

I, HON. JUSTICE BENJAMIN MUTANGA ITOE, Judge of Trial Chamber I "The Chamber" of the Special Court for Sierra Leone, Presiding Judge of the said Chamber;

SEIZED OF the Oral Motion brought by Mr. Tavener, representing the Prosecution and made on Friday, the 25th of February, 2005, for The Chamber to allow the Prosecution to call witnesses to testify on matters related to the Moyamba crime base;

CONSIDERING the fact that the matters on which the said Moyamba crime base witnesses will testify to, relate to portions of the Consolidated Indictment which the Trial Chamber, by its Majority Decision dated the 29th of November, 2004, ordered to be stayed;

CONSIDERING that The Chamber, in this same Majority Decision, directed the Prosecution to either expunge completely, such identified portions of the said Consolidated Indictment or to seek an amendment of the said Indictment in respect of those identified portions and that either option is to be exercised with the leave of the Trial Chamber;

NOTING the Oral Response and submissions which Mr. John Wesley Hall Jr., Court Appointed Counsel for the 1st Accused, Chief Samuel Hinga Norman, made before the Chamber on the same day, Friday, the 25th of February, 2005, endorsing, adopting and supporting the Application made by Mr. Tarverner for the Prosecution;

CONSIDERING the fact that in his response, Mr. Hall submitted as follows:

- i). That the Norman Defence wants to go forward as expeditiously as possible and not take a day off at all if they can avoid it;
- ii). That a week-long continuance in the middle of the trial while the Prosecution gather alternative witnesses does not serve anybody; and
- iii). That they are in agreement to go forward with the Moyamba crime base witnesses;

CONSIDERING, in the light of the above, that the application by the Prosecution was not opposed but rather, was fully supported and endorsed by Mr. Hall, Court Appointed Counsel for the 1st Accused;

MINDFUL OF the Majority Decision on the First Accused's Motion for Service and Arraignment on the Consolidated Indictment, delivered by The Chamber on the 29th of November, 2004;

MINDFUL OF the Separate Concurring Opinion of Judge Bankole Thompson on Decision on First Accused's Motion for Service and Arraignment on the Consolidated Indictment, issued on the 29th of November, 2004;

MINDFUL OF the Dissenting Opinion of Hon. Judge Benjamin Mutanga Itoe, Presiding Judge of the Trial Chamber, on the Chamber Majority Decision Supported by Hon. Judge Bankole Thompson's Separate but Concurring Opinion, on the Motion Filed by the First Accused, Samuel Hinga Norman for Service and Arraignment on the Second Indictment issued on the 29th of November, 2004;

MINDFUL OF the provisions of Rule 73(B) and 73(C) of Rules of Procedure and Evidence of the Special Court;

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MINDFUL OF the provisions of Rule 26 bis of the Rules of Procedure and Evidence of the Special Court;

CONSIDERING the provisions of Article 17 of the Statute of the Special Court for Sierra Leone (“Statute”) on the rights of the Accused and particularly those of Articles 17(2) and 17(4)(b);

**DO HEREBY ISSUE THE FOLLOWING DISSENTING OPINION ON THE CHAMBER
MAJORITY DECISION ON THE PRESENTATION OF WITNESS TESTIMONY ON THE
MOYAMBA CRIME BASE:**

I. SUBMISSIONS OF THE PARTIES

Prosecution Submissions

1. Counsel for the Prosecution, Mr. Tavener, submits that it is anticipated that they will move to the Moyamba crime base this week. This crime base is significant as it was not included in the Initial Indictment. It is now in the Consolidated Indictment and is a current matter of appeal by the First Accused, Chief Samuel Hinga Norman.
2. The Prosecution submit that they have reached “a resolution” with Counsel for the First Accused for those witnesses who will testify to the events in the Moyamba crime base.
3. The Prosecution submit that if the appeal of the First Accused is successful and the Moyamba crime base is not part of the case against him, then any evidence that comes out in respect of this will not be used against him. In order to enable the trial to proceed, the First Accused has agreed to engage in the trial. The Prosecution submit that no harm or prejudice will be done to the First Accused should his appeal be successful.
4. The Prosecution submit that they are not in a position to go ahead with other witnesses but the Moyamba Crime Base witnesses at this stage.



Defence Submissions

5. Court Appointed Counsel for the First Accused, Mr. Hall, proposes that Court Appointed Counsel for the Second and Third Accused begin the cross-examination of witnesses presented by the Prosecution on the Moyamba crime base, with the option for the Court Appointed Counsel for the First Accused to cross-examine if they "choose" to do so.

6. Mr Hall stated that they cannot stand mute in case they lose the appeal and therefore need to cross-examine.

7. He further submitted that they want to go forward as expeditiously as possible and not take a day off at all if they can avoid it. They submit that a week-long continuance in the middle of the trial while the Prosecution gather alternative witnesses does not serve anybody. They are in agreement to go forward with the Moyamba crime base witnesses.

8. Court Appointed Counsel for the First Accused will argue to the Court how the "proof needs to be segregated" if need be, at the close of the case, depending on the outcome of the appeal.

II. DELIBERATION

9. The question which comes under scrutiny is whether the prosecution can or should, at this stage of the proceedings, be allowed to call witnesses to testify on issues affecting the Moyamba crime base which relates to the contentious and contested aspects of the Consolidated Indictment and which the Chamber, in its Majority Decision of the 29th of November, 2004, ordered to be stayed as far as the First Accused is concerned.

10. It would be recalled in this regard, that our Chamber Majority Decision ordered as follows and I quote:

"THAT the identified portions of the Consolidated Indictment that are material and embody new factual allegations and substantive elements of the charges be stayed and that the Prosecution is hereby put to its election either to expunge completely such identified portions

or seek an amendment of the said Indictment in respect of those identified portions and that either option is to be exercised with leave of the Trial Chamber.”

11. From this conclusion and directive, and having “stayed” the new factual allegations and substantive elements of the charges, there appears to me, to be no juridical basis to proceed with hearing witnesses on “stayed” allegations when the appeal on this issue is yet to be disposed of.

12. The Prosecution, by a Motion dated the 6th day of December, 2004, applied for leave of the Chamber to appeal under the provisions of Rule 73(B) of the Rules of Procedure and Evidence. This application was granted by a Chamber Ruling dated the 15th of December, 2004. It therefore stands to reason that juridically, the Appeals Chamber was, and is still, since the 15th of December, 2004, seized of this matter which precisely concerns the Moyamba crime base issues, and which, for diverse reasons, is hotly contested by both the Prosecution and the Defence, indeed, even more so and on more grounds, by the 1st Accused and his Defence Team.

13. The 1st Accused, like the Prosecution, by a Motion dated the 2nd of December, 2004, still under the provisions of Rule 73(B), also sought the leave of the Chamber to appeal. The Chamber, by a Ruling, dated the 16th of December, 2004, granted the leave solicited. As is the case also with the Prosecution, the Appeals Chamber was, since the 16th of January, 2005, seized of the interlocutory Appeal filed by the 1st Accused on issues relating, inter alia, to the Moyamba crime base, and particularly those relating to the “stayed” portions of the Consolidated Indictment.

14. Both the Prosecution and the Defence have appealed against the Majority Decision of the Chamber on diverse grounds and the contention is all centered around the alleged new charges or new particulars which are related to the Moyamba crime base whose witnesses the Prosecution now wants us to hear, notwithstanding the fact that its appeal on it is still pending, and that the Majority Decision had ordered a stay of the new factual allegations and substantive elements of the charges on which these witnesses will testify if this oral application by the Prosecution were granted.

15. It is important to note that the Prosecution, on the 8th of December, 2004, after filing this appeal, filed a Motion in the Chamber for leave to amend the Consolidated Indictment following the aforementioned Order in the Majority Decision to this effect. The hearing of this Motion has been stayed by the Chamber on the grounds of the appeal that is pending on this same issue in the Appeals

Chamber, and this, by virtue of the provisions of Rule 73(C) of the Rules of Procedure and Evidence which provide as follows:

“Whenever the Trial Chamber and the Appeals Chamber of the Court are seized of the same Motion, raising the same or similar issue or issues, the Trial Chamber shall stay proceedings on the said Motion before it until a final determination of the said Motion by the Appeals Chamber.”

16. The legislative intent of the Plenary when drawing up and adopting this rule as I understand it, was to ensure that the Trial Chamber does not continue to hear any matter based on the same or similar issues that are pending before the Appeals Chamber. In this regard, it is clear and uncontested that the appeal before the Appeals Chamber concerns issues relating to the Moyamba crime base where the Consolidated Indictment, as conceded by the Majority Decision itself of the Chamber of the 29th of November, 2004, contains portions “that are material and embody new factual allegations and substantive elements” for which an application to expunge or to amend was to be made to the Chamber.

17. This aspect of the Decision by the Trial Chamber is as much on appeal as that which constrained the Prosecution to seek leave of the Chamber to amend as ordered. The latter Motion is stayed in Chambers on the grounds of the provisions of Rule 73(C). What justification therefore, has our Chamber Majority Decision furnished for derogating and accepting to entertain and determine this particular Prosecution’s Oral Motion that is geared towards securing an Order for the hearing of witnesses related to this same controversial Moyamba crime base venue which is also the subject matter of an appeal that is pending before the Appeals Chamber, instead of also staying it like we have done with the Prosecution’s Motion for leave to amend? I would say none.

18. The Chamber, I would observe, is endowed with the sacred responsibility of ensuring and safeguarding the supremacy and inviolability of the principle of fairness in the conduct of a trial. This principle, more than any other in the conduct of proceedings, impacts greatly on the perception of the image of the integrity of the proceedings where the interests of fairness do require, as in this case, respect for basic rules that ordinarily govern the conduct of proceedings such as a stay of proceedings in the event of an appeal as provided for in Rule 73(C) of the Rules of Procedure and Evidence.

19. Indeed, one of the core issues canvassed on appeal is that the Consolidated Indictment contains new elements and allegations arising from the Moyamba crime base and that a re-arraignment is obligatory. If this contention were to be sustained by the Appeals Chamber, the

proceedings would invariably take a different turn with all the attendant legal and procedural formalities which have to be followed and fulfilled by the Chamber before the trial proceeds. Why should we, even for justifications like the “interests of Justice”, of “Judicial Economy” or of “encouraging expeditiousness”, rush to prematurely hear the evidence on “stayed” issues which are yet to be determined by the Appeals Chamber instead of waiting to do so at the appropriate time?

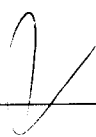
20. In this case, we delivered a ruling on the 2nd of June, 2004, on the Prosecution’s application for Judicial Notice. The Defence sought our leave, under the provisions of Rule 73(B) of the Rules of Procedure and Evidence, to appeal against our Ruling. We granted this leave on the 19th of October, 2004, and are still expecting the decision of the Appeals Chamber on this issue which of course, and as we can expect, may impact on the strategy the Prosecution has to put in place to continue proving its case should the Appeals Chamber uphold the arguments canvassed by the Defence, and this, of course, before the closure of its case which is imminent, and in any event, before the opening of the case for the Defence.

NECESSITY TO STAY THE PROCEEDINGS CONCERNING THE MOYAMBA CRIME BASE

“TRIAL MANAGEMENT STRATEGY”

21. Given the apparent and clearly expressed divergence of opinion on the issues under consideration which are at stake and which are clearly vital and important in the final adjudication of this matter, it is, to my mind, necessary to put in place at this stage, a trial management strategy which combines expediency and fairness, and which, even if not necessarily expeditious, is respectful of the rights of all the parties that we, as a Chamber, are called upon and are expected to protect at all times, of course, within the confines of legality.

22. In the course of the hearing of this Oral Motion, I suggested to Mr. Tavener who was representing the Prosecution, to call witnesses other than the Moyamba crime base witnesses so as to allow time for the Appeals Chamber to issue directives on the contentious Moyamba crime base issues that have already been referred to it. Mr. Tavener in reply said that it would take the Prosecution about one week to get in place, the other witnesses who would testify from other crime bases and whose testimony will not be affected by the pending decision of the Appeals Chamber.

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23. I personally do not think the Prosecution requires so much time to present these alternative witnesses. I say this because the Prosecution, having interacted with these witnesses for quite some time, knows them and their locations very well and can therefore assemble some or all of them in this category, certainly in less than one week so as to enable The Chamber to conduct the proceedings neatly and in total respect of conventional judicial norms.

24. The explanation offered by the Prosecution in this respect is, to my mind, dictated more by considerations for their convenience than for the hard realities that are at stake and which should ordinarily prevail within the framework of a trial management strategy. This is necessary even if we have to lose a few days of trial by allowing the Prosecution a few days to call the non-Moyamba crime base witnesses to testify during the rest of this session and thereafter, to call the Moyamba crime base witnesses at a later stage of the proceedings.

25. I would like to observe here in this regard, that time lost in administering justice credibly is not time wasted at all. In fact, the delay that might ensue, which, in my opinion is necessary, strategic, and judicially useful, will contribute immensely to ensuring the neatness and integrity of our proceedings and upholding the doctrine of fundamental fairness in the interests of both Appellants, the Prosecution and the Defence, but even more importantly, those of the Accused in light of the provisions of Articles 17(2) and 17(4)(b) of the Statute and Rule 26 bis of the Rules of Procedure and Evidence.

26. I think that this should indeed and in fact be the case in order to ensure that the effects of the decisions of the Appeals Chamber on Judicial Notice and on the Appeals by both the Prosecution and the Defence on the Moyamba crime base controversy, are fully integrated into our records and our current trial management strategy, long before the Prosecution closes its case.

PROSECUTION AND DEFENCE COMPROMISES AND AGREEMENTS

27. This Chamber has always solemnly indicated that it encourages and welcomes, within the context of achieving the goals of expeditiousness of the trial, agreements between the Prosecution and the Defence on some non contentions issues in the course of conducting proceedings. We have also said however, that where such agreements are of a nature to violate the law, the rights of the Accused,

or applicable procedures, and I would add, the doctrine of fundamental fairness, they should not, and will not be endorsed or adopted by The Chamber.

28. In this regard, Court Appointed Counsel for the 1st Accused, Mr. John Wesley Hall, Jr., is on record as having said that they cannot stand mute in case they lose the appeal and therefore need to cross examine. He submitted that the Defence want to go forward as expeditiously as possible and not to take a day off at all if they can avoid it. He further submitted that a week long continuance in the middle of the trial while the Prosecution gather alternative witnesses does not serve anybody and concluded by saying that they are in agreement with the Prosecution to go forward with the Moyamba crime base witnesses, thereby supporting in effect, what the Prosecution is seeking to achieve by making this application.

29. I will like to observe here that the rights the Accused enjoys under Article 17 of the Statute are all equally and individually important and that the right to an expeditious trial which is highlighted by both the Prosecution and the Defence to foster their agreement and boost the chances of success of the Prosecution's application, should not be exclusively canvassed to the detriment of the equally important right to a "fair" trial which the accused is entitled to because, a trial, after all, could be expeditious without necessarily being fair.

30. This is primarily the situation we should avoid in the instant case because I am strongly of the opinion that Counsel in such delicate circumstances, should be very cautious, particularly given the absence of the 1st Accused from the proceedings, in making decisions that tend to or indeed, compromise his Article 17 Statutory rights as well as those enshrined in Rule 26 bis of the Rules of Procedure and Evidence.

31. It is my opinion, that this particular agreement between the Prosecution and the Defence should not, and ought not receive the benediction of the Chamber because it flagrantly violates not only the provision of Articles 17(2) and 17(4)(b) Statutory rights of the 1st Accused, but also and more importantly, the doctrine of fundamental fairness to the detriment of the said 1st Accused whose fate on the contentious issues that are at stake, including those of the Moyamba crime base, is yet to be determined by the Appeals Chamber following his appeal against the Majority Chamber Decision that is still pending.

32. In this regard, I would say that if Article 17(2) of the Statute stipulates, as it does, that the Accused "shall be entitled to a fair and public hearing" this includes the respect of his appellate rights which he has exercised and whose outcome we should, and are bound to patiently wait for before we

proceed to hearing evidence on the “stayed” portions of the Consolidated Indictment which constitute the core issues of his pending appeal.

33. I do so hold because to my mind, even arguments based on the “interests of justice”, “Judicial Economy” or “expeditiousness” cannot, and should not, given the circumstances of this case, be countenanced or sustained, for, upholding them with a view to granting this Motion, even though they ordinarily are traditionally accepted criteria in the administration of justice, would, in these particular and peculiar circumstances, occasion a violation of the law to the detriment of the 1st Accused..

34. The question to be answered here is, how can we today start taking evidence in relation to the Moyamba crime base when Our Majority Decision supported by the Separate Concurring Opinion, ordered a stay of some major elements of the crimes alleged to have been committed in the Moyamba crime base when indeed the determination of this contention is sub judice?

35. Indeed, why should we today start taking evidence of witnesses from that contested crime base when our Majority Decision put the Prosecution to its election, either to expunge completely, such identified portions, (referring to what I consider “New Charges” and what is cosmetically characterized as “New Factual allegations and substantive elements of the Charges”) when in fact a Ruling on the Prosecution’s Motion to amend dated the 8th of December, 2004, is now stayed by the Chamber on the grounds that entertaining it at this stage would violate the provisions of Rule 73(C) of the Rules of Procedure and Evidence because these same issues are sub judice before the Appeals Chamber?

36. I would like to observe here that the ICTY cases of SIMIC and KVOCKA which are cited in the Majority Decision to support the granting of this Motion, do not, with respect, apply in this case. In fact, even if these cases have had to deal with a similar subject of “continuing with the proceedings despite a request for a stay” they are distinguishable and are indeed, not on all fours with the case in hand. The primary reason is that in those 2 cases, the Honorable Chambers of the ICTY had not expressly, like we have done in our contested Majority Decision, ordered a “stay” of or an “expungement” of the contentious portions of the Indictment.

37. I am convinced that it does not serve the interests of justice for the Trial Chamber at this stage, to hear and consider evidence from witnesses who will testify on the Moyamba crime base events because it would be legally improper for us to start taking such evidence when there is an appeal pending on this issue and when the facts they may be testifying to may relate to those portions

of the Consolidated Indictment that have been “stayed” or those that have to be “expunged” following the directives of the contested Majority Decision of the 29th of November, 2004.

38. For these reasons, I am of the opinion that to continue with the presentation of witness testimony on areas of the Indictment that are in dispute and are being considered on appeal by the Appeals Chamber would not be in the interests of justice. I do not consider either, that an “agreement” by the Prosecution and the Defence to proceed with the trial constitutes a foundational basis for The Chamber to proceed with this evidence because issues of fairness to the 1st Accused and the avoidance of any prejudice to the case for Accused Persons and their Article 17 Statutory rights, are paramount.

39. I believe that the right of the First Accused to a fair trial would be violated should the trial proceed and should witnesses testify on that venue of the Indictment that is contested and on appeal.

CONCLUSION

40. In conclusion, I am of the opinion that the Prosecution, within the context of expeditiousness, and to avoid stopping the proceedings for too long, should be given a time limit of 5 days to enable them to convene, for the time being, one or some of the non-Moyamba crime base witnesses for them to testify up to the end of this session and this, pending the decision of the Appeals Chamber on the Appeals filed by both the Prosecution and the Defence against the Majority Decision on the 29th of November, 2004, and by the Defence against our Ruling of the 2nd of June, 2004, on Judicial Notice.

41. For the foregoing reasons, I am, of course with the greatest respect and due Deference to the Majority Decision and to Their Lordships, My Learned Brothers and Distinguished Colleagues, not in agreement with the said Majority Decision.

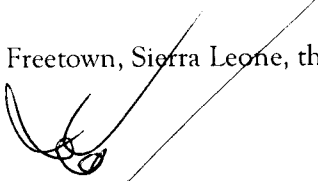
42. I therefore and instead, take a contrary view and do deny and dismiss this Oral Motion.

43. **ACCORDINGLY, I DO HEREBY ORDER AS FOLLOWS:**

1. That the application presented by the Prosecution as well as that portion of the proceedings concerning the Moyamba crime base is stayed until a decision is rendered by the Appeals Chamber on this issue.

2. That the proceedings continue in respect of the non-Moyamba crime base witnesses.
3. That the Proceedings are stayed with effect from today, Tuesday, the 1st of March , 2005, to resume on Monday, the 7th of March, 2005, at 9:30 A.M.
4. That at the session beginning Monday, the 7th of March, 2005, the Prosecution shall only call the non-Moyamba crime base witnesses to testify.
5. THAT THESE ORDERS BE CARRIED OUT.

Done in Freetown, Sierra Leone, this 1st day of March, 2005.



Hon. Judge Benjamin Mutanga Itoe
Presiding Judge,
Trial Chamber I

