



SPECIAL COURT FOR SIERRA LEONE

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THE TRIAL CHAMBER

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

Registrar: Robin Vincent

Date: 1st of March, 2005

PROSECUTOR **Against** **SAM HINGA NORMAN**
MOININA FOFANA
ALLIEU KONDEWA
 (Case No.SCSL-04-14-T)

DECISION ON PRESENTATION OF WITNESS TESTIMONY ON MOYAMBA CRIME BASE

Office of the Prosecutor:

Luc Côté
 James Johnson

Court Appointed Counsel for Sam Hinga Norman:

Dr. Bu-Buakei Jabbi
 John Wesley Hall, Jr.
 Tim Owen, Q.C.

Court Appointed Counsel for Moinina Fofana:

Michiel Pestman
 Arrow Bockarie
 Victor Koppe

Court Appointed Counsel for Allieu Kondewa:

Charles Margai
 Yada Williams
 Ansu Lansana

Neil Gibson
M. Johnson
13.09.

TRIAL CHAMBER I (“The Trial Chamber”) of the Special Court for Sierra Leone (“Special Court”) composed of Hon. Justice Benjamin Mutanga Itoe, Presiding Judge, Hon. Justice Bankole Thompson, and Hon. Justice Pierre Boutet;

SEIZED of the Proposal by the Prosecution and Court Appointed Counsel for the First Accused, Sam Hinga Norman, made on the 25th of February 2005, for the Prosecution to call witnesses to testify on matters related to the Moyamba crime base, which relates to portions of the Consolidated Indictment that the Trial Chamber ordered to be stayed against the First Accused in its Decision of the 29th of November, 2004;

NOTING the *Decision on the First Accused’s Motion for Service and Arraignment on the Consolidated Indictment*, delivered by the Trial Chamber on the 29th of November, 2004;

PURSUANT TO Article 17 of the Statute of the Special Court for Sierra Leone (“Statute”) and Rule 26bis of the Rules of Procedure and Evidence of the Special Court for Sierra Leone (“Rules”);

ISSUES THE FOLLOWING DECISION:

I. PROPOSALS OF THE PARTIES

Prosecution Proposal

1. Counsel for the Prosecution informed the Chamber that it is anticipated that they will move to the Moyamba crime base next week, and that this crime base is significant as it was not included in the Initial Indictment (and is now in the Consolidated Indictment) and is a current matter of appeal by the First Accused.
2. The Prosecution stated that they have reached “a resolution” with Counsel for the First Accused for those witnesses who will testify to the Moyamba crime base.
3. The Prosecution submit that if the appeal of the First Accused is successful and the Moyamba crime base is not part of the case against him, then any evidence that comes out in respect of this will not be used against him, and, however, in order for the trial to proceed the First Accused has agreed to engage in the trial. The Prosecution submit that no harm or prejudice will be done to the First Accused should his appeal be successful.
4. The Prosecution indicated that they are not in a position to go ahead with other witnesses but the Moyamba Crime Base witnesses at this stage.

Defence Proposal

5. Court Appointed Counsel for the First Accused propose that Court Appointed Counsel for the Second and Third Accused begin the cross-examination of witnesses presented by the Prosecution on the Moyamba crime base, with the option for Court Appointed Counsel for the First Accused to cross-examine if they “choose” to do so.

6. Court Appointed Counsel for the First Accused state that they cannot stand mute in case they lose the appeal and therefore need to cross-examine.
7. Court Appointed Counsel for the First Accused stated that they want to go forward as expeditiously as possible and not take a day off at all if they can avoid it. They submit that a week-long continuance in the middle of the trial while the Prosecution gather alternative witnesses does not serve anybody. They are in agreement with the Prosecution to go forward with the Moyamba crime base witnesses.
8. Court Appointed Counsel for the First Accused will argue to the Court how the "proof needs to be segregated" if need be, at the close of the case, depending on the outcome of the appeal.

II. DELIBERATION

9. In the Chambers opinion, the issue to be determined is whether, in terms of fairness to the First Accused, and in the interests of justice, Prosecution witnesses may be called to testify on the Moyamba crime base, which relates to portions of the Consolidated Indictment that the Trial Chamber ordered to be stayed against the First Accused in its Decision of the 29th of November, 2004.

10. This Decision of the Trial Chamber has been appealed by Court Appointed Counsel for the First Accused¹ and by the Prosecution². Leave to appeal has subsequently been granted by the Trial Chamber in both cases.³ The Impugned Decision ordered that: "[T]he identified portions of the Consolidated Indictment that are material and embody new factual allegations and substantive elements of the charges be stayed and that the Prosecution is hereby put to its election 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, and that either option is to be exercised with leave of the Trial Chamber". Subsequent to this Decision the Prosecution filed a Motion for leave to amend the Indictment.⁴

11. In accordance with the Rule 73(C) of the Rules of Procedure and Evidence of the Special Court ("Rules"), in circumstances where there is an appeal against an Impugned Decision, the proceedings on the Motion against that Decision will be stayed until a final determination by the Appeals Chamber. As a consequence of the appeal against the Impugned Decision, the Trial Chamber has not made a ruling on the Prosecution's request for leave to amend the Indictment, and while the Decision of the Trial Chamber is not suspended, its Order for the Prosecution to seek leave of the Trial Chamber to either expunge the identified portions of the Indictment or to amend such portions remains *in fieri* by virtue of Rule 73(C) of the Rules, which prevents the Trial Chamber from making a ruling on this issue until the rendering of the appeals decision on this issue.

¹ Application by First Accused for Leave to Make Interlocutory Appeal Against the Decision of the First Accused's Motion for Service and Arraignment on the Consolidated Indictment, 2 December, 2004.

² Prosecution Application for Leave to Appeal "Decision on the First Accused's Motion for Service and Arraignment on the Consolidated Indictment", 6 December, 2004.

³ Decision on 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, 16 December, 2004; Decision on Prosecution Application for Leave to Appeal "Decision on the First Accused's Motion for Service and Arraignment on the Consolidated Indictment", 15 December, 2004.

⁴ Request for Leave to Amend the Indictment Against Norman, 8 December, 2004.

12. On this basis the Trial Chamber may conclude that the portions of the Consolidated Indictment that the Trial Chamber ruled should be stayed against the First Accused, continue in existence against the Accused, pending a further order by the Trial Chamber to grant leave to amend the Indictment, or decline to do so. As a consequence, the evidence of witnesses who will testify on matters relating to the Moyamba crime base, is relevant to the charges against the First Accused as they exist in the Consolidated Indictment.

13. The Trial Chamber considers that no prejudice will ensue to the Accused if the trial proceeds with the testimony of witnesses who give evidence related to the Moyamba crime base. The Accused has had adequate time and resources to prepare for the cross-examination of these witnesses. Court Appointed Counsel for the First Accused have themselves represented that the First Accused is ready to proceed with the testimony of these witnesses and wishes to proceed with the trial.

14. Under the Statute and Rules of the Special Court, the Trial Chamber is vested with the authority and duty to guarantee the Accused a fair trial and the proper administration of justice. Article 17(2), (3) and (4)(a)(b)(c) and (e) of the Statute provides that:

Article 17
Rights of the accused

2. The accused shall be entitled to a fair and public hearing, subject to measures ordered by the Special Court for the protection of victims and witnesses.
3. The accused shall be presumed innocent until proved guilty according to the provisions of the present Statute.
4. In the determination of any charge against the accused pursuant to the present Statute, he or she shall be entitled to the following minimum guarantees, in full equality:
 - a. To be informed promptly and in detail in a language which he or she understands of the nature and cause of the charge against him or her;
 - b. To have adequate time and facilities for the preparation of his or her defence and to communicate with counsel of his or her own choosing;
 - c. To be tried without undue delay;
 - e. To examine, or have examined, the witnesses against him or her and to obtain the attendance and examination of witnesses on his or her behalf under the same conditions as witnesses against him or her;

15. Rule 26bis of the Rules provides that:

The Trial Chamber and the Appeals Chamber shall ensure that a trial is fair and expeditious and that proceedings before the Special Court are conducted in accordance with the Agreement, the Statute and the Rules, with full respect for the rights of the accused and due regard for the protection of victims and witnesses.

16. In accordance with the Statute and Rules of the Special Court, the Trial Chamber considers that it is in the interests of justice and judicial economy to continue the trial and hear the testimony of witnesses who will give evidence on the Moyamba crime base. The Trial Chamber does not consider that any prejudice will ensue to the Accused. The Trial Chamber will competently and fairly consider the relevance of this evidence to the charges contained in the Consolidated Indictment

against the First Accused in conformity with the Decision of the Appeals Chamber when that Decision is rendered on this issue.

17. The Trial Chamber notes that this finding is in accord with the Decisions of the International Criminal Tribunal for the Former Yugoslavia ("ICTY") and the International Criminal Tribunal for Rwanda ("ICTR"). In the *Simic* case, the Defence requested the Trial Chamber to refuse to hear particular witness testimony until the Appeals Chamber delivered its Decision on an appeal against the Trial Chamber's Decision granting leave to the Prosecution to amend the Indictment, claiming that this testimony was related to the amended portions of the Indictment. The Trial Chamber ruled that it was entitled to proceed with the witness testimony and that it was satisfied that the proceedings were being followed by the Accused, that they were able to give instructions to their Defence Counsels concerning their Defence and that they were not facing new charges.⁵

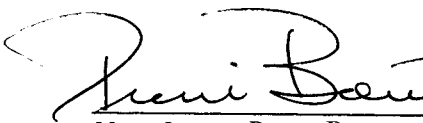
18. In the *Kvočka* case the Defence requested a stay of proceedings in relation to all new witnesses who were related to an appeal pending before the Appeals Chamber.⁶ In opposition, the Prosecution submitted that "[i]f an Appellate Chamber were to determine that the evidence of these new witnesses cannot be considered in reaching a decision in this case, the Trial Judges are presumed to be able to set aside that evidence in reaching your verdict". The Prosecution, furthermore, submitted that "[i]f they then decide the evidence is not admissible, there is a presumption that the judges can set aside that evidence and not consider it in reaching their decision". The Trial Chamber in that case ruled to continue the hearing of witness testimony and advised the Defence that if it felt prejudiced because it had not had time to prepare they should communicate their reasons to the Chamber who would make a ruling on pertinent measures so that there would be no prejudice to the Defence.

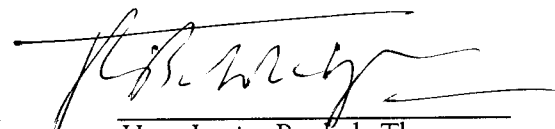
FOR THE ABOVE REASONS, THE TRIAL CHAMBER

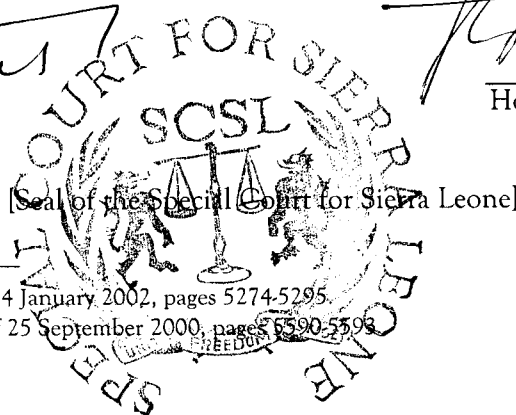
DECIDES that the trial proceedings will continue against the Accused persons and that the Prosecution may present witnesses to give testimony on areas relating to the Moyamba crime base and that the Trial Chamber will make a determination on the relevance of this testimony to the First Accused upon the rendering of the Appeals Chamber's Decision on this matter.

Hon. Justice Benjamin Mutanga Itoe, Presiding Judge, appends his dissenting opinion to this decision.

Done in Freetown, Sierra Leone, this 1st of March, 2005


Hon. Justice Pierre Boutet


Hon. Justice Bankole Thompson



⁵ *Prosecutor v. Simic*, Transcript of 14 January 2002, pages 5274-5295.

⁶ *Prosecutor v. Kvočka*, Transcript of 25 September 2000, pages 5590-5598.