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SCSL-04-14-T
(12401-12407)

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SPECIAL COURT FOR SIERRA LEONE

The Trial Chamber

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

Registrar: Robin Vincent

Date: 4 March 2005

The Prosecutor Against Sam Hinga Norman

Moinina Fofana

Allieu Kondewa

Case No. SCSL-04-14-T

REQUEST BY FIRST ACCUSED FOR LEAVE TO APPEAL

Against the Trial Chamber's Decision on Presentation of Witness Testimony
on Moyamba Crime Base, 1 March 2005

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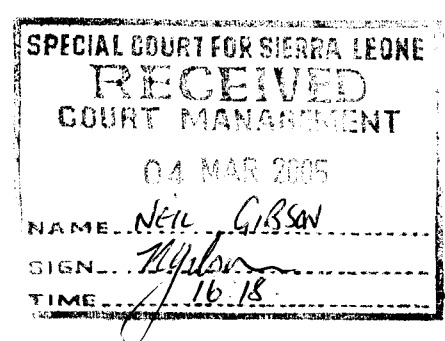
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I. INTRODUCTION

1. Pursuant to Rules 54 and 73(B) of the *Rules of Procedure and Evidence for the Special Court for Sierra Leone (the Rules)*, and in accordance with Article 6(D) (i) (a) of *Practice Direction for Filing Documents Before the Special Court*, 1 June 2004 (**Practice Direction**) and para. 6 of *Practice Direction for Certain Appeals Before the Special Court*, 30 September 2004 (**Appeals Practice Direction**), the First Accused hereby applies for leave of the Trial Chamber to make interlocutory appeal against its *Decision on Presentation of Witness Testimony on Moyamba Crime Base*, 1 March 2005 (**the Decision**)¹.

2. According to the Decision, both Prosecution and Court Appointed Counsel for the First Accused, during a Prosecution Oral Motion on 25 February 2005, made certain representations to the Trial Chamber as to proposed witness testimonies to be made in respect of the alleged crime base of Moyamba, involving portions of the current consolidated indictment which the Trial Chamber had ordered to be stayed in so far as they related to the First Accused in its *Decision on the First Accused's Motion for Service and Arraignment on the Consolidated Indictment*, 29 November 2004 (**29 November 2004 Decision**)², as the said

¹ *Prosecutor v. Norman, Fofana, and Kondewa*, Case No. SCSL-04-14-T, "Decision on Presentation of Witness Testimony on Moyamba Crime Base", 1 March 2005, Doc. 354(RP/ 12238-12242).

² *Ibid.*, "Decision on the First Accused's Motion for Service and Arraignment on the Consolidated Indictment", 29 November 2004, Doc. 282(RP. 10888-10894). SEE ALSO:

Ibid., "Separate Concluding Opinion of Judge Bankole Thompson on Decision on First Accused's Motion for Service and Arraignment on the Consolidated Indictment", 29 November 2004, Doc. 285(RP. 10899-10909).

Ibid., EDissenting Opinion of Hon. Judge Benjamin Mutanga Itoe, Presiding Judge, on the Chamber Majority Decision on the Motion for Service and Arraignment ...", 29 November 2004, Doc. 293(RP. 10971-11011).

portions had not been included in the previous separate initial individual indictment against Sam Hinga Norman alone before he ultimately became First Accused in the consolidated indictment, and which said portions were a current matter of appeal before the Appeals Chamber by both Prosecution and First Accused separately.

3. In brief, the said representations by the Prosecution were as follows: That they were not in a position at this stage to go ahead with witnesses other than the so-called Moyamba crime base witnesses, with whose testimonies they intended to proceed from early March 2005; that the said testimonies were not included in the previous separate individual indictment for Sam Hinga Norman, though they are now included in the current consolidated indictment (CCI) in which he is First Accused; that the said testimonies were among portions of the CCI which were currently subject of an appeal by First Accused; that even if such testimonies were to be adduced now, no harm or prejudice will be occasioned to the First Accused because if the latter's said appeal succeeded such evidence adduced would not be used against him; and that some "resolution" had been reached between the Prosecution and counsel for First Accused for the said testimonies to be proceeded with (see paras. 1-4 inclusive of the Decision).
4. In brief, the representations by Court Appointed Counsel for First Accused were as follows: that in the interest of expeditiousness at the trial, the Defence was also in agreement with proceeding with the Moyamba crime base witnesses and cross-examining them; but that such cross-examination on behalf of first Accused be done after those on behalf of 2nd and 3rd Accused, with the "option" for Court Appointed counsel for the First Accused to cross-examine "if they 'choose' to do so" (para. 5 of the Decision; see paras. 5-8 inclusive of same Decision).

II. RELATED PROCEEDINGS

5. The main related proceeding in respect of the Decision is the earlier 29 November 2004 Majority Decision, whereby it was decided that certain portions of the said indictment, including the alleged Moyamba crime base testimonies,

be stayed (and were thereby automatically stayed by said order of the Trial Chamber) as against the First Accused and that Prosecution be put on its election to seek leave of the Trial Chamber either to expunge such stayed portions completely or to amend the indictment by retaining the said portions therein. The Prosecution obviously accepted the invitation; and a flurry of other proceedings ensued emanating from the Prosecution and Defence alike.

6. By leave granted it on 15 December 2004, Prosecution filed an appeal³ against the 29 November 2004 Decision on 12 January 2005. And by similar leave granted him on 16 December 2004, the First Accused filed his interlocutory appeal⁴ against the same Decision on 17 January 2005. Both appeals were pursuant to Rule 73(B) of the Rules. The Prosecution sought further leave on 8 December 2004 to amend the consolidated amendment as against the First Accused⁵, which leave has not however been granted as yet because of Rule 73(C) and the aforesaid appeals pending before the Appeals Chamber. Meanwhile, the various appeals and applications were attended by the usual exchanges of responses and replies between Prosecution and Defence in respect thereof.

7. This was the state of the procedural background history when the Prosecution made the application by oral motion on 25 February 2005, which resulted in the Decision of 1 March 2005, against which leave to appeal is being sought herein. The said Decision was a majority decision, to which the learned Presiding Judge appended a **Dissenting Opinion**⁶.

³ Ibid, "Prosecution Notice of Appeal Against the Trial Chamber's Decision of 29 November 2004 and Prosecution Submissions on Appeal", 12 January 2005, Doc. 316(RP. 11232-11259).

⁴ Ibid, "Interlocutory Appeal by First Accused Against the Trial Chamber's Decision on the First Accused's Motion for Service and Arraignment on the Consolidated Indictment, 29 November 2004", 17 January 2005, Doc. 318(RP. 11297-11325).

⁵ Ibid.(Prosecution) "Request for Leave to Amend the Indictment Against Norman", 8 December 2004, Doc. 305(RP. 11108-11118).

⁶ Ibid, "Dissenting Opinion of Hon. Justice Benjamin Mutanga Itoe, Presiding Judge, on the Decision on Presentation of Witness Testimony on Moyamba Crime Base", 1 March 2005, Doc. 362(RP. 12360-12371).

III. GROUNDS FOR LEAVE.

8. Even though Rule 73(B) of the Rules discourages interlocutory appeals against decisions on motions under Rule 73, it however derogates from the general rule thereunder by empowering the Trial Chamber to grant such leave “in exceptional circumstances and to avoid irreparable prejudice to a party”(Rule 73(B)).
9. Among the factors and circumstances in respect of the Decision of 1 March 2005 which may be characterised as “exceptional” in terms of Rule 73(B) of the Rules are the following:

- (a). **Open judicial disagreement** on application of the relevant and material law, principles and/or procedure among the learned judges of the Trial Chamber, as is manifested in the aforesaid Majority Decision and Dissenting Opinion, which warrant seizing the Appeals Chamber of the said differences with a view to having the law settled, avoiding irreparable prejudice to the Accused through breaches of his rights, and ensuring that justice overall is done.
- (b) ***Functus Officio Violation***: The Trial Chamber had ordered in the 29 November 2004 Decision that certain specified portions of the consolidated indictment, including all the alleged Moyamba crime base testimonies, be (and were thereby) “stayed”, the Court itself thereby becoming *functus officio* in respect of the said “stayed” elements. It was not within the jurisdiction, power or discretion of the Trial Chamber itself to return to them in its 1 March 2005 majority Decision, “unstay” them as it were, and declare that they now continue in being as against the First Accused, against whom alone they had been “stayed” in the first place.
- (c) **Lack of Jurisdiction from Breach of Rule 73(C) of the Rules**, i.e. by the Trial Chamber itself entertaining, hearing and determining the Prosecution’s oral motion of 25 February 2005 in respect of a matter or issue that is effectively and actively on appeal in the Appeals Chamber before that Chamber has disposed of it. The said oral motion ought to have been put on hold pending

final determination of the relevant appeals by the Appeals Chamber, in compliance with Rule 73(C), the said breach thereby depriving the Trial Chamber of jurisdiction to make the 1 March 2005 Decision, which is accordingly invalid, null and void and ought **not** to be implemented as against the First Accused or at all.

- (d) **Subjecting the First Accused to charges and/or pieces of testimony or evidence** which, at any rate at the present stage, are **essentially hypothetical, conditional, contingent and ultimately speculative** in view of the fact that their relevance and applicability or otherwise to him can only be determined in the future when the relevant appeals shall have been determined by the Appeals Chamber.
- (e) **Violation of First Accused's Trial Rights:** That in view of the foregoing grounds (b) to (d) inclusive hereof, and as emphasised in paras. 29-33 and 38-39 inclusive of the related Dissenting Opinion, the 1 March 2005 Majority Decision "flagrantly violates not only the provisions of Articles 17(2) and 17(4) (b) Statutory rights of the 1st Accused, but also and more importantly, the doctrine of fundamental fairness" (para.31 thereof), and even more cohesively of those of Rule 26 bis, all of which can only cause irreparable prejudice to the First Accused.

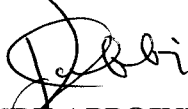
IV. RELIEFS SOUGHT

- 10. Accordingly, the Trial Chamber is hereby urged, in light of the foregoing "exceptional circumstances and to avoid irreparable prejudice to a party", i.e. to the First Accused,
 - (a) to grant leave to the First Accused to appeal against the 1 March 2005 Majority Decision; **AND**

- (b) to grant immediate stay of all the alleged Moyamba crime base testimonies, up until the ensuing interlocutory appeal against the said Decision either fails to materialise in accordance with the relevant Rules or is finally determined by the Appeals Chamber.

Done in Freetown 4th March 2005.

DR. BU-BUAKEI JABBI



COURT APPOINTED COUNSEL

Sam Hinga Norman



First Accused