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SCSL-03-01-T
(28668-28673)

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SPECIAL COURT FOR SIERRA LEONE

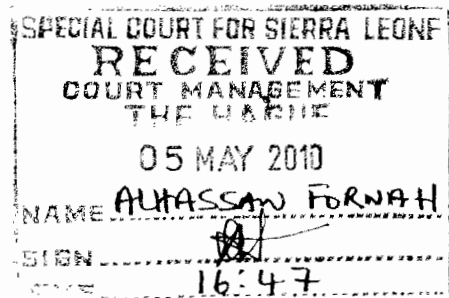
TRIAL CHAMBER II

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

Registrar: Binta Mansaray

Case No.: SCSL-03-1-T

Date: 5 May 2010



PROSECUTOR

v.

Charles Ghankay TAYLOR

DECISION ON URGENT PROSECUTION APPLICATION
FOR LEAVE TO APPEAL DECISION OF 16 APRIL 2010

Office of the Prosecutor:

Brenda J. Hollis
Kathryn Howarth
Sigall Horovitz

Counsel for the Accused:

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

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

SEISED of the “Urgent Prosecution Application for Leave to Appeal Decision of 16 April 2010”, filed on 19 April 2010 (“Motion”),¹ wherein the Prosecution seeks leave to appeal the Trial Chamber’s oral decision of 16 April 2010 relating to the witness summary of Defence witness DCT 306 – Musa Fayia (“Impugned Decision”) on the grounds that:

1) Exceptional circumstances exist in that:

- a) The Impugned Decision raises issues of fundamental legal importance, including the Prosecution’s right to a fair hearing and its right to conduct an effective cross-examination;²
- b) The Impugned Decision may constitute an interference with the course of justice, as it condones the Defence’s systematic failure to provide adequate summaries of the facts to which the witnesses will testify, which impacts the Prosecution’s ability to test the evidence;³
- c) The issue is likely to recur throughout the Defence case, as the majority of the summaries provided by the Defence for its core witnesses are inadequate;⁴

2) The Prosecution will suffer irreparable prejudice in that:

- a) The Decision prevents the Prosecution from effectively testing the evidence of this witness against his statements in order to determine if the new evidence is recently fabricated, and prevents the Prosecution from adequately investigating the details provided during portions of the testimony for which it had no notice;⁵
- b) The inability of the Prosecution to effectively test the credibility of the witness impacts upon the Trial Chamber’s assessment of the weight, if any, to be given to the evidence of the witness, which in turn impacts upon the Impugned Decision on the merits of the case, and is not amenable to cure or resolution by final appeal;⁶

¹ SCSL-03-01-T-944.

² Motion, paras 14-22.

³ Motion, para. 21.

⁴ Motion, para. 22.

⁵ Motion, para. 23.

⁶ Motion, para. 23.

NOTING the “Defence Response to the Urgent Prosecution Application for Leave to Appeal Decision of 16 April 2010”, filed on 23 April 2010 (“Response”),⁷ wherein the Defence opposes the Motion and submits that leave to appeal should be denied, on the grounds that the conjunctive conditions of Rule 73(B) have not been met,⁸ since:

1) No exceptional circumstances exist in that:

- a) No issue of fundamental legal importance has been raised, as the Impugned Decision involves only the Trial Chamber’s discretionary application of settled law, and the Trial Chamber, in exercising this discretion, has applied the law consistently;⁹
- b) The Prosecution has not provided any credible and explicit evidence of an interference with the course of justice;¹⁰
- c) The fact that the issue is likely to recur does not amount to exceptional circumstances, as the Trial Chamber is able to resolve any future objections to Defence witness summaries on a case-by-case basis;¹¹

2) There is no irreparable prejudice, as:

- a) The Impugned Decision does not prevent the Prosecution from effectively challenging the evidence of this witness, as much of the evidence cannot have taken the Prosecution by surprise;¹²
- b) The time given to the Prosecution to prepare for cross-examination was sufficient, especially when considering the information the Prosecution had available to it;¹³

NOTING ALSO the “Prosecution Reply to Defence Response to the Urgent Prosecution Application for Leave to Appeal Decision of 16 April 2010”, filed on 26 April 2010 (“Reply”);¹⁴

⁷ SCSL03-01-T-948, filed according to the Trial Chamber’s “Order for Expedited Filing on Urgent Application for Leave to Appeal Decision of 16 April 2010”, dated 20 April 2010 (SCSL03-01-T-946), wherein the Trial Chamber noted the urgency of the matter and ordered an expedited filing schedule for the response.

⁸ Response, paras 4, 26.

⁹ Response, paras 9-13.

¹⁰ Response, paras 14-15.

¹¹ Response, para. 16.

¹² Response, paras 17-19.

¹³ Response, paras 20-25.

¹⁴ SCSL03-01-T-949, filed according to the Trial Chamber’s “Order for Expedited Filing on Urgent Application for Leave to Appeal Decision of 16 April 2010”, dated 20 April 2010 (SCSL03-01-T-946), wherein the Trial Chamber noted the urgency of the matter and ordered an expedited filing schedule for the reply.

RECALLING the Oral Decision of 16 April 2010 where the Trial Chamber held in relation to the disclosure of witness statements of witness Musa Fayia (DCT-306) that:

[T]he Trial Chamber has held on numerous occasions before, there is no blanket right for the Prosecution to see the statement of a Defence witness, but in each case the Trial Chamber retains the discretion to order such disclosure depending on the circumstances of each case. The test for the Court to determine is whether the Prosecution has demonstrated such undue or irreparable prejudice that it would be in the interest of justice to order the disclosure of the statement. We have also held that a summary is not meant to be a complete statement of everything that the witness will attest to but must at least provide a reasonable indication, however brief, of the evidential areas to be covered by the witness in his testimony. In the present case the Trial Chamber notes that the summary is indeed brief but not necessarily insufficient - or [...] not necessarily grossly insufficient. In particular, the summary states that the witness was a former member of the external delegation. As the Defence has rightly pointed out, the external delegation comprised a very limited number of persons and a number of witnesses have already testified extensively on the role and experience of the external delegation. Furthermore, we agree with the Defence that a large portion of Mr Fayia's testimony relates to existing Defence or Prosecution exhibits, the contents of which do not take either of the parties by surprise. In the circumstances, the Trial Chamber finds that the witness summary of DCT-306, although brief, is not necessarily insufficient and that the Prosecution has not demonstrated undue or irreparable prejudice in that regard. The Prosecution motion for disclosure of the witness statement is therefore denied. However, the Trial Chamber does agree with the Prosecution that the witness's evidence-in-chief did span over areas not specifically mentioned in the summary, and to this extent the summary could be considered as insufficient, although not grossly so. As mentioned in our prior rulings, the proper remedy in that case is to allow the Prosecution some time to prepare its cross-examination in relation to those areas not contained in the summary. The Trial Chamber does not consider that in the present case a substantial adjournment is called for; therefore, the Trial Chamber grants the second leg of the Prosecution motion for a short postponement and will adjourn for the rest of today and adjourn to Monday morning.¹⁵

COGNISANT of the provisions of Article 17 of the Statute of the Special Court for Sierra Leone (“Statute”) and Rules 26bis, 54, 73(A) and (B) and 73ter(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:

¹⁵ Transcript, 16 April 2010, pp. 39249-39251.

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.¹⁶

RECALLING ALSO that this Court has 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 must not be heavily encumbered and, consequently, unduly delayed by interlocutory appeals”;¹⁷ and that “exceptional circumstances” may arise “where the cause of justice may be interfered with” or “where issues of fundamental legal importance” are raised;¹⁸

CONSIDERING that there is no blanket right for the Prosecution to see the statement of a Defence witness,¹⁹ but that where a summary of a witness’s evidence is considered to be insufficient in some respect, the Trial Chamber is vested with a wide discretion to determine an appropriate remedy on a case-by-case basis;²⁰

CONSIDERING that the new facts asserted by the Prosecution in its Reply²¹ by which it seeks to justify an extension of time to “adequately prepare its cross-examination” of Witness DCT 306, were never brought to the attention of the Trial Chamber before it arrived at the Impugned Decision, and are matters that are more appropriately the subject of a separate application for extension of time rather than being raised in the Reply;

CONSIDERING in any event that in the present case, the Trial Chamber in its Impugned Decision granted the Prosecution the remedy of an adjournment in order to prepare its cross-examination, but that Counsel for the Prosecution indicated to the Trial Chamber that he did not wish to avail himself

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

¹⁷ *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.

¹⁸ *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.

¹⁹ *Prosecutor v. Tadić*, IT-94-1-A, Judgement, 15 July 1999, para. 319.

²⁰ See *Prosecutor v. Karemera et al.*, ICTR-98-44-T, Decision on Prosecutor’s Submissions Concerning Edouard Karemera’s Compliance with Rule 73ter and Chamber’s Orders, 2 April 2008, para 4.

²¹ Reply, paras 7-10.

of an adjournment and was prepared to commence his cross-examination forthwith, which is not consistent with the Prosecution's current argument that it suffered irreparable prejudice;²²

CONSIDERING ALSO that the Trial Chamber will be required to determine any issues that might arise in relation to future witnesses on a case-by-case basis, and that therefore the Impugned Decision does not impact on any future determination of the sufficiency of witness summaries, and consequently, there is no irreparable prejudice to the Prosecution

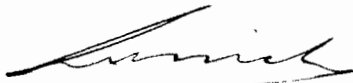
CONSIDERING FURTHER that no fundamental legal issues arise, since the Impugned Decision is merely a discretionary application by the Trial Chamber, of settled law;

FINDING, therefore, that the Prosecution has not met the conjunctive conditions of exceptional circumstances and irreparable prejudice as prescribed by Rule 73(B);

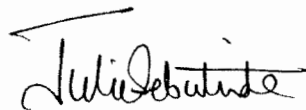
FOR THE ABOVE REASONS

DISMISSES THE MOTION.

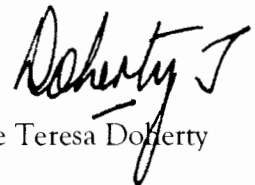
Done at The Hague, The Netherlands, this 5th day of May 2010.



Justice Richard Lussick



Justice Julia Sebutinde
Presiding Judge



Justice Teresa Doherty



²² See Transcript, 16 April 2010, pp. 39251-39252.