

SPECIAL COURT FOR SIERRA LEONE
OFFICE OF THE PROSECUTOR
Freetown – Sierra Leone

Before: Judge Teresa Doherty, Presiding Judge
Judge Richard Lussick
Judge Julia Sebutinde

Registrar: Mr. Robin Vincent

Date filed: 14 April 2005

THE PROSECUTOR

Against

**Alex Tamba Brima
Brima Bazzy Kamara
Santigie Borbor Kanu**

Case No. SCSL – 2004 – 16 – T

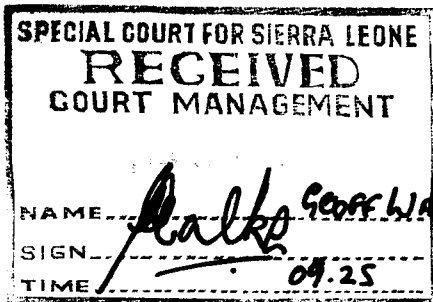
**PROSECUTION RESPONSE TO JOINT DEFENCE APPLICATION FOR
LEAVE TO APPEAL AGAINST THE RULING OF TRIAL CHAMBER II OF 5
APRIL 2005**

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I. PROCEDURAL BACKGROUND

1. The Prosecution files this Response to the Joint Defence Application for Leave to Appeal against the Ruling of Trial Chamber II of 5 April 2005 (“the Application for Leave to Appeal”), filed 8 April 2005.

2. On 5 April 2005, Counsel for the Accused Brima made an oral application that the trial in the proceedings against *Brima* and others be adjourned until the outcome of the investigation into the investigator previously assigned to the Brima Defence Team¹ was made known to the Defence.² Counsel for the Accused Kamara also made an oral application that the trial be adjourned.³ Counsel for the Accused Kanu did not make an application for an adjournment, nor support the applications made by the other Defence Counsel.⁴ The application for an

¹ On 10 March 2005, the Trial Chamber delivered a decision in which the Registrar, pursuant to Rule 77(C)(iii), was ordered to appoint an independent counsel to investigate and to prosecute five named persons for contempt of the court, one of whom was the then investigator of the Defence team of the Accused Brima. The Trial Chamber also ordered certain interim measures, including the suspension of the investigator. See Transcript, 10 March 2005, pp.15-16.

² Transcript, 5 April 2005, p. 6 (lines 1-7) and p. 8 (lines 6-10).

³ Transcript, 5 April 2005, p. 15 (line 20) to p. 16. (line 20). That Application was based upon the late assignment of a new investigator to the Kamara Defence Team and sought “adequate time”.

⁴ Counsel for the Accused Kanu simply informed the Court about the absence of lead Counsel. See Transcript, 5 April 2005, p. 14 (lines 9-14). After the Ruling was delivered, Counsel made a further

adjournment was opposed by the Prosecution.⁵

3. The Accused were absent from Court during this application. The Defence tendered a document (Exhibit D2) signed by the three Accused explaining their decision to not attend Court. The Chamber recorded that the Accused voluntarily absented themselves from Court, pursuant to Rule 60(A).⁶
4. The previous day the Defence had filed a “Joint Defence Request for Disclosure of Independent Investigator’s Report on Contempt of Court Proceedings and Request for Stay of Proceedings”. On 5 April 2005 Counsel for the Defence did not seek to argue the substance of that document.⁷ The Prosecution indicated that it would file a written response to that Request in accordance with the Rules.⁸
5. The Trial Chamber rejected the oral application by the Defence for an adjournment of the trial and ordered the immediate continuation of the trial (“the Ruling”).⁹
6. The Prosecution submits that there is no error in law in the Ruling. The Prosecution further submits that there are no exceptional circumstances and the Applicants would not suffer irreparable prejudice if the Application for Leave to Appeal is denied.

II. ARGUMENT

The Test for Granting Leave to Appeal

7. Rule 73(B) of the Rules of Procedure and Evidence reads:

Decisions rendered on such motions are without interlocutory appeal. However, in

application for an adjournment to discuss the Ruling with the Accused. See Transcript, 5 April 2005, p. 28 (line 26) to p. 30 (line 15).

⁵ Transcript, 5 April 2005, p. 16 (line 27).

⁶ Transcript, 5 April 2005, p. 2 (line 21) to p. 3 (line 15) and p. 27 (line 23) to p. (line 3)

⁷ Transcript, 5 April 2005, p. 8 (lines 21-29).

⁸ Transcript, 5 April 2005 p. 19 (lines 1-2).

⁹ Transcript, 5 April 2005, p. 25 (line 17) to p. 27 (line 12).

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.

8. A previous decision of Trial Chamber I established that 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 of the test are clearly conjunctive and not disjunctive; in other words they must both be satisfied.”¹⁰
9. A more recent decision of that Chamber observed that:

“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 previous applications for leave to appeal so as not to defeat or frustrate the rationale that underlies the amendment of Rule 73(B).”¹¹
10. The Prosecution submits that neither of the two limbs of exceptional circumstances and irreparable prejudice has been demonstrated.
11. The Application for Leave to Appeal notes that the “main argument” presented by the Defence was that the Brima Defence Team did not yet have an investigator to replace the suspended investigator and was therefore unable to proceed without material and information from the team’s investigator.¹² On 5 April 2005 Counsel for the Accused Brima said:

“My main submission is that if, as I understand it, a report has been submitted, we ought to know the findings of that report for us to be able to know whether or not we can continue with the same investigators or not.”¹³
12. The Prosecution notes that the two arguments are different. Notwithstanding this,

¹⁰ *Prosecutor v Sesay and others*, 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, para. 10.

¹¹ *Prosecutor v Norman and others*, SCSL-2004-14-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 Norman, Fofana and Kondewa”, 2 August 2004, para. 25.

¹² Para. 4 of the Application for Leave to Appeal.

¹³ Transcript, 5 April 2005, p. 9 (lines 4-7).

the Prosecution submits that the position of the Brima Defence Team with respect to the non-use of an investigator is entirely of its own choosing. The Brima Defence Team must therefore be taken to intend all consequences that flow from that choice. As such, the circumstances are not exceptional and no prejudice, least of all irreparable prejudice, can arise.

No Irreparable Prejudice

13. The Application for Leave to Appeal argues that the irreparable prejudice arises because¹⁴:

- a) The trial proceedings have been continued without the Brima Defence Team “having an option” to investigate Prosecution witnesses “both prior to and after examination in chief”.
- b) This lack of option “has more to do with the quality and trustworthiness of an efficient investigator than otherwise”.
- c) The Kamara Defence Team finds re-examination (sic) of Prosecution witnesses “difficult” because its investigator has only been recently appointed.
- d) The situation cannot be attributed to the Defence teams.

14. The impact of the need for and availability of a replacement investigator upon the Brima Defence Team has been canvassed extensively before the Chamber, both in oral submission¹⁵ and in written pleadings¹⁶. Not once prior to the Application for Leave to Appeal has it been suggested by the Defence that the Brima Defence Team has been handicapped in choosing a replacement investigator because of the quality, trustworthiness or efficiency of the available candidates. Rather, the choice not to replace the suspended investigator has said to have been because the Accused Brima did not want a replacement.

¹⁴ Para. 16 of the Application for Leave to Appeal.

¹⁵ 10 March 2005, 14 March 2005 and 5 April 2005.

¹⁶ Joint Defence Request for Disclosure of Independent Investigator’s Report for Contempt of Court Proceedings and Request for Stay of Proceedings filed 4 April 2005.

15. On 14 March 2005 Counsel for the Accused Brima said:

“Let me make the situation clear. I thought I had. Mr Brima wants his investigator. I have to act on his instructions. That is normally the way in which generally when instructed counsel acts. The difficulty, of course, as I say, looking at it from a purely professional point of view – that’s what I said – one could, with time, redress the balance. However, I have sought to point out the difficulties in the way, the hurdles, in redressing the balance and placing us in a position that we would have been in on – last Thursday afternoon but for the difficulties that we would appear to have encountered. Now, given time, my lay client may be able to see it that way as well. But at the moment, his direct instructions are, I want my investigator.”¹⁷

On 5 April 2005 Counsel for the Accused Brima said:

”The position of the client is this – and always has been – that unless and until he knows the fate of his now suspended investigator there is no point in another investigator coming on board, wherein the person will have to be installed in the whole possess (sic) and start again.”¹⁸

Later on the same day Counsel for the Accused Brima said:

“ ... the accused is the person who has to work with the investigator, just like all accused persons have a free will as to which counsel they choose, they are all given a list and they all choose who they want to represent them. We cannot impose someone on him, any more than you can impose a lawyer on an accused person.”¹⁹

In a document filed with the Chamber on 4 April 2005 the Defence said:

“The Brima Defence team does not wish to assign a new investigator until the matter concerning the contempt of court proceedings has been settled.”²⁰

16. The Prosecution submits that the position of the Brima Defence Team as regards its investigator is entirely of its own making. As was said in *Prosecutor v Kayishema and Ruzindana*, once a Trial Chamber is satisfied that all of the necessary provisions for the preparation of a comprehensive defence have been

¹⁷ Transcript, 14 March 2005, p. 4 (line 27) to p. 5 (line 9)

¹⁸ Transcript, 5 April 2005, p. 7 (lines 14-18).

¹⁹ Transcript, 5 April 2005, p. 7 (line 29) to p. 8 (line 4).

²⁰ Joint Defence Request for Disclosure of Independent Investigator’s Report for Contempt of Court Proceedings and Request for Stay of Proceedings, filed 4 April 2005, para. 6. No issue as to the competency of available replacement investigators was ventilated.

made available to Defence Counsel, “[t]he utilization of those resources is not a matter for the Trial Chamber”.²¹

17. The Prosecution submits that in light of this, the now articulated argument of the Defence that the Brima Defence Team is handicapped because there are issues as to the quality, trustworthiness and efficiency of potential replacement investigators is disingenuous. This is especially so as Counsel for the Accused Brima have listened twice – without demur – to the submissions of the Office of the Principal Defender that the Accused Brima has categorically rejected replacement investigators²², and without simultaneously raising any issue of competency of the available candidates.
18. The new assertion that the quality, trustworthiness and efficiency of potential replacement investigators has had any impact upon the choices available to the Brima Defence Team is made without explanation or evidentiary foundation. The Prosecution submits that no irreparable prejudice can arise in refusing leave to file an interlocutory appeal on a ground not raised in the argument preceding the impugned Ruling.²³
19. The Application for Leave to Appeal argues an inability of the Brima Defence Team to investigate Prosecution witnesses both prior to and after examination in chief. In this context, it is to be remembered that the Defence have been in

²¹ *Prosecutor v Kayishema and Ruzindana*, ICTR-95-1, “Judgement”, 21 May 1999, para. 61. See also *Prosecutor v Pauline Nyiramasuhuko*, ICTR-97-21, “The President’s Decision on the Application by Arsene Shalom Ntahobali for Review of the Registrar’s Decision Pertaining to the Assignment of an Investigator”, 13 November 2002, para. 7, referred to in the Ruling which establishes that an Accused does not have a right to the choice of an investigator.

²² See Transcript 14 March 2005, p. 2 (lines 10-14) – “Your Honour, the Brima Defence team has already been offered – we have a list of investigators in the office. But from speaking to the client directly, he prefers not to have an investigator assigned in the face of the fact that he still wants the investigator who has been suspended for now.” See also Transcript 5 April 2005, p. 6 (line 27) to p. 7 (line 2) – “During the recess, the office has been on several occasions to the accused Brima with a lot of names of potential investigators, people who have applied to the office, and he has categorically rejected on the grounds that he is still waiting the outcome of the independent investigator’s report.”

²³ The Prosecution notes that if this is the basis of an application for an adjournment, that application should be made with proper particularity directly to the Trial Chamber rather than in an application for leave to appeal pursuant to Rule 73(B).

possession of the redacted statements of the Prosecution witnesses since 2003. The currently suspended investigator has been with the Brima Defence Team since January 2005²⁴ and was suspended on 10 March 2005.

20. On 10 March 2005, Defence Counsel for Kamara stated that there was no investigator on his team.²⁵ This issue was raised as the first of two reasons why Counsel could not cross-examine witness TF1-023 after Counsel for the Accused Brima and Accused Kanu both indicated that they were not in a position to cross-examine the witness. Counsel for Kamara had previously cross-examined witnesses TF1-024 and TF1-277 without indicating any difficulty due to a lack of investigator.²⁶

21. The Prosecution submits that for the above reasons the Application for Leave to Appeal does not demonstrate irreparable prejudice.

No Exceptional Circumstances

22. The Application for Leave to Appeal argues that exceptional circumstances are demonstrated because:

- a) The presence of an investigator within a Defence team at the level of international criminal proceedings may affect the fairness of the trial proceedings.
- b) The principle of equality of arms and the rights enshrined in Article 17 demand the effective participation of an Accused based upon investigative capabilities of the Defence team.
- c) A decision of an Appeals Chamber is warranted merely because an investigator is subject to an investigation for contempt.

²⁴ Transcript, 10 March 2005, p. 44 (lines 26-28).

²⁵ Transcript, 10 March 2005, p. 43 (lines 4-5).

²⁶ Since the trial began Defence Counsel for Kamara has cross-examined all witnesses other than TF1-023 and TF1-098.

23. The Prosecution repeats its submission that the Brima Defence Team have chosen to not accept a replacement investigator and, as such, no issue as to equality of arms or effective participation arises. The Prosecution further reiterates that the Kamara Defence team raised no issue as to their assigned investigator until after the investigator then assigned to the Brima Defence Team was suspended.
24. The Prosecution notes that the Defence fails to expand upon the statement that the mere fact that an investigator is subject to an investigation for contempt warrants an Appeals Chamber decision upon the issue. The Prosecution submits that there is nothing so novel or complex about an order made for an investigation contemplated by the Rules that of itself justifies consideration by the Appeals Chamber. This is so irrespective of who is subject to that investigation.

III CONCLUSION

25. For the foregoing reasons, the Prosecution submits that the Application for Leave to Appeal demonstrates neither irreparable prejudice nor exceptional circumstances. The Ruling contains no error of law or fact.
26. The Prosecution submits that the Application for Leave to Appeal and the application for a stay of proceedings be rejected.

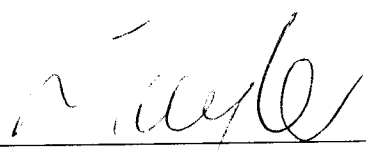
Filed this 14th day of April,

In Freetown

Sierra Leone.



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PROSECUTION INDEX OF AUTHORITIES

Prosecutor v Sesay and others, 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.

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