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SCSL-2004-14-T
(10933 - 10940)

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SPECIAL COURT OF SIERRA LEONE

The Trial Chamber

Case No. SCSL-04-14-T

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

Registrar: Robin Vincent

Date: December 2, 2004

PROSECUTOR

against

Sam Hinga Norman
Moinana Fofana
Allieu Kondewa

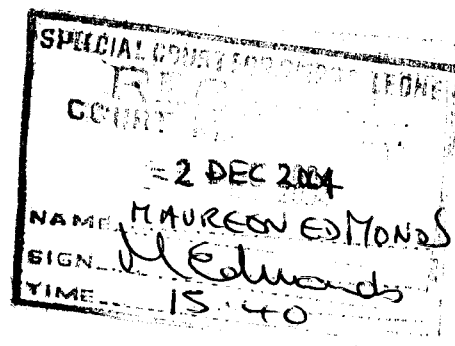
Application by First Accused for Leave to Make Interlocutory Appeal Against the
Decision on the First Accused's Motion for Service and Arraignment on the
Consolidated Indictment

Office of the Prosecutor

Luc Coté
James Johnson

Court Appointed Counsel Sam Hinga
Norman

Dr Bu-Buakei Jabbi
John Wesley Hall



Introduction

1. The Defence for Sam Hinga Norman hereby files this Application by the First Accused for leave to Appeal against Majority Decision on the First Accused's Motion for Service and Arraignment on the Consolidated Indictment.
2. On the 20th of September 2004 the First Accused filed a Motion seeking service and arraignment on the consolidated indictment pursuant to Rules 52 and 61 of the Rules of Procedure and Evidence of the Special Court ("the Rules"). The Application also sought to have the first indictment against him quashed or withdrawn so as to avoid a perceived double jeopardy. The Prosecution thereafter filed a response to which the Defence subsequently filed a reply.
3. The submissions of the Accused were to the effect that the Joinder Indictment filed against him and his co-accused persons was a new and different indictment which requires personal service and an arraignment on the new indictment. This submission of the first accused is premised on the allegation that the Consolidated Indictment expands the scope of the charges brought against the accused, establishing, amongst other things, new crime bases and fresh allegations to which the Accused did not plead during his initial appearance on the First individual indictment before the Designated Judge on the 7th of March 2004
4. On the 29th of November 2004 the Trial Chamber in a vote of two (2) to one (1) ruled against the First Accused's application, but granted reliefs otherwise than what was requested in the said application¹. In their majority decisions, the Judges acknowledged that their own order and Rule 52 as to service had been infringed. The Trial Chamber also definitively found, as alleged in the Motion, that "the consolidated Indictment contains new factual allegations adduced in support of existing confirmed counts and substantive elements of charges that are

¹ *Prosecutor v. Norman, Fofana, Kondewa*, Decision on the First Accused's Motion for Service and Arraignment on the Consolidated Indictment, 29 November 2004

material to the case against the Accused.”² So they granted reliefs putting the Prosecution to their election either to expunge the portions added to the original indictment or to amend the indictment, in either case with leave of the Trial Chamber.³ The majority judges reached the same conclusions but for different reasons. It is significant to note that the minority decision accepted both submissions of the First Accused and held that the First Accused ought to be arraigned on the Consolidated Indictment which the learned dissenting Judge described as new for all purposes.

Basis for Leave

5. Although motions made after the initial appearance of the Accused are generally without interlocutory appeal in terms of Rule 73 (B), the said sub-rule however provides that “in exceptional circumstances and to avoid irreparable prejudice to a party, the Trial Chamber may give leave to appeal. Such leave ... shall not operate as a stay of proceedings unless the Trial Chamber so orders.” The First Accused submits that the entire range of issues and processes since the application of the Prosecution for joint trial and a consolidated indictment up until the majority decision of the Trial Chamber on 29th of November 2004 do admit of “exceptional circumstances” and a high possibility of “irreparable prejudice” to the Accused so as to warrant leave to appeal to the Appeals Chambers to consider the important issues of law, fact and procedure involved therein and to rule on them finally in the interests of the integrity of the entire trial process and in order to avoid irreparable prejudice to the Accused.
6. In light of the foregoing submission, the First Accused hereby urges the Trial Chamber to grant him leave to appeal against its decision of 29th of November 2004 and to order an interim stay of all trial proceedings in respect of the

² *Id.*, para. 38

³ *Prosecutor v. Norman, Fofana, Kondewa*, Consequential Order to Decision on the First Accused’s Motion for Service and Arraignment on the Consolidated Indictment, 30 November 2004

consolidated indictment until final determination by the Appeals Chamber of his interlocutory appeal against the aforesaid decision of 29th of November 2004.

7. It is necessary to indicate at this stage that the entire range of processes in question started with the Prosecution's application on 9th of October 2003 pursuant to Sub-Rule 48 (B) of the Rules both for a joint trial of hitherto separately indicted Accused persons (Sam Hinga Norman, Moinina Fofana, Allieu Kondewa) in terms of Sub-Rule 48(B) and also for a consolidated indictment as the basis on which the said joint trial is to proceed. The three Accused Persons were not opposed in principle to joint trial pursuant to Sub-Rule 48(B); but each raised apprehensions, albeit only orally in the case of Sam Hinga Norman, in respect of the application for a consolidated indictment. Counsel for Norman raised the question of the radical impropriety and/or irregularity of considering the consolidated indictment aspect of the Prosecution's application under Sub-Rule 48(B) or at all when a draft or text of such consolidated indictment was not exhibited to the application in question. However, on the basis of pious undertakings and promises by the Prosecution in respect thereof, the Trial Chamber overruled the objection as overly "technical" and issued its decision on 27th of January 2004 ordering, *inter alia*, that a consolidated indictment be prepared and served upon the Accused persons pursuant to Rule 52 as the basis of their joint trial as sought by the Prosecution.⁴ As it turned out, however, the Prosecution failed both to fulfil its own undertakings and/or promises regarding the text of the future consolidated indictment and also to comply with the peremptory order of the Trial Chamber and the incontestably mandatory Rule 52 in all its aspects, as has now been affirmed by the Trial Chamber in its decision of 29th November 2004.⁵ Are these findings not a basis for automatic nullity, even possibly of the entire proceedings based on the consolidated indictment, whether or not by further considering their possible prejudicial effect on the fair trial or at

⁴ *Prosecutor v. Norman, Fofana, Kondewa*, Decision and Order on Prosecution Motions for Joinder, 27 January 2004

⁵ *Supra*, note 1, para 38

all of the Accused persons? The Trial Chamber, in its decision of 29th of November 2004, clearly thinks otherwise. The First Accused submits that it would be in the interests of justice and of the integrity of the entire trial process for the Appeals Chambers to consider such related questions at this stage, and not later on after more proceedings and processes shall have taken place on the basis of not implausibly questionable foundations of criminal prosecution.

8. Even in its decision of 29th of November 2004, and after affirming the otherwise damaging allegations of non-compliance with service requirements and court orders, and of material additions in the consolidated indictment, the Trial Chamber still merely orders that specified material additions be “stayed” in so far as they “constitute material changes against the First Accused”.⁶ They also order, or put the Prosecution to its election to apply for leave “either to expunge completely from the Consolidated Indictment such identified portions or seek an amendment of the said Indictment in respect of those identified portions”⁷ This hardly seems to be a true “election” or option. For is “expunging” not in itself an “amendment”, with the only difference in the proposed order being taking out or retaining the specified additions? And if the Consolidated Indictment itself is now found to contain “material changes” to the Indictment against the First Accused, then is it not in itself tantamount to an “amendment” of that original indictment, and that without having done so by way of stipulated procedures as are prescribed in Rule 48(A), Rule 49, Rule 50 and/or Rule 51, whether separately or in selective combination? As to the Trial Chamber’s order to “stay” specified portions of the Consolidated Indictment only as against the First Accused or at all: Is that also not an “amendment” of the said Consolidated Indictment itself? In any case, what is the authority for such an order by the Trial Chamber? And how consistent or otherwise are the several orders of the Trial Chamber in the said decision on the 29th of November 2004 with the stipulation, for example, that the

⁶ Para. 38 (emphasis added)

⁷ Supra, note 3, para. 2

Trial Chamber, “shall ensure...that proceedings before the Special Court are conducted in accordance with the Agreement, the Statute and the Rules?”⁸

9. Finally, as was also recognized by even the second Judge in the majority decision in question here in setting out the justification for him to adopt his own reasoning and forward his own reasons in a Separate Concurring Opinion, the area covered by the Motion of the First Accused for service and arraignment on the consolidated indictment is, in the words of the learned Judge:

“an area where the law, in some respects, remains intolerably unclear, if not confusing. In addition, it seems to me that the specific issues raised by this Motion are extremely complex and controversial both in terms of legal theory and practice. Hence, my considered position that while it is of utmost importance for the Chamber to pronounce its authoritative position on them, yet it is equally necessary to recognize the diverse legal perspectives from which the issues can be approached”⁹

The First Accused submits, in deference to the learned majority Judge of the Trial Chamber, that an immediate interlocutory appeal to the highest authoritative organ of the Special Court for Sierra Leone, to wit the Appeals Chamber, coupled with an interim stay of trial proceedings pending its determination of the said appeal, would be the best and most economical way – all told – of ensuring early clarification of this “intolerably unclear if not confusing” area of law, of sorting out and resolving its specific issues that are reputed to be so “extremely complex and controversial both in terms of legal theory and practice”, and also of definitively identifying, systematising and restructuring or prioritising “the diverse legal perspectives from which the issues can be approached”. The determination of the interlocutory appeal is thus highly likely to redound to a

⁸ Rule 26 bis

⁹ *Prosecutor v. Norman, Fofana, Kondewa*, Separate Concurring Opinion of Judge Bankole Thompson on Decision on First Accused’s Motion for Service and Arraignment on the Consolidated Indictment, 29th November 2004, para. 1 (Emphasis added)

considerable enrichment and enhancement of the relevant jurisprudence of both the Special Court of Sierra Leone and also of international criminal tribunals generally.

10. The questions and issues mooted in the foregoing paragraphs 7, 8 and 9 hereof are among the issues and questions that are intended to form the basis of grounds of appeal to be filed by the First Accused if granted the requested leave. The First Accused submits that these and other issues and questions to be raised in the appeal are crucial and important questions of fact, law and procedure which go to the very root of the integrity of the entire trial process and indeed of the entire operations of the Special Court for Sierra Leone as an international criminal tribunal. If some of them are not determined by the highest authority of the Appeals Chamber at this stage, they are highly likely to redound and effect into irreparable prejudice to the First Accused. And it would be much better and far economical that trial proceedings be formally stayed as an exceptional precaution than that the trial proceeds on the present basis to conclusion only for the Appeals Chamber to have to rule in the end perhaps that the entire proceedings have been a nullity *ab initio* or indeed in any essential aspects or dimensions.

Conclusions

11. On the basis of the foregoing and for the reasons and considerations therein, the First Accused hereby applies for, and accordingly respectfully urges the Trial Chamber to grant him the following:
 - (a) Leave to make an interlocutory appeal against the Trial Chamber's Decision on the First Accused's Motion for Service and Arraignment on the Consolidated Indictment delivered on 29th November 2004, pursuant to Rule 73(B) and Rule 108(C) of the Rules of Procedure and Evidence.
 - (b) Stay of all trial proceedings on the said Consolidated Indictment with effect from the filing of the Notice and Grounds of Appeal of the said

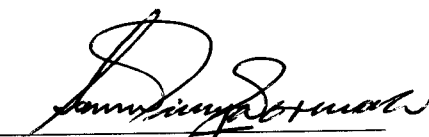
interlocutory appeal up until and pending final determination thereof by
the Appeals Chamber pursuant to Rule 54 and Rule 73 (B) of the Rules.

Dated the 2nd Day of December 2004-12-02

Court Appointed Counsel for the First Accused



Dr. Bu Buakei Jabbi



First Accused
Sam Hinga Norman