

O

SPECIAL COURT FOR SIERRA LEONE

TRIAL CHAMBER II

Before: Justice Teresa Doherty, Presiding Judge
Justice Richard Lussick
Justice Julia Sebutinde
Justice El Hadji Malick Sow, Alternate Judge

Registrar: Herman von Hebel

Case No.: SCSL-03-1-T

Date: 5 September 2008

PROSECUTOR

v.

Charles Ghankay TAYLOR

DECISION ON PUBLIC PROSECUTION MOTION FOR LEAVE TO CALL TF1-036 TO GIVE EVIDENCE-IN-CHIEF & CROSS-EXAMINATION *VIVA VOCE*

Office of the Prosecutor:

Brenda J. Hollis
Leigh Lawrie

Defence Counsel for Charles G. Taylor:

Courtenay Griffiths, Q.C.
Terry Munyard
Andrew Cayley
Morris Anyah

TRIAL CHAMBER II (“Trial Chamber”) of the Special Court for Sierra Leone (“Special Court”);

SEISED of the “Public Prosecution Motion for Leave to Call TF1-036 to Give Evidence-In-Chief & Cross-Examination *Viva Voce*”, filed on 17 July 2008 (“Motion”),¹ wherein the Prosecution requests that it be permitted to call Witness TF1-036 to give evidence entirely *viva voce*,² instead of presenting the evidence of the witness partly through the admission of prior transcripts and related exhibits from the RUF trial;³ submitting that in order to expedite the trial such a variation would (1) achieve efficiency and (2) that because of recent evidentiary developments in the case which were not covered in the prior transcripts,⁴ the Prosecution has determined that it has to adduce additional information through live testimony and fresh examination-in-chief of Witness TF1-036;

NOTING the “Public Defence Response to Prosecution Motion for Leave to Call TF1-036 to Give Evidence in Chief and Cross-Examination *Viva Voce*”, filed on 11 August 2008 (“Response”),⁵ wherein the Defence opposes the Prosecution Motion⁶ on the basis that (1) the issue is *res judicata*,⁷ (2) the Prosecution has not established any legal basis for its Motion,⁸ and (3) there are other alternatives available to the Prosecution which comport with the prior Trial Chamber’s decision;⁹

NOTING the “Public Prosecution Reply to Defence Response to Prosecution Motion For Leave To Call TF1-036 To Give Evidence In Chief and Cross Examination *Viva Voce*”, filed on 13 August 2008 (“Reply”),¹⁰ wherein the Prosecution submits (1) that the Defence misapplies the concept of *res judicata*¹¹ and (2) that the Prosecution bears the burden of proof and therefore a change in the means by which evidence is to be presented is properly a matter of prosecutorial discretion;¹²

RECALLING the Trial Chamber’s “Decision on Prosecution Notice under Rule 92*bis* for the Admission of Evidence Related to *Inter Alia* Kenema District And on Prosecution Notice under Rule 92*bis* for the Admission of the Prior Testimony of TF1-036 into Evidence”, dated 15 July 2008, wherein the Trial Chamber granted the Prosecution request to admit prior trial transcripts and related exhibits to the testimony of TF1-036 into evidence pursuant to Rule 92*bis* of the Rules of Procedure and Evidence (“Rules”) provided that the Prosecution make the said Witness available for cross-examination by the Defence (“Rule 92*bis* Decision”);¹³

¹ SCSL-03-01-T-558.

² Motion, para. 6.

³ SCSL-03-01-T-556, Decision on Prosecution Notice under Rule 92*bis* for the Admission of Evidence Related to *Inter Alia* Kenema District and on Prosecution Notice under Rule 92*bis* for Admission of the Prior Testimony of TF1-036 into Evidence, 15 July 2008.

⁴ Motion, para. 5.

⁵ SCSL-03-01-T-562.

⁶ Response, paras 7, 16.

⁷ Response, paras 8-10.

⁸ Response, paras 11-14.

⁹ Response, para. 15.

¹⁰ SCSL-03-01-T-565.

¹¹ Reply, paras 2, 3.

¹² Reply, paras 4, 5.

¹³ SCSL-03-01-T-555, Decision on Prosecution Notice under Rule 92*bis* for the Admission of Evidence Related to *Inter Alia* Kenema District And on Prosecution Notice under Rule 92*bis* for the Admission of the Prior Testimony of TF1-036 into Evidence, 15 July 2008, p. 6.

RECALLING the "Prosecution's Amended Witness List", filed on 7 February 2008 ("Amended Witness List"), wherein Witness TF1-036 is listed as a "Core Predominantly Linkage Witness" to be called pursuant to Rule 92bis;¹⁴

COGNISANT of Rules 73bis, 85, 89, 90, and 92bis of the Rules;

NOTING in particular Rule 73bis which provides, in relevant part:

Rule 73 bis: Pre-Trial Conference (amended 29 May 2004, 13 May 2006 and 24 November 2006)

(B) Prior to the Pre-Trial Conference the Trial Chamber or a Judge designated from among its members may order the Prosecutor, within a time limit set by the Trial Chamber or the said Judge, and before the date set for trial, to file the following:

[...]

(iv) A list of witnesses the Prosecutor intends to call with:

- (a) The name or pseudonym of each witness;
- (b) A summary of the facts on which each witness will testify;
- (c) The points in the indictment on which each witness will testify; and
- (d) The estimated length of time required for each witness;

(E) After the commencement of the Trial, the Prosecutor may, if he considers it to be in the interests of justice, move the Trial Chamber for leave to reinstate the list of witnesses or to vary his decision as to which witnesses are to be called.

CONSIDERING the Defence submission that the issue raised is *res judicata* as the Trial Chamber previously granted the Prosecution request to submit prior trial transcripts and related exhibits to the testimony of TF1-036 into evidence pursuant to Rule 92bis and that the Motion amounts to an attempt "to go back on that decision", and the Prosecution's reply, submitting that the Prosecution does *not* request the Trial Chamber to reconsider its Rule 92bis Decision, i.e. the admission of the prior trial transcripts and related exhibits, and that the issue raised in the Motion has not been litigated before the Trial Chamber;¹⁵

FINDING that the Defence submissions on the question of whether the issue raised is *res judicata* are without merit, and there is no identity of issues between those raised in the Motion and those settled in the Rule 92bis Decision. The Rule 92bis Decision dealt with a request to admit prior trial transcripts and related exhibits in relation to Witness TF1-036. The Motion, however, deals with a different issue, being a request to present the evidence of Witness TF1-036 *viva voce* as opposed to the presentation of his evidence through prior trial transcripts and exhibits, as previously indicated in the Amended Witness List;

NOTING that Rule 73bis of the Rules does not obligate the Prosecution to file an indication of the method of presentation of the evidence in its Pre-trial conference material and further that the

¹⁴ SCSL-03-01-T-410, Prosecution's Amended Witness List, 7 February 2008 ("Amended Witness List").

¹⁵ Reply, para. 2.

jurisprudence of the Special Court permits the Prosecution to move witnesses from its “back-up” to “core” witness list without seeking leave of the Trial Chamber, if such variation does not prejudice the Defence in its trial preparation;¹⁶

CONSIDERING THEREFORE that it falls within the discretion of the Prosecution to present its case through live witness testimony;

NOTING FURTHER that the Defence has previously complained, in relation to an application to adduce evidence through Rule 92*bis*, that the Accused would be deprived of a public hearing by such a procedure¹⁷ and, furthermore, that the Defence has not demonstrated how it would be prejudiced by the presentation of live testimony in the present case;

FINDING THEREFORE that the Prosecution has the liberty to choose the method of its presentation of evidence and may choose to change such method of presentation, and that the Defence is not prejudiced in the instant case since it will have the right to cross-examine the witness;

FOR THE ABOVE REASONS

GRANTS the Motion.

Done at The Hague, The Netherlands, this 5th day of September 2008.

Justice Richard Lussick

Justice Teresa Doherty
Presiding Judge

Justice Julia Sebutinde

[Seal of the Special Court for Sierra Leone]

¹⁶ *Prosecutor v. Sesay, Kallo, Gbao*, SCSL-04-15-T, Decision Regarding the Prosecution’s Further Renewed Witness List, 5 April 2005, paras 30, 31.

¹⁷ See SCSL-03-01-T-391, Public Defence Response to Prosecution Motion for Admission of Part of Prior Evidence of TF1-362 & TF1-371 Pursuant to Rule 92*ter*, 14 January 2008, para. 12.