

THE SPECIAL COURT FOR SIERRA LEONE

CASE NO.: SCSL- 04 – 15 - T
APPEALS CHAMBER

THE PROSECUTOR
OF THE SPECIAL COURT
v.
ISSA HASSAN SESAY
MORRIS KALLON
AUGUSTINE GBAO

WEDNESDAY 28 JULY 2004
3.00 P.M.
DECISION

Before Judge:

George Gelaga King, Presiding

For the Registry:

Mr. Geoff Walker

For the Prosecution:

Mr. Desmond De Silver QC
Ms. Lesley Taylor

For the Accused Issa Hassan Sesay:

Ms. Sareta Ashraph

For the Accused Morris Kallon:

(Absent)

For the Accused Augustine Gbao:

(Absent)

Court Reporter:

Mr. Momodou Jallow

1 Wednesday, 28 July 2004

2 [Upon commencing at 3.00 p.m.]

3 [Ruling]

4 [Open session]

5 MR. WALKER:

6 All persons having anything to do before this Special Court Appeals Chamber draw near and give
7 your attendance.

8
9 Justice George Gelega King sitting at this Appeals Chamber of the Special Court for Sierra Leone on
10 the 28th July 2004. This is the Prosecutor v. Issa Hassan Sesay: The rendering of two decisions.
11 The first decision is the rendering of a decision on the Defence application to show good cause to
12 allow an appeal of the decision on application of Issa Sesay for provisional release. The second is
13 the rendering of a decision on the Defence motion seeking disclosure of documentation relating to the
14 motion on the recruitment of child soldiers.

15 JUSTICE KING:

16 This is the ruling:

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18 The Defence application:

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20 The Accused Issa Hassan Sesay seeks leave to appeal the provisional release decision of Judge
21 Boutet denying the application for bail.

22
23 The Defence argues that good cause is demonstrated by the following, relating to paragraphs 48 and
24 51 of the Provisional Release Decision:

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26 (a) The Judge should have been satisfied that prior to Sesay's arrest, he was informed and aware of
27 the extreme seriousness of the crimes falling within the jurisdiction of the Court, and failed to provide
28 adequate reasons for why he was not so satisfied. Moreover, the indictment was confidential, so
29 Sesay could not have been expected to demonstrate that had he been aware of it, he would have
30 surrendered. Thus, the Defence demonstrated that Sesay had the opportunity to flee and did not
31 avail himself of that opportunity notwithstanding sufficient notice of the existence and nature of the
32 Special Court.

33
34 (b) The Judge misinterpreted the evidence relating to Sesay's role in the peace process. Sesay was
35 instrumental in bringing the RUF to the peace table and worked hard to play a part in bringing the
36 conflict to an end, placing himself under the authority of the UN to end the war. The Defence placed
37 great weight on this evidence and submits that it should not have been dismissed in a single sentence

1 without further explanation. Therefore, the Defence argues that the judge erred in law and fact.
2 The Prosecution response.

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4 The Prosecution submits that the reasons advanced by the Defence do not amount to good cause.
5 According to the Prosecution, in order to show good cause the Defence must show that the Trial
6 Chamber may have erred by not applying the law correctly or failing to take into account and assess
7 all the decisive facts of a case. The Prosecution submits that the Defence has failed to demonstrate
8 any error in law or fact.

9
10 In relation to paragraph 48 of the Provisional Release Decision, the Prosecution argues:

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12 (a) The test being one of reasonableness, the judge did not arrive at a conclusion that no reasonable
13 person could have reached.

14
15 (b) Paragraph 48 must be seen in its context where a number of other factors were taken into
16 consideration, such as, and I quote, "The inability of the Special Court to directly perform any arrest
17 on the territory of Sierra Leone; the current diminished capability of the national authorities to promptly
18 and efficiently provide any police supervision or intervention in the case of flight of the Accused. The
19 fact that the report relied on by the Defence mentions that the potential exists for an extremist reaction
20 to the Special Court and the seriousness of the crimes brought against the Accused."

21
22 In relation to paragraph 51 of the Provisional Release Decision, the Prosecution argues:

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24 (a) This paragraph must also be read in its context where other factors were considered.

25
26 (b) The Judge took into account the Accused's role in peace negotiations and provided
27 comprehensive reasons to support his entire decision. It was not an error to say this aspect was more
28 relevant as a mitigating factor.

29
30 The Prosecution notes that the Defence emphasises two paragraphs out of a decision containing 57
31 paragraphs.

32
33 The Principal question for determination:

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35 As stated in my decision on application for leave to appeal against refusal of bail in the *Kallon* case,
36 the principal question in this application is whether the applicant has shown good cause as required
37 by Rule 65(E) of the Rules. The Rule provides, and I quote, 65(E): "Any decision rendered under this

1 Rule shall be subject to appeal in cases where leave is granted by a single judge of the Appeals
2 Chamber, upon good cause being shown. Applications for leave to appeal shall be filed within seven
3 days of the impugned decision."

4
5 What is good cause?

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7 The Appeals Chamber in other international jurisdictions has held that in order to show good cause,
8 the Defence must show that the Trial Chamber may have erred in making the impugned decision. If
9 the answer is in the affirmative, then according to these decisions, good cause is shown.

10
11 I take cognisance of the fact that, and I quote, "The Judges of the Appeals Chamber of the Special
12 Court shall be guided by the decisions of the Appeals Chamber of the International Tribunal for the
13 Former Yugoslavia and for Rwanda." This provision, however, does not deter the newly constituted
14 Special Court for Sierra Leone from developing its own Jurisprudence and case law, being guided, of
15 course, by the relevant decisions of the two international tribunals.

16
17 As already stated in the *Kallon* case, it seems to me that that test, while useful and helpful is too
18 restrictive. It gives only one instance of good cause, that is to say where the Defence makes out a
19 *prima facie* case that an error of law and/or fact has been made by the Trial Chamber, or a single
20 Judge of that Chamber, as the case may be. Indeed, a bench of the ICTY Appeals Chamber in
21 *Prosecutor v Sainovic and Ojdanic* considered that and I quote: "In special cases, good cause
22 pursuant to Rule 65(D) may include situations where it is felt that there is a need for a full bench of the
23 Appeals Chamber to give an opinion as to issues relating to provisional release which arise in a
24 particular case"

25
26 In my judgment, the concept of good cause ought to be extended to include those instances where
27 the question in relation to which the appeal is sought, is one of general principle to be decided for the
28 first time, or a question of public importance upon which further argument and a decision of the
29 Appeals Chamber as a whole would be in the interest of justice, paying particular regard to the fact
30 that ordinarily the Accused may only make one application for bail to the Judge or Trial Chamber

31
32 Has good cause been shown in this application?

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34 As acknowledge by the Prosecution, the Defence arguments that have been made regarding
35 paragraphs 48 and 51 of the Provisional Release Decision cannot be read in isolation, but must be
36 considered in the context of the whole rubric: "Will the Accused, Issa Hassan Sesay appear for trial if
37 granted bail?"

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2 The balance between an assessment of the circumstances which are under the control of the
3 Accused, but which emanate out of the general situation in this country, and which could apply to all
4 accused before the Special Court for Sierra Leone, and the specific submissions of any particular
5 accused is a crucial one. It is therefore my considered opinion that apart from the question whether
6 errors were made by the learned judge, good cause exists for granting leave to appeal, as it seems to
7 me that the question of this balance in applications regarding provisional release is of such
8 importance as to merit further argument.

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10 Apart from the precise grounds as characterised and raised by the Defence in this motion, the broader
11 question whether provisional release can ever be granted to an accused before the Special Court for
12 Sierra Leone and if so, under what circumstances, is one of fundamental importance and a decision of
13 the Appeals Chamber would be in the interests of justice.

14
15 I therefore grant the Defence leave to appeal against the decision of Judge Boutet refusing bail to the
16 Accused.

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18 In accordance with Rule 108(C) of the Rules, any notice and grants of appeal must be filed within
19 seven days of the receipt of this decision.

20
21 The next case, call the next case, please.

22 MR. WALKER:

23 This is the rendering of a decision on the Defence motion seeking disclosure of documentation
24 relating to the motion on the recruitment of child soldiers.

25 JUSTICE KING:

26 This is the Ruling:

27
28 The Appeals Chamber of the Special Court for Sierra Leone, seized of the motion seeking disclosure
29 of documentation relating to the motion on the recruitment of child soldiers, filed confidentially on 28th
30 May 2004 (the Defence motion);

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32 Noting the Prosecution response filed confidentially on 4th June 2004;

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34 Noting the Defence reply filed confidentially on 8th June 2004;

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36 Noting that on the 25th March, the Defence in *Prosecutor v Norman* filed a motion to recuse Judge
37 Winter from deliberating in the preliminary motion on the recruitment of child soldiers (Recusal

1 Motion);

2 Noting that on the 14th May 2004, Justice Winter responded to the Recusal Motion. This response
3 was initially filed publicly but was subsequently made confidential at the request of Justice Winter as
4 Acting President as some of its contents were not considered to be in the public interest;

5
6 Noting that on the 19th May 2004, Justice Robertson filed a confidential note to the Court and the
7 parties on the motion to recuse Justice Winter. This note was properly filed confidentially for -- as it
8 made reference to internal Chambers memoranda and deliberations;

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10 Noting that on 26th May 2004, Justice Winter filed a confidential letter to the Presiding Judge, Justice
11 Gelega King;

12
13 Noting that on 26th May 2004, Justice Robertson filed a confidential letter to the Presiding Judge,
14 Justice Gelega King;

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16 Considering that all the documents to which the Defence refers were properly filed confidentially;

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18 Considering however, that it be in the public interest to reveal the contents of the letters to the
19 Presiding Judge of 26th May 2004, having the document numbers 98 and 99 on the court records file;

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21 Stating that the contents of the letters as follows:

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23 Justice Winter states, and I quote, "I, Justice Renate Winter, withdraw paragraphs 7 to 22 of my
24 response to the motion to recuse myself from deliberating on the preliminary motion on the
25 recruitment of child soldiers dated 14th May 2004. I understand that Justice Robertson has recused
26 himself voluntarily. This document is to be filed confidentially."

27
28 Justice Robertson states, and I quote, "I am glad that Justice Winter has withdrawn paragraphs 7 to
29 22 of her observations. Although there is no basis for any objection to my sitting on the motion to
30 recuse Justice Winter, it still seems to me for the reason I gave in my own note to the Court and
31 parties about this matter, that it would be appropriate for me to withdraw from determination of it. With
32 your permission, I will do so."

33
34 Considering that any further disclosure of documents filed confidentially is not warranted, that
35 transparency has been provided, and that the contents of the two letters rendered the Defence motion
36 moot, hereby rejects the Defence request for full disclosure of all remaining documentation connected
37 to the recusal motion.

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Done at Freetown this 28th day of July 2004.

Thank you.

[Whereupon the Appeals hearing adjourned to 3.15 p.m.]

CERTIFICATE

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6 I, Momodou Jallow, Official Court Reporter for the Special Court for Sierra Leone, do hereby certify
7 that the foregoing proceedings in the above-entitled cause were taken at the time and place as stated;
8 that it was taken in shorthand (*machine writer*) and thereafter transcribed by computer; that the
9 foregoing pages contain a true and correct transcription of said proceedings to the best of my ability
10 and understanding.

11
12
13 I further certify that I am not of counsel nor related to any of the parties to this cause and that I am in
14 nowise interested in the result of said cause.

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18 _____ Momodou Jallow
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