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SCSL-04-15-A
(5138-5144)

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SPECIAL COURT FOR SIERRA LEONE

IN THE APPEALS CHAMBER

Before:	Justice Renate Winter, Presiding Judge Justice Jon M. Kamanda Justice George Gelaga King Justice Emmanuel Ayoola Justice Shireen Avis Fisher
Acting Registrar:	Binta Mansaray
Date:	14 October 2009

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

DECISION ON SESAY REQUEST TO ADMIT EXHIBIT MFI-134 FROM *PROSECUTOR v. TAYLOR*

Office of the Prosecutor:
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THE APPEALS CHAMBER of the Special Court for Sierra Leone ("Appeals Chamber") composed of Justice Renate Winter, Presiding Judge, Justice Jon M. Kamanda, Justice George Gelaga King, Justice Emmanuel Ayoola and Justice Shireen Avis Fisher;

BEING SEISED of the "Request that the Pre-Hearing Judge Present to the Appeals Chamber Exhibit MFI-134 from Prosecutor v. Taylor," filed by the Sesay Defence on 31 August 2009 (the "Motion");

CONSIDERING the "Prosecution Response to Sesay Request to Admit Exhibit MFI-134 from *Prosecutor v. Taylor*," filed on 1 September 2009 ("Response");

NOTING that Sesay filed no submissions in reply;

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

I. SUBMISSIONS OF THE PARTIES

1. The Sesay Defence seeks the admission on appeal of Exhibit MFI-134 from *Prosecutor v. Charles Ghankay Taylor* trial pursuant to Rule 115 of the Rules "or the Appeals Chamber's inherent power."[1] Sesay recognizes that the time to file motions under Rule 115 has elapsed, and he submits that "[s]hould Rule 115 not be applicable here, the Defence requests that the Appeals Chamber exercise its inherent power to admit" the evidence.[2]

2. The Sesay Defence submits that Exhibit MFI-134 is a letter from Sesay to Charles Taylor "concerning Sesay's dedication to peace and his belief that the United Nations peacekeeping forces attacked the RUF in May 2000."[3] The Sesay Defence submits that it was not available at trial because it first came into his knowledge and possession on 25 August 2009, six months after the Trial Judgment rendered in this case.[4]

3. The Sesay Defence requests that Exhibit MFI-134 be admitted and considered together with the evidence at trial and his submission on appeal.[5] It submits the exhibit is relevant to (i) the Trial Chamber's findings pertaining to Sesay's superior responsibility for attacks directed against

[1] Motion, para. 1.
[2] Motion, n. 1.
[3] Motion, para. 1.
[4] Motion, para. 5.
[5] Motion, para. 1.

UNAMSIL peacekeeping forces;[6] (ii) his *mens rea* in relation to those attacks;[7] and (iii) the Trial Chamber's findings pertaining to the sentence imposed upon Sesay.[8]

4. The Prosecution opposes the Motion. It submits that the Motion is filed late according to the deadline set out in Rule 115(A). According to the Prosecution, an extension of time is predicated on a showing of good cause, but the fact that the evidence was first disclosed to the Sesay Defence after the time for filing a motion under Rule 115 had elapsed does not in itself constitute good cause for granting an extension of time.

5. In relation to the evidence at issue, the Prosecution submits that, for the evidence to be considered not available at trial, it must have not been available in any form, including that it could not have been discovered at an earlier date through the exercise of due diligence.[9] The Prosecution submits that "Sesay must have known of the existence of this letter if he personally wrote it," the Sesay Defence must demonstrate the efforts made to obtain and present the evidence at trial, and if it was not possible to obtain, then it could have given evidence of its existence and contents during trial.[10]

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. As discussed in earlier decisions in this case,[11] in order for additional evidence to be admissible under Rule 115 of the Rules it must satisfy the following requirements:

7. 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.[12] The applicant's duty to act with reasonable diligence includes making "appropriate use

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[6] Motion, paras 8, 13.
[7] Motion, paras 8, 12.
[8] Motion, paras 8, 14.
[9] Response, para. 6, *citing Prosecutor v. Mrškić et al.*, ICTY-95-13/1-A, Decision on Mile Mrškić's Second Rule 115 Motion, 13 February 2009, para. 6; *Prosecutor v. Nahimana et al.*, ICTR-99-52-A, Decision on Appellant Jean-Bosco Barayagwiza's Motions for Leave to Present Additional Evidence, 8 December 2006, para. 40; *Prosecutor v. Ntagerura et al.*, ICTR-99-46-A, Decision on Prosecution Motion for Admission of Additional Evidence, 10 December 2004, para. 9.
[10] Response, para. 19.
[11] *See Sesay et al.*, SCSL-04-15-A, Decision on Gbao's Motion to Admit Additional Evidence Pursuant to Rule 115, 5 August 2009 ("Gbao Rule 115 Decision").
[12] Gbao Rule 115 Decision, para. 10, *citing 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*

of all mechanisms … available under the Statute and the Rules … to bring evidence on behalf of an accused before the Trial Chamber."[13]

8. Second, the applicant must show that the evidence is both relevant to a material issue and credible.[14] Evidence is relevant if it relates to findings material to the Trial Chamber's decision.[15] Evidence is credible if it appears to be reasonably capable of belief or reliance.[16] A finding that evidence is credible demonstrates nothing about the weight to be accorded to such evidence.[17]

9. 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.[18] 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.[19] 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.[20] A party that fails to do so runs the risk that the evidence will be rejected without detailed consideration.[21]

10. Although Rule 115 of the Rules 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.[22]

11. Whether the evidence was available at trial or not, evidence shall not be assessed in isolation, but in the context of the totality of the evidence given at trial.[23]

III. DISCUSSION

12. As a preliminary matter, we note that the Motion was filed after the time limit provided in Rule 115(A) had elapsed, that is after submissions in reply under Rule 113. In such instances, the

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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.

[13] Gbao Rule 115 Decision, para. 10 (and citations therein).

[14] Gbao Rule 115 Decision, para. 11 (and citations therein).

[15] *Ibid.*

[16] *Ibid.*

[17] *Ibid.*

[18] Gbao Rule 115 Decision, para. 12 (and citations therein).

[19] *Ibid.*

[20] *Ibid.*

[21] *Ibid.*

[22] Gbao Rule 115 Decision, para. 13 (and citations therein).

[23] Gbao Rule 115 Decision, para. 14 (and citations therein).

proper procedure is for the applicant to submit a request for an extension of time under Rule 116, which may be granted upon a showing of good cause. Nevertheless, in the interests of expeditious proceedings in this case, and in light of the fact that good cause has been established by the fact that the proposed additional evidence only came into the Sesay Defence's possession after the time limit had elapsed, we shall therefore consider the Motion on its merits.

13. Exhibit MFI-134 is a letter purportedly written by Sesay to Charles Taylor and dated 11 May 2000.[24] According to the Sesay Defence, the Prosecution first disclosed the evidence on 25 August 2009, six months after the Trial Judgment was rendered. The Prosecution submits that the timing of disclosure was a result of the fact that the exhibit was put into evidence in *Prosecutor v. Taylor* by Taylor on 18 August 2009, and that it was not in the Prosecution's possession until 16 July 2009.[25]

14. The proposed additional evidence may not have been in an applicant's possession until after trial, however, the Sesay Defence must also demonstrate that it was not available to them at trial in any form, or discoverable through the exercise of due diligence.[26] Exhibit MFI-134 was purportedly written by Sesay.[27] Its existence was therefore known to him during trial. In the Motion, the Sesay Defence has not made any showing of what efforts, if any, it made during trial to learn of the evidence and to obtain it. The Sesay Defence has not made any showing that it experienced difficulty in obtaining the document or the information therein during trial, nor has it made any showing that, if it had such difficulties, it brought them to the attention of the Trial Chamber. In addition, because the document was purportedly written by Sesay, he knew of the nature of its contents. The Sesay Defence has not made any showing that they sought to proffer evidence of its contents during trial, including when Sesay testified as a witness. In these circumstances, we find the evidence was available at trial for the purpose of Rule 115 of the Rules.

15. Having determined that the Sesay Defence failed to demonstrate that Exhibit MFI-134 was unavailable at trial, the question is if it had it been presented at trial it would have affected the verdict or altered a sentence imposed.

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[24] *See* Motion, Annex.
[25] Response, para.
[26] Gbao Rule 115 Decision, para. 10, *citing 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.
[27] Motion, para. 1.

16. The Sesay Defence contends that the exhibit affects: (i) the Trial Chamber's findings of his failure to prevent or punish his subordinates for directing attacks against UNAMSIL peacekeepers and killing four UNAMSIL peacekeepers;[28] (ii) the Trial Chamber's findings of Sesay's actual or imputed knowledge of attacks directed against UNAMSIL peacekeepers on 1, 2, 3, 7 and 9 May 2000 and the abduction of UNAMSIL peacekeepers on 3 May 2000;[29] and (iii) the Trial Chamber's findings at the sentencing stage with respect to mitigation of his sentence for his role during the peace process in light of his convictions for attacks directed against UNAMSIL personnel.[30]

17. The Sesay Defence makes no submissions in support of its contention that the proposed additional evidence would affect the findings of Sesay's failure to prevent or punish crimes committed by subordinates. Without such submissions, we are unable to see how the proposed evidence would affect the Trial Chamber's findings.

18. In relation to the second submission, the Sesay Defence claims that Exhibit MFI-134 demonstrates his subjective belief that the UNAMSIL peacekeepers "initiated the transgressions and had assumed a combative role."[31] If accepted, Exhibit MFI-134 would go to establishing Sesay's contemporaneous understanding of the events. The Sesay Defence, however, fails to account for the fact that the Trial Chamber expressly considered his subjective beliefs about UNAMSIL personnel's aggressive conduct.[32] For example, at trial, Sesay submitted, *inter alia*, that there "was a full-blown conflict between RUF and UN and that UNAMSIL personnel were now combatants and … that it was therefore reasonable and necessary for him to take defensive action."[33] He also submitted that "[e]ven if Issa Sesay was mistaken (or had been misled) about the fact that UNAMSIL had not initiated or attacked the RUF, it is clear from the radio logs that this was the information he had received."[34] These submissions were expressly rejected by the Trial Chamber.[35] By failing to demonstrate that the Trial Chamber would have reached a different finding if it had considered Exhibit MFI-134 in the context of the totality of the evidence given at trial, the Sesay Defence fails to show of the proposed additional evidence would have affected the verdict.

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[28] Motion, para. 13.
[29] Motion, para. 12.
[30] Motion, para. 14.
[31] Motion, para. 13.
[32] Trial Judgment, para. 2280.
[33] Sesay Final Trial Brief, para. 1331.
[34] Sesay Final Trial Brief, para. 1332.
[35] Trial Judgment, para. 2280.

19. In relation to the effect on sentencing, the Sesay Defence states that the Trial Chamber found he "was not entitled to any mitigation for his role during the peace process because he 'fail[ed] to prevent or punish the perpetrators of the attacks against the UNAMSIL personnel, a direct affront to the international community's own attempts to facilitate peace in Sierra Leone.'"[36] The Sesay Defence merely submits that "Exhibit MFI-134 would have affected this finding," but it fails to specify how it would. We note that the significance of the finding quoted by the Sesay Defence is not simply that Sesay failed to prevent and punish his subordinates, but that the Trial Chamber "[*did*] *not accept Sesay's explanation of his reasons* for failing to prevent or punish the perpetrators of the attacks against the UNAMSIL personnel."[37] The Sesay Defence fails to explain why the Trial Chamber, which considered and rejected his similar submissions, would have imposed a different sentence if it had considered Exhibit MFI-134.

20. In light of the findings above, we are not satisfied that that Exhibit MFI-134 would have had an impact on the verdict or sentence and therefore that its exclusion would lead to a miscarriage of justice. The evidence proffered is therefore rejected. This finding is without prejudice to any of Sesay's grounds of appeal against the Trial Judgment and Sentencing Judgment.

IV. DISPOSITION

21. For the foregoing reasons, we **DISMISS** Sesay's Motion in its entirety.

Done this 14th day of October 2009 at Freetown, Sierra Leone.

Justice Renate Winter, Presiding

Justice Jon M. Kamanda

Justice George Gelaga King

Justice Emmanuel Ayoola

Justice Shireen Avis Fisher

[Seal of the Special Court for Sierra Leone]

[36] Motion, para. 14.
[37] Sentencing Judgment, para. 228 (emphasis added).