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SCSL-03-01-1
(19297 - 19300)

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SPECIAL COURT FOR SIERRA LEONE

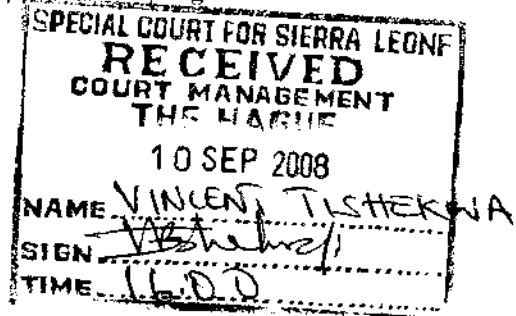
TRIAL CHAMBER II

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: 10 September 2008



PROSECUTOR

v.

Charles Ghankay TAYLOR

DECISION ON CONFIDENTIAL PROSECUTION APPLICATION FOR
LEAVE TO APPEAL DECISION TO VARY THE PROTECTIVE MEASURES OF TF1-168

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 “Confidential Prosecution Application for Leave to Appeal Decision to Vary Protective Measures of TF1-168”, filed on 20 June 2008 (“Motion”),¹ wherein the Prosecution seeks leave to appeal an oral decision of the Trial Chamber rendered on 18 June 2008 (“Impugned Decision”)² on the grounds that i) the Trial Chamber erred in failing to apply the proper test to vary protective measures for Witness TF1-168;³ ii) this error involves exceptional circumstances because it relates to the serious issue of witness protection;⁴ and, iii) this error results in irreparable prejudice to the Prosecution because a key witness is no longer willing to testify to core issues at trial;⁵

NOTING the “Confidential Defence Response to ‘Prosecution Application for Leave to Appeal Decision to Vary the Protective Measures of TF1-168’”, filed on 30 June 2008 (“Response”),⁶ wherein the Defence argues that the Prosecution has failed to meet the threshold for granting leave to appeal pursuant to Rule 73(B) of the Rules and that therefore the Motion should be denied;⁷

NOTING FURTHER the “Public Prosecution Reply to ‘Confidential Defence Response to Prosecution Application for the Leave to Appeal Decision to Vary the Protective Measures of TF1-168’”, filed on 3 July 2008 (“Reply”),⁸ wherein the Prosecution submits i) that it has demonstrated that its request for leave to appeal is based on exceptional circumstances;⁹ ii) that the Trial Chamber made a clear error of law;¹⁰ and, iii) that as a result of the Trial Chamber’s Decision the Prosecution was not able to call a key witness resulting in irreparable prejudice to the Prosecution;¹¹

RECALLING the “Urgent and Confidential with Confidential Annexes A, B, C and D Defence Motion Pursuant to Rule 75 (G) to Rescind Closed Session Protective Measures Granted Orally in Other Proceedings for Witness TF1-168”;¹² the response and reply thereto¹³ as well as the additional oral submissions of the parties;¹⁴

RECALLING in particular the oral submissions of the Prosecution that:

“Your Honours, if I could beg your indulgence, one matter of law. We did not make an application for closed session for this witness. This is an existing order. So what is being considered is rescission and the burden is not on us to show lesser measures. The burden is on the Defence to show changed circumstances.”¹⁵

¹ SCSL03-01-T-544.

² Transcript 18 June 2008, pp. 12144-12145.

³ Motion paras 9, 10.

⁴ Motion, paras 9, 11-13.

⁵ Motion, paras 15, 16.

⁶ SCSL03-01-T-548.

⁷ Response, para. 16.

⁸ SCSL03-01-T-552.

⁹ Reply, para. 6.

¹⁰ Reply, paras 3, 4.

¹¹ Reply, para. 7.

¹² SCSL03-01-T-533.

¹³ SCSL03-01-T-537; SCSL03-01-T-538.

¹⁴ Transcript, 17 June 2008, pp. 12039-12043.

¹⁵ See submission of Ms. J. Hollis, Transcript 17 June 2008, p. 12041, ln 16-21.

And the response thereto of the Presiding Judge that the Trial Chamber “was aware” of that burden;¹⁶

RECALLING that in the interests of justice the Defence application in relation to Witness TF1-168 was resolved urgently by way of oral decision as the witness was about to testify;¹⁷

RECALLING the Oral Decision of 18 June 2008 (“Impugned Decision”) where the Trial Chamber held:

By a majority, Justice Doherty dissenting, we partly allow the motion and vary the existing protective measures so that instead of an entirely closed session the following measures will, in the opinion of the Trial Chamber, strike a proper balance between the rights of the accused and the security of the witness; i.e. continued use of a pseudonym, voice distortion, image distortion, screening from the public, private sessions whenever necessary and those other protective measures concerning dissemination of information about the witness which are presently in place;¹⁸

MINDFUL of Rules 26bis, 54, 73 (B) and 75 of the Rules of Procedure and Evidence (“Rules”);

NOTING that Rule 73(B) provides that:

Decisions rendered on such motions are without interlocutory appeal. However, in exceptional circumstances and to avoid irreparable prejudice to a party, the Trial Chamber may give leave to appeal. Such leave should be sought within 3 days of the decision and shall not operate as a stay of proceedings unless the Trial Chamber so orders.

NOTING therefore that Rule 73(B) does not confer a general right of appeal, but rather that leave to appeal may be granted by the Trial Chamber only in cases where the conjunctive conditions of exceptional circumstances and irreparable prejudice to a party are both satisfied;

CONSIDERING that the overriding legal consideration in respect of an application of this nature is that the applicant’s case must reach a level nothing short of exceptional circumstances and irreparable prejudice, having regard to the restrictive nature of Rule 73(B) and the rationale that criminal trials must not be heavily encumbered and, consequently, unduly delayed by interlocutory appeals;¹⁹

RECALLING the Appeals Chamber ruling that:

In this Court, the procedural assumption is that trials will continue to their conclusion without delay or diversion caused by interlocutory appeals on procedural matters, and that any errors which affect the final judgement will be corrected in due course by this Chamber on appeal;²⁰

¹⁶ Transcript 17 June 2008, p 12041, ln 22.

¹⁷ Transcript 18 June 2008, pp. 12144, ln 29 – p. 12145, ln 13. See also SCSL-03-01-T-535, Order for Expedited Filing in Relation to Defence Motion SCSL-03-01-T-533, 10 June 2008.

¹⁸ Transcript 18 June 2008, pp. 12144-12145.

¹⁹ See *Prosecutor v. Sesay et al.*, SCSL-2004-15-PT, Decision on the Prosecutor’s Application for Leave to File an Interlocutory Appeal Against the Decision on the Prosecution Motion for Joinder, 13 February 2004.

²⁰ See *Prosecutor v. Norman et al.*, SCSL-2004-14-AR73, Decision on Amendment of the Consolidated Indictment, 16 May 2005, para. 43.

CONSIDERING that although owing to the urgency of the situation the Trial Chamber in its oral decision rendered in summary fashion, did not restate the standard that it had applied in reaching the conclusion that the varied protective measures would “strike a proper balance between the rights of the Accused and the security of the witness”, the Chamber was clearly aware of that standard when it arrived at the decision;²¹

SATISFIED HOWEVER, that the Prosecution has met the conjunctive conditions of exceptional circumstances in that the issue at stake relates to witness protection and irreparable prejudice in that the Impugned Decision has resulted in a key witness for the Prosecution becoming unwilling to testify as a result of the rescinded protective measures;²²

FOR THE ABOVE REASONS;

GRANTS the Motion.

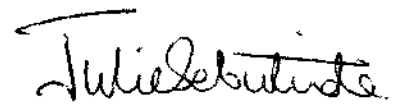
Done at The Hague, The Netherlands, this 10th day of September 2008.



Justice Richard Lussick



Justice Teresa Doherty
Presiding Judge



Justice Julia Sebutinde

[Seal of the Special Court for Sierra Leone]



²¹ Transcript 17 June 2008, p. 12041, ln 16-22.

²² *Prosecutor v. Brima, Kamara, Kanu*, SCSL-04-16-T-414, Decision on Prosecution Application for Leave to Appeal Decision on Oral Application for Witness TF1-150 to Testify without being Compelled to Answer Questions on Grounds of Confidentiality, 12 October 2005. The Defence referring to Decision SCSL-04-16-T-588 misstates the Trial Chamber’s jurisprudence, Response, para. 13.