

(11190 - 11195)

SPECIAL COURT FOR SIERRA LEONE  
THE TRIAL CHAMBER 1

CASE NO. SCSL-04-15-T

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

**Registrar:** Robin Vincent

**Date:** 9<sup>th</sup> April 2005

**PROSECUTOR**

**Against**

**Issa SESAY  
Morris KALLON  
Augustine GBAO**

---

**Application by the Second Accused for Leave for Interlocutory Appeal Against the Majority Decision of the Trial Chamber of 9<sup>th</sup> December 2004 on the Motion on Issues of Urgent Concern to the Accused Morris Kallon**

---

**Office of the Prosecutor:**

Luc Côté  
Lesley Taylor

**Defence Council for Morris Kallon**

Shekou Touray  
Vincent Nmehielle  
Melron Nicol-Wilson  
Rachel Irura

|                                       |                    |
|---------------------------------------|--------------------|
| <b>SPECIAL COURT FOR SIERRA LEONE</b> |                    |
| <b>RECEIVED</b>                       |                    |
| <b>COURT MANAGEMENT</b>               |                    |
| 11 APR 2005                           |                    |
| NAME                                  | Neil GIBSON        |
| SIGN                                  | <i>Neil Gibson</i> |
| TIME                                  | 14:53              |

The Defence for Morris Kallon hereby files this application to the Trial Chamber for Leave pursuant to Rule 73(B) of the Rules of Procedure and Evidence of the Special Court of Sierra Leone (Rules of Procedure and Evidence) to Appeal the Majority Decision of the Trial Chamber on the Second Accused's Motion on Issues of Urgent Concern to Morris Kallon, which dismissed the Second Accused's Motion in its entirety. Accordingly, the Defence for the Second Accused states as follows:

## I. FACTS AND BACKGROUND

1. The Defence of the Second Accused filed a Motion on Issues of Urgent Concern to Morris Kallon on 1<sup>st</sup> October 2004, contending:

- i) that personal service of the said amended consolidated indictment was not served on him in accordance with the procedure outlined in Rule 52 of the Rules pursuant to the 28<sup>th</sup> January 2004 Joinder Decision of the Trial Chamber;
- ii) that there has been non-compliance with the Trial Chamber's Consequential Order of 12<sup>th</sup> May 2004 that directed the registrar to prepare a certified copy of the Amended Consolidated Indictment and serve it on the Second Accused in accordance with Rule 52;
- iii) that the Second Accused was not properly arraigned before the Trial Chamber on the Amended Consolidated Indictment on which the trial is now based and on which it is proceeding;
- iv) that the original indictment against the Second Accused on which he had made his initial appearance and properly arraigned, has not been stayed despite the Trial Chamber's Joinder Decision that a Consolidated Indictment be prepared on which the Trial should proceed.

2. On 9<sup>th</sup> December 2004 a Majority of two (2) to one (1) of the Trial Chamber found against the Second Accused and dismissed his Motion and contentions.<sup>1</sup>

3. On 7<sup>th</sup> April 2005, the Minority Decision of the Trial Chamber written by Honourable Justice Benjamin Mutanga Itoe of 18<sup>th</sup> March 2004, which partially dissented from the

---

<sup>1</sup> See Kallon -- Decision on Motion On Issues of Urgent Concern to the Accused Morris Kallon of 9<sup>th</sup> December 2004.

Majority Decision of the Chamber, was served on the Second Accused and his Defence Team thus completing the decision of the Trial Chamber.

## II. BASES FOR LEAVE

4. Rule 73(B) grants a party the opportunity to seek leave of the Trial Chamber to make an interlocutory appeal and the Trial Chamber may give such leave to appeal “in exceptional circumstances and to avoid irreparable prejudice to a party.” Under the said Rule 73(B), where the leave is granted, it “shall not operate as a stay of proceedings unless the trial Chamber so orders.”

## III. ARGUMENT

5. The Defence Team of the Second Accused submits that the entire range of issues and processes since the application of the Prosecution for Joint Trial and a Consolidated Indictment and an Amended Consolidated Indictment up until the Majority Decision of the Trial Chamber 9<sup>th</sup> December 2004 and the Minority Decision of the Chamber of 18<sup>th</sup> March 2005 raise “exceptional circumstances” and a probability of “irreparable prejudice” to the Accused.

6. The exceptional nature of the circumstances and great likelihood than not of irreparable damage warrants a leave to appeal the decision of the Trial Chamber to the Appeals Chamber to consider the very important issues of law, procedure and fact involved in the application and to rule on these issues with finality in the interests of Justice and the integrity of the entire process as well as to afford the Second Accused his fundamental right of fair trial.

7. The Defence Team of the Second Accused concedes to the finding of both the Majority and Minority Decisions of the Trial Chamber that the Consolidated Indictment and the Amended Consolidated Indictment were legally served on the Second Accused. Accordingly, the Second Accused will not canvass this issue on appeal.

8. The Defence Team of the Second Accused, however, contends that his non arraignment on the Consolidated Indictment and on ALL counts of the Amended Consolidated Indictment is a breach of his right to fair hearing under Articles 9(2) and 14(3) (a) of the International Covenant on Civil and Political Rights 1966 (ICCPR) and under Rule 50 of the Rules of Procedure and Evidence. Accordingly, failure to re-arraign the Second Accused on the Amended Consolidated Indictment as the now controlling indictment is prejudicial to the Second Accused.

9. In furtherance of the above contention, the Defence Team of Second Accused avers that the Consolidated and the Amended Consolidated Indictment are new, irrespective of their being based on the original Individual Indictment of the Second Accused. Thus, the Majority of the Trial Chamber misdirected themselves in not holding that the said Consolidated Indictment and the Amended Consolidated Indictment are new and therefore required a re-arraignment of the Second Accused to enable him to plead to the entire Indictments rather than to just COUNT 8 of the Amended Consolidated Indictment, which Honourable Judge Pierre Boutet, in his majority decision, believed was the only new charge.

10. The Second Accused relies on the reasoning by Honourable Judge Itoe in his minority decision as the correct position when he said:

If, as I hold, the Consolidated Indictment is New as compared to the Initial Individual Indictment, it to my mind, follows that the Amended Consolidated Indictment which is based, this time, not only on the Initial Individual Indictment but also and above all, on the Consolidated Indictment for which no plea was taken by the Applicant, is also a New Indictment. If this is the case, as I indeed hold it is, it follows that a plea on all the counts of the Amended Consolidated Indictment should necessarily and obligatorily have been taken instead of rightfully having the entire counts on the indictment read to the Accused and taking and recording a plea only on one of them, that is, on Count 8.<sup>2</sup>

---

<sup>2</sup> *Prosecutor v. Issa Sessay, Morris Kallon & Augustine Gbao* (Case No. SCSL-2004-15T), Partially Dissenting Opinion of Hon. Justice Benjamin Mutanga Itoe on the Chamber Majority Decision of the 9<sup>th</sup> of December 2004 on the Motion on Issues of Urgent Concern to the Accused Morris Kallon (hereinafter, Urgent Concerns Motion) ¶ 39.

11. It is also the Second Accused Defence Team's contention that the Majority of the Trial Chamber erred procedurally by their failure to stay or order the withdrawal of the original Individual Indictment and the Consolidated Indictment, which are still subsisting with the now controlling Amended Consolidated Indictment. Thus, the subsistence of the Individual Indictment is also prejudicial to the Second Accused and their non-withdrawal under Rule 51 of the Rules of Procedure and Evidence is a procedural anomaly that impacts on the integrity of the entire process. In the same vein, there is the tendency that the Second Accused protection from Double Jeopardy under Article 9(1) of the Statute of the Special Court and Article 14(7) of the ICCPR would be eroded. The subsistence of the original Individual Indictment and the Consolidated Indictment smacks of a grand design to have a stand-by indictment should something happen to the Amended Consolidated Amendment. That is procedurally and legally unfair and un-transparent and an abuse of the entire process, which in turn is prejudicial to the Second Accused.

12. It is now undisputable that the representation of the Prosecution that only Count 8 of the Amended Consolidated Indictment is new. According to Honourable Justice Itoe's minority decision, "[T]his affirmation by the Prosecution as I have said, has turned out to be unreliable and misleading because apart from the New Count 8, there are some other new elements characterised by the Chambers a "additional specificity" in the Consolidated Indictment." <sup>3</sup> It becomes vital, as opined by Justice Itoe that the Prosecution withdraw the original Individual Indictment and the Consolidated Indictment to prevent the continued violation of "the Principle of fundamental fairness" and the contravention of the provisions of Articles 9(1) and 17(2) of the Statute as read with those of Rule 26*bis* of the Rules."<sup>4</sup>

## CONCLUSION

WHEREFORE, the Defence Team for Morris Kallon prays the Trial Chamber to grant the Team leave pursuant to Rule 73(B) of the Rules of Procedure and Evidence to appeal

---

<sup>3</sup> *Ibid*, ¶ 55.

<sup>4</sup> *Ibid*.

the Majority Decision of the Trial Chamber of 9<sup>th</sup> December 2004 on the Motion on Issues of Urgent Concern to the Accused Moris Kallon.

Respectfully Submitted this 9<sup>th</sup> Day of April 2005,

Counsel for the Second Accused .

A handwritten signature in black ink, appearing to read 'Vincent Nmeielle', with a large, sweeping flourish extending from the end of the signature.

Vincent Nmeielle  
Melron Nicol-Wilson  
Rachel Irura  
Shekou Touray