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SCSL-2004-15-T
(8051-8057)

8051

IN THE SPECIAL COURT FOR SIERRA LEONE

THE APPEAL CHAMBER

Before: Judge Emmanuel Ayoola, Presiding
Judge Renate Winter
Judge George Gelaga King
Judge Raja Fernando

Registrar: Mr Robin Vincent

Date filed: 1st September 2004

Case No. SCSL 2004 – 15 – T

In the matter of:

THE PROSECUTOR

Against

**ISSA SESAY
MORRIS KALLON
AUGUSTINE BAO**

**NOTICE AND GROUNDS OF APPEAL OF DECISION ON WITHDRAWEL OF
COUNSEL OF 6 JULY 2004**

Office of the Prosecutor

Mr Desmond de Silva QC, Deputy Prosecutor
Mr Luc Cote, Chief of Prosecutions

Mrs Leslie Taylor

For Morris Kallon

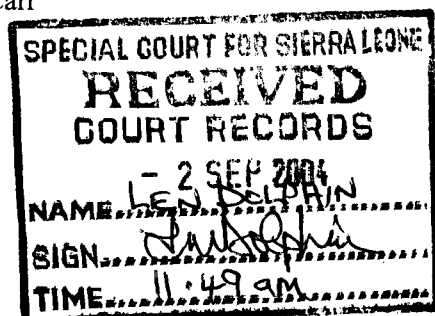
Mr Sekou Touray
Mr Raymond Brown
Mrs Wanda Brown

For Augustine Gbao

Girish Thanki
Andreas O'Shea
John Cammegh
Kenneth Carr

For Issa Sesay

Timothy Clayson
Wayne Jordash



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NOTICE OF APPEAL

1. Counsel for Augustine Bao hereby respectively give notice of appeal of the Trial Chamber's Decision on Application to Withdraw Counsel of 6 July 2004.
2. Annexed hereto are the Appellants Grounds of Appeal.

Andreas O'Shea

1st September 2004

GROUNDS OF APPEAL

GROUND 1: Application of the incorrect rule and test

1. The Trial Chamber erred in addressing the issue before it as one of withdrawal of counsel rather than an issue of the right of the accused to choose whether to have counsel. In particular, it erred in making a ruling in terms of Rule 45(E) in deciding upon Mr Bao's application to dispense with the services of his lawyers and/or 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 not to have counsel. 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 with respect to counsel, which are addressed in Article 17 of the Statute and Rules 26 *bis*, 42 and 61 of the Rules of Procedure and Evidence.

2. The Trial Chamber therefore erred in applying the incorrect test, not recognising that the test to be applied when considering the question whether counsel may withdraw from a case or whether an accused may choose to have or not to have counsel are necessarily and should be quite different.

GROUND 2: Failure to take into account the right to defend oneself and the right and/or the right not to have counsel.

3. Further, the Trial Chamber erred in not having regard to the right to defend oneself and/or the right not to have counsel, as well as the fundamental nature of that right(s). The trial chamber referred to the right to have counsel, but did not acknowledge the right clearly implied the right not to have counsel. Further, it failed to have any regard to the preceding sentence of Article 17 which refers to the right to defend oneself. The Trial Chamber erred in failing to recognise that the right to choose whether to have representation is a

fundamental and therefore subject to the most exceptional limitation only in order to put into place measures to protect the ends of justice. The Trial Chamber therefore failed to have any regard to the fundamental nature of the right or even to consider the extent to which the right was fundamental or a minimum guarantee. This is evident from the failure to refer to the right not to have counsel at all or its fundamental nature, the failure to refer to the fundamental nature of the right to counsel or the right to self-representation, and the treatment of the test for affording such right as equivalent to the test for withdrawal of counsel under Rule 45(E).

GROUND 3: Failure to apply the principles of necessity and proportionality in deciding on the appropriate measure to protect the proceedings

4. Further and or in the alternative, the Trial Chamber failed to apply measures which were necessary and proportional only for the protection of a fair trial and the integrity of the proceedings, without denying the accused his freedom to dispense with representation. The Trial Chamber failed to consider other options proportional to the situation such as to appoint counsel as *amicus* or 'stand-by' counsel to act on behalf of the Court rather than the accused, in the interests of preserving the fairness of the trial.
5. The Trial Chamber failed to have regard to the unnecessary and potentially damaging consequences of imposing counsel on the accused in a manner which created the fiction that he is properly represented. It therefore failed to take in account how its decision would affect its own role towards an effectively unrepresented accused, the position in which it would place counsel for the accused, the potentially hostile relationship which may result between the client and the lawyer, because the client's wishes are being ignored, possibility of the accused playing the lawyer off against the court by virtue of the fiction that the lawyer may be acting on instructions, as well as preventing the accused from taking his own active part in the proceedings such that no-one is in a position to put the accused defence to the Court.

6. The Trial Chamber failed to consider other mechanisms by which all these undesirable consequences could be avoided, and in particular the possibility of appointing a lawyer on behalf of the court directly rather than on behalf of the accused directly so that the lawyer's role is more clearly defined for all concerned, the lawyer himself, the court, the accused and the prosecution.

GROUND 4: Failure to hear counsel for the accused before ruling on the issue

7. 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.
8. The Chamber failed to recognise that it cannot assess what is effectively in the best interests of the trial without hearing counsel for the accused since there are relevant factors peculiarly within the knowledge of counsel.

GROUND 5: Imposition or dismissal of counsel not properly within the judicial province

9. The Trial Chamber's decision is wrongly premised on the understanding that the issue of the appointment, assignment, or dismissal of counsel to an accused is a matter within the judicial province. The Trial Chamber therefore fails to consider that it is a matter first of all within the discretion of the accused, second a matter for the discretion of counsel having regard to his professional duties and ethics, and finally for the principal defender.

10. The Trial Chamber fails to consider that the lawyer client relationship is no more a matter within the judicial province than the appointment and dismissal of prosecution counsel within the Prosecutor's Office. It therefore fails to have regard to the principle of equality of arms, which may be violated where judges purport to have power over the relationship between client and lawyer, but not over the relationship between Prosecutor and prosecution counsel.

GROUND 6: Irrationality and inequality of treatment in departing from decision in case of another accused

11. 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,¹ 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.

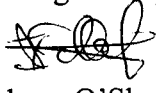
¹ *Prosecutor v Sam Hinga Norman, Moinina Fofana and Allieu Kondewa*, Case No SCSL-04-14-T, Decision on the Application of Samuel Hinga Norman for Self Representation under Article 17(4)(d) of the Statute of the Special Court of 8th June 2004.

GROUND 7: Irrationality in requiring the impossible

12. The Trial Chamber fails to take into account that the notion of representation necessarily entails authority and instructions. Without either, counsel cannot be said to be representing an accused person. The idea of representation is that the court is appraised of the defence through the representative and this assumes the capacity to undertake this task. The Order to counsel to continue to represent the accused even in the absence of authority and instructions to do so from the client is therefore requiring counsel to do the impossible.

GROUND 8: Failure to have regard to the misleading impression which might be created for the public

13. Further, the Trial Chamber failed to take into account that the pretence that the accused is properly represented pulls a mask over the reality of the situation to the general public.

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Andreas O'Shea

Counsel for Augustine Bao

1st September 2004