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SCSL-03-01-T  
(31082-31088)

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SPECIAL COURT FOR SIERRA LEONE

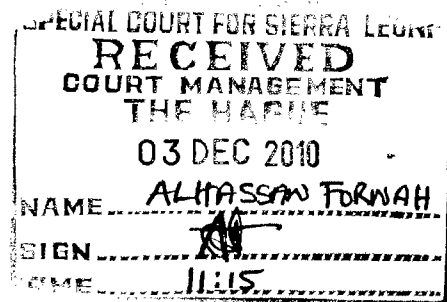
TRIAL CHAMBER II

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: 2 December 2010



PROSECUTOR

v.

Charles Ghankay TAYLOR

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DECISION ON DEFENCE MOTION SEEKING LEAVE TO APPEAL THE DECISION ON THE  
DEFENCE MOTION FOR ADMISSION OF DOCUMENTS AND DRAWING OF AN ADVERSE  
INFERENCE RELATING TO THE ALLEGED DEATH OF JOHNNY PAUL KOROMA

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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”);

**RECALLING** that the Trial Chamber ordered the Defence to file all its remaining motions by 24 September 2010,<sup>1</sup> but indicated on 12 November 2010 that this time limit would not apply to the Motion for leave to appeal;<sup>2</sup>

**SEISED** of the “Defence Motion Seeking Leave to Appeal the Decision on the Defence Motion for Admission of Documents and Drawing of an Adverse Influence Relating to the Alleged Death of Johnny Paul Koroma”, filed on 15 November 2010 (“Motion”);<sup>3</sup> wherein the Defence seeks leave to appeal the Trial Chamber’s “Decision on Public with Confidential Annexes A-D Defence Motion for Admission of Documents and Drawing of an Adverse Inference Relating to the Alleged Death of Johnny Paul Koroma” (“ Impugned Decision”), dated 11 November 2010,<sup>4</sup> on the grounds that the Trial Chamber’s majority erred in law and/or fact (a) in finding that the exculpatory evidence contained in the affidavit of Defence Witness DCT-032, (“Affidavit”) which contradicts the evidence of Prosecution witnesses relating to an alleged murder committed by subordinates of Charles Taylor on his orders, goes to proof of the acts and conduct of the Accused and thus is inadmissible at the request of the Accused under Rule 92bis;<sup>5</sup> and (b) in finding that, if the Affidavit of DCT-032 is not admissible, then the other materials submitted have no relevance, including the record of disbursements made by the Prosecution to DCT-032 and the indemnity letter written by the Prosecution to DCT-032, which errors the Defence submits, amount to “exceptional circumstances” and result in “irreparable prejudice” to the Accused under Rule 73(B);<sup>6</sup>

**NOTING** that the Defence further submits that:

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<sup>1</sup> *Prosecutor v. Taylor*, SCSL-03-01-T, Transcript 13 September 2010, p. 48323.

<sup>2</sup> *Prosecutor v. Taylor*, SCSL-03-01-T, Transcript 12 November 2010, p. 49115.

<sup>3</sup> SCSL-03-01-T-1122.

<sup>4</sup> SCSL-03-01-T-1119.

<sup>5</sup> Motion, paras.3,8

<sup>6</sup> Motion, paras. 3, 9.

- 1) “exceptional circumstances” exist in that:
- a) the foregoing errors of law and/or fact, individually or collectively, amount to exceptional circumstances as the interests of justice might be interfered with or because further decision is conducive to the interests of justice and/or because the case raises a question of fundamental importance;<sup>7</sup>
  - b) the fact that the Prosecution, for good reason or otherwise, kept the exculpatory material at issue away from the Accused until very late in the proceedings and now admission into evidence is being erroneously refused, might result in the interests of justice being interfered with and therefore calls for further decision on appeal;<sup>8</sup>
  - c) the question of what constitutes acts and conduct of the accused and the meaning of an “omission” under Rule 92bis jurisprudence, especially when considered in the context of the ability of the Accused to admit [*sic*] exculpatory evidence, raises a question of fundamental legal importance or alternatively raises a question to be determined for the first time on appeal<sup>9</sup>. Furthermore, the fact that there is a carefully and well-reasoned re-occurring split on the Bench on this issue suggests that a further decision would be conducive to the interests of justice,<sup>10</sup> and
  - d) The errors of law and/or fact relating to non-admission of the Affidavit are especially egregious and elevate the exceptional circumstances surrounding it because the majority’s

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<sup>7</sup> Motion, para.10

<sup>8</sup> Motion, para.11

<sup>9</sup> Motion, para.12

<sup>10</sup> Motion, para.12

decision not to admit the disbursement record and the indemnity letter were contingent on the admission of the Affidavit;<sup>11</sup>

2) Irreparable prejudice exists in that:

- a) the failure of the Trial Chamber to admit the exculpatory material at issue and consequently not being able to consider the exculpatory evidence in its Judgement deliberations is not easily remediable upon final appeal;<sup>12</sup>
- b) the Defence will not be able to rely on the evidence relating to the Prosecution's recruitment and payment practices, as well as information that contradicts Prosecution allegations, in its Final Brief;<sup>13</sup>
- c) without admitting any of the documents at issue, the Trial Chamber cannot consider any Defence request to draw adverse inferences from the Prosecution's disclosure violation, which issue the Trial Chamber has left to the Judgement deliberations stage;<sup>14</sup>

**NOTING** the "Prosecution Response to 'Public with [sic] Defence Motion Seeking Leave to Appeal the Decision on the Defence Motion for Admission of Documents and Drawing of an Adverse Inference Relating to the Alleged Death of Johnny Paul Koroma", filed on 19 November 2010 ("Response"),<sup>15</sup> wherein the Prosecution submits that the Motion should be dismissed on the basis that the Defence has failed to prove either of the conjunctive requirements of Rule 73(B);<sup>16</sup>

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<sup>11</sup> Motion, para.13

<sup>12</sup> Motion, para.14

<sup>13</sup> Motion, para.14

<sup>14</sup> Motion, para.14

<sup>15</sup> SCSL-03-01-T-1124.

<sup>16</sup> Response, paras 2, 17.

NOTING that the Prosecution argues that the Defence has failed to establish “exceptional circumstances” in that:

- 1) since all evidence offered by the Defence is presumably exculpatory, the allegedly exculpatory evidence it seeks to admit pursuant to Rule 92bis cannot of itself constitute “exceptional circumstances”;<sup>17</sup>
- 2) the Impugned Decision did not address the issue of the applicability of Rule 92bis to omissions to act, and therefore the Defence argument on this ground cannot be a question of fundamental legal importance justifying leave to appeal;<sup>18</sup> and
- 3) the Defence’s argument regarding the interpretation of the prohibition on admission under Rule 92bis as being limited to statements submitted by the Prosecution or Co-Accused and going to prove acts and conduct, is contrary to the plain language of the rule and of the case law, including that of this Trial Chamber, which has held that the prohibition applies to evidence introduced by both parties to prove or disprove the Accused’s acts or conduct;<sup>19</sup>

NOTING that the Prosecution also argues that the Defence has failed to establish that the Impugned Decision will result in irreparable prejudice, as it is capable of remedy upon final appeal;<sup>20</sup>

NOTING ALSO the “Defence Reply to Prosecution Response to Defence Motion Seeking Leave to Appeal the Decision on the Defence Motion for Admission of Documents and Drawing of an Adverse Inference Relating to the Death of Johnny Paul Koroma”, filed on 24 November 2010 (“Reply”);<sup>21</sup>

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

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<sup>17</sup> Response, para. 5.

<sup>18</sup> Response, para. 6.

<sup>19</sup> Response, paras 7-8.

<sup>20</sup> Response, paras 11-16.

<sup>21</sup> SCSL-03-01-T-1127.

**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.<sup>22</sup>

**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”;<sup>23</sup> and that “exceptional circumstances” may arise “where the cause of justice may be interfered with” or “where issues of fundamental legal importance” are raised;<sup>24</sup>

**CONSIDERING** that the Motion raises an issue of fundamental legal importance, namely, the interpretation of Rule 92bis, and in particular, whether the exclusion of evidence going to proof of the acts and conduct of the Accused applies to exculpatory evidence tendered by the Defence;

**CONSIDERING FURTHER** that a continuous erroneous interpretation of Rule 92bis on this issue could result in irreparable prejudice to the Accused that cannot be easily remedied on final appeal;

**SATISFIED** therefore that the Defence has met the conjunctive conditions of exceptional circumstances and irreparable prejudice as prescribed by Rule 73(B);

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<sup>22</sup> *Prosecutor v. Norman, Fofana and Kondewa*, SCSL-2004-14-AR73, Decision on Amendment of the Consolidated Indictment, 16 May 2005, para. 43.


<sup>23</sup> *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.

<sup>24</sup> *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.

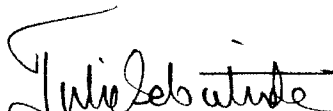
FOR THE ABOVE REASONS

GRANTS the Motion.

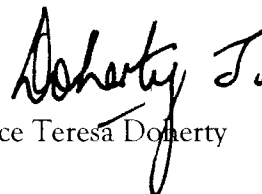
Done at The Hague, The Netherlands, this 3<sup>rd</sup> day of December 2010.



Justice Richard Lussick



Justice Julia Sebutinde  
Presiding Judge



Justice Teresa Doherty

