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SCSL-04-14-T
(18556-18561)

18556

**SPECIAL COURT FOR SIERRA LEONE
Trial Chamber 1**

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

Registrar: Mr. Lovemore G. Munlo, SC

Date: 19th June 2006

PROSECUTOR

Against

**Samuel Hinga Norman
Moinina Fofana
Allieu Kondewa**

Case No. SCSL-04-14-T

Public

**APPLICATION BY FIRST ACCUSED FOR LEAVE TO MAKE
INTERLOCUTORY APPEAL AGAINST THE DECISION ON MOTIONS BY
MOININA FOFANA AND SAM HINGA NORMAN FOR THE ISSUANCE OF A
SUBPOENA *AD TESTIFICANDUM* TO H.E. ALHAJI DR. AHMAD TEJAN
KABBAH, PRESIDENT OF THE REPUBLIC OF SIERRA LEONE**

Office of the Prosecutor:

Mr Christopher Staker
James Johnson
Joseph Kamara

Attorney-General and
Minister of Justice of the
Republic of Sierra Leone for
President Kabbah:
Frederick M. Carew

For Samuel Hinga Norman

Dr. Bu-Buakei Jabbi
John Wesley Hall, Jr.
Alusine Sani Sesay

For Moinina Fofana:

Michiel Pestman
Arrow J. Bockarie
Victor Koppe

For Allieu Kondewa:

Charles Margai
Yada Williams
Ansu Lansana
Susan Wright.

SPECIAL COURT FOR SIERRA LEONE
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Introduction

1. Pursuant to Rule 73(B) of the Rules of Procedure and Evidence, Court Appointed Counsel for the First Accused hereby file this Application for leave to Appeal against the Majority Decision on the Norman Motion for the issuance of a *Subpoena Ad Testificandum* to H.E. Alhaji Dr. Ahmad Tejan Kabbah, President of the Republic of Sierra Leone.
2. Further pursuant to Rule 6(b) of the Practice Direction for Certain Appeals Before the Special Court, on the 16th of December 2005, Court Appointed Counsel for the First Accused filed a Motion requesting the Trial Chamber to *Subpoena* H.E. Alhaji Dr. Ahmad Tejan Kabbah, pursuant to Rule 54 of the Rules of Procedure and Evidence, to compel him to appear as witness in the CDF trial on behalf of the First Accused .
3. The submissions of the First Accused were to the effect that President Kabbah's testimony would materially assist the First accused in rebutting paragraphs 13, 14, 15, 18, 20 and 21 of the consolidated indictment since in his position as Minister of Defence he appointed the First Accused to the role of coordinator of the CDF, the First Accused was directly answerable to him and the two were in constant contact as to the conduct of the war, and the President helped to raise money to pay for the war effort¹. Counsel further stated that President Kabbah knew what the first Accused was doing at all times because he was in contact with President Kabbah by satellite phone.²
4. On the 15th of June 2006, the Trial Chamber in a vote of two to one ruled against the Motion for the issuance of a *subpoena Ad Testificandum* to H.E. Alhaji Dr. Ahmad Tejan Kabbah to testify as witness for the First Accused. In their majority decisions, the Judges ruled that, The chamber finds that these submissions fail to identify with sufficient specificity how the proposed testimony would materially assist the case of the First Accused in rebutting paragraphs 13, 14, 15, 18, 20 of the consolidated indictment, and further, how it might impact upon The Chamber's findings on any element of any crime or mode of liability with which the First Accused is charged.³ Thus, Counsel for Norman have failed to show a legitimate forensic purpose for the issuance of a subpoena pursuant to Rule 54.⁴ In the Separate Concurring Opinion⁵, Justice Itoe, concluded "that the subpoena solicited against him cannot, and should not, be issued because he enjoys this immunity not only under the provisions of

¹ Norman Reply to Prosecution, para. 21

² Ibid, para. 21.

³ SCSL-04-14-T-617, para. 49

⁴ Ibid, para. 50

⁵ SCSL-04-14-T-617, Separate Concurring Opinion, para 180

Section 48(4) but also under international practice in legal systems of other countries in the World.”⁶

5. The Chamber concluded by stating that “According to the provisions of this rule, a subpoena must be “necessary” for “the preparation or conduct of trial”. The Chamber, having proceeded to a detailed examination of the Applicant’s submissions, finds, for the reasons set forth in the previous part, more specifically part C, paragraphs 32 to 54 inclusive, that the issuance of a subpoena is not warranted in relation to President Kabbah as concerns either the First Accused or the Second Accused⁷.

SUBMISSIONS

Reasons for seeking leave

6. The standard for leave to appeal at an interlocutory stage is set high by Rule 73(B), which restricts such leave to “exceptional circumstances” and “irreparable prejudice” may otherwise be suffered. The Appeals Chamber stated, that 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 Law⁸. Counsel for the Accused submit that the entire range of issues, the law and procedures and the requirements for the issuance of a subpoena, status in issuing subpoenas do admit of “exceptional circumstances” and “irreparable prejudice” to the First Accused so as to warrant the Trial Chamber, to grant leave to appeal to consider the important issues therein and to rule on them finally in the interest of the integrity of the entire process to avoid irreparable prejudice to the First Accused.
7. Counsel for the First Accused consider it as an exceptional circumstance that there are serious differences between the Judges over the interpretation of the Rules and Procedure of the court which are fundamental and require authoritative resolution for the sake of the trial. Further, as the Appeals Chamber has also stated, that “it must be remembered, both when applying the Rules and when making procedural decisions on matters about which the Rules are silent (as they often are) that this court is unique-as the UN Secretary General in his Report put it, *sui generis*”⁹ The question must always be whether a particular procedure is appropriate under the rules and practices of this court.
8. Article 17(4) (e) of the Statute of the Special Court provides that the Accused shall have the right “to examine, or have examined against him or her and to obtain the attendance and examination of witnesses on his or behalf under the

⁶ Ibid, para. 180

⁷ SCSL-04-14-T-617, para.55

⁸ SCSL-04-14-T-397, para. 43

⁹ SCSL-04-14-T-397, para. 46

same condition as witnesses against him or her.” Counsel for the First Accused consider this provision of the substantive Statute to preponderate and prevail over the technical constructions of Rule 73(B) by the Majority Decision. The First Accused will suffer irreparable prejudice in this regard if leave is not granted, because Alhaji Dr. Ahmad Tejan Kabbah as President and Minister of Defence who appointed his Deputy Defence Minister as National Coordinator of the Civil Defence Forces and also supervised his activities and those of the Kamajors would have knowledge and information relating to the charges laid which would be crucial and indispensable to the defence of the First Accused

9. In his dissenting opinion, Justice Thompson said , “in this quest for the truth, I am guided by the principle that it is of paramount importance for the chambers to continue to be flexible in the process of receptivity of evidence, as it had been in the case for the prosecution, so as to ensure that no relevant evidence vital to the discovery of the truth is foreclosed by reason of legal technicalities, novel artificial distinctions, or outmoded juridical doctrines not contemplated by plain and ordinary meaning of the applicable statutory provisions and rules.”¹⁰ And that “such a flexible judicial approach is dictated, if not rendered imperative, by the doctrine of equality of arms and the doctrine of fundamental fairness, both of which are the conceptual underpinning of Article 17(4)”¹¹, Justice Thompson further opined.
10. Counsel for the First Accused submit that President Kabbah has exclusive relevant Knowledge of such importance that no other witness on the list of witnesses can testify on issues that this witness is expected to testify about. In the Decision of the Court, the Trial Chamber said “we consider that it would be inappropriate to issue a subpoena if the information sought to be obtained is obtainable through other means”¹² Counsel submit that, some of the most crucial evidence about various material aspects of the charges, and testimonies before the court lie in the breast of the President and may not be obtained otherwise.
11. Counsel further submit that depriving the first Accused the opportunity of calling this witness will admit of both exceptional circumstances and irreparable prejudice to the case for the First Accused. The said witness did not only play a leadership role in mobilising military resources but equally logistical resources for the CDF as a pro-government faction. At all times material to this indictment President Kabbah was the President of Sierra Leone, from 30th November 1996 to December 1999, during which period he served as President in office and also temporarily ousted in exile.
12. The questions and issues mooted in the foregoing paragraphs hereof are among the issues and questions that are intended to form the basis of grounds of Appeal

¹⁰ SCSL-04-14-T-617-Dissenting Opinion of Justice Bankole Thompson, para. 2

¹¹ Ibid, para 3

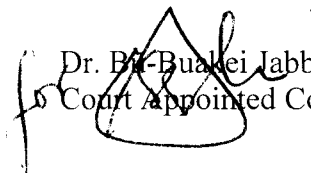
¹² SCSL-04-14-T-617-Majority decision, para. 30

to be filed by the First Accused if granted the requested leave . Counsel for the First Accused, submit 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 and of the integrity of the entire trial process and the operations of the Special Court for Sierra Leone as an International Court.

13. The Appeals Chamber will authoritatively be making a distinction between an attempt in this case to issue a subpoena to a serving Head of State in the national court and an international tribunal like the Special Court for Sierra Leone. The constitutional issues raised by Justice Benjamin Itoe, that the President has immunity and therefore cannot be subpoenaed by the court is not applicable in this case. The Special Court is not a national court for Sierra Leone and is not part of the judicial system of Sierra Leone exercising judicial powers of Sierra Leone. This was affirmed by the Appeals Chamber when it said “accordingly, there is no reason to conclude that Special Court should be treated as anything other than an international tribunal or court, with all that implies for the question of immunity for a serving Head of State.”¹³ Surely the Separate Concurring Opinion seems to have derailed from the international to the national domestic plane in its analysis of the constitutional issues.

CONCLUSION

14. 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, leave to make an interlocutory appeal against the Trial Chamber’s Decision on the *subpoena Ad Testificandum* to H.E. Alhaji Dr. Ahmad Tejan Kabbah, President of the Republic of Sierra Leone, pursuant to Rule 73(B).


Dr. B.A. Buakei Jabbi
Court Appointed Counsel

¹³ SCSL-2003-01-1-59

LIST OF AUTHORITIES

- 1. SCSL-04-14-T-617: Decision on Motions by Moinina Fofana and Sam Hinga Norman for the issuance of a subpoena ad testificandum to H.E Alhaji Dr. Ahmad Tejan Kabbah**
- 2. SCSL-03-01-I: Decision on Immunity from Jurisdiction**
- 3. SCSL-04-14-AR73: Decision on Amendment of the Consolidated Indictment**