

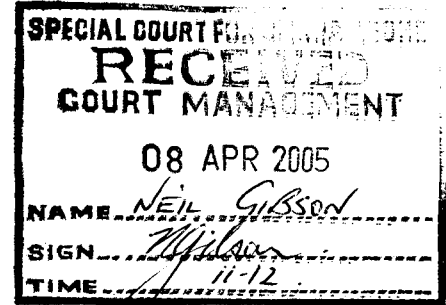
**SPECIAL COURT FOR
SIERRA LEONE**

Case No. SCSL-2004-16-T

Before: Judge Teresa Doherty, Presiding
Judge Julia Sebutinde
Judge Richard Lussick

Registrar: Robin Vincent

Date filed: April 8, 2005

**THE PROSECUTOR**

against

ALEX TAMBA BRIMA**BRIMA BAZZY KAMARA**

and

SANTIGIE BORBOR KANU

**JOINT DEFENCE APPLICATION FOR LEAVE TO APPEAL AGAINST THE RULING OF TRIAL
CHAMBER II OF 5 APRIL 2005**

Office of the Prosecutor:

Luc Coté
Robert Petit

Defence Counsel for Kanu:

Geert-Jan A. Knoops, Lead Counsel
Cary J. Knoops, Co-Counsel
A.E. Manly-Spain, Co-Counsel

Defence Counsel for Brima:

Kevin Metzger
Glenna Thompson
Kojo Graham

Defence Counsel for Kamara:

Wilbert Harris
Mohamed Pa-Momo Fofanah

I INTRODUCTION

1. Pursuant to Rule 73(B) of the Rules of Procedure and Evidence (“**Rules**”), the three Accused Mr. Brima, Mr. Kamara, and Mr. Kanu (“**Applicants**”) hereby seek leave to appeal from the Trial Chamber of its oral decision made on 5 April 2005 concerning the Defence oral request for a stay of the proceedings.

II REQUIREMENTS FOR FILING APPLICATION

2. Article 6 of the Practice Direction for Certain Appeals before the Special Court (“**Practice Direction**”) provides that a party wishing to appeal from a decision of a Trial Chamber “shall file and serve on the other parties in accordance with the Rules, an application for leave to appeal accompanied by a copy of the ruling or judgment appealed (...).” However, given the fact that the ruling was made orally, and that the Defence has not yet been provided with the transcripts of said decision, the Defence is as yet unable to provide such copy, nor is the Defence able to provide the precise title of the Decision, as required by Rule 6(a) of the Practice Direction. The other requirements as laid down in Article 6 will be addressed below.

2.1 Summary of the Proceedings

3. Article 6(b) of aforementioned Practice Direction requests the party to provide a summary of the proceedings before the Trial Chamber relating to the decision sought to be appealed.

Impugned Decision

4. On 5 April 2005, in the afternoon, Trial Chamber II gave its unanimous decision (“**Impugned Decision**,” the transcript of which is attached hereto as **exhibit 1**)¹ on the oral Defence application for a stay of the proceedings until the report of the independent counsel regarding potential contempt of court proceedings has been issued to the Defence and the pending appeal against these interim measures are dealt with by the Appeals Chamber. The main argument presented by the Defence was that the Brima Defence team did not yet have an investigator which replaces the investigator under suspicion, and was as such unable to continue proceedings without the required information and material from the team’s investigator.
5. The Trial Chamber denied this oral motion on the basis that, *inter alia*, the ruling of 14 March 2005 allowed an adjournment of the trial in order to accommodate the Defence and enable it to retain an alternative investigator.² The Chamber

¹ See Transcript, 5 April 2005, p. 25, line 17 to p. 27, line 12.

² Transcript, 5 April 2005, p. 25, lines 21 – 22.

considered that the Defence had ample time to make these alternative arrangements.³ The Chamber held that the Accused does not have the right to choose his own investigator.⁴

6. Moreover, the Trial Chamber decided that the “Confidential Joint Defence Request for Disclosure of Independent Investigator’s Report on Contempt of Court Proceedings and Request for Stay of Proceedings,” filed on 4 April 2005, will only be dealt with after the Prosecution has been granted time to respond, and the Defence to reply.⁵
7. The Trial Chamber moreover held that it is of the opinion that the contempt of court proceedings have no bearing on the proceedings for this Chamber.⁶
8. As to the Defence argument that the materials on which the Defence relies in cross-examination may be tainted by the fact that these stem from the suspended investigator’s investigations, and could thus not be used for cross-examination, at least until a final decision has been reached on in the contempt of court proceedings, the Trial Chamber held that this argument is speculative.⁷
9. Moreover, the Trial Chamber held that Rule 60(B) provides for the possibility that the accused is absent during the proceedings. The Trial Chamber held that the Accused are all represented by competent counsel, and that this does not withhold the Trial Chamber from continuing the proceedings.⁸
10. Thus, the Trial Chamber decided to deny the oral application by the Defence in its Impugned Decision.

Earlier Proceedings

11. On 10 March 2005, Trial Chamber II ordered an investigation based on the existence of a *prima facie* case as to contempt of court, in accordance with Rule 77(C)(iii) of the Rules.⁹
12. On 11 March, the Defence filed a “Confidential Joint Defence Appeal Motion Pursuant to Rule 77(J) on Both the Imposition of Interim Measures and an Order Pursuant to Rule 77(C)(iii).”¹⁰

³ Transcript, 5 April 2005, p. 25, lines 23 – 25.

⁴ Transcript, 5 April 2005, p. 25, lines 26 – 27.

⁵ Transcript, 5 April 2005, p. 26, lines 16 – 20.

⁶ Transcript, 5 April 2005, p. 26, lines 21 – 24.

⁷ Transcript, 5 April 2005, p. 26, line 28 to p. 27, line 1.

⁸ Transcript, 5 April 2005, p. 27, lines 2 – 7.

⁹ Transcript, 10 March 2005, p. 15, line 11, to p. 16, line 13.

13. On 4 April 2005, the Prosecution filed its “Confidential Prosecution Response to the ‘Joint Defence Notice of Appeal.’” The Defence has not yet replied to this Response.

2.2 Exceptional Circumstances and Irreparable Prejudice

14. Rule 73(B) of the Rules requests that “in exceptional circumstances and to avoid irreparable prejudice to any party, the Trial Chamber may give leave to appeal.” The Defence is of the opinion that (i) such exceptional circumstances exist in the present case, and that denial of leave to appeal could (ii) lead to irreparable prejudice to the Defence. In “Decision on Prosecution’s Application for Leave to File an Interlocutory Appeal against the Decision on the Prosecution Motions for Joinder” of 13 February 2004, Trial Chamber I held that “[i]t is clear from a plain reading of Rule 73(B) that granting leave is an exceptional option. As this is an exclusionary rule, if the two-limb test has been complied with, the Prosecution must demonstrate that there is something to justify the exercise of this direction by the Chamber in its favour.” The Defence is of the humble opinion that in the instant case, both criteria set out in Rule 73(B) have been met, and thus leave to appeal should be granted.

Irreparable Prejudice

15. The Defence is of the opinion that this matter, if not brought to the Appeals Chamber of this Court, will have serious effects on the Defence, thus leading to irreparable prejudice to the case of the Defence.
16. Such irreparable prejudice originates from the fact that the proceedings against Mr. Brima et al. have been continued without the Brima team having an option to investigate Prosecution’s witnesses brought both prior to and after examination-in-chief, and thus have not been able to properly prepare and conduct cross-examination. The fact that the Brima Defence team is handicapped in choosing from the list of investigators has more to do with the quality and trustworthiness of an efficient investigator than otherwise. Also, in the case of the Kamara team, counsel indicated to the Court that the presence of an investigator who has only recently been appointed, makes their re-examination of Prosecution witnesses difficult. Without further argument, this situation cannot be attributed to the Defence teams, as the quality of an investigator is of essential importance;

¹⁰ In conjunction with the “Confidential Notice of Appeal” of 11 March 2005 and the “Confidential Joint Defence Index of Record to Appeal Motion of March 11, 2005 and Additional Appeal Submissions of March 14, 2005.” On March 14, 2005, the Defence also submitted its “Additional Joint Defence Appeal Submission Pertaining to Joint Defence Appeal Motion Pursuant to Rule 77(J) on Both the Imposition of Interim Measures and an Order Pursuant to Rule 77(C)(iii) of March 11, 2005.”

therefore the refusal by the Trial Chamber to grant a stay of proceedings cannot be justified.

Exceptional Circumstances

- 17. Also, the second criterion, that of exceptional circumstances, is met because the presence of an investigator within a Defence team at the level of international criminal proceedings may affect the fairness of these proceedings, even if one would consider that an accused has an absolute right to choose his own investigator.


- 18. The mere fact that an investigator is subjected to an investigation in the context of contempt of court proceedings as such is already an exceptional circumstance which is of fundamental relevance and importance and on which an Appeals Chamber should have the final word. After all, and again, it seems self-evident that the effective participation of an Accused in an international criminal trial depends to a large extent on the investigative capabilities and capacities of the Defence team. This notion clearly also relates to the prevalence of the principle of equality of arms and thus affects the rights as set out in Article 17 of the Statute. As a consequence the Defence believes that an exceptional circumstance arises in the instant case.


III RELIEF SOUGHT


- 19. Based on the foregoing arguments, the Defence prays the honorable Trial Chamber to grant leave to the Defence to appeal from the Impugned Decision.

- 20. Additionally, the Defence prays the honorable Trial Chamber to stay the proceedings until a final decision has been taken on this issue.

Respectfully submitted,
On April 8, 2005


Geert-Jan Knoops


pp Kevin Metzger


pp Wilbert Harris

BRIMA ET AL
5 APRIL 2005 OPEN SESSION

1 investigators who until the ruling on the Brima defence teams investigator
2 was with us and apparently, basically --

3 PRESIDING JUDGE: Mr Fofanah, it is not point of law and I do recall
4 it. The transcript will speak for itself. Rest assured we will review it.
10:20:25 5 Thank you.

6 MR FOFANAH: As Your Honour pleases.

7 PRESIDING JUDGE: In the light of the issues raised, we will consider
8 the various submissions and we will give our decisions at two o'clock
9 today. Please adjourn the court.

10:21:17 10 [Luncheon recess taken at 10.21 a.m.]

11 [TB050405B - RK]

12 [On resuming at 2.14 p.m.]

13 PRESIDING JUDGE: I have before me the decision of the Trial Chamber
14 on the oral application this morning by the Defence for an adjournment of
14:13:23 15 the trial. I will now read that decision.

16 [Ruling]

17 After considering the oral application for an adjournment of the
18 trial submitted this morning by the Defence counsel for Brima and having
19 heard the oral arguments of both parties, we decide as follows:

14:13:43 20 The Chamber recalls its oral ruling of the 14th of March 2005
21 allowing an adjournment of the trial in order to accommodate the Defence
22 and enable it to retain an alternative investigator.

23 We consider that since that date the Defence had ample time to make
24 alternative arrangements regarding the appointment of a Defence
14:14:16 25 investigator.

26 The Chamber notes the provisions of Article 17 of the Statute which
27 does not give an accused person any right to select an investigator.

28 The Trial Chamber notes that the Defence office to start its legal
29 obligation under Rules 45(A) and 45(B)(iii) over two weeks ago by

1 furnishing each of the relevant Defence teams a list of potential
2 investigators from which to choose a replacement for Brima Samura.

3 The Trial Chamber cites with approval the principle laid down by the
4 International Criminal Tribunal for Rwanda in the case of the *Prosecutor v.*
14:15:10 5 *Clement Kayishema and Ruzidana* in which the tribunal held: "Once the Trial
6 Chamber is satisfied that all of the necessary provisions for the
7 preparation of a comprehensive defence were available, and were afforded to
8 all the Defence counsel in this case. The utilisation of those resources
9 is not a matter for the Trial Chamber."

14:15:40 10 we further cite with approval the principle laid down by the
11 International Criminal Tribunal for Rwanda in the case of the *Prosecutor v.*
12 *Pauline Nyiramasuhuko* and others where the president of the tribunal held:
13 "whereas an indigent accused has a right to choose Defence counsel to
14 represent him, he does not have a similar right to the choice of an
14:16:10 15 investigator."

16 The Trial Chamber notes that a joint defence request for disclosure
17 of the independent investigator's report on contempt of court proceedings
18 and request for a stay of proceedings was filed by the Defence on the 4th
19 of April 2005 and will be decided after the response and reply of both
14:16:39 20 parties are filed.

21 This Trial Chamber emphasises that the current trial against the
22 accused and the potential contempt of court proceedings against other
23 persons are two different matters. The status of the potential contempt of
24 court proceedings has no bearing on the present trial.

14:17:02 25 The Chamber also notes that none of the Defence counsel has been
26 instructed to act for any of the parties to the potential contempt of court
27 proceedings.

28 Moreover, the Chamber observes that the Defence submission that
29 materials received from the Defence investigator could be tainted is

1 speculative and does not constitute a valid reason for an adjournment.

2 The Court notes that the accused have, by their own choice, absented
3 themselves from the proceedings and notes the provisions of Rule 60(B).

4 The Chamber observes that, although none of the lead defence counsel
14:17:57 5 is currently present at trial, the Chamber notes that the submission by
6 Defence counsel that the accused are all represented by experienced and
7 prepared counsel.

8 The Chamber concludes that the Defence has submitted no convincing
9 reasons for an adjournment of the trial and therefore this Chamber rejects
14:18:21 10 the oral application by the Defence for an adjournment of the trial and
11 orders immediate continuation of the trial.

12 That is the ruling of the chamber.

13 MR MANLEY-SPAINE: May it please Your Honour, having regard to the
14 instruction given by the defendant Kanu for not coming to court, we -- I,
14:18:52 15 as Defence counsel of Kanu, request an adjournment so that I can visit him
16 and reconcile my position. As you may be aware, carrying on in his absence
17 and contrary to his instructions may embarrass me.

18 PRESIDING JUDGE: Mr Manley-Spaine, in fact in the light of this
19 ruling, the Court has every intention of allowing Defence counsel to inform
14:19:24 20 and advise their respective clients on the implication of this ruling and
21 to advise them of their rights and allowing the accused to give appropriate
22 instructions. Subject to any other submissions, we will adjourn briefly.
23 However, before we do so, counsel will recall that this morning Ms Thompson
24 was tendering a handwritten document from the accused and I ruled that the
14:20:03 25 prosecution should be shown it before it was tendered and subsequently we
26 got lost in the procedure. So if that could now be put into the Court,
27 please, as we have had no opportunity to read it.

28 MS THOMPSON: Yes, My Lord, I have given it to my learned friend for
29 the Prosecution. I shall now pass it on again.