

THE SPECIAL COURT FOR SIERRA LEONE

CASE NO.: SCSL-04-14-PT
APPEALS CHAMBER

THE PROSECUTOR
OF THE SPECIAL COURT
v.
SAM HINGA NORMAN
MOININA FOFANA
ALLIEU KONDEWA

26 MAY 2004
1012H
MOTION

Before the Judges:

George Gelaga King, Presiding
Emmanuel Ayoola
A Raja N. Fernando

For the Registry:

Ms. Maureen Edmonds

For the Prosecution:

Mr. Desmond de Silva, QC
Dr. Walter Marcus-Jones
Mr. Jim Johnson

For the Accused Samuel Hinga Norman:

Mr. James Blyden Jenkins-John
Mr. Sulaiman B. Tejan-Sie

For the Accused Moinina Fofana:

Ms. Simone Monasebian
Mr. Ibrahim Yilla

For the Accused Allieu Kondewa:

(Absent)

Court Reporter:

Ms. Gifty C. Harding

P R O C E E D I N G S

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MS. EDMONDS:

All persons having anything to do before the Special Court Appeal Chamber draw near and give your attendance.

Special Court for Sierra Leone 2004-14-PT, Prosecutor vs. Fofana, motion for production of documents and adjournment of proceedings.

Interpreter, please take your oath.

(Interpreter sworn)

MR. PRESIDENT:

Call the motion, the last one for -- asking for production of documents and extension of time. All right.

Now, there was a motion filed on behalf of Fofana for production of documents and adjournment of proceedings. Who represents Fofana? Can we have your representation in the first place?

MR. DE SILVA:

May it please the Court. I appear for the Prosecution in this case, together with my learned friends Dr. Walter Marcus-Jones and Mr. Jim Johnson. The Defendant Fofana's interest will be looked after this morning by Ms. Simone Monasebian and Mr. Ibrahim Yilla.

Can I say on behalf of the Prosecution at the very outset that -- and I can certainly give my reasons of course if I'm required to do so, that this is a purported motion which we would invite this court to strike down.

MR. PRESIDENT:

Yes, madam.

MS. MONASEBIAN:

Yes, Your Honours, if I may. I am Simone Monasebian, the Principal Defender for the Special Court, and I thank Your Honours for giving me an opportunity to address this matter.

Mr. Pestman, lead counsel for Mr. Fofana has not been able to appear today and asks the Court to forgive him for not being able to appear. Local counsel Mr. Bockarie is in Bo and also unable to appear, so I find myself forced to advocate on their behalf, although it may have to be in a limited manner, as Your Honours may see in a few moments.

First let me just note, Your Honours, that it is Mr. Fofana's counsel's position that he indeed was a party to this motion, and being a party to this motion he should have been served various confidential filings which I will not discuss. What I can tell Your Honours is that he has only received the first of

1 this set of confidential filings. It is his position that absent having received all of them he cannot be in
2 a position to appear for oral argument and he cannot be in a position to provide the Court with any
3 information that may be in his client's interest.

4
5 I have, Your Honours, read those confidential documents and I will not argue on the basis of what I
6 know to be in them. What I would say, Your Honours, is that we know that in the practice directive,
7 which I'm sure that my learned counsel the Deputy Prosecutor will refer to in a few moments, is it
8 intended that all parties receive documents, all documents in a case. I do acknowledge that there are
9 times when the Court has the inherent power to limit the documents from a complete distribution, but
10 normally that would be in the case where it may not be given to one party, that being the Prosecutor
11 or the Defence, because it's an *ex parte* application.

12
13 In this instance, it's Mr. Fofana's lawyer's claim that there was no reason that he would not be given
14 those other documents and that if he were not to be given those documents he should have been
15 given some opportunity to be heard as to why he was diverse to that opportunity before the result
16 occurred and he only learnt about it after hand -- afterwards.

17
18 What I would also ask Your Honours is, I know that learned counsel for the Prosecution would say
19 that the document was not properly signed, that although Mr. Pestman's name appears on the cover
20 page of the document and in one of the two instances, also appears typed on the back page of the
21 document -- of the motion, that his name was not signed. And this is something that I and the deputy
22 Prosecutor have discussed before and I know that he will bring to your attention that the practice
23 directive, Article 7, provides that all documents had to have on the cover page date -- on the cover
24 page the date that it was signed and submitted for filing

25
26 I note, Your Honours, that it says, "All documents have to have on the cover page" -- the word being
27 used is "have to have". So, I know that the Prosecution will argue there was no signature and so Your
28 Honours don't have an appropriate motion on the Fofana team before them. But what I would say is
29 this: If Your Honours look at No. 7, point No. 7 of the practice directive, it says only that the document
30 "should be signed". In No. 1 of Article 7 it says certain things that are required, "all documents have
31 to have a date on it". Numbers 1 through 6 -- or, rather, bullet points 1 through 6 under Article 7
32 sub-section 1 has the word "have". Yet when we get to No. 7, the word "should" is being used. That
33 being the case that a document, according to the Registrar's practice directive, should be signed with
34 a clear indication of the name of the person who signed it.

35 MR. PRESIDENT:

36 Has he signed it in bold letters -- in capital letters?
37

1 MS. MONASEBIAN:

2 He has not signed it.

3 MR. PRESIDENT:

4 I see the word "signed" is in capital letters in 7; that is of some significance, isn't it?

5 MS. MONASEBIAN:

6 I would say that there is an intention to alert the parties that signing is important by putting it in
7 capitals, but I also say that word -- the word "should" is used and I think that counsel who are already
8 here would argue that Your Honours look at the word "should" in conjunction with the capitalising, but
9 nevertheless, give him the opportunity to have his motion heard.

10

11 What I would say is this: I cannot speak as to what was in counsel's mind for Mr. Fofana or for
12 Mr. Norman. I'm sure that Mr. Norman will address Your Honour -- Mr. Norman's counsel will address
13 Your Honours question in that regard.

14

15 All I can say to Your Honours --

16 MR. PRESIDENT:

17 That is if we call on him. That is if we call on him.

18 MS. MONASEBIAN:

19 Exactly, Your Honours.

20 MR. PRESIDENT:

21 It might not be necessary to call on him.

22 MS. MONASEBIAN:

23 Very well, that is correct, Your Honours, and that's why I used the word "if" but Your Honour is of
24 course correct about that.

25

26 The only other thing I can say to Your Honours is that I won't get into the merits of the proceedings I
27 just would ask that the motion be considered by the Court, that his request for an adjournment be
28 given serious consideration to which I know the Court will do, and that if he's given the opportunity to
29 see those confidential documents that Your Honours find it to be needed, that he then has the
30 opportunity, if need be, to reply in writing if not orally.

31

32 Thank you, Your Honours.

33 MR. PRESIDENT:

34 Before you sit down, are you aware of a communication from one of the counsel saying in fact that
35 they had signed on behalf of your client?

36 MS. MONASEBIAN:

37 Communication from counsel in the Norman team?

1 MR. PRESIDENT:

2 Mrs. Reiger, what document was that?

3

4 I'm informed that Ms. Quincy Whitaker sent a communication to the senior legal advisor to say that in
5 fact they not only signed for Norman, but she signed also on behalf of Fofana.

6 MS. MONASEBIAN:

7 I am indeed aware of an e-mail from Ms. Whitaker to the Senior Chambers Officer indicating when
8 Mr. Pestman complained that he was not on the agenda for today -- or for yesterday, rather, that Ms.
9 Whitaker saw that communication of Mr. Pestman and indeed immediately responded by saying that
10 when it was signed it was signed by our team on behalf of another team as well.

11

12 However, I will want to --

13 MR. PRESIDENT:

14 No, I just pointed that out to you.

15 MS. MONASEBIAN:

16 Yes, that is absolutely the case, Your Honour. I should also point out that Ms. Whitaker did not sign; it
17 is Mr. Sulaiman Tejan --

18 MR. PRESIDENT:

19 I know that. I have seen the signature. I am just saying are you aware of that communication.

20 MS. MONASEBIAN:

21 Absolutely, Your Honour, I am.

22 MR. PRESIDENT:

23 Thank you, very much. Thank you.

24

25 Mr. Banjan Tejan-Sie, do you have anything to say?

26 MR. TEJAN-SIE:

27 My Lord, except if you have questions -- safe that you do have questions for us, we do not wish to
28 comment.

29 MR. PRESIDENT:

30 Would you stand up, please.

31 MR. TEJAN-SIE:

32 Sorry. Sorry, My Lord. Except if you do have questions for us, we do not wish to comment on this.

33 MR. PRESIDENT:

34 Mr. Blyden Jenkins-Johnson?

35 MR. JENKINS-JOHNSON:

36 The same applies.

37

1 MR. PRESIDENT:

2 Mr. Desmond de Silva?

3 MR. DE SILVA:

4 Well, I think we have something to say here. I think this is a thoroughly impudent application
5 *(microphone not activated)* -- oh, I have to turn this on so others can hear too.

6
7 This is a thoroughly impudent application for a whole variety of reasons. It would be a very dangerous
8 precedent for this Court to start acting on motions unsigned by any member of a Defence team
9 whereby it is claimed in some curious way that some other member of some other team has signed to
10 cover the particular defendant in question. One can see a whole variety of dangers springing from
11 such lax conduct.

12
13 It would be our submission to this Court that this Court does not entertain applications of this kind, and
14 that's why I call the motion a purported motion. This is a motion for the production of documents and
15 the adjournment of proceedings which originate or suppose to originate in a motion which, in our
16 respectful submission, is not a proper motion. And I can demonstrate that in many ways.

17
18 Your Honour, the original motion was filed by mister -- by Chief Hinga Norman and those documents
19 the Court has before it. Can I invite the Court just to look at those documents? It's page 693 on the
20 top right-hand side.

21 MR. PRESIDENT:

22 Yes.

23 MR. DE SILVA:

24 Now, if you are -- if Your Honours were kind enough to go over to the first page of that motion,
25 page 694, the Court will see in paragraph 1 the introduction; it is submitted on behalf of Chief Samuel
26 Hinga Norman. The submission is on behalf of him. There is no suggestion that Fofana -- that
27 anything is being done on behalf of the Defendant Fofana.

28
29 If you go to paragraph 2, it reads: "The said preliminary motion was signed on the chief's behalf."
30 There is no mention of the Defendant Fofana. If the Court is kind enough then to go to page 703, the
31 final page of that motion, the Court will observe it is only being signed on behalf of the Defendant
32 Norman and not on behalf of the Defendant Fofana.

33
34 Now, this is meant to be the basis of this purported application. Now, this Court, as do other courts,
35 realising the importance attached to the way in which documents are to be filed, has produced
36 practice directions which this Court has been referred to.

37

1 Article 7 sub-article 7, on page 3 of the Practice Directions that the Court has, Article 7 -- sorry,
2 Article 7 sub-article 7 on page 3, as My Lord King quite rightly observed, the words "signed" are in
3 capitals for a very good reason: in order to make quite clear to those filing motions that there must be
4 attached to that motion or appended to that motion the signature of the name of that person who
5 signed it.

6
7 Now, I need hardly spell out the dangers that can flow from the sort of situation that could arise in this
8 case where you have an unsigned motion. Then when you look at the body of Chief Hinga Norman's
9 motion, there is no evidence on that that anything is being done on Mr. Fofana's behalf. When one
10 then goes to the reply that is filed in this matter on page 3 -- I'm sorry, it's on -- Your Honours would
11 probably have a reply on page 3252, that's the Hinga Norman reply, and the Court goes to the final
12 page at page 3255, there isn't a single member of Fofana's legal team who appears to feature there.

13
14 I was taken a bit aback when My Lord King said this morning that there was an e-mail from Quincy
15 Whitaker.

16 MR. PRESIDENT:

17 You were not aware of that?

18 MR. DE SILVA:

19 I am wholly unaware of it.

20 MR. PRESIDENT:

21 You were not served at all?

22 MR. DE SILVA:

23 I haven't been served with it. I was taken a little bit by surprise.

24
25 I'm told we were not copied on it.

26 MR. PRESIDENT:

27 You were not copied?

28 MR. DE SILVER:

29 No, we were not copied on it. Ms. Monasebian has been kind enough to tell me that we were not
30 copied.

31 MR. PRESIDENT:

32 Very well.

33 MR. DE SILVA:

34 So, it is a most extraordinary situation. And I'd just invite this Court to get up, as courts should, in our
35 respectful submission on behalf of the Prosecution, to make sure that the Rules that apply to matters
36 of this kind are strictly observed -- I'm so sorry, I --

1 MR. PRESIDENT:

2 The information she is trying to pass on to me is that she just consulted her e-mail and said that you
3 have a copy of this e-mail. She sent to you a copy.

4 MR. DE SILVA:

5 Well, none of us seemed to have received it, but --well, even on the assumption that it had come to
6 me in some way, it doesn't affect the basic principle of the Prosecution's approach to these matters.
7 It's a thoroughly unsatisfactory situation: a motion has not been properly brought; it's a motion that
8 tries to ride on the back of somebody else's motion. I can conceive of all manner of difficulties that
9 could arise where one defendant permits, as I have indicated --

10 MR. PRESIDENT:

11 Mr. Desmond de Silva, thank you very much. I think we've seen the point that you are making.

12 MR. DE SILVA:

13 Thank you, very much.

14 MR. PRESIDENT:

15 And the motion is dismissed.

16

17 Now we go to the substantive motion.

18 MS. MONASEBIAN:

19 Your Honours, if I just may seek one point of clarification.

20 MR. PRESIDENT:

21 No need now because we have dismissed it and we can go to the substantive motion.

22

23 Who is presenting this motion?

24 MR. DE SILVA:

25 May it please Your Lords. I appear for the Prosecution again, together with Mr. Marcus-Jones and my
26 learned friend Mr. Jim Johnson. The Defendant Norman, he is represented by my learned friends Mr.
27 James Blyden Jenkins-Johnson and Mr. Tejan-Sie.

28 MR. PRESIDENT:

29 Thank you.

30

31 Mr. Tejan-Sie, yes.

32 MR. TEJAN-SIE:

33 May it please you, My Lord. Your Lordship has in a bundle a document, an agreement signed by my
34 lead counsel and the Deputy Prosecutor, Desmond de Silva, QC. My Lord, we rely on this document
35 in its entirety and would refer in particular to paragraphs 1 through paragraph 3 of that document.

36 MR. PRESIDENT:

37 Signed by?

1 MR. TEJAN-SIE:

2 Signed by Mr. Desmond de Silva and Mr. Blyden Jenkins-Johnson, lead counsel for the Norman
3 team.

4

5 The essence of that agreement --

6 MR. PRESIDENT:

7 You say paragraphs what?

8 MR. TEJAN-SIE:

9 Paragraphs 1 through to 3, My Lord, and the essence of that application --

10 MR. PRESIDENT:

11 One to?

12 MR. TEJAN-SIE:

13 Three, My Lord. The essence Your Lordships will see on this agreement is to rest on our written
14 submissions and not to comment on observations already filed as confidential documents before this
15 Court.

16

17 Except Your Lordships have any further questions, this is all we have to say.

18 MR. PRESIDENT:

19 I thank you for the dignified way in which you've responded.

20 MR. TEJAN-SIE:

21 Much obliged, My Lord.

22 MR. PRESIDENT:

23 Right. Mr. Desmond de Silva?

24 MR. DE SILVA:

25 *(Microphone not activated)* we hope that this Court finds it a dignified way forward and we rely on our
26 written submissions.

27 MR. PRESIDENT:

28 Well, I want to thank you very much, both of you for your cooperation in this matter and the dignified
29 way you have handled it.

30

31 We are going to adjourn at this stage and we'll inform you of the date for the decision.

32 MR. DE SILVA:

33 As Your Lordship pleases.

34 *(Court adjourned at 1038H)*

35 *(Pages 1 to 8 by Gifty C. Harding)*

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CERTIFICATE

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

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

_____ Gifty C. Harding