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SCSL-04-14-T
(14423-14431)

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SPECIAL COURT FOR SIERRA LEONE

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TRIAL CHAMBER I

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

Interim Registrar: Lovemore Green Munlo, SC

Date: 9th of December, 2005

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

MAJORITY DECISION ON REQUEST FOR LEAVE TO APPEAL DECISION ON PROSECUTION MOTION FOR A RULING ON ADMISSIBILITY OF EVIDENCE

Office of the Prosecutor:

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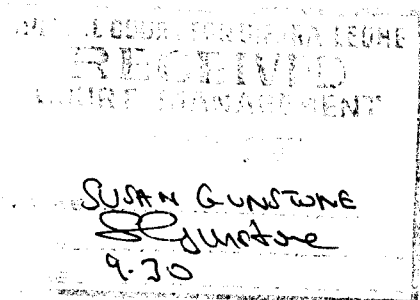
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TRIAL CHAMBER I (“the Chamber”) of the Special Court for Sierra Leone (“Special Court”) composed of Hon. Justice Pierre Boutet, Presiding Judge, Hon. Justice Bankole Thompson and Hon. Justice Benjamin Mutanga Itoe;

SEIZED OF the *Request for Leave to Appeal Decision on Prosecution Motion for a Ruling on the Admissibility of Evidence* (“Motion”), filed by the Office of the Prosecutor (“Prosecution”) on the 27th of June, 2005;¹

NOTING the *Joint Defence Response to Prosecution Request for Leave to Appeal Decision on Prosecution Motion for a Ruling on the Admissibility of Evidence*, filed by the Defence on the 7th of July, 2005 (“Joint Response”);

NOTING the *Reply to Joint Defence Response to Prosecution Request for Leave to Appeal Decision on Prosecution Motion for a Ruling on the Admissibility of Evidence*, filed by the Prosecution on the 12th of July, 2005;

MINDFUL of the *Decision on the Urgent Prosecution Motion on Admissibility of Evidence*, rendered on the 23rd of May, 2005;

MINDFUL of the *Reasoned Majority Decision on Prosecution Motion for a Ruling on the Admissibility of Evidence*, filed on the 22nd of June, 2005, comprising of the Separate Concurring Opinion of Hon. Justice Benjamin Mutanga Itoe and the Dissenting Opinion of Hon. Justice Pierre Boutet (“Impugned Decision”);

MINDFUL of the oral rulings of the Chamber on the admissibility of evidence, pertaining to witnesses TF2-187, TF2-135, and TF2-189, delivered on the 1st, 2nd and 3rd of June, 2005;

NOTING that leave to appeal is being sought pursuant to Rule 73(B) of the Rules of Procedure and Evidence of the Special Court (“Rules”) which provides that:

Decisions rendered on such motions are without interlocutory appeal. However, in exceptional circumstances and to avoid irreparable prejudice to a party, the Trial Chamber may give leave to appeal. Such leave should be sought within 3 days of the decision and shall not operate as a stay of proceedings unless the Trial Chamber so orders.

PURSUANT TO Rule 73(B) of the Rules;

HEREBY ISSUES THE FOLLOWING MAJORITY DECISION:

I. PARTIES SUBMISSIONS

Prosecution Submissions

1. The Prosecution seeks leave to appeal the Impugned Decision on the basis that the Trial Chamber erred in law by refusing to allow in the CDF trial the adduction of evidence of sexual violence or violence in a sexual conduct.² Accordingly, the Prosecution submits that as a result of

¹ See also *Prosecutor against Norman, Fofana and Kondewa*, Case No. SCSL-04-14-T, Decision on Extremely Urgent Prosecution Request for An Extension of Time to Seek Leave to Appeal, 7 June 2005.

² Motion, paras 6 and 8-30. See also Reply, paras 4-7.

these various errors in law, exceptional circumstances exist for leave to appeal to be granted and that it has suffered irreparable damage in that it has been precluded from adducing relevant evidence in support of the charges contained in the Consolidated Indictment and in particular evidence proving the individual criminal responsibility of the accused.³

2. In addition, the Prosecution also submits that the differences expressed by the Judges in the Impugned Decision on a subject matter of such paramount importance warrant a clear and consistent resolution by the Appeals Chamber.⁴

Defence Submissions

3. The Defence Jointly submit that the Prosecution has failed to demonstrate the very narrow and conjoint test of both the existence of exceptional circumstance and irreparable prejudice and that, accordingly, the Motion should be denied.⁵ In particular, the Defence further submit that alleged errors in law do not amount to exceptional circumstances and that a request for leave to appeal is not a vehicle to re-litigate substantive arguments already deliberated upon by the Trial Chamber in the Impugned Decision.⁶

4. The Defence also submit that the mere existence of judicial dissent among the Judges on the applicable law and procedure, as it emerged from the Impugned Decision, does not in itself constitute exceptional circumstances for the purposes of Rule 73(B) and that the Prosecution, in particular failed to explain why such disagreement in the present case amounts to exceptional circumstances.⁷

II. DELIBERATION

Applicable Jurisprudence

5. In a series of Decisions since the inception of the Court, this Chamber has articulated and expounded the principles and criteria governing the granting of leave for interlocutory appeals as developed from the relevant statutory provision on the subject, to wit, Rule 73(B) of the Rules. It is necessary to reiterate for purposes of the present application the relevant principles. The basic principle is that, generally, interlocutory decisions are not subject to appeal.⁸ A further principle is that, exceptionally, the Trial Chamber may grant leave to appeal.⁹ We have also affirmed that the legislative rationale behind the restrictive character of Rule 73(B)¹⁰ is that criminal trials must not be heavily encumbered and consequently unduly delayed by interlocutory appeals.¹¹ The Chamber, has, further, held that Rule 73(B) specifically requires that an application for leave to appeal must show

³ Motion, paras. 7 and 31-34. See also para. 37. see also Reply, paras 10-11 and paras 20-21.

⁴ Motion, paras 10 and 35. See also Reply, paras 16-18.

⁵ Response, paras 3 and 21.

⁶ *Id.*, paras 11-13.

⁷ *Id.*, paras 14-16.

⁸ *Prosecutor against Sesay, Kallon and Gbao*, Case No. SCSL04-15-PT, Decision On Prosecution's Application For Leave to File An Interlocutory Appeal Against The Decision On The Prosecution Motions For Joinder, 13 February 2004, para 10.

⁹ *Id.*

¹⁰ *Id.*, para 11.

¹¹ *Prosecutor against Brima, Kamara and Kanu*, Case No SCSL04-15-PT, Decision On Prosecution Application For Leave To File An Interlocutory Appeal Against Decision On Motion For Concurrent Hearing Of Evidence Common to Cases SCSL2004-15-PT And SCSL2004-16-PT, 1 June 2004, para 19.

“exceptional circumstances” and “irreparable prejudice” conjunctively and not disjunctively.¹² A related principle that has emerged out of the existing case-law authorities on the issue of interlocutory appeals is that Rule 73(B) involves a high threshold that must be met before the Chamber can exercise its discretion to grant leave to appeal,¹³ the overriding legal consideration being that an applicant’s case must reach a level of “exceptional circumstances” and “irreparable prejudice.”

6. Furthermore, we have held that “exceptional circumstances” may depend upon the particular facts and circumstances. In that regard, we reasoned that the concept may cover, for example, (i) an “issue of general principle to be decided for the first time”, (ii) “a question of public international law importance upon which further argument or decision at the appellate level would be” conducive “to the interests of justice,” (iii) a question which “raises series of issues of fundamental legal importance to the Special Court in particular, international criminal law, in general,” or (iv) an issue of “some novel and substantial aspect of international criminal law for which no guidance can be derived from national criminal law systems.”

7. By way of some authoritative judicial endorsement of the restrictive or limited nature of Rule 73(B), we cite in support of the restatement of the applicable jurisprudence, the observation of the Appeals Chamber of this Court in its *Decision on Amendment of the Consolidated Indictment*. There, the Chamber emphasized:

“The standard for leave to appeal at an interlocutory stage is set high by Rule 73(B), which restricts such leave to *exceptional cases* where irreparable prejudice may otherwise be suffered. The test is not satisfied merely by the fact that there has been a dissenting opinion on the matter in the Trial Chamber, or that the issue strikes the Trial Chamber judges as interesting or important for the development of international criminal law. In this Court *the procedural assumption is that trials will continue to their conclusion without delay or diversion caused by interlocutory appeals....and that any errors which affect the final judgment will be corrected in due course by this Chamber on appeal.*”¹⁴

Merits of Prosecution’s Application

8. Guided by the foregoing principles, we now proceed to assess and determine the merits of the Prosecution’s application. Specifically, the key issue for determination is whether the Prosecution’s application does reach the statutory level of both “exceptional circumstances” and “irreparable prejudice” to justify the exercise by the Chamber of its discretion, exceptionally under Rule 73(B), to grant leave to appeal. In essence, has the Prosecution satisfied the conjunctive criteria of “exceptional circumstances” and “irreparable prejudice”?

9. The thrust of the Prosecution’s contention as regards the “exceptional circumstances” requirement is twofold. The first is that the Trial Chamber committed errors of law in the Impugned Decision in that it did not address “the evidentiary spectrum by which sexual violence can be led.” The second is that the subject matter of admissibility of evidence of sexual violence is of “such

¹² See *Prosecutor against Sesay, Kallon and Gbao*, Case No. SCSL04-15-PT, Decision On Prosecution’s Application For Leave to File An Interlocutory Appeal Against The Decision On The Prosecution Motions For Joinder, 13 February 2004, *supra* note 12, para 10.

¹³ *Prosecutor against Brima, Kamara and Kanu*, Decision On Prosecution Application For Leave To File An Interlocutory Appeal Against Decision On Motion For Concurrent Hearing Of Evidence Common to Cases SCSL-2004-15-PT And SCSL-2004-16-PT, 1 June 2004, *supra* note 13, para 19.

¹⁴ *Prosecutor against Norman, Fofana and Kondewa*, Decision on Amendment of the Consolidated Indictment, 18 May 2005, para. 43.



importance, that clarity and consistency is paramount and should be resolved by the Appellate Chamber." We re-emphasize that errors of law are conceptually outside the statutory scope and contemplation of Rule 73(B) as basis for the exercise by a Trial Chamber of its exceptional authority to grant leave for an interlocutory appeal. So are the notions of "judicial dissent" or "differing judicial perspectives on legal issues." Without more, they cannot legally sustain an application for leave to file an interlocutory appeal.

10. We, likewise, reiterate that the issue of the admissibility of evidence of sexual violence claims no special primacy in law as against the issue of the admissibility of any other type of evidence in relation to allegations in an indictment to warrant special authoritative determination by an appellate forum as an interlocutory matter. It is trite law that errors alleging wrongful admission or exclusion of evidence in criminal trials can be raised and remedied at the final appeal stage.

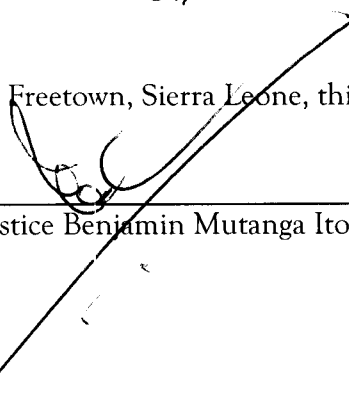
III. CONCLUSION

11. We, accordingly, hold that the Prosecution has failed to satisfy the first of the conjunctive criteria laid down by Rule 73(B). We are unable, therefore, to exercise our discretion pursuant to the aforesaid Rule 73(B) to grant leave to appeal. Having so ruled, it is not necessary to examine the merits of the application in the light of the "irreparable prejudice" requirement of the Rule.

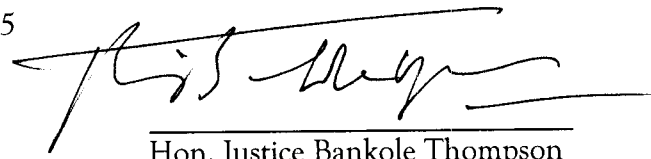
IV. DISPOSITION

12. Accordingly, the Prosecution's Motion is **DISMISSED**.

Done at Freetown, Sierra Leone, this 9th day of December 2005



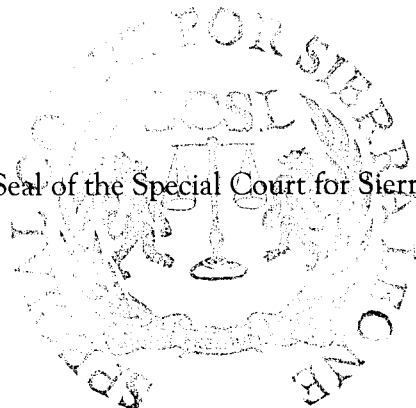
Hon. Justice Benjamin Mutanga Itoe



Hon. Justice Bankole Thompson

Hon. Justice Pierre Boutet appends a Dissenting Opinion to the aforesaid Majority Decision.

[Seal of the Special Court for Sierra Leone]





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Before: Hon. Justice Pierre Boutet, Presiding Judge
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Interim Registrar: Mr. Lovemore Munlo SC

Date: 9th of December 2005

PROSECUTOR	Against	SAM HINGA NORMAN MOININA FOFANA ALLIEU KONDEWA (Case No.SCSL-04-14-T)
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DISSENTING OPINION OF JUSTICE PIERRE BOUTET ON THE MAJORITY DECISION ON REQUEST FOR LEAVE TO APPEAL DECISION ON PROSECUTION MOTION FOR A RULING ON ADMISSIBILITY OF EVIDENCE

Office of the Prosecutor:

James Johnson
 Nina Jorgensen

Court Appointed Counsel for Sam Hinga Norman:

Dr. Bu-Buakei Jabbi
 John Wesley Hall, Jr.
 Clare da Silva (*Legal Assistant*)

Court Appointed Counsel for Moinina Fofana:

Victor Koppe
 Arrow Bockarie
 Michiel Pestman
 Andrew Ianuzzi (*Legal Assistant*)

Court Appointed Counsel for Allieu Kondewa:

Charles Margai
 Yada Williams
 Ansu Lansana
 Martin Michael (*Legal Assistant*)

1. With due respect for my Learned Brothers Justice Bankole Thompson and Justice Benjamin Mutanga Itoe I cannot agree with their analysis nor can I agree with their findings and disposition of this Motion and I therefore append this brief Dissenting Opinion.

I. INTRODUCTION

2. This Decision is in response to the Motion of the Prosecution seeking leave to appeal the *Reasoned Majority Decision on Prosecution Motion for a Ruling on the Admissibility of Evidence* issued on the 24th of May, 2005 ("Impugned Decision"), considering whether evidence of sexual violence may be adduced at trial in support of existing Counts in the Consolidated Indictment against the Accused. I previously appended a Dissenting opinion also to the Impugned Decision.

3. For the purposes of this Decision, I adopt the introductory portions set forth in the Majority Decision that include a preamble to this Motion and the submissions of the parties.

II. DISCUSSION

Applicable Standards for Leave to Appeal

4. Leave to appeal is being sought by the Prosecution pursuant to Rule 73(B) of the Rules of Procedure and Evidence of the Special Court ("Rules") which provides that:

Decisions rendered on such motions are without interlocutory appeal. However, in exceptional circumstances and to avoid irreparable prejudice to a party, the Trial Chamber may give leave to appeal. Such leave should be sought within 3 days of the decision and shall not operate as a stay of proceedings unless the Trial Chamber so orders.

5. According to the established jurisprudence of the Special Court, Rule 73(B) of the Rules generally does not confer a right of interlocutory appeal but only grants leave to appeal in exceptional cases, while the criteria of exceptional circumstances and irreparable prejudice outlined in Rule 73(B) of the Rules represent two limbs of the test and are conjunctive and must both be satisfied;¹

6. Worthy of note in the context of the present discussion is that, in the Chamber's prior ruling in the case of *Prosecutor against. Sesay, Kallon and Gbao*, the Chamber stated that:

[T]he overriding legal consideration in respect of an application for leave to file an interlocutory appeal is that the applicant's case must reach a level of exceptional circumstances and irreparable prejudice. Nothing short of that will suffice having regard to the restrictive nature of Rule 73(B) of the Rules and the rationale that criminal trials must not be heavily encumbered and consequently unduly delayed by interlocutory appeals.²

¹ *Prosecutor against Sesay, Kallon and Gbao*, Case No. SCSL-04-15-PT, Decision on Prosecution's Application for Leave to File an Interlocutory Appeal against the Decision on the Prosecution Motions for Joinder, 13 February 2004, para. 10; see also *Prosecutor against Brima, Kamara and Kanu*, Case No. SCSL-2004-16-PT, Decision on Prosecution's Application for Leave to File an Interlocutory Appeal against the Decision on the Prosecution Motions for Joinder, 13 February 2004, para. 13.

² *Prosecutor against Sesay, Kallon and Gbao*, Case No. SCSL-04-15-PT, Decision on Prosecution Application for Leave to File an Interlocutory Appeal against Decision on Motion for Concurrent Hearing of Evidence Common to Cases SCSL-2004-15-PT and SCSL-2004-16-PT, 1 June 2004, para. 21.

7. I also note, more particularly, that this Chamber in its *Decision on Request by First Accused for Leave to Appeal Against the Trial Chamber's Decision on Presentation of Witness Testimony on Moyamba Crime Base*, rendered on the 24th of May, 2005, considered as follows:

[t]hat the fact of judicial dissent amongst the Judges of the Trial Chamber on the applicable law and procedure applied in the Impugned Decision does not in itself constitute an exceptional circumstance, although the nature and significance of the matters sought to be appealed, in conjunction with the fact of dissent, might be considered as factors relevant to this determination;³

Leave to Appeal the Impugned Decision Should be Granted in the Present Circumstances

8. I am of the opinion that this Motion should be granted in that it meets the criteria of exceptional circumstances and irreparable prejudice prescribed by Rule 73(B) of the Rules and, consequently, the Prosecution should be allowed to appeal the Decision on Admissibility of Evidence before the Appeals Chamber.

9. The Motion raises serious issues that concern the admissibility of evidence in the trial against the Accused that could consequently impact on the fairness of the trial proceedings. In particular, considering the diverse legal perspectives on what I view to be fundamental issues expressed by the Judges of the Chamber as evidenced by the Impugned Decision, which comprises also of the Separate Concurring Opinion by Justice Benjamin Mutanga Itoe and my Dissenting Opinion, I consider that it will be in the overall interests of justice and the preservation of the integrity of the proceedings to leave the law on such important issues unsettled and in a state of uncertainty.

10. Furthermore, the underlying issue to this Impugned Decision on the admissibility of evidence is related to crimes of sexual violence, as I previously stated in a related but different Dissenting Opinion related to such crimes:

“Victims of sexual violence have the right to have crimes that are committed against them prosecuted with all due respect to the Rule of Law.”⁴

That, in itself, would constitute exceptional circumstances within the meaning of Rule 73(B) of the Rules. Failure to do so in these circumstances would not be in the interests of justice.

11. I am further of the opinion that the difference of legal opinion expressed by the Justices of the Trial Chamber in the Impugned Decision is, in the present circumstances, on issues of fundamental importance, and as such, constitutes exceptional circumstances and that, should no leave to appeal it be accordingly granted, irreparable prejudice may ensue that could not be cured through the final disposition of the trial.

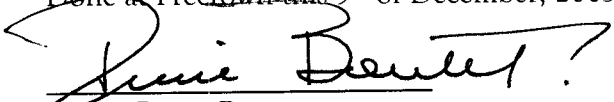
³ *Prosecutor against Norman, Fofana and Kondewa*, Case No. SCSL-04-14-T, Decision on Request by First Accused for Leave to Appeal Against the Trial Chamber's Decision on Presentation of Witness Testimony on Moyamba Crime Base, 24 May 2005.

⁴ *Prosecutor against Norman, Fofana and Kondewa*, Case No. SCSL-04-14-T, Dissenting Opinion of Judge Pierre Boutet on Decision on the Prosecution's Application for Leave to File an Interlocutory Appeal against the Decision on the Prosecution's Request for Leave to Amend the Indictment against Samuel Hinga Norman, Moinina Fofana and Allieu Kondewa, 5 August 2004, para. 18.

14431

12. For these specific reasons I, therefore, cannot agree with the findings and disposition of the Majority in this Decision and I would grant thus leave to appeal the Impugned Decision.

Done at Freetown this 9th of December, 2005


Justice Pierre Boutet

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