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SCSL-03-01-T
(27095-27101)

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SPECIAL COURT FOR SIERRA LEONE

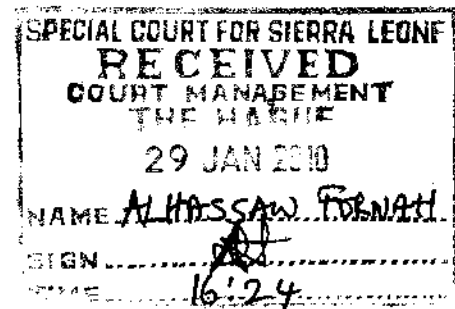
TRIAL CHAMBER II

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

Acting Registrar: Binta Mansaray

Case No.: SCSL03-1-T

Date: 29 January 2010



PROSECUTOR

v.

Charles Ghankay TAYLOR

DECISION ON PUBLIC WITH ANNEX A AND CONFIDENTIAL ANNEX B URGENT
APPLICATION FOR LEAVE TO APPEAL ORAL DECISIONS OF 14 JANUARY 2010 ON USE OF
DOCUMENTS IN CROSS-EXAMINATION

Office of the Prosecutor:

Brenda J. Hollis
Nicholas Koumjian
Nina Jørgensen
Kathryn Howarth

Counsel for the Accused:

Courtenay Griffiths, Q.C.
Terry Munyard
Morris Anyah
Andrew Cayley
Silas Chekera
James Supuwood

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

SEISED of the “Public with Annex A and Confidential Annex B Urgent Application for Leave to Appeal Oral Decisions of 14 January 2010 on Use of Documents in Cross-Examination”, filed on 18 January 2010 (“Motion”),¹ wherein the Prosecution seeks leave to appeal two decisions issued orally by the Trial Chamber on 14 January 2010 disallowing the use of two documents during the cross-examination of the Accused (“impugned Decisions”), namely (a) a declaration by Mia Farrow dated 9 November 2009 (“Mia Farrow Declaration”) and (b) page 270 of a book entitled “ECOMOG, A Sub-Regional Experience in Conflict Resolution, Management and Peacekeeping in Liberia”, by Lt. Col. F. B. Aboagye (“ECOMOG Book”)² on the grounds that:

1. Exceptional circumstances exist in that:

- (a) the Trial Chamber’s application of its Decision on Prosecution Motion in Relation to the Applicable Legal Standards Governing the Use And Admission of Documents By the Prosecution During Cross-Examination”³ imports an unduly high standard for the use of documents during cross-examination which is inconsistent with the case law of the *ad hoc* Tribunals and the Special Court, and which is likely to be applied every time the Prosecution seeks to put a document to the Accused during the remainder of cross-examination, which matters “give rise to an issue of fundamental legal importance that has so far not been considered by the Appeals Chamber”;⁴ and
- (b) the Trial Chamber’s strict approach is likely to interfere with the course of justice as it prevents the Prosecution from fully exercising its right to test the evidence of the Accused in cross-examination and deprives the Trial Chamber of information relevant to determining the weight to be given to the testimony of the Accused;⁵ and

2. The Prosecution will suffer irreparable prejudice in that:

- (a) the impugned Decisions prevent the Prosecution from fully exercising its right to test the evidence of the Accused through cross-examination, and

¹ SCSL-03-01-T-875. The Trial Chamber also takes note of the Prosecution’s “Supplemental Filing of Authority as Annex C in Relation to Urgent Application for Leave to Appeal Oral Decision of 14 January 2010 on use of Documents in Cross-Examination”, filed on 19 January 2010 (SCSL-03-01-T-879).

² Motion, paras 1, 24.

³ SCSL-03-01-T-865.

⁴ Motion, paras 9-17.

⁵ Motion, paras 18-22.

(b) there is no cure available on final appeal;⁶

RECALLING the Trial Chamber’s “Order for Expedited Filing”, dated 20 January 2010, wherein the Trial Chamber noted the urgency of the matter and ordered expedited filing schedules for a response and reply;⁷

NOTING the “Defence Response to the Public with Annex A and Confidential Annex B Urgent Application for Leave to Appeal Oral Decisions of 14 January 2010 on Use of Documents in Cross-Examination”, filed on 22 January 2010 (“Response”),⁸ wherein the Defence opposes the Motion and submits that the Motion does not meet the conjunctive threshold of “exceptional circumstances” and “irreparable prejudice” under Rule 73(B) of the Rules of Procedure and Evidence (“Rules”);

NOTING ALSO the “Prosecution Reply to Defence Response to Application for Leave to Appeal Oral Decisions of 14 January 2010 on Use of Documents in Cross-Examination”, filed on 25 January 2010 (“Reply”);⁹

COGNISANT of the provisions of Article 17 of the Statute of the Special Court for Sierra Leone (“Statute”) and Rules 73(A) and (B);

NOTING that Rule 73(B) provides:

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;

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.¹⁰

RECALLING ALSO that this Court has also held that an interlocutory appeal does not lie as of right and 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

⁶ Motion, para. 23.

⁷ SCSL-03-01-T-881.

⁸ SCSL-03-01-T-883.

⁹ SCSL-03-01-T-888.

¹⁰ *Prosecutor v. Norman et al*, SCSL-2004-14-AR73, Decision on Amendment of the Consolidated Indictment, 16 May 2005, para. 43.

must not be heavily encumbered and, consequently, unduly delayed by interlocutory appeals";¹¹ and that "exceptional circumstances" may arise "where the cause of justice may be interfered with" or "where issues of fundamental legal importance" are raised;¹²

CONSIDERING the well-established principle that Trial Chambers exercise broad discretion in evidentiary matters and that the Appeals Chambers generally defer to them in such matters;¹³

RECALLING the Trial Chamber's "Decision on Prosecution Motion in Relation to the Applicable Legal Standards Governing the Use and Admission of Documents by the Prosecution During Cross-Examination", filed on 30 November 2009 ("Decision on Documents"),¹⁴ wherein the Trial Chamber held that it should be "particularly cautious when the subject of the cross-examination is the Accused himself, since the borderline between cross-examination as to credit and cross-examination on issues that may be probative of his guilt is difficult if not impossible to determine" and laid down clear guidelines regarding the use and admission of "fresh evidence"¹⁵ during cross-examination of an accused person, holding *inter alia*, that:

[...] where documents containing "fresh evidence" are to be used in cross-examination solely for the purpose of impeaching the credibility of the Accused, there is no statutory or procedural obligation upon the Prosecution to disclose those documents beforehand. However, a document containing "fresh evidence" probative of the guilt of the Accused is subject to disclosure and its use will not be permitted during cross-examination unless (a) it is in the interest of justice and (b) it does not violate the fair trial rights of the Accused. Furthermore, such document will not be admitted into evidence unless the Prosecution can establish "exceptional circumstances". In considering whether such exceptional circumstances have been established, the Trial Chamber will take into consideration (i) when and by which means the Prosecution obtained these documents, (ii) when it disclosed them to the Defence and (iii) why they are being offered only after the conclusion of the Prosecution case;¹⁶

¹¹ *Prosecutor v. Taylor*, SCSL-03-01-T-584, Decision on Confidential Prosecution Application for Leave to Appeal Decision to Vary the Protective Measures of TF1-168, 10 September 2008.

¹² *Prosecutor v. Taylor*, SCSL-03-01-T-764, Decision on Defence Application for Leave to Appeal the Decision on Urgent Defence Motion Regarding a Fatal Defect in the Prosecution's Second Amended Indictment Relating to the Pleading of JCE, 18 March 2009; *Prosecutor v. Taylor*, SCSL-03-01-T-764, Decision on Public Prosecution Application for Leave to Appeal Decision Regarding the Tender of Documents, 11 December 2008, p. 3; *Prosecutor v. Sesay, Kallon and Gbao*, SCSL-2004-15-T-357, Decision on Defence Applications for Leave to Appeal Ruling of 3rd February 2005 on the Exclusion of Statements of Witness TF1-141, 28 April 2005.

¹³ *Prosecutor v. Fofana and Kondewa*, SCSL-04-14-A, Judgement, 28 May 2008, para. 34, quoting *Prosecutor v. Kupreskic et al.*, IT-95-16-A, Judgement, 23 October 2001, para. 30.

¹⁴ *Prosecutor v. Taylor*, SCSL-03-01-T-865, Decision on Prosecution Motion in Relation to the Applicable Legal Standards Governing the Use and Admission of Documents by the Prosecution During Cross-Examination, 30 November 2009 ("Decision on Documents").

¹⁵ "Fresh evidence" refers to "any documents which were not admitted during the Prosecution case, whether or not they were available to the Prosecution at the time." See Decision on Documents, para. 23.

¹⁶ Decision on Documents, para. 27.

NOTING that while neither party appealed the Decision on Documents within the time allowed by the Rules, the Prosecution in effect seeks to challenge the very principles laid down in that decision and not merely their "application";¹⁷

RECALLING the first Oral Decision of 14 January 2010 where the Trial Chamber held that:

We've considered the Defence objection to the use of the document and to the arguments put forward by the Prosecution in resisting that objection. We note that the document purports to deal with a central issue in the Prosecution case. The document itself was not produced in the Prosecution case but has been produced during the cross-examination of the accused. The document allegedly is a statement by a person as to what she was told by a second person who was relating what she was told by third person or persons. The accused, of course, has had no chance to challenge any of the allegations in this document or to cross-examine the alleged makers of the various statements that embodied the document now before the Court. We find that the document is highly prejudicial and we hold that the two criteria that are required to be met for the use of the document have not been met. In other words, there's nothing put before us that would allow us to say that its use in cross-examination is in the interests of justice or that it does not violate the fair trial rights of the accused. We therefore uphold the Defence objection and will not allow the document to be used in cross-examination. ("First Impugned Decision");¹⁸

RECALLING FURTHER the second Oral Decision of 14 January 2010 where the Trial Chamber held that:

We would firstly say that we disagree with the Prosecution claims that they have no means to challenge and test the Accused's evidence on the points in issue, and whether this document is allowed to be used or not does not affect the Prosecution's ability to effectively cross-examine. The document itself does not contain indisputable facts. It remains contentious whether the questions are put to the witness by means of the document, or whether the questions - there are questions simply put to the witness that may have been - may have arisen from the document. The nature of the document doesn't change simply because the questions are put to the witness by means of the document. Having said that, the document is obviously new, was not produced in the Prosecution case. It's incriminating in that it does

¹⁷ For example the Prosecution argues in paragraph 10 of the Motion that according to the ICTY jurisprudence, "issues pertaining to such matters as 'interests of justice' and 'prejudice to the accused' arise at the 'admission stage'", and submits that the Trial Chamber has "import[ed] an unusually high standard" for having used these same criteria for the 'use' rather than 'admission' of such documents. The Prosecution goes on to argue in favour of the ICTY jurisprudence *vis-à-vis* the Decision on Documents submitting that with regard to the 'use stage' "the Prosecution does not have to provide any justification for the use of a document in cross-examination. According to the ICTY Trial Chamber [in *Prlić*], it is only at the admission stage that a party is required to indicate the purpose for which a document is tendered and that arguments as to admissibility are heard." In paragraph 11 and footnote 17 of the Motion, the Prosecution in effect goes on to argue that the 'use test' contained in the Decision on Documents incorporates factors which should be applied at the "admission stage", namely the "interests of justice" and the "violation of the rights of the accused" criteria. Again in paragraph 14 of the Motion, the Prosecution argues that the Decision on Documents erroneously includes the criterion of 'prejudice to the accused' in the 'use test' submitting that, "it is clear from the ICTY jurisprudence that the issue of prejudice to the accused is ordinarily to be considered at the admission stage." In paragraphs 16-17, the Prosecution submits that the Trial Chamber has failed to include a distinction between documents that the Prosecution intends to use only for impeachment and those that it intends to use for proving guilt, thereby effectively seeking to re-write the Decision on Documents.

¹⁸ Transcript, 14 January 2010, pp. 33348-3334.

go to the guilt of the accused, and we're not satisfied that the two requirements of the test have been established; that is, we're not able to say that it's in the interests of justice to use this document in cross-examination, and we're not able to say that it does not violate the fair trial rights of the accused. We uphold the objection. ("Second Impugned Decision");¹⁹

CONSIDERING that in holding that the Mia Farrow Declaration and page 270 of the ECOMOG Book could not be used in cross-examination of the Accused because the Prosecution had failed to demonstrate that their use was "in the interests of justice" or that "it did not violate the fair trial rights of the Accused," the Trial Chamber was properly applying the two-pronged test for use of documents containing fresh evidence probative of the guilt of the accused as referred to in paragraph 27 of the Decision on Documents and that any other factors mentioned in the First and Second Impugned Decisions were taken into consideration in assessing those two criteria;²⁰

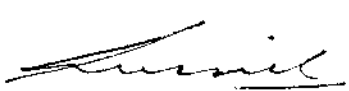
CONSIDERING ALSO that in this case, the evidence of the Accused can be effectively tested through means other than by a use of documents which contravenes the principles laid down in the Decision on Documents and that the Prosecution has not exhausted such other means;

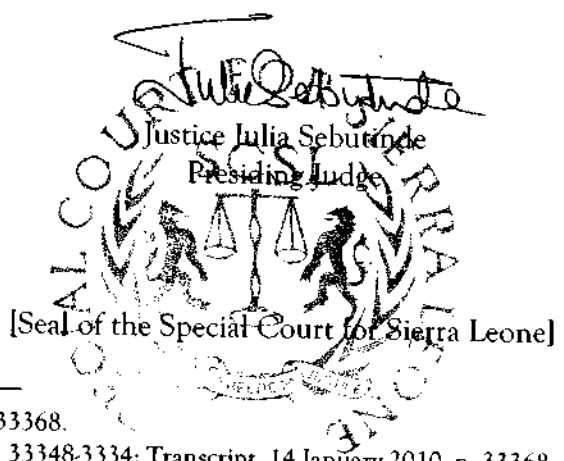
HOLDING therefore that the Prosecution has not satisfied the conjunctive conditions of exceptional circumstances and irreparable prejudice;

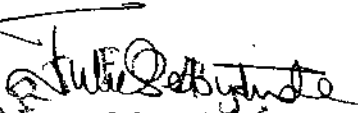
HEREBY DENIES THE MOTION.


Justice Doherty appends a partially Dissenting Opinion.

Done at The Hague, The Netherlands, this 29th day of January 2010.


Justice Richard Lussick




Justice Julia Sebutinde
Presiding Judge


Justice Teresa Doherty

¹⁹ Transcript, 14 January 2010, p. 33368.

²⁰ Transcript, 14 January 2010, pp. 33348-3334; Transcript, 14 January 2010, p. 33368.

SEPARATE AND PARTIALLY DISSENTING OPINION OF JUSTICE TERESA DOHERTY

I concur with the Decision and its conclusion that the Prosecution's Motion should be denied.

However, I respectfully disagree with the statement on page 5 of the Majority Decision in which it notes that

while neither party appealed the Documents Decision within the time allowed by the Rules, the Prosecution in effect seeks to challenge the very principles laid down in that decision and not merely their "application".

In my view the Prosecution seeks to show that the Trial Chamber's application of the test applies an unduly high standard for use of documents in cross-examination and does not challenge the test itself.²¹ I am of the opinion that even if a party does not challenge a decision setting out a legal standard, it may still appeal individual decisions in which the Trial Chamber applies and/or interprets this legal standard.

I find, nevertheless, that the Prosecution has not satisfied the conjunctive conditions of exceptional circumstances and irreparable prejudice in the instant cases, and for that reason, concur with the Decision to deny the Motion.

Done at The Hague, The Netherlands, this 29th day of January 2010.

Teresa Doherty

Justice Teresa Doherty



²¹ Motion, para. 9.