

SCSL-04-16-T

(8852 - 8857).

**SPECIAL COURT FOR
SIERRA LEONE**

Case No. SCSL-2004-16-T

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

Registrar: Robin Vincent

Date filed: 27 May 2005

SPECIAL COURT FOR SIERRA LEONE	
RECEIVED	
COURT MANAGEMENT	
26 MAY 2005	
NAME:	NEIL GIBSON
SIGN:	<i>Neil Gibson</i>
TIME:	15:57

THE PROSECUTOR

against

ALEX TAMBA BRIMA

BRIMA BAZZY KAMARA

and

SANTIGIE BORBOR KANU

**JOINT DEFENCE APPLICATION FOR LEAVE TO APPEAL FROM DECISION ON DEFENCE
MOTION TO EXCLUDE ALL EVIDENCE FROM WITNESS TF1-277**

Office of the Prosecutor:

Luc Coté
Lesley Taylor

Defence Counsel for Kanu:

Geert-Jan A. Knoops, Lead Counsel
Carry J. Knoops, Co-Counsel
A.E. Manly-Spain, Co-Counsel

Defence Counsel for Brima:

Glenna Thompson
Kojo Graham

Defence Counsel for Kamara:

Mohamed Pa-Momo Fofanah

I INTRODUCTION

1. Pursuant to Rule 73(B) of the Rules of Procedure and Evidence, the Defence for all three AFRC Accused herewith files its “Joint Defence Application for Leave to Appeal from Decision on Defence Motion to Exclude All Evidence from Witness TF1-277,” (“**Application**”) against the “Decision on Joint Defence Motion to Exclude All Evidence from Witness TF1-277 Pursuant to Rule 89(C) and/or Rule 95” (“**Impugned Decision**,” attached as **exhibit 1**) of 24 May 2005.

II SUMMARY OF THE PROCEEDINGS

2. On 11 March 2005, the joint Defence for all three AFRC Accused filed its “Confidential and Under Seal Joint Defence Motion to Exclude All Evidence from Witness TF1-277 Pursuant to Rule 89(C) and/or Rule 95” (“**Motion**”). On 6 April 2005, the Prosecution responded to the Motion in its “Prosecution Response to Joint Defence Motion to Exclude All Evidence from Witness TF1-277 Pursuant to Rule 89(C) and/or 95” (“**Response**”). The Defence replied to this in its “Confidential Joint Defence Reply to Prosecution Response to Joint Defence Motion to Exclude All Evidence from Witness TF1-277 Pursuant to Rule 89(C) and/or 95” (“**Reply**”) dated 11 April 2005.

III EXCEPTIONAL CIRCUMSTANCES AND IRREPARABLE PREJUDICE

3. Rule 73(B), upon which this Application is based, requires the Defence to establish both “irreparable prejudice” and “exceptional circumstances.”

3.1 Irreparable Prejudice

4. The Defence submits that in this instance, irreparable prejudice to the Accused can be avoided by granting leave to appeal from the Impugned Decision.

5. The Defence contends that the underlying issue, i.e. the admittance of hearsay evidence of a witness who has been confronted with prior inconsistent statements relating to this very issue of his hearsay evidence, is a fundamental matter. The Defence moreover submits that the question whether indirect hearsay evidence of this nature, while being confronted with prior inconsistent statements, should be allowed in international proceedings without testing the reliability thereof, will influence the future of the trial proceedings before the Special Court. Leaving this matter able to be appealed only at a later stage would seriously affect the proceedings against the Accused.
6. The Defence submits that the admission of this specific form of evidence by the honorable Trial Chamber creates exceptional circumstances which, according to the humble opinion of the Defence, is of such a fundamental nature, that it requires the Appeals Chamber, the supreme judicial body of the Special Court, to rule upon it.
7. In addition to the foregoing, the Defence asserts that the Impugned Decision may lead to a violation of the Accused's right to cross-examine the evidence against him. While the ICTY Trial Chamber ruled in *Prosecutor v. Aleksovski* that "Rule 90(A) provides that witnesses shall in principle be heard directly by Chambers (...),"¹ the honorable Trial Chamber concludes in para. 19 of the Impugned Decision that "it was not strictly necessary for the Prosecution to establish that the other two persons engaged in the conversation were not available to give evidence. This is not a matter which would affect the admissibility of the Witness's evidence, but goes to its weight to be determined thereafter."
8. Taking into consideration the ICTY case law set out above, the Defence wishes to submit that the principle as set out by the Trial Chamber in the Impugned Decision, indicating that it is not necessary to determine the original source of the

¹ *Prosecutor v. Aleksovski*, Case No. IT-95-14/1, Decision on Prosecutor's Appeal on Admissibility of Evidence, 16 February 1999, para. 17.

evidence delivered in court, has a great prejudicial effect on the Accused and his fair trial. This view could result in the Defence being unable at any time to cross-examine the original sources, i.e., other two persons mentioned by witness TF1-277 while they may very well be available to the Prosecution. In this approach, the Defence would thus be unable to challenge said testimony of witness TF1-277. This may result in irreparable prejudice to the Accused, who is, in that scenario, unable to cross-examine the original source of hearsay evidence against him.

3.2 Exceptional Circumstances

9. The Impugned Decision concerns a principal matter which has, in combination with the issue of prior inconsistent statements, not yet been decided upon by the Appeals Chamber of the Special Court, as far as the defence is able to observe. As set out under section 3.1 above, dismissal of this Application can have prejudicial effect on the Accused. The purported prejudice affects the rights of the Accused to a fair trial in such manner that it qualifies as “exceptional circumstances” as required by Rule 73(B) of the Rules.
10. The concept of admission of hearsay evidence, in combination with a clearly prior inconsistent statement by the particular witness may create an exceptional circumstance. As to the issue of a prior inconsistent statement, in this particular instance, it should be observed that the honorable Trial Chamber, as the Defence holds, erred in law and fact by concluding in para 21 that the prior inconsistency was not between the prior written statement and sworn evidence but between this testimony and the interview note. However, in para 22 of the decision, the honourable Trial Chamber seems to accept that such interview notes can amount to relevant evidence under rule 89C, as follows also from para 23 of the impugned decision. Seen from this perspective, exceptional circumstances may arise due to the acceptance of interview notes as having a form of substantive validity.

3.3 Conclusion

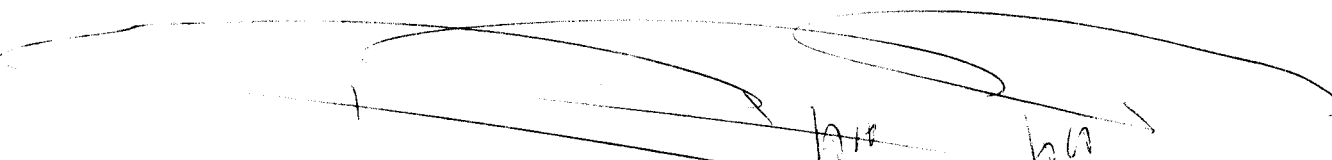
11. The Defence submits that leave to appeal is justified based on the fact that the Accused will suffer irreparable prejudice if no leave to appeal be granted, and given the exceptional circumstances which, in addition to the prejudice, warrant a leave to appeal.

IV RELIEF SOUGHT

12. Based on the foregoing arguments, the Defence prays the honorable Trial Chamber to grant leave to the Defence to appeal from the Impugned Decision.

Respectfully submitted,

On 27 May 2005



Geert-Jan A. Knoops

Glenna Thompson

Mohamed Pa-Momo Fofanah

DEFENCE AUTHORITY

- *Prosecutor v. Aleksovski*, Case No. IT-95-14/1, Decision on Prosecutor's Appeal on Admissibility of Evidence, 16 February 1999.