays that the Trial Chamber denies the Prosecution's Application, therewith denying the Prosecution the right to appeal from the Trial Chamber Decision and Order, as no exceptional circumstances, nor irreparable prejudice to the Prosecution have been proved, as required by Rule 73(B) of the Rules, and moreover, joining the trials of the two separate groups, the RUF and the AFRC, is not in the interest of justice, as required by Rule 82(B) of the Rules and/or may raise a conflict of interests as set out by this Rule.

Respectfully submitted,
Done at this 5th day of February, 2004

PP Geert-Jan Alexander Knoop
Geert-Jan Alexander Knoop
Lead Counsel