

148

SCSL-2003-07-PT
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SPECIAL COURT FOR SIERRA LEONE

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THE TRIAL CHAMBER

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

Registrar: Robin Vincent

Decision of: 10th day of December 2003

The Prosecutor against

Morris Kallon
(Case No.SCSL-2003-07-PT)

**DECISION ON THE DEFENCE APPLICATION FOR LEAVE TO APPEAL
"DECISION ON THE PROSECUTION'S MOTION FOR IMMEDIATE
PROTECTIVE MEASURES FOR WITNESSES AND VICTIMS AND FOR NON-
PUBLIC DISCLOSURE"**

Office of the Prosecutor:
Luc Côté, Chief of Prosecutions
Sharan Parmar, Associate Legal Officer

Defence Counsel:
James Oury, Co-Counsel
Stephen Powles, Co-Counsel
Melron Nicol-Wilson, Legal Assistant

SPECIAL COURT FOR SIERRA LEONE	
RECEIVED	
COURT RECORDS	
1.0 DEC 2003	
NAME	Neil Gisso J
SIGN	<i>Neil Gisso</i>
TIME	11:45

THE SPECIAL COURT FOR SIERRA LEONE (“THE SPECIAL COURT”),

SITTING AS the Trial Chamber (“the Chamber”) composed of Judge Bankole Thompson, Presiding Judge, Judge Pierre Boutet and Judge Benjamin Itoe;

CONSIDERING the Order on the Defence Objection Filed as Reply Evidence in the Prosecutor’s Motion for Immediate Protective Measures for Witnesses and Victims and for Non-Public Disclosure rendered on the 21st of May 2003.

CONSIDERING the Decision on the Prosecution’s Motion for Immediate Protective Measures for Witnesses and Victims and for Non-Public Disclosure (“the Decision”), rendered by Judge Bankole Thompson as Designated Judge on the 23rd of May 2003;

BEING SEIZED of the Defence Application for Leave to Appeal the Decision on the Prosecutor’s Motion for Immediate Protective measures for Witnesses and Victims and for Non-Public Disclosure, filed on the 21st of July 2003 (“the Application”);

CONSIDERING the Prosecution’s Response thereto, filed on the 28th of July 2003;

CONSIDERING that there has been no Reply thereto by the Defence within the time limits prescribed by the Rules of Procedure and Evidence (“the Rules”);

NOTING THE SUBMISSIONS OF THE PARTIES,

RULES AS FOLLOWS:

1. On the 7th of April 2003 the Prosecution, pursuant to the provisions of Articles 16 and 27 of the Statute of the Special Court (“the Statute”) and of Rules 53, 54, 73 and 75 of the Rules, filed a motion for Immediate Protective Measures for Victims and Witnesses and for Non-disclosure in respect of an approved indictment brought against Morris Kallon (the Applicant in the present proceedings) by the Prosecutor of the Special Court.
2. On the 23rd April 2003, the Defence filed a Response and the latter filed a Reply to the aforesaid Response on the 29th of April 2003.
3. Having considered this matter on the strength of the submissions only pursuant to Rule 73 of the Rules, His Lordship, Hon Judge Bankole Thompson, on the 23rd May 2003, sitting as a Designated Judge under the provisions of Rule 28 of the Rules, rendered a ruling granting the application submitted and canvassed by the Prosecution.
4. It is against this Decision that the Applicant, Morris Kallon, is seeking the leave of the Trial Chamber to appeal by filing an Application in this respect on the 29th of May 2003.

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5. The Defence/Applicant therefore seeks our leave to appeal against the Decision of the Hon. Judge Bankole Thompson pursuant to Rule 73 (B) of the Rules as it considers that an appeal would be in his interests and those of "a fair and expeditious trial". The Defence avers that the provisions relating to protective measures and the resulting disclosure by the Prosecution to the Defence are fundamental and form part of the "paramount due process right of the Accused to a fair trial" as was highlighted in the Decision¹.
6. It contends that in the Decision, the Learned Judge relied upon material that had only been raised by the Prosecution Reply to the Defence Response to the Prosecution Motion for Protective Measures (filed on the 29th of April 2003). The Defence observes that the Designated Judge was correct in relying upon this material but submits however, that it should have been given the opportunity to counter these assertions. Consequently, the Defence submits that the learned Judge did not have the benefit of the complete facts upon which to base the Decision.
7. The Applicant further submits that the Designated Judge erred in law in ordering that the Prosecution withhold identifying data relating to the witnesses until 42 days prior to their testimony at trial. The Defence reiterates the jurisprudence of the International Criminal Tribunal for the former Yugoslavia ("the ICTY") in *Prosecutor v. Brđjanin and Talic* where it was held that the Prosecution would not be permitted to seek blanket protective measures and redact material from every statement on the basis of the general security situation in the former Yugoslavia.² Accordingly, the Defence submits that blanket assertions on the basis of the security situation in Sierra Leone in itself is not sufficient.
8. The Applicant argues in addition that when deciding upon protective measures, they must be proportional to the situation. The Defence therefore submits that in international law, the test regarding whether a measure is proportional or not was set out by the ICTY in *The Prosecutor v. Hadzihasanovic et al.*³ Relying on jurisprudence as guidance, the Defence submits that for a protective measure to be proportionate under international law, the Prosecution must be required to identify which witnesses truly require a delay in disclosure of their identity in order to ensure their safety. The decision whether to disclose the identifying data relating to each witness should then be made by the Trial Chamber on an individual basis. The Defence therefore submits that the Decision, in providing for the blanket delay in disclosure of witnesses' identity until 42 days before testimony, is simply disproportionate and unlawful under international law.

¹ At paragraph 10.

² Trial Chamber, Case No. IT-99-36, Decision on Motion by Prosecution for Protective Measures, 3 July 2000.

³ Trial Chamber, Case No. IT-01-47-PT, Decision Granting Provisional Release to Mehmed Alagic, 19 December 2001.

3329

9. It further submits that the Learned Judge erred in ordering a log to be kept with a record of the name, address and position of each person or entity who receives a copy of or information from a witness statement and by ordering that the Defence provides to the Chamber and the Prosecution, a designation of all persons working in the Defence team who have access to information rendered in the Order. This, the Defence argues, is contrary to the jurisprudence of the ICTY case *Prosecutor v. Brdjanin and Talic*⁴ in which the Trial Chamber rejected the Prosecution's request for a log to be kept by the Defence team as it was considered to be oppressive. Moreover, the Defence submits that if a log were eventually used in contempt proceedings against members of the Defence team pursuant to Rule 77 of the Rules, then this could potentially lead to a violation of the rule against self-incrimination.
10. The Prosecution/Respondent on its part, submits that the Defence has failed to demonstrate how an appeal of the Decision has a significant effect on ensuring a fair and expeditious trial required by Rule 73 (B) of the Rules.
11. The Respondent further submits that the Defence argument in which it submits that the Designated Judge erred in not allowing the Defence to comment on the additional materials contained in the Prosecution's Reply of the 29th of April 2003 is not a challenge to the Decision but a challenge to the Order on the Defence Objection filed as Reply Evidence in the Prosecutor's Motion for Immediate Protective Measure and Non-Disclosure rendered on the 21st of May 2003.
12. The Respondent further notes that the Defence already challenged the admission of this material in its Defence Objection. Consequently, the Respondent contends, the Defence should not be permitted to make unlimited challenges to the Motion as it is not in the interests of a fair and expeditious trial. Moreover, the Respondent avers that the Defence has altered its position in that it now concedes that the Judge was right in considering the additional information but insists that it should have been given the opportunity to reply to it. In the Prosecution's view, the additional material in question was not relied upon by the Designated Judge in the Decision. The inability of the Defence to comment on them cannot therefore have caused any prejudice to the Defence and that in the absence of such prejudice, an appeal against the Decision would not materially advance the proceedings and subsequently would not, according to the Respondent, be "in the interest of a fair and expeditious trial" within the meaning of Rule 73 (B).
13. It also submits that the Decision, by ordering the Prosecution to withhold the identifying data until 42 days prior to their testimony, is in conformity with the jurisprudence of the other International Tribunals. The Prosecution avers to the Decision in which the issue of witness protection must be regarded in light of the particular circumstances of Sierra Leone. The Prosecution

⁴ See page 2 *ibid.*

contends that the existence of exceptional circumstances and a real fear for the safety of potential witnesses is outlined in its submissions and supporting materials, particularly given the volatility in Sierra Leone and its neighbours.

14. It argues further that the leave to appeal raises no grounds pertaining to how it could significantly affect the conduct of the proceedings, nor does it consider that there is any reason for which immediate resolution by the Appeals Chamber could materially advance the proceedings.
15. Lastly, the Respondent asserts that the Defence log is necessary in order for the Court and the Prosecution to have precise knowledge of all persons dealing with confidential and sensitive information such as the identifying data of protected witnesses. Furthermore, the Respondent submits that reconsideration of this aspect of the Decision would not be "in the interest of a fair and expeditious trial" within the meaning of Rule 73 (B).
16. In the determination of this Application the Chamber has adequately advised itself on the provisions of Rule 69 (A) and 69 (C) which are consonant with those of Article 17 (2) of the Statute and which provide as follows:

Rule 69 (A):

In exceptional circumstances, either of the parties may apply to a Judge of the Trial Chamber or the Trial Chamber to order the non-disclosure of the identity of a victim or witness who may be in danger or at risk, until the Judge or Chamber decides otherwise.

Rule 69 (C):

Subject to Rule 75, the identity of the victim or witness shall be disclosed in sufficient time before a witness is called to allow adequate time for preparation of the prosecution and the defence.

17. The Chamber is therefore mindful of the need for the protection of and respect for the rights of victims and witnesses when considering the interests of the public and of the international community while examining cases of this nature and to ensure that persons accused of violations of international humanitarian law be brought to trial, whilst at the same time, guaranteeing on the other hand, the paramount rights recognised under the principles of due process to which the accused is entitled in the conduct of his defence.
18. Consequently, in deciding on the issue of whether or not to grant leave to appeal on these matters, the Chamber considers matters relating to protective measures, their consequences for the witnesses and victims and the resulting effect on the rights of the Accused, as being equally predominantly important.
19. The Chamber observes that the Decision for which the Applicant seeks leave to appeal relates to the granting of protective measures for witnesses and

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3331

victims, who in this regard, are guaranteed this privilege under Articles 16 (4) and 17 (2) of the Statute as well as under Rules 69 and 75 of the Rules.

20. In seeking leave to appeal, the Applicant is relying on the provisions of Rule 73 (B) of the Rules which, before it was amended, read as follows:

“Decisions rendered on such motions are without interlocutory appeal save where leave is granted by the Trial Chamber on the grounds that a decision would be in the interest of a fair and expeditious trial.”

21. Following the Third Plenary Meeting of the Judges of the Special Court, Rule 73 (B) was amended on the 1st of August 2003, and now reads as follows:

“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 three days of the decision and shall not operate as a stay of proceedings unless the Trial Chamber so orders.”

22. In view of the fact that the Application was filed before the new amendment came into force, the Trial Chamber has opted to decide this application on the basis of Rule 73 (B) as it was before the above amendment, because it is at this stage, less onerous and more advantageous to the Applicant.

23. We observe that for this Application for leave to appeal to succeed under these provisions, the Applicant must show, to the satisfaction of the Trial Chamber, that granting it would be on the understanding that a decision on it would be in the interests of “a fair and expeditious trial” as provided for under Rule 73 (B) (as it then read) of the Rules.

24. The notion of a “fair and expeditious trial” under the amended Rule 73 (B) stems from, and indeed re-echoes, the statutory provisions of Article 17 which guarantee and spell out the rights of the Accused in the following terms:

“... (2): The accused shall be entitled to a fair and public hearing subject to measures ordered by the Special Court for the protection of victims and witnesses.

(3): The accused shall be presumed innocent until proved guilty according to the provisions of the present statute.

(4): In the determination of any charge against the accused pursuant to the present Statute he or she shall be entitled to the following minimum guarantees:

332

- a. To be informed promptly and in detail in a language which he or she understands, the nature and cause of the charge against him or her;
 - b. To have adequate time and facilities for the preparation of his or her defence and to communicate with Counsel of his or her own choosing;
 - c. To be tried without undue delay;
 - d. To be tried in his or her presence and to defend himself or herself in person or through legal assistance of his or her own choosing; to be informed, if he or she does not have legal assistance, of this right; and to have legal assistance assigned to him or her, in any case where the interests of justice so require, and without payment by him or her in any such case if he or she does not have sufficient means to pay for it;
 - e. To examine, or have examined, the witnesses against him or her and to obtain the attendance and examination of witnesses on his or her behalf under the same conditions as witnesses against him or her;
 - f. To have the free assistance of an interpreter if he or she cannot understand or speak the language used in the Special Court;
 - g. Not to be compelled to testify against himself or herself or to confess guilt.”
25. Against the background of these rights of the Accused, justice in International Criminal Tribunals and the Statutes and Rules of Procedure and Evidence which govern them, equally recognise the rights of witnesses and victims of those crimes against international humanitarian law allegedly committed to some protective measures. This is amply demonstrated in the provisions of Article 17 (2) of the Statute, which whilst guaranteeing the rights of the Accused on one hand, subjects him or her on the other to measures ordered by the Special Court for the protection of victims and witnesses. The Chamber would like to observe that such measures were regularly and judiciously ordered and put in place by the Hon. Judge Bankole Thompson in the Decision that forms the subject matter of the application under examination.
26. In seeking leave to appeal against this Decision which, as an interlocutory decision, is ordinarily not appealable, the applicant must satisfy the Trial Chamber that “a decision” on it would be in the interests of a “fair and expeditious trial”.

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3333

27. The Chamber understands that the words “a decision” under Rule 73 (B) refers to the Decision which, should leave be granted by the Trial Chamber, is to be rendered by the Appeals Chamber on Judge Thompson’s Decision for which leave to Appeal is being sought. The Trial Chamber would therefore grant the leave, only if satisfied that such a decision by the Appeals Chamber would enhance a “fair and expeditious trial” of the proceedings which are scheduled to commence before the Trial Chamber in the very near future.
28. The words “fair and expeditious”, we observe, are conjunctively used and should be construed as such. It stands to reason therefore, that the Applicant must demonstrate to our satisfaction that the decision of the Appeals Chamber would not only be in the interest of a fair trial on the one hand, but also, and at the same time, an expeditious trial, on the other hand.
29. The Chamber would like to observe that what is guaranteed to the Accused is a fair and public hearing which should be conducted without undue delay as provided for under Article 17 (2) and 17 (4) (C) of the Statute. This right is limited to fairness. It is neither unlimited nor all-embracing for, as we observe, it has to be read and interpreted subject to the equally entrenched statutory rights of victims and witnesses to protective measures as expressly provided for under Article 17 (2) of the Statute.
30. What constitutes the rights of the Accused to a “fair and public hearing” is largely and extensively defined in all its ramifications in the provisions of Article 17 of the Statute. A close examination of each of these rights as against the pre-trial proceedings concerning the Applicant which have so far been held, reveals that none of them, to our mind, has so far been violated, and if at all, not to the extent of occasioning what we consider to be even on the most liberal judicial interpretation a miscarriage of justice.
31. We take this position because we are aware of the fact that we are still at the pre-trial stage of the proceedings against the Accused and that the prejudices which we imagine he is now subjected to and which, to our mind, are not substantial, are the veil that separates him from the witnesses who will be testifying against him and the log to be kept with a record of the name, address and position of each person or entity who receives a copy of or information from a witness statement and ordering that the Defence provides to the Chamber and the Prosecution, a designation of all persons working on the Defence team who have access to information rendered in the Order.
32. In this regard, the Decision for which leave to appeal is sought, guarantees that the protective measures will be lifted 42 days before the witness is to testify at trial and this, within the spirit of the provisions of Rule 75 of the Rules, during which his full rights as an Accused as guaranteed by the Statute and the said Rules, will be strictly respected, 42 days being a time frame more advantageous to the Accused than the strict 21 day rule found in the

jurisprudence of the International Criminal Tribunals for the former Yugoslavia and for Rwanda.

33. In fact, an examination of arguments advanced by the Applicant has so far failed to convince the Chamber on the extent to which the Decision sought to be appealed against has substantially, if at all, violated the rights of the Accused and how a decision of the Trial or the Appeals Chamber, would be in the interests of ensuring a fair and expeditious trial as against what has so far happened in the proceedings that have taken place in the Trial Chamber.
34. While it is conceded that a definition of this term can hardly be formulated with a universally legally accepted precision, it can at least be generally accepted that the term an "expeditious trial" is one which is conducted within time limits that are, in the circumstances, considered reasonable. These must include the hurdles to be surmounted in relation to various procedural intricacies and technicalities inherent in a trial of that nature and taking into account factors related to the respect of the rights of the Accused, those of the Prosecution, and nonetheless, those of the witnesses and victims, coupled with the imperative necessity of ensuring that the trial, as much as possible, and as much as the law would permit, is fair and public.
35. In this context, the Trial Chamber would like to be persuaded on the Applicant's contention that an appeal to the Appeals Chamber, which would only proceed if the leave sought in these proceedings would, if granted, contribute to achieving the goals of an expeditious trial.
36. The Trial Chamber observes that the Special Court is a jurisdiction with a limited duration of three years and that appeals on interlocutories, unless good reason is shown for a real necessity or legal justification to grant them, should not be allowed to undertake a premature and speculative journey to the Appeals Chamber for adjudication since this option, if conceded, is very time consuming and therefore, inconsistent and incompatible with, and also prejudicial to what an expeditious trial is supposed to achieve and which the Applicant wants the Chamber to believe, he is targeting.
37. We therefore hold that there are no good nor convincing reasons nor grounds to grant this Motion for leave to appeal because we are of the opinion that granting it would defeat the objective of a fair and expeditious trial as envisaged in Rule 73 (B) (as it then was) of the Rules under which the Application is brought, as it would, on the contrary contribute to an undue delay in the commencement of the trial which we expect to start in the very near future.
38. In light of the above, this Application which lacks any merit to warrant its being granted, is accordingly dismissed.

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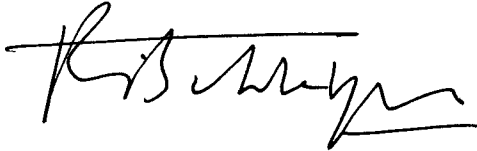
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THEREFORE, FOR THE FOREGOING REASONS

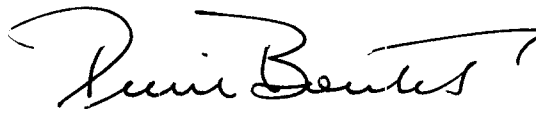
THE CHAMBER,

REJECTS the Application for leave to appeal against the Decision.

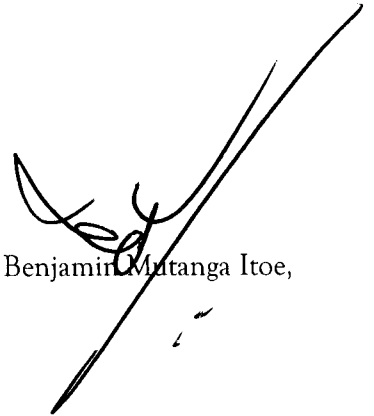
Done in Freetown, this 10th day of December 2003.



Judge Bankole Thompson,
Presiding Judge



Judge Pierre Boutet,



Judge Benjamin Mutanga Itoe,

