1311) SCSL-04-15-A (5073-5081) 5073

SPECIAL COURT FOR SIERRA LEONE

IN THE APPEALS CHAMBER

Before: Justice Renate Winter, Pre-Hearing Judge

Acting Registrar: Binta Mansaray

Date: 5 August 2009

PROSECUTOR **Against** **ISSA HASSAN SESAY**
MORRIS KALLON
AUGUSTINE GBAO
(Case No. SCSL-04-15-A)

DECISION ON GBAO MOTION TO ADMIT ADDITIONAL EVIDENCE PURSUANT TO RULE 115

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I, Justice Renate Winter, Pre-Hearing Judge in this case,

BEING SEISED of the "Public Gbao Request under Rule 115 for Additional Evidence to be Admitted on Appeal," filed on 29 June 2009 (the "Motion");

CONSIDERING the "Public Prosecution Response to Gbao Request under Rule 115 for Additional Evidence to be Admitted on Appeal," filed on 8 July 2009 ("Response");

NOTING that Gbao has not filed submissions in reply;

HEREBY render this Decision on the Motion based on the written submissions of the Parties.

I. SUBMISSIONS OF THE PARTIES

1. Gbao seeks the admission on appeal of a part of the transcript of the testimony given by Witness TF1-314 on 20 October 2008 in the *Prosecutor v. Charles Ghankay Taylor* trial.[1] Gbao submits that this evidence came into existence "more than two months after the RUF case closed,"[2] and therefore was unavailable to him at trial.[3]

2. Gbao submits that admission of the evidence is in the interest of justice.[4] He contends the evidence shows that Witness TF1-314 lied under oath during the RUF Trial,[5] and as a result casts doubt on TF1-314's credibility.[6] Gbao seeks to have the evidence admitted "for the express limited purpose of challenging the veracity of the witness."[7] He argues that if the evidence is admitted and the Appeals Chamber finds that the Trial Chamber erred in finding Witness TF1-314 credible, then "the findings based on her evidence should be dismissed,"[8] which would support Grounds 5 and 6 of Gbao's Appeal challenging his convictions under Counts 7-9 in Kailahun District.[9]

3. The Prosecution opposes the Motion. It submits that even though both Gbao and the Trial Chamber were given the proposed additional evidence more than four months before the Trial Judgment was rendered, he neither sought to reopen the trial proceedings to add it to the trial record

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[1] Motion, paras 10, 15. *See Prosecutor v. Taylor*, Case No. SCSL-03-01-T, Transcript of 20 October 2008, TF1-314, pp. 18702, 18780-18783.
[2] Motion, para. 16.
[3] Motion, para. 16.
[4] Motion, para. 20.
[5] Witness TF1-314 testified during the RUF Trial on 2, 4 and 7 November 2005.
[6] Motion, para. 12.
[7] Motion, paras 15, 16. Prosecution disclosed the evidence to the Gbao Defence on 27 October 2008, Motion, paras 10, 15.
[8] Motion, paras 12, 13, 14.
[9] Motion, paras 11, 17.

nor to make submissions. Therefore, Gbao fails to show that the proposed evidence was unavailable at trial.[10]

4. The Prosecution argues that, under all circumstances, "the evidence could not have been a decisive factor in reaching the decision at trial."[11] The Prosecution notes that although the Trial Chamber found TF1-314 to be "largely credible," it nonetheless required corroboration of her evidence regarding Gbao's acts and conduct and found her testimony to be corroborated.[12] According to the Prosecution, the proposed evidence "is not such that it could result in the dismissal of the entire testimony of TF1-314,"[13] and submits that a Trial Chamber may accept "a witness's evidence, or parts thereof, notwithstanding inconsistencies."[14]

5. The Prosecution argues that the witness's inconsistent statement was "already explored during cross-examination in the RUF Trial"[15] and also in the *Taylor* trial, where the witness explained that her inconsistent evidence as to whether she carried a gun during food-finding missions was due to a fear of "self-incrimination and being arrested."[16] The Prosecution further argues that Gbao does not suggest any other inconsistencies or alleged lies in TF1-314's testimony during the RUF trial,[17] and that the proposed additional evidence does not "cast doubt on her testimony as to her personal experiences of being forcibly married."[18]

II. APPLICABLE LAW

6. Rule 115 of the Rules allows for additional evidence to be admitted by the Pre-Hearing Judge upon the fulfilment of the criteria provided therein. Rule 115 of the Rules states in full:

> (A) A party may apply by motion to the Pre-Hearing Judge to present before the Appeals Chamber additional evidence which was not available to it at the trial. Such motion shall clearly identify with precision the specific finding of fact made by the Trial Chamber to which the additional evidence is directed. The motion shall also set out in full the reasons and supporting evidence on which the party relies to establish that the proposed additional evidence was not available to it at trial. The motion shall be served on the other party and filed with the Registrar not later than the deadline for filing the submissions in reply. Rebuttal material may be presented by any party affect by the motion.

[10] Response, paras 18, 19.
[11] Response, para. 20.
[12] Response, paras 21, 27. *See Prosecutor* v. *Sesay et al.*, Case No. SCSL-04-15-T-1234, Judgment, 2 March 2009 ("Trial Judgment"), paras 1409-1413.
[13] Response, para. 22.
[14] Response, para. 23.
[15] Response, para. 25.
[16] Response, para. 24.
[17] Response, para. 24.
[18] Response, para. 27.

> (B) Where the Pre-Hearing Judge finds that such additional evidence was not available at trial and is relevant and credible, he will determine if it could have been a decisive factor in reaching the decision at trial. Where it could have been such a factor, the Pre-Hearing Judge may authorise the presentation of such additional evidence and any rebuttal material.
>
> (C) The Appeals Chamber may review the Pre-Hearing Judge's decision with or without an oral hearing.

7. As this is the first instance at the Special Court in which a Party seeks to admit additional evidence on appeal, the Appeals Chamber has not previously had the opportunity to interpret and apply the requirements of this Rule. Both Parties argue that Rule 115 should be applied in a manner consistent with the corresponding procedure at the ICTY and ICTR.[19] I agree: while the jurisprudence of other international criminal tribunals is not binding on the Special Court, it is persuasive authority where applicable and may be of assistance to the Chambers.[20]

8. In relevant part, Rule 115 of the Rules is materially similar to Rule 115 of the Rules of Procedure and Evidence of the ICTY and ICTR. Sub-Rule (B) of each of those rules states:

> (B) If the Appeals Chamber finds that the additional evidence was not available at trial and is relevant and credible, it will determine if it could have been a decisive factor in reaching the decision at trial. If it could have been such a factor, the Appeals Chamber will consider the additional evidence and any rebuttal material along with that already on the record to arrive at a final judgement in accordance with [ICTY Rule 117 or ICTR Rule 118].[21]

9. The jurisprudence of the ICTY and ICTR holds that for additional evidence to be admissible under Rule 115 of their Rules it must satisfy the following requirements:

10. First, the applicant must demonstrate that the proposed additional evidence tendered on appeal was not available to him at trial in any form, or discoverable through the exercise of due diligence.[22] The applicant's duty to act with reasonable diligence includes making "appropriate use

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[19] Motion, para. 3.

[20] Article 20(3) of the Statute provides, in part, "[t]he judges of the Appeals Chamber of the Special Court shall be guided by the decisions of the Appeals Chamber of the International Tribunals for the former Yugoslavia and for Rwanda."

[21] Rule 115 of the ICTY Rules (referring to "Rule 117"); Rule 115 of the ICTR Rules (referring to "Rule 118").

[22] *See Prosecutor v. Stanišić and Simatović*, ICTY-03-69-AR65.4, Decision on Prosecution Appeal of Decision on Provisional Release and Motions to Present Additional Evidence Pursuant to Rule 115, 26 June 2008 ("*Stanišić* Rule 115 Decision"), para. 6; *Prosecutor v. Simić*, ICTY-95-9-A, Decision on Blagoje Simić's Motion for Admission of Additional Evidence, Alternatively for Taking of Judicial Notice, 1 June 2006 ("*Simić* Rule 115 Decision"), para. 12; *Prosecutor v. Krstić*, ICTY-98-33-A, Decision on Applications for Admission of Additional Evidence on Appeal, 5 August 2003 ("*Krstić* Rule 115 Decision"), p. 3; *Prosecutor v. Blaškić*, ICTY-95-14-A, Decision on Evidence, 31 October 2003 ("*Blaškić* Rule 115 Decision"), p. 2.

of all mechanisms ... available under the Statute and the Rules ... to bring evidence on behalf of an accused before the Trial Chamber."[23]

11. Second, the applicant must show that the evidence is both relevant to a material issue and credible.[24] Evidence is relevant if it relates to findings material to the Trial Chamber's decision.[25] Evidence is credible if it appears to be reasonably capable of belief or reliance.[26] A finding that evidence is credible demonstrates nothing about the weight to be accorded to such evidence.[27]

12. If the applicant is able to satisfy these prongs of the test, then he must demonstrate that the evidence *could* have had an impact on the verdict.[28] In other words, the evidence must be such that, considered in the context of the evidence given at trial, it could demonstrate that the conviction was unsafe.[29] A party seeking to admit additional evidence bears the burden of specifying with clarity the impact the additional evidence could have on the Trial Chamber's decision.[30] A party that fails to do so runs the risk that the evidence will be rejected without detailed consideration.[31]

13. Although Rule 115 of the Rules (at the Special Court or the other international courts) does not explicitly provide for this, the ICTY and ICTR Appeals Chambers consider that even if relevant and credible evidence were available at trial, it may nonetheless be admitted on appeal if the applicant can establish that the exclusion of it would lead to a miscarriage of justice. That is, it must be demonstrated that had the additional evidence been admitted at trial, it *would* have affected the verdict.[32]

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[23] *See Simić* Rule 115 Decision, para. 12; *Krstić* Rule 115 Decision, p. 2; *Prosecutor v. Kupreškić et al.*, ICTY-95-16-A, Appeal Judgement, 23 October 2001 ("*Kupreškić et al.* Appeal Judgement"), para. 50; *Prosecutor v. Tadić*, ICTY-94-1-A, Decision on Appellant's Motion for the Extension of the Time-Limit and Admission of Additional Evidence, 16 October 1998 ("*Tadić* Decision on Extension of Time Limit"), para. 47; *Prosecutor v. Ntagerura et al.*, ICTR-99-46-A, Decision on Prosecution Motion for Admission of Additional Evidence, 10 December 2004 ("*Ntagerura et al.* Rule 115 Decision"), para. 9 (internal citations omitted).

[24] *See Prosecutor v. Krajišnik*, ICTY-00-39-A, Decision on Appellant Momčilo Krajišnik's Motion to Present Additional Evidence, 20 August 2008 ("*Krajišnik* Rule 115 Decision"), para. 6; *Stanišić* Rule 115 Decision, para. 6; *Simić* Rule 115 Decision, para. 12; *Krstić* Rule 115 Decision, p. 2.

[25] *See Krajišnik* Rule 115 Decision, para. 6; *Stanišić* Rule 115 Decision, para. 7.

[26] *See Krajišnik* Rule 115 Decision, para. 6; *Prosecutor v. Haradinaj et al.*, ICTY-04-84-AR65.1, Confidential Decision on Prosecution's Application to Present Additional Evidence in Its Appeal Against the Re-Assessment Decision, 10 March, ("*Haradinaj et al.* Rule 115 Decision"), para. 16. *See Ntagerura et al.* Rule 115 Decision, para. 22.

[27] *See Krajišnik* Rule 115 Decision, para. 6; *Stanišić* Rule 115 Decision, para. 7; *Haradinaj et al.* Rule 115 Decision, para. 16.

[28] *See Krajišnik* Rule 115 Decision, para. 7; *Stanišić* Rule 115 Decision, para. 7; *Simić* Rule 115 Decision, para. 12; *Krstić* Rule 115 Decision, p. 2.

[29] *Ibid.*.

[30] *See Krajišnik* Rule 115 Decision, para. 7; *Stanišić* Rule 115 Decision, para. 6; *Simić* Rule 115 Decision, para. 12; *Kupreškić et al.* Appeal Judgement, para. 69.

[31] *See Krajišnik* Rule 115 Decision, para. 7; *Stanišić* Rule 115 Decision, para. 6; *Kupreškić et al.* Appeal Judgement, para. 69.

[32] *See Krajišnik* Rule 115 Decision, para. 8; *Kajelijeli v. Prosecutor*, ICTR-98-44A-A, Decision on Defence Motion for the Admission of Additional Evidence Pursuant to Rule 115 of the Rules of Procedure and Evidence, 28 October 2004,

14. Whether the evidence was available at trial or not, the ICTY Appeals Chamber has recognised that the evidence shall not be assessed in isolation, but in the context of the totality of the evidence given at trial.[33]

III. DISCUSSION

A. Whether the evidence was available at trial

15. Gbao submits that because the evidence in question did not come into existence until after the closing arguments in the *Sesay et al.* trial it was not available at trial.[34] Witness TF1-314 testified in the *Taylor* trial on 20 October 2008,[35] and the Prosecution disclosed this evidence to Gbao on 27 October 2008.[36] At the same time the Prosecution brought this evidence to the attention of the Trial Chamber in the interests of justice.[37] Gbao closed its case on 24 June 2008[38] and all the Parties delivered their closing arguments on 4 and 5 August 2008. The Trial Chamber delivered an oral summary of its Judgment in this case on 25 February 2009 and filed its written reasons on 2 March 2009.

16. It is undisputed that the evidence Gbao seeks to have admitted became available to him four months before the Trial Chamber delivered the Trial Judgment. The question is whether the fact that the evidence became available to Gbao after his closing arguments rendered it "unavailable" within the meaning of Rule 115 of the Rules.

17. Evidence is "unavailable" only where the applicant has exhausted "all mechanisms ... available under the Statute and the Rules ... to bring evidence on behalf of an accused before the Trial Chamber."[39] The fact that evidence comes into existence after the close of the hearings does not prevent a reopening of the case should fresh evidence come to light.[40] The Trial Chamber

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para. 11; *Ntagerura et al.* Rule 115 Decision, para. 11; *Prosecution v. Delić*, ICTY-96-21-R-R119, Decision on Motion for Review, 25 April 2002, para. 18; *Prosecution v. Krstić*, ICTY-98-33-A, Decision on Application for Subpoenas, 1 July 2003, para. 16; *Krstić* Rule 115 Decision, p. 4; *Blaškić* Rule 115 Decision, p. 3; *Stanišić* Rule 115 Decision, para. 8; *Simić* Rule 115 Decision, para. 13; *Blaškić* Rule 115 Decision, p. 2; *Krstić* Rule 115 Decision, p. 3.

[33] *See Krajišnik* Rule 115 Decision, para. 9; *Simić* Rule 115 Decision, para. 14; *Krstić* Rule 115 Decision, p. 4; *Kupreškić et al.* Appeal Judgement, paras 66, 75.

[34] Motion, paras 15-16.

[35] Motion, fn.14, para. 15.

[36] Motion, para. 10.

[37] Response, para. 18.

[38] Trial Judgment, Annex B: Procedural History, para. 35.

[39] *Supra*, para. 10.

[40] The ICTY Appeals Chamber has held that permission to reopen a case in order to introduce new evidence may be granted where the request regards "fresh" evidence. The test for whether evidence is "fresh" requires that that it must not have been in the possession of the moving party at the time of the conclusion of its case, and it must be evidence which could not have been obtained prior to conclusion of the case by the exercise of reasonable diligence. *See e.g.*, *Prosecutor v. Čelebići (Mucić et al.)* ICTY-96-21-A, Appeal Judgement, 20 February 2001, ("*Čelebići* Appeal

remained seised of the case during the time after closing arguments and before the rendering of the Trial Judgment.

18. The ICTY Appeals Chamber has held in the context of a Rule 115 decision that the fact that the evidence originated before the Trial Chamber rendered its judgement but after the close of the hearings did not prevent a reopening of the case should important evidence come to light.[41] An ICTY Trial Chamber reopened proceedings in order to remedy the prejudice to the defence of the disclosure of evidence by the Prosecution after closing arguments. Like here, the defence there intended to use the evidence to challenge a witness's credibility.[42]

19. Gbao could thus have applied to reopen the case to present the additional evidence while the Trial Chamber was still seised of his case, but elected not to do so. Under these circumstances, I find the evidence was available at trial for the purpose of Rule 115 of the Rules.

B. Whether omission of the evidence would lead to a miscarriage of justice

20. I endorse the jurisprudence of the other international tribunals that, although the evidence was available at trial, it nevertheless may be admitted on appeal provided that the applicant establishes that its exclusion would amount to a miscarriage of justice. The operative question in this part is whether Gbao has demonstrated that if the transcript of Witness TF1-314's testimony in the *Taylor* trial had been admitted at trial, it *would* have affected the verdict.

21. According to Gbao the evidence establishes that Witness TF1-314 lied during the *Sesay et al.* trial with regard to carrying a gun while on food-finding missions. On the basis that the transcript amounts to proof of a lie, he argues that her testimony in the trial is not credible and therefore all "findings based on her evidence should be dismissed."[43] He argues that this new evidence, coupled with the Trial Chamber's "assessment that Witness TF1-314 required corroboration for any testimony related to Gbao's acts and conduct, should serve to dismiss her

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Judgment"), paras 279-282. *See also Prosecutor* v. *Delalić et al.*, ICTY-96-21-T, Decision on the Prosecution's Alternative Request to Reopen the Prosecution's Case, 19 August 1998, para. 26. According to the ICTY Appeals Chamber, the "primary consideration in determining an application for reopening a case to allow for the admission of fresh evidence is the question of whether, with reasonable diligence, the evidence could have been identified and presented in the case-in-chief of the party making the application." *Čelebići* Appeal Judgement, para. 283.

[41] *See e.g., Prosecutor v. Naletilić and Martinović*, ICTY-98-34-A, Decision on Naletilić's Consolidated Motion to Present Additional Evidence, 20 October 2004, para. 24 ("[T]he Appeals Chamber agrees with the Prosecution's submission that the fact that a document was issued after the close of the hearings does not prevent a re-opening of the case in the interests of justice should new and crucial evidence come to light.).

[42] *See Prosecutor v. Furundzija*, ICTY-95-17/1-T, Judgement, 10 December 1998, para. 92.

[43] Motion, para. 14.

testimony in its entirety."[44] He specifically contests his convictions for crimes under Counts 7 to 9 in Kailahun District.[45]

22. Witness TF1-314 provided evidence during the RUF trial with respect to sexual slavery (Count 7),[46] forced marriages (Count 8),[47] outrages upon personal dignity (Count 9)[48] and child soldiers (Count 12).[49] Gbao does not propose to use the evidence to impugn a specific factual finding, such as by showing that it directly contradicts factual testimony relied upon by the Trial Chamber to enter a conviction. Rather, Gbao suggests that the evidence "relates solely to her credibility" by showing that she lied on the witness stand and that therefore all of her testimony should be disregarded.[50]

23. Gbao's argument that the evidence would have altered any of the verdicts against him is unconvincing. The Trial Chamber recognized what it called "slight variations"[51] between Witness TF1-314's testimony at trial and her prior statements. The Trial Chamber also referenced the witness's contradictory testimony in *Sesay et al.* on the same issue that Gbao argues she purportedly admits to lying about in relation to its finding that the "witness provided unsubstantiated evidence concerning certain events which [were not] accepted by the Chamber."[52] Thus the Trial Chamber already considered the witness's statements at issue to be contradictory when it assessed the witness's credibility. Gbao has failed to establish that further evidence of her contradictory statements in this regard would have had any effect on the Trial Chamber's treatment of the witness's evidence, let alone that it would have changed a verdict.

24. Moreover, none of Gbao's convictions were based on Witness TF1-314's testimony alone. Gbao argues that the Trial Chamber "only relied upon the testimony of two specific witnesses — TF1-314 and TF1-093 — to establish the widespread nature of crimes under Counts 7-9 in Kailahun District" and that the Trial Chamber required TF1-093's testimony to be corroborated.[53] Gbao does not provide any citation or support for his argument that only the testimony of two witnesses was used to establish with widespread nature of the crimes. Contrary to his submission, the Trial Chamber in fact relied on further evidence to establish the widespread nature of crimes under

[44] Motion, para. 13.
[45] Motion, paras 12, 13, 14, 17.
[46] Trial Judgment, paras 1460-1461.
[47] Trial Judgment, paras 1406-1407, 1460-1461.
[48] Trial Judgment, paras 1474-1475.
[49] Trial Judgment, para. 591.
[50] Motion, para. 12.
[51] Trial Judgment, para. 594.
[52] Trial Judgment, para. 593, *citing* Transcript of 7 November 2005, TF1-314, pp. 13-14 (closed session).
[53] Motion, para. 18.

Counts 7-9 of the Indictment in Kailahun District. The Trial Chamber stated that it heard evidence of "numerous incidents of sexual violence in Kailahun District and note[d] that sexual violence was widespread ... during the Indictment period."[54] The Trial Chamber pointed to specific evidence from Witnesses TF1-093 and TF1-045. The Trial Chamber also stated that it

> heard evidence from insider witnesses and witnesses who had been "bush wives" who testified to the widespread rebel practice of abducting women and forcing them to act as "wives" in Kailahun District. Many of the women interviewed by expert witness TF1-369, who authored Exhibit 138, the *Expert Report on Forced Marriages*, were school children and petty traders who were abducted from Koinadugu, Tonkolili, Pujehun, Kono, Bonthe, Bo, Freetown and Kenema and taken to Kailahun.[55]

30. Referring to this testimony and others, the Trial Chamber concluded "that it was common practice for rebels to keep captured women subject to their control as sex slaves and to force conjugal relationships on women who unwillingly became their 'wives'."[56]

31. Because the Trial Chamber relied upon testimony that would not be impugned by the additional evidence proffered by Gbao, I find that this factor too indicates that the proffered evidence would not necessarily affect any verdict.[57]

32. In light of the findings above, I am not satisfied that non-admission of the proffered evidence would amount to a miscarriage of justice. This finding is without prejudice to any of Gbao's grounds of appeal against the Trial Judgment and Sentencing Judgment.

IV. DISPOSITION

33. For the foregoing reasons, I **DISMISS** Gbao's Motion in its entirety.

34. Done this 5th day of August 2009 at Freetown, Sierra Leone.

Justice Renate Winter
Pre-Hearing Judge

[54] Trial Judgment, para. 1405.
[55] Trial Judgment, para. 1409, *citing* Exhibit 138, Expert Report Forced Marriage, p. 12097. The Chamber notes that the Expert Witness also testified that numerous women were abducted who were not assigned as "wives" to rebels, but remained under the control of RUF fighters and were forced to engage in sexual intercourse with various rebels: Transcript of 27 July 2006, TF1-369, p. 60 (CS); Exhibit 138, Expert Report Forced Marriage, pp. 12097-12098.
[56] Trial Judgment, para. 1465.
[57] *See e.g., Nahimana et al. v. Prosecutor*, ICTR-99-52-A, Decision on Appellant Jean-Bosco Barayagwiza's Motions for Leave to Present Additional Evidence Pursuant to Rule 115 of the Rules of Procedure and Evidence, 8 December 2006, para. 30 (finding that in light of the other evidence adduced at trial, the Appellant had not shown the Trial Chamber would necessarily opt for evidence proffered on appeal).