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SCSL-2004-15-T
(6890-6897)

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IN THE SPECIAL COURT FOR SIERRA LEONE

THE TRIAL CHAMBER

Before: The Trial Chamber
Judge Benjamin Itoe, presiding
Judge Bankole Thompson
Judge Pierre Boutet

Registrar: Mr Robin Vincent

Date filed: 9th July 2004

Case No. SCSL 2004 – 15 – PT

In the matter of:

THE PROSECUTOR

Against

**ISSA SESAY
MORRIS KALLON
AUGUSTINE BAO**

**APPLICATION FOR LEAVE TO APPEAL GBAO – DECISION ON
APPLICATION TO WITHDRAW COUNSEL**

Office of the Prosecutor

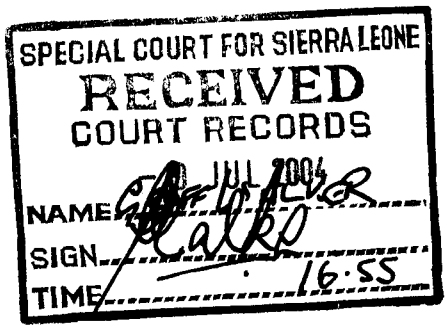
Luc Cote, Chief of Prosecutions
Leslie Taylor

Counsel for Augustine Bao

Girish Thanki,
Andreas O'Shea
John Cammegh
Kenneth Carr

Counsel for co-accused

Timothy Clayson and Wayne Jordash for Issa Sessay
Shekou Touray, Raymond Brown and Wanda Akin for Morris Kallon



Background

1. This is an application for leave to appeal the Trial Chamber's *Gbao – Decision on Application to Withdraw Counsel* of 6th July 2004.
2. On the 5th of July 2004, the first day of the trial, counsel for the accused indicated that the accused would wish to make a brief statement, not as an opening statement under Rule 84 of the Rules of Procedure and Evidence, but as an exceptional grace from the Trial Chamber in terms of its general power to make orders for the conduct of proceedings under Rule 54. Upon inquiry by the Trial Chamber, counsel for Mr Bao indicated that he could not control the content of the statement which Mr Bao wished to make. The Trial Chamber ruled that it would not exercise its power under Rule 54 in the way suggested, but would permit the accused he would make an opening statement which must be consistent with the terms of Rule 84.
3. On the 6th July 2004, the second day of the trial, counsel for Mr Bao indicated to the court that Mr Bao would make a statement to the Court. Mr Bao attempted to commence a statement which fell outside the parameters of Rule 84. After several interjections from His Honour Judge Bankole Thompson to caution against making political statements, Mr Bao was eventually prevented from continuing with his attempt to make a statement and informed that he would not be allowed to proceed further. Mr Bao subsequently indicated that he would walk out in protest, but in fact stayed for the remainder of the proceedings that day. Following argument on another matter and at the point when counsel for Mr Bao was about to make a contribution to that argument, the Presiding Judge noted that Mr Bao had his hand raised. Counsel took instructions and reported to the Chamber that Mr Bao had a matter to raise under article 17 of the Statute in that he wished to address the question of his legal representation. After a five minute adjournment, counsel for Mr Bao reported that Mr Bao has something relating to his legal representation which he would like to express and that counsel had explained his professional position to the client. The Chamber followed by reverting back to the other

motion on the floor before coming back to the question of Mr Bao's legal representation. During the arguments on the other motion, counsel for Mr Bao drew the attention of the Chamber to the fact that what Mr Bao had told him put into question his legal representation and that therefore that question should in principle be resolved before counsel contributed to the argument on this other motion on the floor, but agreed with the Chamber's position that he would argue the point in his capacity as an officer of the court.

4. When the Chamber reverted to counsel for Mr Bao on his wish to address the court on legal representation and the Presiding judge, Benjamin Itoe, having asked counsel if he has a preliminary issue before the Chamber turned to Mr Bao, counsel for Mr Bao suggested that it would be best to hear Mr Bao's concern from his own mouth. So, Mr Bao then stated:

My position in this case is very simple and since my right under 17 had been denied I have decided not to recognise this Court. And henceforth no lawyer should appear here, should represent me, should defend me in this Court.

His Honour Presiding judge Itoe then indicated that the Court would give a ruling on the application that afternoon at 15.00 p.m. Mr Gbao followed up with the statement that:

I stand to defend myself, I wish to fight this place anyhow I see proper I will bring total justice.

His Honour Judge Itoe repeated that the Court would rule in the afternoon, but corrected the time to 16.00 p.m. Mr Cote for the prosecution then requested clarification on what the accused meant and indicated that if the accused was wanting to represent himself then he would wish to make representations on the matter. The Presiding Judge indicated to Mr Cote that his understanding was that Mr Bao does not recognise the court and does not want anyone to represent him. Mr Cote drew the Court's attention to the fact that there was a rule on the issue. Mr Bao was asked to sit down and then the Court immediately adjourned. After the adjournment, the Chamber read out its ruling

on the matter. The following day was when Mr Bao absented himself from Court and counsel for Bao read into the record as Exhibit 1 a declaration drafted by counsel and signed by Mr Bao reasserting his position that he did not recognise the legitimacy of the Court, did not wish any lawyer to represent him before the court and further that he would not give lawyers any instructions on the evidence.

5. The relevant Rule to be applied here is Rule 73 (B), which provides that:

In exceptional circumstances and to avoid irreparable prejudice to a party, the Trial Chamber may give leave to appeal.

Exceptional circumstances

6. It is respectfully submitted that exceptional circumstances arise here for the purposes of the desirability of permitting an appeal because:
- a. The issue of the right to legal representation and the right to defend oneself concerns one of the minimum guarantees and fundamental aspects of the right to a fair trial.
 - b. The factual circumstances of this application are exceptional as compared to any other question that has come or is likely to come before the Special Court for Sierra Leone, the essence of which being that the accused wishes to defend himself after having employed the services of counsel throughout the pre-trial period, does not wish to change his counsel but rather dispense with counsel before the Special Court for Sierra Leone, raises the issue at the outset of the trial and is being tried with two other co-accused who are potentially affected by his decision and the Court's Ruling. Further the issue was framed by a request from the accused to defend himself, as opposed to a request by counsel to withdraw.

- c. An appeal in this case would make an important contribution to the development of international criminal procedure since no Appeal Chamber has been directly faced with the issue of the right to defend oneself and only three cases before other international tribunals are arguably factually similar for the purposes of the application of the law, each providing a differing result and solution to the problem. Even these cases bare distinguishing factors, two involving cases where the accused never chose counsel,¹ the other involving a situation where counsel applied to withdraw.²
- d. The Trial Chamber's decision involves implications not only for the accused but also for his counsel, since it requires counsel to remain to the finality of the case and does so in circumstances where they would normally be professionally embarrassed by the refusal to provide instructions and entitle them to withdraw. It places counsel in a very difficult, if not impossible position.
- e. Trial Chamber's Order carries implications which pervade every single aspect of the Trial and therefore is set apart from almost every other issue for which leave to appeal might be sought, where the implications are limited within certain parameters determined by the subject-matter of the Order.

Irreparable prejudice

7. Irreparable prejudice may arise, and thus should be avoided, for the defence from:

¹ See *Prosecutor v Slobodan Milosevic*, Case No IT-02-54-T, Reasons for Decision on the Prosecution Motion Concerning Assignment of Counsel of 4 April 2003; *Prosecutor v Vojislav Seselj*, Case No. IT-03-67-PT, Decision on Prosecution's Motion for Order Appointing Counsel to Assist Vojislav Seselj with his Defence of 9 May 2003.

² See *Prosecutor v Barayagwiza*, Case No ICTR-97-19-T, Decision on Defence Counsel Motion to Withdraw of 2 November 2000.

- a. a conviction based on a trial where the explanations, denials and assertions of the accused are not made known due to the absence of the accused in combination with the refusal to provide instructions. An accused who defends himself is able to present these matters, even if less effectively than properly instructed counsel. Counsel representing an accused who refuses to give instructions cannot convey any matter on his behalf to the Chamber or test the evidence with them. The fact that the accused has brought this situation upon himself does not change the fact that irreparable prejudice may be caused for the purpose of Rule 73 (B).
- b. Cross-examination of witnesses without proper instructions, not only being of very little effect, but also potentially leading to the wrong questions being put, causing prejudice not only to the accused but also to the co-accused.
- c. Investigations being carried out blind. Direct prejudice might result from approaching witnesses, taking statements from witnesses and calling witnesses, in circumstances where, had counsel been apprised of the clients instructions, his professional judgement may have led to a wholly different decision because of the damage such witnesses might cause to the client's case.

8. Irreparable prejudice may arise for the prosecution from:

- a. The inability of the prosecution to cross-examine the defendant by virtue of the combined absence from court and the refusal to give instructions.
- b. The inability of prosecution witnesses to identify the accused.

9. If leave is granted in terms of Rule 73(B), the grounds will be as follows:

GROUND OF APPEAL

1. The Trial Chamber erred in denying Mr Bao's application to exercise his right to defend himself. Having regard to the fact that this right constitutes a minimum guarantee and a matter of such fundamental importance to the accused and the proceedings, it is an unqualified right, subject to the Court's ability to take other independent measures such as the appointment of *amicus* or 'stand-by counsel' to protect the fairness of the trial and the integrity of the proceedings. In the alternative, it is a qualified right to be limited only in the most exceptional circumstances. Given that no evidence had been called and the accused had not yet demonstrated an inability to defend himself, the circumstances were not sufficiently exceptional to impose counsel against his will and consent.
2. The Trial Chamber erred in addressing the issue as one of withdrawal of counsel rather than an issue of the right of the accused to self-representation. In particular it erred in making a ruling in terms of Rule 45(E) in deciding upon Mr Bao's application to defend himself, since this provision addresses the situation where counsel has applied to withdraw from the proceedings, rather than the situation where the accused applies to defend himself. Rule 45(E) therefore deals with the right of counsel to withdraw, and is limited in its scope of regulation of the relationship between counsel and the Court, and is not concerned with the rights of the accused, which are addressed in Article 17 of the Statute and Rules 26 *bis*, 42 and 61 of the Rules of Procedure and Evidence.
3. The Trial Chamber erred in ruling on Mr Bao's application before hearing from counsel for the accused on the appropriate course to be taken having

regard to Mr Bao's statement that he did not wish legal representation. Counsel for Mr Bao must be heard both because they continue to represent the interests of the accused until otherwise ordered by virtue of the principle of regularity, and because they are personally affected by the Order of the Court. Counsel for co-accused must be heard because the interests of their clients are affected by the manner of representation for the co-accused.

4. The Trial Chamber erred in making an Order which provides for a solution to Mr Bao's request to represent himself which differed significantly from the Order made in response to Mr Hinga Norman's request to represent himself in the CDF Trial,³ without setting out its basis for distinguishing between the two situations. In one case, that of Norman, the right to self-representation was accorded with qualification. In the other case, that of Bao, the right to self-representation was denied. In both cases the accused had indicated that they did not wish to be represented by counsel and in both cases the constitutionality or legality of the Special Court for Sierra Leone respectively was raised by the accused in their purported opening statements. In both cases, the issue of representation was being raised by the accused rather than a formal application from counsel to withdraw. It is therefore respectfully submitted that the Trial Chamber's Order violates Article 17(1) of the Special Court Statute which provides for the equality of accused before the Special Court for Sierra Leone, and compromises the consistency of the jurisprudence without express justification, such essential to the fairness of the trial and the effective preservation of the principle of legality.

Andreas O'Shea



John Cammegh

Ben Holden



³ *Prosecutor v Sam Hinga Norman, Moinina Fofana and Allieu Kondewa*, Case No SCSL-04-14-T, Decision on the Application of Samuel Hinga Norman for Self Representation under Article 17(4)(d) of the Statute of the Special Court of 8th June 2004.