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SCSL-04-14-T
(12488 - 12495)

12488

SPECIAL COURT FOR SIERRA LEONE

In the Trial Chamber

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

Registrar: Robin Vincent

Date: 17 March 2005

THE PROSECUTOR

-against-

SAMUEL HINGA NORMAN, MOININA FOFANA, and ALLIEU KONDEWA

SCSL-2004-14-T

**FOFANA MOTION FOR ADJUSTMENT
OF STATUS OF COUNSEL**

Office of the Prosecutor:

Mr Luc Côté
Mr James C. Johnson
Mr Kevin Tavener

Counsel for Moinina Fofana:

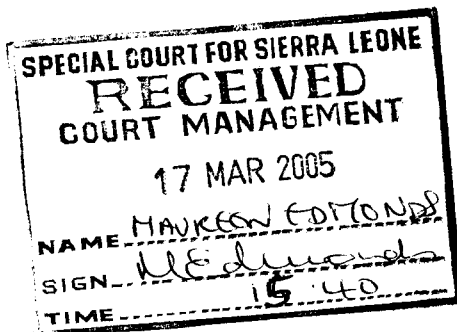
Mr Victor Koppe
Mr Arrow Bockarie
Mr Michiel Pestman
Mr Andrew Ianuzzi

Counsel for Samuel Hinga Norman:

Dr Bu-Buakei Jabbi
Mr John Wesley Hall
Mr Ibrahim Yillah
Ms Clare DaSilva

Counsel for Allieu Kondewa:

Mr Charles Margai
Mr Yada Williams
Mr Ansu Lansana
Mr Martin Michael



INTRODUCTION

1. The defence for the Second Accused (the “Defence”) hereby submits its ‘Motion for Adjustment of Status of Counsel’ (the “Motion”).
2. The Defence seeks a re-classification of its current status as Court-Appointed Counsel to that of Assigned Counsel.
3. The Defence submits that (i) the material conditions recognized by the Trial Chamber for the change in status have lapsed and (ii) maintaining the current status, given such lapse, is inconsistent with the right of the Second Accused to be represented by counsel of his choice. Accordingly, and for the reasons set forth below, counsel for Mr Fofana should be re-classified as Assigned Counsel.

BACKGROUND

4. On the afternoon of 20 September 2004, the Trial Chamber took note of the continued absence of the three Accused from the proceedings. Mr Arrow Bockarie, counsel for the Second Accused, explained that Mr Fofana was apprehensive about the protective measures in place with respect to certain witnesses¹.
5. Mr Bockarie subsequently informed the Chamber on 21 September 2004 that, upon reflection, Mr Fofana had changed his position and was willing to attend the proceedings². However, Mr Fofana was ill and did not attend the proceedings on that day³. Unlike Mr Norman, the Second Accused did not instruct his Assigned Counsel to boycott the proceedings.

¹ Trial Transcript (“Tr.”), 20 September 2004 at 113:4-27. The First Accused, Mr Norman, had recently conditioned his attendance in court on compliance with a set of written demands and instructed his standby counsel not to appear in court on his behalf in his absence.

² Tr., 21 September 2004 at 3:23 – 4:10.

³ A doctor’s report confirmed this. *Id.* at 65:23 – 66:4.

6. Notwithstanding Mr Bockarie's assurances and the lack of any disruptive behaviour on the part of the Second Accused, the Chamber orally announced the appointment of Court-Appointed Counsel for both the First and Second Accused, noting:

Counsel for the second accused as well ... are also, from today, appointed as Court-appointed counsel. In fact, that would be their designation for now in order to enable the Court to take charge of the proceedings, but they can still ... have their briefing with their client, the second accused just like the Court-appointed counsel for the first accused can also take—be briefed ... by the first accused⁴.

7. The Court further noted, with respect to the Second Accused, that the “issue could be revisited in due course” should conditions materially change, i.e., should Mr Fofana decide to participate in the proceedings⁵.
8. Mr Fofana appeared in court on 22 September 2004 and indicated that he intended to appear in the future and be represented by his Assigned Counsel. At no time did he seek to represent himself, assert that he had instructed his Assigned Counsel not to appear on his behalf, or engage in any disruptive behaviour.

⁴ Tr., 21 September 2004 at 5:19-6:16. In its subsequent written ruling, the Chamber concluded that the First Accused had “exhibited disruptive behaviour in court proceedings on a number of occasions ...” and then proceeded to assess said behaviour. *See* ‘Ruling on the Issue of Non-Appearance of the First Accused Samuel Hinga Norman, the Second Accused Moinina Fofana, and the Third Accused Allieu Kondewa at the Trial Proceedings’ (the “Ruling”), SCSL-2004-14-T-217, 4 October 2004 at ¶¶18-23. In the ultimate paragraph of its analysis, the Chamber had only this to say regarding the Second Accused: “The Trial Chamber also holds that the Second Accused ... [has] failed to attend court for no lawful reason and on the basis of Rule 60 of the Rules, and in the interests of justice, the trial will proceed in [his] absence while ensuring that [his] interests are properly represented in Court by Court Appointed Counsel”. Ruling at ¶ 24. The Defence submits that the absence of Mr Fofana from the proceedings has always been “lawful”. It is not incumbent on an accused person to articulate reasons—lawful or otherwise—for his absence from trial proceedings. Although such absence may not be advisable with respect to the preparation of a defence, it is the right of any criminal defendant to voluntarily boycott his trial proceedings, so long as his absence is not disruptive.

⁵ Tr., 21 September 2004 at 8:15-28 (“This said, the Chamber would stand by its decision on your designation, *but the situation may well be reassessed* after we must have received some medical evidence on your client, and *if the Court is convinced that your client has really effected a U-turn from what happened yesterday, and that he is prepared to participate in these proceedings. It is only then that we might be minded to revisit our position*—our ruling of this morning, which is made in order to enable this Tribunal to proceed with the cases before it. With this said, our ruling stands, and the proceedings will continue on your designation as we have ruled today. *The issue could be revisited in due course.*”) (emphasis added).

9. On 23 September 2004, Mr Fofana failed to appear in court. With the exception of one day⁶, he did not return for the duration of the Second and Third Trial Sessions. However, throughout his absence, Mr Fofana never instructed his counsel not to appear on his behalf nor did he engage in any disruptive behaviour.
10. In late February 2005—approximately mid-way through the Fourth Trial Session—the Second Accused expressed to Court-Appointed Counsel his eagerness to attend the remainder of the trial proceedings and to actively participate in his defence. Shortly thereafter, Mr Fofana once again appeared in court, and he regularly attended the remainder of the session.
11. The Defence orally moved the Chamber to re-adjust the status of counsel on 4 March 2005. Noting that it preferred to consider formal submissions, the Chamber invited the Defence to submit a written motion⁷.

SUBMISSIONS

The Applicable Law

12. The Statute of the Special Court for Sierra Leone (the “Statute”) affords an accused person the right “[t]o be tried in his or her presence, and to defend himself or herself in person or through legal assistance of his or her own choosing”⁸.
13. The SCSL Rules of Procedure and Evidence (the “Rules”) provide that “[a]n accused may not be tried in his absence unless: (i) the accused has made his initial appearance, has been afforded the right to appear at his own trial, but refuses to do so”⁹. The Rules further provide that, in his absence, an “accused

⁶ See Tr., 29 November 2004.

⁷ Tr., 4 March 2004 at 51:3 – 53:12.

⁸ Article 17(4)(d).

⁹ Rule 60(A)(i).

may be represented by counsel of his choice, or as directed by a Judge or Trial Chamber”¹⁰.

14. With respect to the designation of counsel as “Court-Appointed” as a result of the absence of an accused person from the trial proceedings, jurisprudence of this Trial Chamber indicates that such designation is appropriate only when the absence threatens to “obstruct the judicial machinery by preventing the commencement or a continuation of trials”¹¹.
15. Additionally, as this Chamber has previously indicated, where counsel has been designated “Court-Appointed” based upon the absence of an accused person from the proceedings, the resumption of attendance by the accused person will trigger a reassessment of the designation¹².
16. Accordingly, an accused person is in no way obligated to attend his trial proceedings, and the exercise of such privilege—in the absence of any aggravating factors—should not affect the accused person’s right to be represented by counsel of his choice.

The Material Conditions Recognized by the Trial Chamber Have Lapsed

17. Notwithstanding the Defence’s position that the Second Accused was, and is, free to attend or boycott his trial at any time so long as no disruption of the proceedings ensues, it is submitted that the conditions recognized by the

¹⁰ Rule 60(B).

¹¹ See ‘Ruling on the Issue of the Refusal of the Third Accused, Augustine Gbao, to Attend Hearing of the Special Court for Sierra Leone on 7 July 2004 and Succeeding Days’, SCSL-2004-15-T-194, 13 July 2004. Contrary to Mr Norman, the Second Accused never presented the court with a list of demands nor did he ever instruct counsel not to attend on his behalf. Rather, Mr Fofana merely exercised his right not to be present. Such absence, in and of itself, did not in any demonstrable way “impede the administration of justice or frustrate the ends of justice”, amount to “disruptive behaviour”, nor “obstruct the judicial machinery by preventing the commencement or a continuation of trials by deliberately being absent” *Id.* at ¶¶ 8, 17

¹² See note 4, *supra*.

Chamber in its Ruling as necessitating a change in status are no longer operative¹³.

18. In its Ruling, with respect to the Second Accused, the Chamber noted—without further elucidation—that “the Second Accused ... [has] failed to attend court for no lawful reason and on the basis of Rule 60 of the Rules, and in the interests of justice, the trial will proceed in [his] absence while ensuring that [his] interests are properly represented in Court by Court Appointed Counsel”¹⁴.

19. Any misgivings harboured by the Chamber with regard to the orderly procedure of the trial in the absence of the Second Accused or the proper representation of Mr Fofana’s interests should be laid to rest. As noted above, the Second Accused has been voluntarily and eagerly attending his trial proceedings since 1 March 2005. Furthermore, he has expressed his intention to continue in this vein until the close of the Prosecution’s case (and beyond if necessary) as well as his complete support and trust in his legal team¹⁵.

20. Accordingly, counsel’s designation as “Court-Appointed” is no longer necessary or appropriate, and the Defence requests that it be re-designated as “Assigned Counsel”.

Maintaining the Current Status is Inconsistent with the Rights and Wishes of the Second Accused

21. Pursuant to the Statute, the Rules, and the jurisprudence of this Chamber, an accused person is entitled to be represented by counsel of his choice, barring

¹³ The Defence submits that the change in status was never appropriate vis-à-vis the Second Accused and is *a fortiori* inappropriate now that Mr Fofana is once again attending his trial and participating robustly in his defence.

¹⁴ Ruling at ¶ 24.

¹⁵ If so ordered, the Defence will provide the Chamber with an Affidavit to this effect.

any disruptive behaviour or attempts to obstruct the orderly progression of the trial proceedings¹⁶.

22. As stated above, Mr Fofana has demonstrably affirmed his full support and trust in his legal team—a team he initially accepted and has never denounced—by voluntarily appearing in court and participating in his defence.

23. It is submitted that—given the state of Mr Fofana’s involvement in the proceedings at this stage—the current designation of counsel as “Court-Appointed” does not give full effect to the Second Accused’s right to be represented by counsel of his choice. To say the least, the designation is bothersome in so far as it casts counsel primarily in the role of agents of the Court rather than the personal advocates of Mr Fofana. As there appears to be no existing reason to maintain it, the Defence requests that the current designation be dispensed with.

CONCLUSION

24. For the reasons stated above, the Defence respectfully requests that it be re-designated “Assigned Counsel”. Such re-designation will in no way negatively impact Mr Fofana’s representation and is in accordance with the applicable law and the rights and wishes of the Second Accused.

COUNSEL FOR MOININA FOFANA


Victor Koppe

¹⁶ See Motion at ¶¶ 12-15, *supra*.

DEFENCE LIST OF AUTHORITIES

1. Statute of the Special Court for Sierra Leone, Article 17(4)(d).
2. Special Court for Sierra Leone Rules of Procedure and Evidence, Rule 60.
3. SCSL Trial Chamber I, 'Ruling on the Issue of Non-Appearance of the First Accused Samuel Hinga Norman, the Second Accused Moinina Fofana, and the Third Accused Allieu Kondewa at the Trial Proceedings', SCSL-2004-14-T-217, 4 October 2004.
4. SCSL Trial Chamber I, 'Ruling on the Issue of the Refusal of the Third Accused, Augustine Gbao, to Attend Hearing of the Special Court for Sierra Leone on 7 July 2004 and Succeeding Days', SCSL-2004-15-T-194, 13 July 2004.