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SCSL-04-14-T
(12453 – 12470)

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SPECIAL COURT FOR SIERRA LEONE
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IN THE APPEALS CHAMBER

Before: Justice Emmanuel Ayoola, Presiding
Justice Raja Fernando
Justice Geoffrey Robertson

Registrar: Robin Vincent

Date: 11 March 2005

PROSECUTOR Against Samuel Hinga Norman
Moinina Fofana
Allieu Kondewa
(Case No.SCSL-04-14-AR65)

FOFANA - APPEAL AGAINST DECISION REFUSING BAIL

Office of the Prosecutor

(Respondent):
David Crane
Luc Côté
Desmond de Silva

Defence Counsel for Sam Hinga Norman:

Bu-Buakei Jabbi

Defence Counsel for Moinina Fofana (Appellant):
Michiel Pestman
Arrow J. Bockarie
Victor Koppe

Defence Counsel for Allieu Kondewa:
Charles Margai

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3. The Best Evidence Rule

21. Any decision to grant or deny bail will involve the most anxious consideration of questions which are not susceptible of proof but rather turn on substantial grounds for belief. Whether there is a real risk that the defendant will flee or intimidate witnesses or commit further offences calls for a calculation of odds based on all the inferences, arguments and evidential materials that the parties can muster. Frequently they will produce hearsay statements, or speculative opinion by persons who know the defendant or are involved with the Prosecution or its witnesses. The weight accorded to such evidential material will vary and will often depend on whether it can be tested by cross-examination or at least by forensic argument. But strict rules of evidence are inherently inappropriate to a court which must decide whether there are substantial grounds for believing something.[13]

22. Rule 89 of the Rules, which is not restrictive in its provisions, is applicable in an application for bail as it is in a trial by the Trial Chamber. That rule provides:

A. The rules of evidence set forth in this Section shall govern the proceedings before the Chambers. The Chambers shall not be bound by national rules of evidence.

B. In cases not otherwise provided for in this Section a Chamber shall apply rules of evidence which will best favour a fair determination of the matter before it and are consonant with the spirit of the Statute and the general principles of law.

C. A Chamber may admit any relevant evidence.

23. The evidence which best favours the fair determination of a bail application is evidence of guarantees offered by the defendant that he will attend trial and pose no danger to others. All relevant evidential material should be considered so the court can build up the fullest possible picture of the defendant's conduct and intentions if released. Although the probative value of particular items in isolation may be minimal, the very fact that they have some relevance means that they must be available for counsel to weave into argument and for the Judge to have before him in deciding what to make of the overall factual matrix.

24. The so-called "best evidence rule" is an anachronism. It was developed in a pre-industrial age when copying was done by hand and, given the risk of transcription errors, the courts required to see the handwritten originals. The rule has no modern application other than to require a party in

[13] See *R E Moles*, 1981, Crim Law LR 170 and *R v Mansfield Justices Ex Parte Sharkey* (1985) QB613.

possession of the original document to produce it.[14] If the original is unavailable then copies may be relied upon - the rule has no bearing at all on the question of whether an unsigned statement or submission is admissible. If relevant, then under Rule 89(C) they may (and in bail applications, should) be admitted, with their weight to be determined thereafter. There is no rule that requires, as a precondition for admissibility, that relevant statements or submissions must be signed. That may be good practice, but it is not a rule about admissibility of evidence. Evidence is admissible once it is shown to be relevant: the question of its reliability is determined thereafter, and is not a condition for its admission.[15]

25. It follows that the Judge made an error of law in refusing to admit the statement of Ms Fortune, who had attended court to give evidence on the previous hearing but had been unable to sign her statement because she was overseas. The Judge held in terms that both the Fortune statement and the Sierra Leone government submission were relevant but;

> I am not minded to favourably invoke the provisions of Rule 89(C) to accept these two documents which are unauthenticated and therefore unreliable. I accordingly exclude them from impacting on the substantive determination of this matter.[16]

The fact that a statement is unauthenticated does not make it necessarily unreliable - especially where the identity of its maker and the fact that she made it are not in dispute. The fact that both documents were relevant meant that they should both have been admitted, for what they were worth when their probative value could be assessed in the context of all the other evidential material.

26. Rule 89(C) ensures that the administration of justice will not be brought into disrepute by artificial or technical rules, often devised for jury trial, which prevent judges from having access to information which is relevant. Judges sitting alone can be trusted to give second hand evidence appropriate weight, in the context of the evidence as a whole and according to well-understood forensic standards. The Rule is designed to avoid sterile legal debate over admissibility so the court can concentrate on the pragmatic issue of whether there is a real risk that the defendant will not attend the trial or will harm others.

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[14] See Richard May, *Criminal Evidence*, 3rd Edition (1995), p24; *Garton v Hunter* 1969 (2QB 37); Sapinka et al *The Law of Evidence in Canada*, 2nd Edition (Butterworths 1999), Chapter 18.6.

[15] See *Prosecutor v Zejnil Delalic, Zdravko Mucic et. al*, Decision on the Motion of the Prosecutor for the Admissibility of Evidence, International Criminal Tribunal for Yugoslavia (ICTY), para 19: "it is neither necessary or desirable to add to the provisions of sub-Rule 89(C) a condition of admissibility which is not expressly prescribed by that provision."

[16] Bail Decision, Paragraph 58.