

SCSL - 2004 - 15 - PT
(303 - 308)

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**SPECIAL COURT FOR SIERRA LEONE
OFFICE OF THE PROSECUTOR
FREETOWN - SIERRA LEONE**

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

Registrar: Robin Vincent

Date filed: 11 February 2004

THE PROSECUTOR

Against

AUGUSTINE GBAO aka AUGUSTINE BAO ET AL

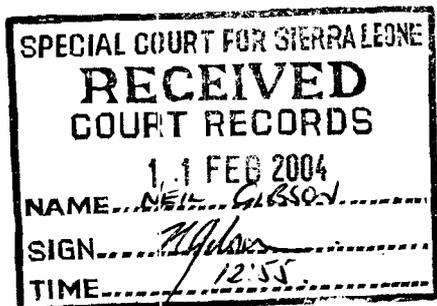
CASE NO. SCSL - 2004 - 15 - PT

**PROSECUTION REPLY TO DEFENCE "RESPONSE TO PROSECUTION'S
APPLICATION FOR LEAVE TO APPEAL AGAINST THE DECISION ON THE
PROSECUTION'S MOTIONS FOR JOINDER"**

Office of the Prosecutor:
Luc Côté, Chief of Prosecutions
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Kenneth Carr

Defence Counsel for Co-accused
Timothy Clayson for Sesay
James Oury and Steven Powles for Kallon



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INTRODUCTION

The arguments raised in the Response of Defence Counsel for Augustine Gbao to the Prosecution’s Application for Leave to Appeal Against the Decision on Prosecution’s Motion for Joinder should be rejected. The Defence’s arguments fail to demonstrate how the present exceptional circumstances and irreparable prejudice caused to the Prosecution as a result of the said Decision do not warrant granting leave to appeal. Rather, the Defence introduces considerations that are irrelevant to the application of Rule 73(B).

BACKGROUND

1. On 9 February 2004, the Defence for Augustine Gbao filed its response (the “**Defence Response**”)¹ to the “Prosecution’s Application for Leave to File an Interlocutory Appeal Against the Decision on the Prosecution’s Motion for Joinder” dated 3 February 2004 (the “**Prosecution’s Application**”), which seeks leave to appeal the Decision on Prosecution’s Motion for Joinder (the “**Decision**”) dated 27 January 2004.
2. The Prosecution notes that the Defence Response was incorrectly filed before the Appeals Chamber rather than the Trial Chamber.²

ARGUMENT

3. The Defence argues that the Prosecution’s Application be denied on the grounds that the Prosecution has “failed to demonstrate that there is irreparable harm and exceptional circumstances justifying the granting of leave to appeal.”³
4. Rule 73(B) of the Rules of Procedure and Evidence for the Special Court for Sierra Leone (the “**Rules**”) permits the granting of leave to appeal of preliminary motions “in exceptional circumstances and to avoid irreparable prejudice to a party”. The Prosecution reiterates Part IV, paragraphs 13 – 21, of the Prosecution Application and respectfully submits that exceptional circumstances are indeed present in conjunction with those circumstances that demonstrate the irreparable prejudice to the Prosecution resulting from the Decision, thus satisfying the requirements of Rule 73(B).
5. The Defence Response introduces, without providing any basis or authority, considerations which they allege as necessary in determining whether exceptional circumstances are present to justify the granting of leave to appeal in this instance. The Prosecution submits that these considerations are irrelevant to a determination of Rule 73(B). However, should the Court decide to entertain these arguments, the Prosecution submits that they fail to demonstrate how the present exceptional

¹ Registry Page (“RP”) 174 – 178.

² Rule 73(B) reads: “However, in exceptional circumstances and to avoid irreparable prejudice to a party, the *Trial Chamber* may give leave to appeal [Emphasis added].”

³ Defence Response, para. 12.

circumstances and irreparable prejudice caused to the Prosecution as a result of the said Decision do not warrant a granting of leave to appeal

Delay to the proceedings

6. The Defence Response argues at paragraph 5 that the sought-after leave to appeal will cause unnecessary delay in the commencement of trials. First, it should be noted that the Prosecution has not requested a stay of proceedings in consideration of the impact of the Prosecution's Application to proceedings before the Court. Second, the Prosecution also draws attention to the "Order for Expedited Filing", issued by the Trial Chamber on 4 February 2004, which clearly indicates the desire of the Trial Chamber for a "fair and expeditious consideration" of the Prosecution's Application. Similarly, the Prosecution notes the availability of Rule 117, which provides for expedited procedure in the consideration of appeals, including those brought pursuant to Rule 73(B).
7. The Prosecution also replies that the rigour of Rule 73(B) anticipates that any potential delay brought about by an interlocutory appeal is justifiable, and submits that these requirements are met in the following instance in light of the irreparable prejudice to the Prosecution should the trials proceed in accordance with the joinder decision of the Trial Chamber.
8. The Defence argues at paragraph 6 that a joinder of trials will cause unnecessary delay in the conduct of trials, and further speculates on trial length at paragraph 7 of the Defence Response. While such arguments may have been applicable on consideration of the Prosecution's Motion for Joinder, the Prosecution submits that they are irrelevant to a determination as to whether exceptional circumstances and irreparable prejudice to the Prosecution are present in order to satisfy Rule 73(B).

Presence of exceptional circumstances in this instance

9. The Prosecution disputes the argument of the Defence at paragraph 8 that "the issues raised by the Prosecution in its application for leave are little more than matters of convenience and practicality." On the contrary, the Prosecution's Application demonstrates serious prejudice in terms of substantive and procedural law, in

particular, paragraphs 3 – 10, which outline the error of law in the Decision, and paragraphs 13 – 21, which outline the irreparable prejudice caused to the Prosecution as a result of the Decision.

“Issues of law of great public significance to the development of international criminal law”

10. The Prosecution replies that this consideration is irrelevant to the application of Rule 73(B) in this instance, which was raised by the Defence at paragraph 9 without any basis or authority.

Improper application of Rule 73(B)

11. Finally, the Prosecution submits that the Defence incorrectly interprets Rule 73(B). First, the Defence appears to argue at paragraph 10 that “the issue of joinder is determined once” and consequently need not be resolved upon interlocutory appeal. The Prosecution respectfully submits that in light of the irreparable prejudice caused to the Prosecution as a result of the Decision, the matter demands determination in an interlocutory appeal before the commencement of trial proceedings.
12. Second, the Defence later argues at paragraph 11 that the “the essence of allowing interlocutory appeals must surely be to deal with matters which cannot be effectively be dealt with at the end of the trial because the damaged [sic] caused has a reasonable possibility or prospect of leading to a wrongful conviction or a wrongful acquittal.” The plain language of Rule 73(B) permits an interlocutory appeal in any instance provided exceptional circumstances and irreparable prejudice to a party exist, a determination of which is not limited to issues of wrongful conviction or acquittal.

CONCLUSION

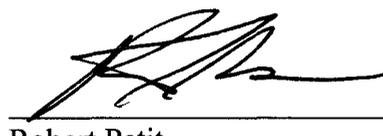
Accordingly, the Prosecution reasserts that the orders prayed for in the Prosecution Application be granted.

Freetown, 11 February 2004

For the Prosecution,



Luc Côté
Chief of Prosecutions



Robert Petit
Senior Trial Attorney