

SCSL-2003-02-PT  
(321-334)

4 AUG 2003  
NEIL GIBSON  
Nylor  
13-05



**SPECIAL COURT FOR SIERRA LEONE**

JOMO KENYATTA ROAD • FREETOWN • SIERRA LEONE

PHONE: +1 212 963 9915 Extension: 178 7000 or +39 0831 257000 or +232 22 295995

FAX: Extension: 178 7001 or +39 0831 257001 Extension: 174 6996 or +232 22 295996

IN THE TRIAL CHAMBER

HOLDEN IN FREETOWN

**Before:** His Lordship, The Rt. Hon. Judge Benjamin Mutanga Itoe

**Registrar:** Robin Vincent

**Date:** 22<sup>nd</sup> day of July 2003.

**The Prosecutor against**

Foday Saybana Sankoh  
Also known as Popay, Papa and Pa  
SCSL-03-02-PT

**RULING ON THE MOTION FOR A STAY OF PROCEEDINGS  
FILED BY THE APPLICANT**

**Office of the Prosecutor:**  
Mr. James Johnson  
Mr. Nicolas Browne-Marke

**Applicant Counsel:**  
Mr. Ibrahim Yillah  
Ms. Haddijatou Kah-Jallow  
Claire Carlton-Hanciles

**Attorney General:**  
Mr. Joseph G Kobba

**Registry:**  
Mrs. Musu Kamara  
Ms. Mariana Goetz

042

1 HIS LORDSHIP, THE RT. HON. JUDGE BENJAMIN MUTANGA ITOE:

2  
3 This is my Ruling on this Motion.

4  
5 These proceedings are before me as a pre-trial Judge designated under the  
6 provisions of Rule 28 of the Rules of Procedure and Evidence of the Special Court  
7 for Sierra Leone. They are brought under the Provisions of Rule 54 and 73 of the  
8 Rules and stem from a request for an Order to stay the proceedings in the case of  
9 Foday Saybana Sankoh, filed in the Registry of the Special Court on the 24<sup>th</sup> of  
10 April, 2003, on behalf of the Applicant, Foday Saybana Sankoh, by Barrister John  
11 R. W.D Jones of the Defence Office.

12  
13 The application seeks an Order under Rule 54, for a stay of the proceedings in the  
14 criminal matter against him on humanitarian grounds, pending the results of the  
15 physiological and psychiatric examination ordered by the designated judge.

16  
17 Rule 54 under which the remedy is sought provides as follows:  
18 ‘At the request of either party or of its own motion, a Judge or Trial Chamber may  
19 issue such order summonses subpoenas, warrants and transfer order as may be  
20 necessary for purposes of an investigation or for preparation of the conduct of a  
21 trial.’

22  
23 The major argument advanced to sustain this application for a stay of proceedings  
24 is that given his physiological and psychiatric condition for which the Court has  
25 ordered an examination, the results of which are still being awaited, a continuation  
26 of the proceedings in the ailing and fragile condition in which he is at the  
27 moment, would amount to inhuman and degrading treatment which the Defence  
28 contends, is contrary to Universal Principles of Human Rights Law and in  
29 particular, Article 5 of the African Charter of the Human Rights, Article 3 of the

1 European Convention on Human Rights, and Article 7 of the International  
2 Covenant on Civil and Political Rights (ICCPR).

3  
4 It is further submitted by the Applicant that Article 10 of the ICCPR provides that  
5 all persons deprived of their liberty shall be treated with humanity and with respect.  
6 As a follow up of this submission, Defence Counsel contends that a continuation  
7 of the proceedings in this case, given the physical condition on the applicant,  
8 would tantamount to inhuman and degrading treatment which the aforecited legal  
9 instruments are out to extirpate.

10  
11 From the written submissions, this contention appears to stem from two motions  
12 and may be, in anticipation of more which The Applicant imagines may be filed by  
13 the Prosecution, namely, the Extremely Urgent Prosecution Motion dated the 7<sup>th</sup> of  
14 April, 2003, and the Prosecution Motion for Immediate Protective Measures for  
15 Witnesses and Victims and for non Public Disclosure, also dated the 7<sup>th</sup> of April,  
16 2003, motions which the Defence Office has had to reply to on behalf of the  
17 Applicant, its client.

18  
19 The facts known so far in this matter, which need to be highlighted in order to  
20 facilitate the comprehension, trend, and context of this ruling, briefly stated, are as  
21 follows:-

22  
23 The Applicant is charged before the Special Court for Sierra Leone on a seventeen  
24 count indictment for committing crimes ranging from murder, rape, sexual slavery,  
25 amputations and other offences against International Humanitarian Law  
26 committed against several Sierra Leonean citizens and Officials of the United  
27 Nations Missions in Sierra Leone, thereby endorsing and bearing the greatest  
28 responsibility for serious violations of International Humanitarian Law and Sierra  
29 Leonean Law, offences committed within the territory of Sierra Leone since the  
30 30<sup>th</sup> of November, 1996, and in so doing, threatened the establishment and the

1 implementation of the Peace process in Sierra Leone. These offences are defined  
2 respectively in Articles 1, of both the Agreement dated the 16<sup>th</sup> of January 2002,  
3 setting up the Court and its Statute which is attached to it as its integral part.  
4

5 Since the alleged offences come clearly within the jurisdiction of the Special Court  
6 for Sierra Leone, the Applicant was accordingly handed over to its custody for a  
7 continuation of investigations and the eventual judicial process. At the end of the  
8 investigations, a 17 count indictment was preferred against him by the Prosecutor  
9 of the Special Court.  
10

11 On the 15<sup>th</sup> of March, 2003, he made his initial appearance as an accused for a plea  
12 to be taken during a Pre-trial session of the Special Court of Sierra Leone in  
13 Bonthe, and this, in accordance with the provisions of Rules 28 and Rule 61 of the  
14 Rules of Evidence and Procedure of the Court.  
15

16 Curiously enough, he was brought before me in a wheel chair. He looked tired,  
17 exhausted, pale, feeble. He was apparently and indeed in a pitiful state. In a bid to  
18 verify his identity, I asked him if his name, as indicated on the indictment, was  
19 Foday Saybana Sankoh, also known as Popay, also known as Papa, also known as  
20 Pa. He did not even look up to face me. His face was inclined downwards. Each  
21 time he looked like he was trying to make an effort to raise his head as if he wanted  
22 to talk to me, he still dropped it downwards and finally never talked to me at all.  
23 He kept mute and provided no answer to all the questions I put to him in various  
24 forms, all of this intended to confirm his identity as a preliminary to his being  
25 called upon to take a plea. Infact, he remained embarrassingly indifferent and  
26 irresponsible.  
27

28 At this stage, Duty Counsel, Barrister Mrs Hadijattou Kah Jallow, who had put in  
29 appearance for him, drew my attention to a letter she had addressed to the Court  
30 in which she highlighted the poor medical condition of her client and requested a

1 physiological and psychological examination to be conducted on him before he  
2 could be called upon to plead. This letter, she said, was a sequel to and the result of  
3 the experiences she had had during her Counsel/Client relationship and briefings  
4 with the Applicant before his initial appearance.

5  
6 Invited to reply to this application and submission by the Defence, Prosecuting  
7 Counsel, Mr. James Johnson, indicated that he had no objection to it. I accordingly  
8 ruled by granting the application and ordering, under the provisions of Section 74  
9 (bis) of Rules of Procedure and Evidence, that the Applicant be subjected to a  
10 Physiological and Psychiatric examination. No plea was called or taken for very  
11 obvious reasons. The matter was adjourned to the 20<sup>th</sup> of March, 2003, to give time  
12 for the Order of the Court to be carried out.

13  
14 In execution of this Order, the Registry immediately flew in a certain Dr. Verkaik,  
15 an expert from Holland to proceed with the examination. When the pre-trial  
16 proceedings resumed on the 21<sup>st</sup> of March, 2003, the Applicant still appeared  
17 before me in a wheel chair. I proceeded again to question him on his identity. This  
18 I did twice but he did not respond. I there and then resorted to calling in an  
19 interpreter to put these questions to him in Krio. 'Are you Mr. Foday Saybana  
20 Sankoh', I asked him. He remained irresponsive. At this stage, I called in the  
21 Registrar of the Court, Mr. Robin Vincent, to report on the state of the execution  
22 of my Order dated the 15<sup>th</sup> of March, 2003, for a medical examination to be carried  
23 out on the Applicant. He produced a report to this effect. When questioned on it,  
24 Dr. Verkaik stated that the report was inconclusive and that the Applicant needed  
25 to undergo a further and more detailed examination. He produced a copy of his  
26 report. I ordered that copies of it be served on the Prosecution and on the Defence.

27  
28 At this stage, Counsel for the Prosecution, Mrs Hollis, and so did Counsel for the  
29 Defence as well, agreed that the report was indeed inconclusive and that a further  
30 examination of the Applicant's medical condition was necessary.

1  
2 Mrs Hollis continued however, and urged me to rule, not only that the Applicant's  
3 identity was not in doubt and that a further verification was not necessary, but also,  
4 and in addition, that a plea of "Not Guilty" be entered for the Applicant, given the  
5 circumstances of the case at that stage.

6  
7 Defence Counsel, Mrs Jallow, objected to this on the grounds of the prematurity of  
8 such an application because the plea could lawfully not be taken before the results  
9 of the examinations were known. I upheld the Defence Counsel's objection and  
10 issued another Order, still for a further, but this time, a conclusive physiological  
11 and psychiatric examination of the Applicant whose results would enable me to  
12 determine whether he is fit to plead and to stand trial or not.

13  
14 In taking this stand, I was and am still guided by a reverence to the importance a  
15 plea occupies in a criminal trial because it marks, after the filing of the indictment,  
16 the actual commencement of criminal proceedings which, in any event, cannot get  
17 underway without a plea having been entered.

18  
19 It is indeed a cardinal principle of criminal law that entering a plea is the exclusive  
20 privilege of the accused. This prerogative cannot be delegated to anyone, not even to  
21 his Counsel, for, when the trial begins, he and he alone is stigmatised as the  
22 culprit. He and he alone holds the secret as to who committed the offence, indeed,  
23 as to whether he committed the offence or not. He has two options: to plead guilty  
24 or not guilty in the full exercise of this fundamental Human Right of his. In so  
25 doing, he must fully understand and appreciate the nature and the consequences of  
26 the plea he is entering. In this regard, he must be seen to be sane and lucid and  
27 must equally be seen, not only to have pleaded, but also to have fully understood  
28 the nature and the consequences of the plea he has taken and on which his trial or  
29 subsequent proceedings will be based.

30

1 LORD READING in the case of *R vs Lee Kun* 11 C.A.R at page 293, had this to  
2 say to lend credence to this trend of thought:-

3  
4 “The reason why the accused should be present at the trial is that he may hear the  
5 case made against him, and have the opportunity of answering to it; the presence of  
6 the accused means not merely that he must be physically present and in attendance  
7 but also that he must be capable of understanding the nature of the proceedings”,  
8 indeed, I would add, the nature of the charges brought against him.

9  
10 In fact, the Applicant’s presence in Court is ineffective and immaterial in so far as  
11 it is at least presumed for now, and pending the results of the medical examination,  
12 that there is no cause to believe that he is fit to plead. I agree with the Defence  
13 Counsel when she submits that the preliminary issue to be determined is whether  
14 the Applicant is fit to plead or not. In this regard, the test to guide our practice  
15 and relevant in determining issues of this nature and which was enunciated in the  
16 case of *R. V Prichard* (1836) 7 C&P Page 303 is, “whether the Defendant was of  
17 sufficient intellect to comprehend the course of the Proceedings of the trial so as to  
18 make a proper Defence, to challenge a juror to whom he might wish to object and  
19 to understand the details of the evidence if there was no certain mode of  
20 communication to the Defendant, the details of the evidence so that he could  
21 clearly understand them and be able to properly make his Defence to the charge  
22 against him”.

23  
24 In reply to the arguments advanced by the Applicant to support the motion, the  
25 Respondent has submitted as follows:

26  
27 -That the plea to stop the proceedings is unnecessary since any further action in this  
28 matter is in any event, suspended until such a time that the report on the  
29 additional physiological and psychiatric examinations will be made available. For

1 the Respondent, this adjournment adequately protects the interests of the  
2 Applicant.

3  
4 That the allegation by the Applicant that service of the motions or other processes,  
5 which in any event are normal and part of the proceedings, violates, given his  
6 medical condition, his fundamental human rights and amounts to subjecting him  
7 to inhuman and degrading treatment, is unfounded and baseless.

8  
9 That the conclusion by the Defence of the Applicant's incapacity to plead or to  
10 understand the proceedings, is premature at that stage and that this can only be  
11 decided by the nature and conclusion of the medical report on the state of the  
12 accused when it becomes available.

13  
14 It is indeed my view, that it would be very premature and pretentious for a team of  
15 non-medical or paramedical actors in the judicial of scene like the Prosecution and  
16 the Defence or least still, the Presiding Judge, to conclude one way or the other at  
17 this stage and this, before the results of the medical examination on the Applicant  
18 become available. I in fact consider any attempt to conclude the issue at this stage  
19 one way or the other, to be a purely speculative exercise.

20  
21 After ordering the medical examination on the 29<sup>th</sup> of March 2003, I adjourned  
22 this matter to a date to be fixed by the Registrar upon consultation with the Parties,  
23 and this, after abstaining from taking the plea. Since the entry of the plea is a  
24 mandatory preliminary to the commencement of these proceedings, it stands to  
25 reason that pending the fixing of the date for a continued hearing, the Pre-trial  
26 process stands adjourned and suspended until the psychological and physiological  
27 condition of the Applicant is verified and certified as either good or bad.

28  
29 If the former were to be the case, it could probably be concluded that there is a  
30 credible reason to believe that the consistent conduct of irresponsiveness of the



1 Applicant is a design to enable him evade a trial, in which event, a plea of 'Not  
2 Guilty' may automatically be entered at that stage in his favour to enable the trial to  
3 proceed. If the latter finding were however the credible thesis of his condition, he  
4 may be subjected to other judicial measures but will certainly be entitled to neither  
5 a discharge, nor, least still, an acquittal, and this indeed, within the practice  
6 underlying the principles which were well established in the historic MacNaughten  
7 Rules 10CL & FIN 200 (1843).

8  
9 In the present proceedings, the Applicant allegedly remains, following the  
10 indictment approved by His Lordship, the Judge, Bankole Thompson, criminally  
11 answerable for the offences for which he today is being called upon to defend  
12 himself, and particularly so because it is so far, neither contended nor is it alleged  
13 on his behalf that he, at the material time he is alleged to have committed those  
14 offences which are particularised in the indictment, was in the physical state in  
15 which he is today, nor was he or is he mentally deranged.

16  
17 Indeed, the determination of the application before me calls for answers to three  
18 questions: Firstly, is it clearly established that the process of commencing a trial  
19 against the applicant or pursuing it if it became necessary, on an indictment which  
20 accuses him of having allegedly committed or facilitated the commission of grave  
21 and serious crimes against humanity, without more, amount to or fall within the  
22 purview of the definition of what the law considers as inhuman and degrading  
23 treatment? In other words, what does it take to complain of inhuman and  
24 degrading treatment? Secondly, what would be the consequences of putting on  
25 hold, the on-going and pending pre-trial process? Indeed, should the remedy sought  
26 by the applicant be granted and the pre-trial process put on hold? Thirdly, should,  
27 or can this application for a stay of proceedings be granted in these circumstances  
28 particularly given the reasons for the adjournment of the applicant's proceedings,  
29 merely on the grounds that a continuation of the process would tantamount to, as  
30 it is alleged in his favour, subjecting him to inhuman and degrading treatment?

1  
2 As far as the first question is concerned, it is my considered opinion that for a  
3 treatment to be termed inhuman or degrading, it should be established that the  
4 said treatment, intended or not, and which at times could be spiced by a  
5 deprivation of liberty, be it lawful or otherwise, is such as causes or inflicts anguish,  
6 human suffering, hardship, and humiliation on the victim. In other words, it  
7 should amount to a violation of the human integrity of the individual subjected to  
8 it.

9  
10 Infact, even though the provisions of Article 5 of the Universal Declaration of  
11 Human Rights enshrine the key elements of torture, degrading and inhuman  
12 treatment as does Article 5 of the African Charter of Human Rights and People's  
13 Liberty, it is observed that a treatment which amounts to inhuman and degrading  
14 treatment might not necessarily fulfil the ingredients of what constitutes the  
15 element of torture, but torture could encompass those acts that individually or  
16 collectively, constitute what is considered as being inhuman and degrading.

17  
18 Does this application in favour of Mr. Foday Saybana Sankoh, allege or canvass  
19 facts or acts which sustain the contention that he has been or is being, or indeed,  
20 would be subjected to inhuman and degrading treatment?

21  
22 From the fact before me so far, the applicant has been accorded the type of rare  
23 care and delicate attention that certainly is completely the contrary of anything that  
24 is considered cruel, inhuman or degrading. It is on record, from what the Expert,  
25 Dr Verkaik who examined him said, that he is receiving very delicate and special  
26 attention from his attendants. Dr. Verkaik's medical report states that the  
27 Applicant could not feed himself; he could not walk or put himself in an upright  
28 position; he was incontinent for urine and faeces, which is the reason why he wears  
29 diapers. This denotes that his diapers are regularly changed, a fact which again  
30 highlights what is referred to as the delicate treatment which the applicant is

1 receiving and which can certainly not be assimilated to what could, by any stretch  
2 of the imagination, be likened to degrading and inhuman treatment.

3  
4 As far as his medical condition is concerned, I have indicated my desire to verify  
5 his physiological and psychiatric state before holding any further proceedings. This  
6 Order was reinforced by a similar Order dated the 7<sup>th</sup> of April, 2003, by His  
7 Lordship, Honourable Judge Bankole Thompson. When soon thereafter it was  
8 reported that the applicant's health was deteriorating, His Lordship, Honourable  
9 Judge Gelaga- King, in an Order dated the 29<sup>th</sup> of March, 2003, ordered his  
10 immediate transfer to a segregated quarter of the United Nations Choithram  
11 Hospital in Freetown, with a view to providing him with all necessary medical  
12 treatment. On that same day, that is the 29<sup>th</sup> of March, 2003, following a further  
13 deterioration of his situation, His Lordship, Honourable Judge George Gelaga-  
14 King, again issued another Order authorising his transfer to a Military Hospital in a  
15 neighbouring Country. This followed a medical report to the effect that the  
16 Applicant has suffered a paralysis on his left arm and leg, a heart **arethemea** and a  
17 reduced level of consciousness.

18  
19 In my considered judgement, given the delicate and personal care accorded to the  
20 Applicant in custody, the medical treatment he receives, coupled with the concern  
21 this Court has expressed in by issuing an Order in favour of medical evacuation, is  
22 very far from what could be termed 'inhuman and degrading treatment'.

23  
24 I am comforted in this view by an examination of certain judicial decisions whose  
25 facts savoured of acts of inhuman and degrading treatment such as that of Ireland  
26 vs. the U.K. (1978) 2 EHRR 25, where it were held that interrogation techniques  
27 such as sleep deprivation and a denial of adequate food was considered to be  
28 inhuman and degrading treatment just as treatment is considered inhuman if it  
29 causes intense physical or mental suffering. In the case of *Cyprus VS Turkey*  
30 (1976) 4 EHRR 482, it was held that physical assault can amount to inhuman

1 treatment particularly where weapons or other instruments have been used, and so  
2 also are sexual assaults. In *Ribitch vs Austria (1995) 21 EHRR 573* it was  
3 considered an infringement of the protection of the individuals right against  
4 inhuman and degrading treatment where the person is deprived of his liberty and  
5 there is any recourse to physical force which has not been necessitated by his own  
6 conduct, and which act, diminishes human dignity.

7  
8 In the application before me for consideration, there is no proof that the applicant  
9 was, is being, or would be subjected to any of the aforementioned analysed  
10 situations. On the contrary, there is proof that he was and is still being treated  
11 humanely, delicately, and kindly. In the absence therefore of any proof by counsel  
12 that the continued judicial proceedings against his client have amounted to, do or  
13 would amount to inhuman and degrading treatment, Counsel's arguments on this  
14 point cannot stand.

15  
16 On the second question as to what effect a halt in judicial proceedings would have,  
17 I would like to observe that this would be very counter productive. It will indeed  
18 occasion a clog in the wheel of the judicial machinery because if a stay were to be  
19 ordered as canvassed by Counsel for the Applicant, this will erode the whole  
20 foundation on which further judicial orders, pronouncements or proceedings  
21 would be based when the medical report on his physiological and psychological  
22 examination becomes available. The stay of proceedings would even affect the  
23 Applicant more adversely than it would, any other party because, the Defence,  
24 through a myriad of judicial due processes, is expected to remain very much in the  
25 scene as a watch dog to challenge all possible illegalities that may affect his client. In  
26 so doing, he ensures the protection of his client and the right to a fair hearing  
27 which the rule of law guarantees to him.

28

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28  
29  
30  
31

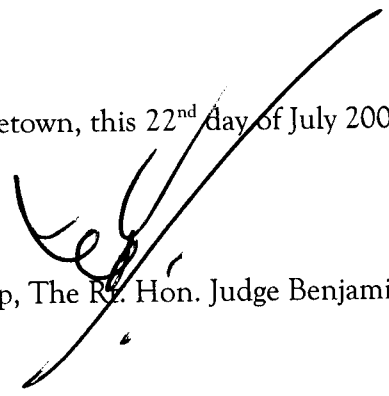
It therefore stands to reason, as a reply to the third question, that the application to stay proceedings in this matter and the reasons advanced to sustain it is, from the fore-going analysis, unwarranted and without substance. It is accordingly dismissed.

I do order that the proceedings related thereto which, for reasons of a continued medical evaluation of the applicant were adjourned, remain adjourned for the time being and to resume as soon as the Order on the medical examinations to be conducted on him is executed and a report on it, made available to warrant a resumption of the proceedings.

The Applicant will continue to remain in custody within the territory of the Republic of Sierra Leone until a further Order to the contrary.

During the hearing on the 15<sup>th</sup> of July, 2003, Counsel for the applicant did submit and observe verbally that it is taking too long for the medical report to be made available and that this is occasioning a lot of anxiety and anguish to her client's family. We appreciate this, and it is in this regard that I am ordering the Registrar, who unfortunately is not here today as I did indicate in Bonthe, to expedite immediate action on the execution of the Orders which exist on this issue and to report to the Court for an examination and a review of this situation on a date which he will fix in consultation and agreement with the other parties in this matter.

Done at Freetown, this 22<sup>nd</sup> day of July 2003



His Lordship, The Rt. Hon. Judge Benjamin Mutanga Itoe.

334

1  
2  
3

