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SCSL-04-14-T

18797

(18797-18803)

**SPECIAL COURT FOR SIERRA LEONE
OFFICE OF THE PROSECUTOR
Freetown – Sierra Leone**

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

Registrar: Mr. Lovemore G. Munlo SC

Date filed: 7 July 2006

THE PROSECUTOR

Against

**Samuel Hinga Norman
Moinina Fofana
Allieu Kondewa**

Case No. SCSL-04-14-T

PUBLIC

**PROSECUTION RESPONSE TO APPLICATION BY THE FIRST ACCUSED FOR LEAVE TO APPEAL
AGAINST THE DECISION ON EXTENSION OF TIME TO SUBMIT DOCUMENTS**

Office of the Prosecutor:

Mr. Christopher Staker
Mr. Joseph F. Kamara
Ms. Nina Jørgensen
Mr. Urs Wiedemann

Court Appointed Defence Counsel for Norman

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

Court Appointed Defence Counsel for Fofana

Mr. Victor Koppe
Mr. Arrow J. Bockarie
Mr. Michiel Pestman

Court Appointed Defence Counsel for Kondewa

Mr. Charles Margai
Mr. Yada Williams
Mr. Ansu Lansana

SPECIAL COURT FOR SIERRA LEONE	
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COURT MANAGEMENT	
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NAME	MAUREEN EDWARDS
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I. INTRODUCTION

1. The Prosecution files this Response to the application on behalf of the First Accused of 3 July 2006 (“**Application**”)¹ for leave to appeal against the Trial Chamber’s “Decision on First Accused Urgent Motion for Extension of Time to Submit Documents Pursuant to Rule 92bis” filed on 29 June 2006 (“**Decision on Urgent Motion**”).²
2. The Prosecution notes the “Order for Expedited Filing” of 5 July 2006.³
3. The Application is opposed by the Prosecution on the basis that the requirements for a successful application for leave to appeal pursuant to Rule 73(B) of the Rules of Procedure and Evidence (“**Rules**”) have not been satisfied by the Defence.

II. BACKGROUND

4. On 6 June 2006, the Defence on behalf of the First Accused filed a motion requesting in relevant part leave to delay the filing of 92bis evidence until no later than 21 days after the cross-examination of all witnesses to be called on behalf of the co-accused.⁴ This motion was dismissed by the Trial Chamber on 14 June 2006 and the Defence was ordered to submit any documents pursuant to Rule 92bis no later than 4.00 pm on 16 June 2006.⁵ On 15 June 2006, the Defence on behalf of the First Accused filed an urgent motion for an extension of this deadline until 14 July 2006.⁶ This request was dismissed by the Trial Chamber in its Decision on Urgent Motion which is the subject of the current Application.
5. In its Decision on Urgent Motion, the Trial Chamber sets out related discussions that took place in court and oral instructions to the Defence to file documents pursuant to Rule 92bis within specified time frames.⁷

¹SCSL-04-14-T-646, 3rd July 2006.

²SCSL-04-14-T-642, 28 June 2006.

³ *Prosecutor v Norman, Fofana, Kondewa*, SCSL-04-14-T-647, “Order for Expedited Filing”, 5 July 2006.

⁴ *Prosecutor v Norman, Fofana, Kondewa*, SCSL-04-14-T-608, “Norman Motion to Defer Further Evidence and Closing of his Case to September-December Trial Session”, 6 June 2006.

⁵ *Prosecutor v Norman, Fofana, Kondewa*, SCSL-04-14-T-619, “Decision on Norman Motion to Defer Further Evidence and Closing of his Case to September-December Trial Session”, 14 June 2006, para. 17 (a)(v) and (c) (“**Decision of 14 June 2006**”).

⁶ *Prosecutor v Norman, Fofana, Kondewa*, SCSL-04-14-T-622, “First Accused Urgent Motion for Extension of Time to Comply with Order Contained in ‘Decision on Norman Motion to Defer further Evidence and Closing of his Case to September-December Trial Session’”, 15 June 2006.

⁷ Decision on Urgent Motion, footnotes 9-15 and accompanying text and see also Decision of 14 June 2006, para. 7.

III. ARGUMENT

The Test pursuant to Rule 73(B)

6. The Defence states that “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 [where] ‘irreparable prejudice’ may otherwise be suffered”.⁸ The Prosecution agrees that the applicable law consists of the conjunctive “exceptional circumstances” and “irreparable prejudice” test pursuant to Rule 73(B), as interpreted restrictively in the extensive Special Court jurisprudence in relation to applications of the type currently before the Chamber.
7. This Trial Chamber has held, in particular, that “the probability of an erroneous ruling by the Trial Chamber does not, of itself, constitute ‘exceptional circumstances’ for the purposes of a Rule 73(B) application”.⁹ The principles governing the issue of granting leave to file an interlocutory appeal within the jurisdiction of the Special Court were recently summarized in the decision of this Trial Chamber relating to the First and Second Accused’s applications for leave to appeal the Chamber’s decision on their motions for the issuance of a subpoena to President Kabbah.¹⁰

Exceptional Circumstances

8. It is not clear from the Application exactly what are the errors that the Defence claims to have been made by the Trial Chamber in the Decision on Urgent Motion. Paragraph 10 of the Application states that the issues referred to in the earlier paragraphs of the Motion are merely “among” the issues that the Defence seeks to raise on appeal.
9. Paragraphs 7 and 8 of the Application argue that the Trial Chamber somehow misinterpreted Rule 92*bis* in imposing the time-limit that it did. It is not clear from the Application what the Defence considers to be the correct interpretation, or how the Defence claims that the Decision on Urgent Motion was inconsistent with that interpretation. On one reading, these paragraphs of the Application may be suggesting

⁸ Para 6 of Application

⁹ See e.g. *Prosecutor v Sesay, Kallon and Gbao*, SCSL-04-15-T-401, “Decision on Application for Leave to Appeal the Ruling (2 May 2005) on Sesay Motion Seeking Disclosure of the Relationship between Governmental Agencies of the United States of America and the Office of the Prosecutor”, 15 June 2006, para. 20.

¹⁰ *Prosecutor v Norman, Fofana, Kondewa*, SCSL-04-14-T-643, “Decision on the Motions by the First and Second Accused for Leave to Appeal the Chamber’s Decision on their Motions for the Issuance of a Subpoena to the President of the Republic of Sierra Leone”, 28 June 2006.

that the Trial Chamber has no power to impose *any* time-limit on the filing of documents under Rule 92bis. If so, the Prosecution submits that this point is unsupportable having regard to the provisions of the Rules relied upon by the Trial Chamber and the Chamber's inherent powers to control the proceedings to ensure overall fairness..

10. On another reading, these paragraphs could be arguing that the particular time-limit imposed by the Trial Chamber in this case was so short that it was inconsistent with the fair trial rights of the Defence. If so, what the Defence is alleging is not an error in the interpretation of Rule 92bis, but rather, an abuse of the Trial Chamber's discretion in imposing the deadline that it did. These paragraphs do not identify how the Trial Chamber abused its discretion, other than to state that the time-limit imposed is insufficient to permit the Defence to obtain documents that are important to its case. The mere fact that a party is dissatisfied with a time-limit imposed by a Trial Chamber cannot constitute "exceptional circumstances" for the purposes of Rule 73(B), especially in the circumstances of the present case where, as is noted in the Decision on Urgent Motion, multiple adjournments and extensions of time have already been granted to the Defence.
11. The Defence seeks to demonstrate exceptional circumstances by citing an ICTY decision in the case of *Halilovic*,¹¹ in which a defence motion for the admission of a witness statement pursuant to Rule 92bis of the ICTY's Rules of Procedure and Evidence was granted. This decision contributes nothing to the discussion of 'exceptional circumstances' and is therefore completely irrelevant in the context of the current Application. The question whether witness statements can be admitted pursuant to Rule 92bis is not the issue.
12. The Prosecution does not dispute the fundamental importance of the fair trial rights of the Accused as enshrined in Article 17 of the Statute of the Special Court. However, the Prosecution does not agree that the denial of an extension of time in this instance amounts to an incorrect interpretation of the relationship between the various rules, resulting in an infringement of fair trial rights. Moreover, the Defence cannot assert a lack of flexibility in the process of receptivity of evidence, in particular in relation to witness J. A. Carpenter. The Chamber has gone to appropriate, indeed extensive lengths

¹¹ *Prosecution v Sefer Halilovic*, IT-01-48-T, "Decision on Further Defence Rule 92bis Motion", 25 July 2005 (<http://www.un.org/icty/halilovic/trialc/decision-e/050725-2.htm>).

to accommodate the Defence to allow it every reasonable opportunity to acquire and submit any documents pursuant to Rule 92*bis*. In other words, the Chamber has already offered the Defence a wide latitude precisely to ensure that its right to have adequate time and facilities for the preparation of its defence was respected. Mention should also be made of Article 17(4)(c) which guarantees the right of the co-accused to be tried without undue delay.

13. There is therefore nothing in the Decision on Urgent Motion that rises to the level of exceptional circumstances.

IV. IRREPARABLE PREJUDICE


14. Since the Defence has failed to demonstrate exceptional circumstances, it is submitted that there is no need to consider the “irreparable prejudice” limb of Rule 73(B). However, in the event that the Trial Chamber does address this question, the following submissions are made.
15. In relation to irreparable prejudice, the Defence simply states that “[t]he documents to be tendered by Counsel for the First Accused are very important for the case of the First Accused and will cause irreparable prejudice to the case of the First Accused”. The Defence fails to demonstrate what type of documents it seeks to admit and how these documents are essential to its case.
16. In this respect, resort to the appeals process is also premature as the Defence for the First Accused has not yet closed its case and it may still apply to add exhibits that have not yet been obtained, provided that it can make the necessary showing of good cause.

V. CONCLUSION

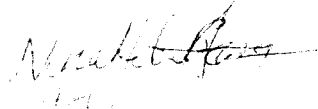
17. For these reasons the Prosecution submits that the Application should be dismissed.

Filed in Freetown,
7 July 2006

For the Prosecution,



Christopher Staker
Acting Prosecutor



Joseph F. Kamara
Senior Trial Attorney

A. MOTIONS, ORDERS, DECISIONS AND JUDGMENTS

1. *Prosecutor v Norman, Fofana, Kondewa*, SCSL-04-14-T-646, “Application by the First Accused for Leave to File Interlocutory Appeal against the Decision on First Accused Urgent Motion for Extension of Time to submit Documents Pursuant to Rule 92bis”, 3rd July 2006.
2. *Prosecutor v Norman, Fofana, Kondewa*, SCSL-04-14-T-642, “Decision on First Accused Urgent Motion for Extension of Time to submit Documents pursuant to Rule 92bis”, 28 June 2006.
3. *Prosecutor v Norman, Fofana, Kondewa*, SCSL-04-14-T-647, “Order for Expedited Filing”, 5 July 2006.
4. *Prosecutor v Norman, Fofana, Kondewa*, SCSL-04-14-T-608, “Norman Motion to Defer Further Evidence and Closing of his Case to September-December Trial Session, 6 June 2006.
5. *Prosecutor v Norman, Fofana, Kondewa*, SCSL-04-14-T-619, “Decision on Norman Motion to Defer Further Evidence and Closing of his Case to September-December Trial Session”, 14 June 2006, para. 17 (a)(v) and (c).
6. *Prosecutor v Norman, Fofana, Kondewa*, SCSL-04-14-T-622, “First Accused Urgent Motion for Extension of Time to Comply with Order Contained in ‘Decision on Norman Motion to Defer further Evidence and Closing of his Case to September-December Trial Session’”, 15 June 2006.
7. Decision on Urgent Motion, footnotes 9-15 and accompanying text and see also Decision of 14 June 2006, para. 7.
8. *Prosecutor v Sesay, Kallon and Gbao*, SCSL-04-15-T-401, “Decision on Application for Leave to Appeal the Ruling (2 May 2005) on Sesay Motion Seeking Disclosure of the Relationship between Governmental Agencies of the United States of America and the Office of the Prosecutor”, 15 June 2006, para. 20.
9. *Prosecutor v Norman, Fofana, Kondewa*, SCSL-04-14-T-643, “Decision on the Motions by the First and Second Accused for Leave to Appeal the Chamber’s Decision on their Motions for the Issuance of a Subpoena to the President of the Republic of Sierra Leone”, 28 June 2006.
10. *Prosecution v Sefer Halilovic*, IT-01-48-T, “Decision on Further Defence Rule 92bis Motion”. 25 July 2005.
(<http://www.un.org/icty/halilovic/trialc/decision-e/050725>)