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SCSL-04-15-T
(26056-26062)

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THE SPECIAL COURT FOR SIERRA LEONE

BEFORE:

Hon. Justice Bankole Thompson, Presiding
Hon. Justice Benjamin Itoe,
Hon. Justice Pierre Boutet

Registrar: Mr. Lovemore Green Munlo, SC

Date filed: 5th March 2007

The Prosecutor

-v-

Issa Hassan Sesay et al.

Case No. SCSL-2004-15-T

PUBLIC

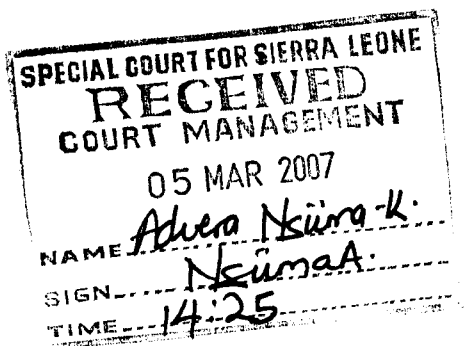
APPLICATION FOR LEAVE TO APPEAL 2nd MARCH 2007 DECISION

Office of the Prosecutor
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Defence for Sesay
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Introduction

1. In its 2nd March 2007 Decision (Decision)¹, this Chamber dismissed the Defence's 7th November 2006 "Sesay Defence Request for Clarification on Rule 98 Decision" (Request)² on the grounds that "there does not exist ... jurisdiction empowering the Court ... to clarify (except for clerical errors) its decisions after they have been delivered or published."³ This Chamber also stated that "even if it possessed such jurisdiction, the alleged clarifications sought by the Defence ... [are] matters that could have formed the bases of grounds for appeal."⁴
2. The Chamber made two errors of law: i) failing to recognise its own jurisdiction; and ii) failing to rule that the clarifications sought could have been reviewed by the Chamber. The Defence seeks leave to appeal the Decision on the grounds that the Chamber's errors of law amount to exceptional circumstances. Without rectifying those errors, irreparable prejudice will result.

The Applicable Law

3. The applicable law has been outlined in a number of decisions. The subject of leave for interlocutory appeal is governed by Rule 73(B) which states:

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 appeal should be sought within 3 days of the decision and shall not operate as a stay of proceedings unless the Trial Chamber so orders.
4. As emphasised by the Chamber, Rule 73(B) is restrictive and "the applicant's case must reach a level of exceptional circumstances and irreparable prejudice" to satisfy the conjunctive requirement provided by the Rule."⁵
5. The Chamber has also indicated that, "[e]xceptional circumstances may exist depending upon the particular facts and circumstances, where for instance the question in relation to which

¹ *Prosecutor v. Sesay et al.*, SCSL-04-15-718, "Decision on Defence Request for Clarification on Rule 98 Decision," 2nd March 2007.

² *Prosecutor v. Sesay et al.*, SCSL-04-15-661.

³ *Decision*, at para. 5.

⁴ *Id.*, at para. 6.

⁵ *Prosecutor v. Sesay et al.*, SCSL-4-15-401, "Decision on Application for Leave to Appeal the Ruling (2nd 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," 15th June 2005, at paras. 14 and 15.

leave to appeal is sought is one of general principle to be decided for the first time, or is a question of public international law importance upon which further argument or decision at the Appellate level would be conclusive to the interests of justice, or where the cause of justice might be interfered with, or is one that raises serious issues of fundamental legal importance to the Special Court for Sierra Leone in particular, or international criminal law, in general, or some novel and substantial aspect of international criminal law for which no guidance can be derived from national criminal law systems.”⁶

Exceptional Circumstances – Inconsistent Approach

Does this Chamber have jurisdiction?

6. The Chamber has previously exercised jurisdiction and clarified its own decisions. Moreover, the Chamber has proactively encouraged other parties to avail itself of this “remedy” by directing other Counsel to file a formal Motion for Clarification.

7. In *Prosecutor v. Norman et al.*, Counsel for the first and second accused, via letter, requested clarification on this Chamber’s “Decision on Motions for Judgment of Acquittal Pursuant to Rule 98 and Separate and Concurring Opinion of Hon. Justice Bankole Thompson.”⁷ The Chamber then directed Counsel to file a formal motion:

[T]he Defence was informed by the Legal Officer for Trial Chamber I that the appropriate forum for a request for interpretation of decisions would be to file a formal Motion for Clarification.⁸

8. Counsel for the first and second accused then filed a “Joint Motion” on 27th October 2005.⁹ This Joint Motion was not dismissed for want of jurisdiction. The Chamber ruled on the Joint Motion on 3rd February 2006 (*Norman*).¹⁰ Issues of jurisdiction, exceptional review jurisdiction, or clerical errors are not even considered in *Norman*.

9. The Defence submits that the Chamber is empowered with jurisdiction to review its own decisions by virtue of the fact that it has done so in the past. The Chamber also has the inherent power to review its own decisions.

⁶ *Id.*, para. 6.

⁷ *Prosecutor v. Norman et al.*, SCSL-04-14-473, 21st October 2005.

⁸ *Prosecutor v. Norman et al.*, SCSL-04-14-477, “Joint Motion for the First and Second Accused to Clarify the Decision on Motions for Judgment of Acquittal Pursuant to Rule 98,” 27th October 2005, at para. 1.

⁹ *Id.*

¹⁰ *Prosecutor v. Norman et al.*, SCSL-04-15-550, “Decision on Joint Motion of the First and Second Accused to Clarify the Decision on Motions for Judgment of Acquittal Pursuant to Rule 98,” 3rd February 2006.

10. There is nothing to properly distinguish jurisdiction of the two situations – the Joint Motion and the Request. It is a fundamental principle of law that “[a]ll accused shall be equal before the Special Court.”¹¹ The Defence interprets this to mean that the Chamber must provide the same remedies to each accused, irrespective of which group to which they were previously attached. In circumstances where a Chamber appears to discriminate between accused or groups of accused, there must be cogent reasons and those reasons must be clearly expressed.
11. The Chamber cannot claim jurisdiction in one case without claiming jurisdiction in another without undermining the administration of justice. Due to the fact that this Chamber allowed remedies for one group of accused and precluded those same remedies to another group of accused, this Chamber erred in law. The demonstrable difference in treatment between the CDF and RUF accused is an exceptional circumstance. It is further submitted that the error of law of differential treatment, if allowed to remain uncorrected, will lead to irreparable prejudice – the Defence will be uncertain of the case it must meet.

This Chamber previously ruled on a motion requesting clarification on similar issues in the Request. Can this Chamber review the Request?

12. In *Norman*, the principle issue decided upon was due process to ensure that defence Counsel could appropriately prepare and present its defence case. The issues sought to be clarified were grounded in whether Counsel needed to address certain allegations of crime in the preparation and presentation of its case:

As we are in the midst of preparing the presentation of our defence, the Defence brings this motion to request clarification from the Trial Chamber as to the correct interpretation to be given to Paragraph 25(g) of the Indictment in light of the Trial Chamber’s Decision.¹²

13. The Defence relied upon this Chamber clarifying its own decision, *Norman*, to interpret the 25th October 2006 Oral Decision for Judgment of Acquittal¹³ and to understand the case it has to meet. The clarifications sought in the Request are indistinguishable in object and purpose from those sought and granted in *Norman*.

¹¹ Statute of the Special Court for Sierra Leone, Article 17(1).

¹² Joint Motion, para. 5. *See also, Norman*.

¹³ *Prosecutor v. Sesay et al.*, SCSL-04-15-T, Trial Transcript, October 25th 2006.

14. In *Norman*, this Chamber exercised its discretion to clarify whether certain allegations of crime remained as part of the Prosecution's case. No objection was raised to the object and purpose of the clarifications sought.
15. This demonstrable error of law, namely the failure to apply the law (or exercise jurisdiction) consistently between different accused amounts to exceptional circumstances. Without rectification, this error will lead to inconsistent law, a lack of clarity in the jurisprudence, and the denial of a fair trial remedy – without which the Defence will suffer irreparable prejudice. The irreparable prejudice is clear in that the Defence is uncertain of the case it must meet.
16. The Chamber's Decision is wholly inimical to a fair trial. The Decision ought to be considered by the Appeals Chamber because it appears that the Chamber is allowing remedies for one group of accused and precluding those same remedies for another group of accused. The Chamber has also failed to apply the law (or exercise jurisdiction) consistently between different accused. In so doing, the Chamber has denied Mr. Sesay a remedy – to have decisions clarified – available to other accused.

Irreparable Prejudice – Violation of Due Process

Due process requires that, in preparing and presenting a defence case, an accused has the right to know all the allegations against him.

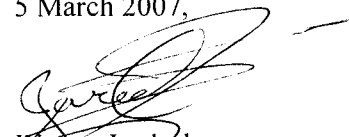
17. The Chamber's failure to consider clarifications sought is tantamount to undermining due process. The failure to provide the clarifications violates Mr. Sesay's right to know whether i) vague and unspecific paragraphs not specifying particular locations of crime; ii) evidence of crime at locations not pleaded in the Indictment; and iii) evidence of crime near – but not at – locations listed in the Indictment remain part of the Prosecution's case. The failure also violates Mr. Sesay's right to know iv) the meaning of "approximate" temporal time periods for allegations of crime and whether crimes occurring outside those "approximate" time periods remain part of the Prosecution's case.
18. Without clarification, this error will lead to denial of a fair trial remedy – Mr. Sesay will not know the case against him. Without knowing the case against him, Mr. Sesay's due process rights will be violated and he will suffer irreparable prejudice.

Request

19. The Defence requests leave to appeal the 2nd March 2007 Decision.

26061

5 March 2007,



Wayne Jordash
Sareta Ashraph

LIST OF AUTHORTIES

26062

Decisions

Prosecutor v. Sesay et al., SCSL-04-15-718, “Decision on Defence Request for Clarification on Rule 98 Decision,” 2nd March 2007.

Prosecutor v. Sesay et al., SCSL-04-15-T, Oral Decision for Judgment of Acquittal, Trial Transcript, October 25th 2006.

Prosecutor v. Norman et al., SCSL-04-15-550, “Decision on Joint Motion of the First and Second Accused to Clarify the Decision on Motions for Judgment of Acquittal Pursuant to Rule 98,” 3rd February 2006.

Prosecutor v. Norman et al., SCSL-04-14-473, “Decision on Motions for Judgment of Acquittal Pursuant to Rule 98 and Separate and Concurring Opinion of Hon. Justice Bankole Thompson,” 21st October 2005.

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Motions

Prosecutor v. Sesay et al., SCSL-04-15-661, “Sesay Defence Request for Clarification on Rule 98 Decision,” 7th November 2006.

Prosecutor v. Norman et al., SCSL-04-14-477, “Joint Motion for the First and Second Accused to Clarify the Decision on Motions for Judgment of Acquittal Pursuant to Rule 98.” 27th October 2005.

Statutes

Statute of the Special Court for Sierra Leone, Article 17(1).