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SCSL-03-01-T
(29979-29984)

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SPECIAL COURT FOR SIERRA LEONE

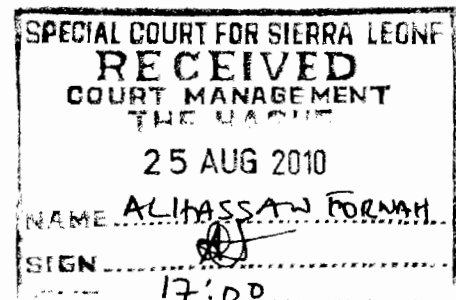
TRIAL CHAMBER II

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: 25 August 2010



PROSECUTOR

v.

Charles Ghankay TAYLOR

DECISION ON URGENT APPLICATION FOR LEAVE TO APPEAL DECISION
EXCLUDING THE USE OF CUSTODIAL STATEMENT OF ISSA SESAY

Office of the Prosecutor:

Brenda J. Hollis
Nicholas Koumjian
Kathryn Howarth

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 Application for Leave to Appeal Decision Excluding the Use of Custodial Statement of Issa Sesay, filed on 16 August 2010 (“Motion”);¹ wherein the Prosecution pursuant to Rule 73(B) of the Rules of Procedure and Evidence (“Rules”) seeks leave to appeal the Trial Chamber’s oral decision of 13 August 2010 (“Impugned Decision”) prohibiting the use of the custodial interview of Defence Witness DCT-172, Issa Hassan Sesay dated 10 March 2003 (“custodial interview”) for the purposes of impeachment of his evidence in-chief, on the grounds that:

1) Exceptional circumstances exist under Rule 73(B) in that:

- a) The matters in the custodial interview in relation to which the Prosecution seeks to cross-examine Issa Sesay are central issues in the case and go to the heart of the Trial Chamber’s ability to assess his credibility as a witness and the reliability of his evidence. Accordingly, the Impugned Decision interferes with the course of justice as it prevents the Prosecution from fully exercising its right to cross-examine Mr. Sesay, and therefore hinders both the “fair trial” rights of the Prosecution and the search for the truth;²
- b) The Impugned Decision raises new issues of fundamental legal importance, namely, (i) whether and under what circumstances a party may use a Prosecution interview of an Accused, that was found to be involuntary and inadmissible in separate proceedings where that Accused, now a convicted prisoner, volunteers to testify as a witness in other proceedings, and (ii) whether a Trial Chamber can simply follow the decision of another Trial Chamber in adjudicating on the admissibility of statements offered in cross-examination;³

2) The Prosecution will suffer irreparable prejudice in that:

- a) the impugned Decision prevents the Prosecution from conducting a full and proper cross-examination of Issa Sesay “in contradiction of the Prosecution’s fair trial rights”, and
- b) there is no cure available on final appeal;⁴

¹ SCSL-03-01-T-1050.

² Motion, paras. 14-16.

³ Motion, para 17.

⁴ Motion, para. 18.

RECALLING the “Order for Expedited Filing” dated 17 August 2010 wherein the Trial Chamber noted the urgency of the matter and ordered expedited filing schedules for a response and a reply in relation to the Motion;⁵

NOTING the “Defence Response to Prosecution Urgent Application for Leave to Appeal Decision Excluding the Use of Custodial Statement of Issa Sesay”, filed on 19 August 2010 (“Response”), wherein the Defence opposes the Motion on the grounds that it does not meet the conjunctive threshold of “exceptional circumstances” and “irreparable prejudice” under Rule 73(B);⁶

NOTING ALSO the “Prosecution Reply to Defence Response to Prosecution Urgent Application for Leave to Appeal Decision Excluding the Use of Custodial Statement of Issa Sesay”, filed on 20 August 2010 (“Reply”);⁷

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.⁸

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

⁵ SCSL-03-01-T-1051.

⁶ SCSL-03-01-T-1055.

⁷ SCSL-03-01-T-1057.

⁸ *Prosecutor v. Norman, Fofana and Kondewa*, 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";⁹ and that "exceptional circumstances" may arise "where the cause of justice may be interfered with" or "where issues of fundamental legal importance" are raised;¹⁰

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;¹¹

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"),¹² wherein the Trial Chamber laid down clear guidelines regarding the use and admission of "fresh evidence" during cross-examination 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.";¹³ [Emphasis added].

RECALLING ALSO the Trial Chamber's Oral Decision of 13 August 2010 ("Impugned Decision") where Justice Richard Lussick ruled on the Prosecution's application to use part of the custodial interview for the purposes of cross-examining Issa Sesay, as follows:

Mr. Koumjian, this is a unanimous decision. Now, we would have no objection to the pages of the document that you've indicated being put to the witness if the material put to him simply went to the fact that it's a prior inconsistent statement, inconsistent, that is, with his prior

⁹ *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.

¹⁰ *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.

¹¹ *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.

¹² *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").

¹³ Decision on Documents, para. 27.

testimony – with his current testimony. But the material very clearly goes to the proof of guilt of the Accused. Now, we're aware of the way in which it was obtained and I think the application you referred to earlier sets out the details of how it was obtained involuntarily from the witness and adjudicated by Trial Chamber I to have been so involuntarily obtained. Now, because it does go to the – the material does go to the proof of guilt of the Accused, we're of the view, as we have expressed in our decision of 30 November 2009, that such material would not be in the interests of justice to be used against the Accused by cross-examining this witness on that material. It also, in our view, would violate the fair trial rights of the accused. And so Mr. Koumjian, we rule that the document, or parts of the document you've indicated, cannot be used in cross-examination of this witness.¹⁴

CONSIDERING that the Prosecution, having acknowledged that the parts of the custodial interview sought to be used in cross-examination did contain material that goes to proof of guilt of the Accused,¹⁵ assumed the burden of proving that the use of the said document was *inter alia*, “in the interest of justice” and “not prejudicial to the fair trial rights of the Accused,” in accordance with the standard required by the Decision on Documents, but that it failed to so prove;

CONSIDERING ALSO that in holding that the use of the material would “not be in the interests of justice to be used against the Accused ” and that “it would violate the fair trial rights of the Accused,” the Trial Chamber was judicially exercising its discretion and 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 Documents Decision and that any other factors mentioned in the Impugned Decision were related to the assessment of those two criteria;

CONSIDERING ALSO that the Prosecution application is premised upon the erroneous assumption that the Trial Chamber “adopted legal findings adjudicated in another case and applied them to manifestly distinct issues in the present case”¹⁶ and that “novel issues of law arise” in the Impugned Decision;¹⁷

CONSIDERING FURTHER in view of the extensive testimony of Issa Sesay both in this trial and in his own trial¹⁸ as well as the evidence of other witnesses, in relation to the diamond trade in Sierra Leone, that the Prosecution has an abundance of material upon which to effectively cross-examine Issa Sesay other than by the use of the custodial interview and cannot therefore claim ‘irreparable prejudice’;

¹⁴ *Prosecutor v. Taylor*, SCSL-03-01-T, Trial Transcript 13 August 2010, pp. 46255-46266.

¹⁵ *Ibid.*, pp. 46254-46255.

¹⁶ Motion, paras 11-13.

¹⁷ Motion, para. 17.

¹⁸ *Prosecutor v. Sesay, Kallon and Gbao*, Case No. SCSL 04-15-T.

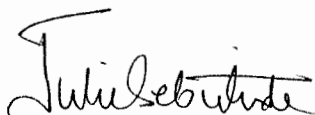
HOLDING therefore that the Prosecution has not satisfied the conjunctive conditions of exceptional circumstances and irreparable prejudice under Rule 73(B);

HEREBY DISMISSES THE MOTION.

Done at The Hague, The Netherlands, this 25th day of Month 2010.



Justice Richard Lussick



Justice Julia Sebutinde
Presiding Judge



Justice Teresa Doherty

