

271)

SCSL-04-16-T
(8742-8749)

8742

**SPECIAL COURT FOR
SIERRA LEONE**

IN THE APPEALS CHAMBER

Case No. SCSL-2004-16-T

Before: Judge Emmanuel Ayoola, Presiding
Judge George Gelaga King
Judge Renate Winter
Judge Geoffrey Robertson, QC
Judge A. Raja N. Fernando

Registrar: Robin Vincent

Date filed: 16 May 2005

THE PROSECUTOR

against

ALEX TAMBA BRIMA

BRIMA BAZZY KAMARA

and

SANTIGIE BORBOR KANU

**JOINT DEFENCE REPLY TO PROSECUTION RESPONSE TO THE
"JOINT DEFENCE APPEAL" DATED 3 MAY 2005**

Office of the Prosecutor:

Luc Coté
Lesley Taylor

Defence Counsel for Kanu:

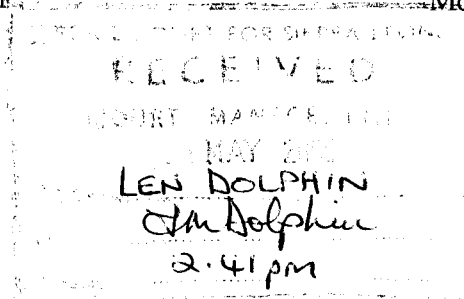
Geert-Jan A. Knoops, Lead Counsel
Carry J. Knoops, Co-Counsel
A.E. Manly-Spain, Co-Counsel

Defence Counsel for Brima:

Glenna Thompson
Kojo Graham

Defence Counsel for Kamara:

Mohamed Pa-Momo Fofanah



I INTRODUCTION

1. On 3 May 2005, the Defence filed its “Joint Defence Notice of Appeal on Decision on Independent Counsel” (“**Notice of Appeal**”), its “Joint Defence Appeal against Decision on the Report of Independent Counsel Pursuant to Rules 77(C)(iii) and 77(D) of the Rules of Procedure and Evidence of 29 April 2005” (“**Appeal Motion**”), and the “Joint Defence Index of Record on Appeal Concerning decision on Independent Counsel” against the Trial Chamber’s “Decision on the Report of the Independent Counsel Pursuant to Rules 77(C)(iii) and 77(D) of the Rules of Procedure and Evidence” of 29 April 2005 (“**Impugned Decision**”).
2. On 12 May 2005, the Prosecution filed its response in “Prosecution Response to the ‘Joint Defence Appeal’ Dated 3 May 2005,” (“**Prosecution Response**”). The Defence herewith files its “Defence Reply to Prosecution Response to the ‘Joint Defence Appeal’ Dated 3 May 2005” in reply thereto.

II ADMISSIBILITY OF THE APPEAL

3. In para. 9 of the Prosecution Response, the Prosecution suggests that Rule 77(J) should not be interpreted literally. The Defence submits that this is in contradiction of the general rule that a provision should be read in its literal meaning read in conjunction with the object and purpose of the provision.¹ The Defence submits that the wording is very clear, “[any decision rendered by a Single Judge or Trial Chamber shall be subject to appeal,”² and that thus any different interpretation would be in contradiction to the intention of the drafters of the Rules of Procedure and Evidence. The Defence therefore submit that its Appeal Motion is admissible under Rule 77(J) of the Rules.

¹ See Article 31 of the 1969 Vienna Convention on the Law of Treaties.

² Underlining added.

- 4. For the other arguments raised by the Prosecution in this respect, the Defence is of the opinion that, in response to Section III of the Prosecution Response, it suffices to refer to Section II of the Appeal Motion, and the Defence contends that its appeal is admissible.

III STANDING IN THIS MATTER

- 5. In Section IV of the Prosecution Response, it is stated as an alternative argument that the Defence has no standing to bring this appeal and that only the parties to the actual contempt proceedings would have standing to bring such appeal.³
- 6. First of all, Rule 77(J) as such does not limit the right to appeal to only parties directly involved in the actual contempt of court proceedings, and therefore, in view the Defence, the right to appeal also extends to parties which (defence) rights are involved without that party itself being subject of contempt of court proceedings. However, in the instant case, this situation does not emerge because the Impugned Decision was directly taken in the AFRC proceedings, and therefore embedded within these proceedings as a judicial sequel. Excluding the right to appeal pursuant to Rule 77(J) in such a scenario would render this right meaningless.
- 7. Therefore, the Defence submits that, since the Impugned Decision was taken by Trial Chamber II in the case *against* the Accused, Case No. SCSL-2004-16-T, the Defence has standing to bring the appeal against a decision taken in its own case. Moreover, the Defence contends that the mere fact that all of the Accused are not involved in potential contempt of court as such, cannot negate the fact that they have a reasonable interest to a participation in these proceedings, as the outcome thereof affects the fairness of their cases as well as the scope of the principle of effective participation of the accused persons and their Defence teams within the AFRC proceedings. The example the Prosecution provided in para. 19 of its

³ Prosecution Response, para. 18.

Response is therefore not applicable to the current situation, as the Impugned Decision was taken in the case against the Accused. It is the content of this specific Impugned Decision of which the Accused appeal from, and not the ensuing contempt proceedings before the Designated Judge from Trial Chamber I.

8. The Defence therefore holds that the Prosecution argument should be dismissed, and that the Defence does have standing in this matter before the Appeals Chamber.

IV MERITS OF THE APPEAL

4.1 First Appeal Ground

9. The Defence relies on its argument as set out in the Appeal Motion. However, it wishes to emphasize some additional arguments in reply to the arguments set out in the Prosecution Response.
10. The Prosecution refers in its Response to the “general principle” embodied in Rule 77 “that the procedures for contempt trials should as far as possible be the same as the procedures for trials of crimes under Articles 2-5 of the Statute.” Earlier, in para. 10 of the Prosecution Response, this reasoning was linked to Rule 77(E) of the Rules, which provides that Parts IV to VIII shall apply as appropriate to the contempt of court proceedings.
11. In para. 11, however, the Prosecution Response indicates that the independent counsel’s report should be treated in the same way as the submission of an indictment by the Prosecutor pursuant to Rule 47(B). The Defence objects to this line of reasoning. According to Rule 77(C)(iii) of the Rules, the independent counsel reports back to the Trial Chamber after its investigation as to whether there are sufficient grounds for instigating contempt proceedings. It is on the basis of this report that “the Chamber may issue an order in lieu of an indictment and

direct the independent counsel to prosecute the matter.” This, therefore, differs from the Rule 47(B) procedure, where “[t]he Prosecutor, if satisfied in the course of an investigation that a suspect has committed a crime or crimes within the jurisdiction of the Special Court, shall prepare and submit to the Registrar an indictment for approval by the aforementioned Judge.” The main difference between the two procedures is that in the Rule 77(C) procedure, the Trial Chamber decides, on the basis of the report, whether the person should be indicted, while under the Rule 47(B) procedure, it is up to the Prosecutor to decide whether to prosecute. The designated Judge shall only review and approve the indictment according to Rule 47(E) of the Rules, and thus his role is more limited.

12. The fact that no appeal against a Rule 47(E) decision is possible under the Rules, again underlines the difference between the two procedures. Contrary to what the Prosecution states in para. 13 of its Response, the Defence holds that there *is* a specific provision for an appeal against the Impugned Decision in Rule 77(J), but indeed agrees that no such right to appeal exists as to the approval or dismissal of an indictment by a designated Judge under Rule 47(B) of the Rules. Interpretation by analogy should be restricted only to situations where no applicable provisions are available. In the current situation, however, the proceedings of Rule 77(J) are clearly meant to be a *specialis* to the general appeal system within the Special Court. Now that this provision provides for this specific situation, no analogical interpretation should be allowed.

13. Another difference is, of course, that the Rule 47(B) decisions are taken independently by a Prosecutor, which decisions stand on their own, in that they do not derive from pending criminal proceedings against accused before this Special Court. The Impugned Decision was taken in Case No. SCSL-2004-16-T, and therefore open to appeal by the Accused in those proceedings. It is the Defence submission that any argument that the Accused are third parties in *those* proceedings, should thus be disregarded.

14. The independent counsel's report was the basis for the Impugned Decision, and therefore forms part of the proceedings against the Accused. It is the Defence submission that it should have been provided with a copy of the underlying material for the Impugned Decision, in order to properly respond to the allegations in accordance with the principle of *audi alterem partem*.

15. Therefore, the Defence reiterates its first appeal ground, on the basis that the Trial Chamber has taken the Impugned Decision without having given the Defence a chance to properly respond to the independent counsel's report in compliance with the principles of fairness and transparency of documents based on which a criminal court comes to a decision.

4.2 Second Appeal Ground

16. With regard to the Defence second appeal ground, the Defence wishes to add the following.

17. The Prosecution relies on Article 82(3) of the ICC Statute to indicate that an (interlocutory) appeal should not have suspensive effect, unless otherwise indicated in the Rules of Procedure. The Defence wishes to indicate that no similar rule exists before the Special Court, nor does it exist before the ICTY or ICTR. Therefore, the Defence submits that the Prosecution cannot rely on this ICC provision to support its argument. Rather, the absence of such rule creates the discretion of a Trial Chamber to adjourn the criminal proceedings until the Appeals Chamber has dealt with the issues in this regard, in order to prevent prejudice and *faits accomplis*.

18. The Defence, however, did, in its Appeal Motion, not petition for a suspension of the proceedings, as is also evidenced by the relief sought, and did not ask to "force the trial proceedings to a halt until the interlocutory appeal is decided."

19. The Defence primary argument relates to the fact that the Trial Chamber took its Impugned Decision without first deciding on the several Defence motions which are pending before the Trial Chamber, and which relate to the very *ratione materiae* of the underlying matter. The fact that an appeal motion is pending on this same substance was only invoked as an additional argument in this instance.
20. In para. 34 of the Prosecution Response, the Prosecution indicates that it does not understand the Defence request that the Trial Chamber should first have decided on the Defence request for disclosure of the independent counsel's report, because it is of the opinion that the Defence has no such right. However, in the absence of a ruling of the Trial Chamber on whether this report should have been disclosed to the Defence prior to taking the Impugned Decision, the Prosecution's view qualifies as merely an *opinion*, without providing any legal precedent.
21. The Defence therefore submits that the Trial Chamber, by making its Impugned Decision, without hearing the three Accused in whose case the decision was taken, as well as without disclosing the underlying report, erred in law and/or fact by taking this decision prematurely.

4.3 Third Appeal Ground

22. The Prosecution asserts that the Defence argument represents a "misconception of the nature of a decision of a Trial Chamber under the second sentence of Rule 77(C)(iii)."⁴ The Defence submits that its argument does not relate to a decision finding a person in contempt of court, as mistakenly alleged by the Prosecution in para. 37 of its Response. The Defence, however, holds that Rule 88(C) of the Rules is, by virtue of Rule 77(E), applicable to the Impugned Decision, taken under this same Rule 77. This is supported by the broad wording of Rule 77(E),

⁴ See para. 37 of the Prosecution Response.

which makes the Rules in Parts IV to VIII applicable “to proceedings under this Rule.”

23. The Prosecution reiterates its arguments relating to the comparison of indictments taken under Rule 47; the Defence has rebutted this argument earlier on in this Reply, and will not repeat this. Suffice it to say that it considers the analogy of Rule 47 inappropriate given that the applicable Rule 77(E) in conjunction with Rule 88(C) provide for an answer.

24. Therefore, the Defence argument that the Impugned Decision contains a lack of motivation, still stands, and the Defence submits that this results in an error of law and/or fact, and thus the Defence holds that the Impugned Decision should be reversed.

V RELIEF SOUGHT

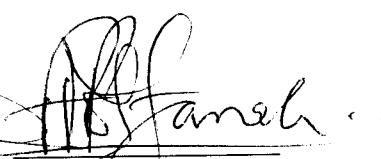
25. For the reasons set out above and in the Appeal Motion, the Defence respectfully prays the honorable Appeals Chamber to:

- (i) Grant the appeal and reverse the Impugned Decision, i.e., to declare null and void the Impugned Decision;
- (ii) Render any other decision the honorable Appeals Chamber deems appropriate.

Respectfully submitted,
On 16 May 2005

Geert-Jan A. Knoops

Glenna Thompson



Mohamed Pa-Momo Fofanah