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SCSL-03-01-T  
(33323-33328)

33323



## SPECIAL COURT FOR SIERRA LEONE

### TRIAL CHAMBER II

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

**Registrar:** Binta Mansaray

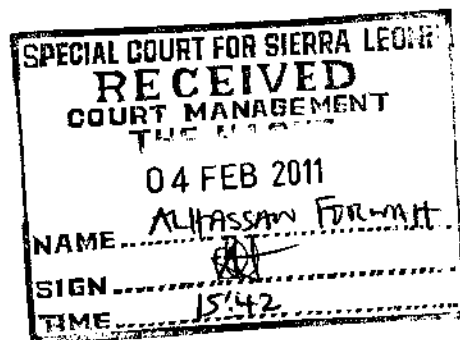
**Case No.:** SCSL03-1-T

**Date:** 4 February 2011

**PROSECUTOR**

v.

**Charles Ghankay TAYLOR**



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**DECISION ON DEFENCE MOTION SEEKING LEAVE TO APPEAL THE DECISION ON DEFENCE MOTION TO RECALL FOUR PROSECUTION WITNESSES AND TO HEAR EVIDENCE FROM THE CHIEF OF WVS REGARDING RELOCATION OF PROSECUTION WITNESSES**

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**Office of the Prosecutor:**  
Brenda J. Hollis

**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 “Defence Motion Seeking Leave to Appeal the Decision on Defence Motion to Recall Four Prosecution Witnesses and to Hear Evidence from the Chief of WVS Regarding Relocation of Prosecution Witnesses”, filed on 27 January 2011 (“Motion”),<sup>1</sup> wherein the Defence seeks leave to appeal the Trial Chamber’s “Decision on Public with Annexes A-H and Confidential Annexes I-J Defence Motion to Recall Four Prosecution Witnesses and to Hear Evidence from the Chief of WVS Regarding Relocation of Prosecution Witnesses”, dated 24 January 2011 (“Impugned Decision”),<sup>2</sup> on the basis that:

- 1) “exceptional circumstances” exist in that:
  - a. the refusal by the Trial Chamber to countenance testing witness credibility vis-à-vis the new information that the Defence has received regarding the promise of relocation to witnesses amounts to an interference with the interests of justice;<sup>3</sup>
  - b. the Trial Chamber’s consideration of a number of factors in the absence of any consideration of the merits of the Defence argument, or of the fair trial rights of the Accused, or of the interests of justice, amounts to an interference with the interests of justice;<sup>4</sup>
  - c. the issues at bar give rise to a question of fundamental importance, namely the role of financial compensation/inducements in relation to the credibility of witnesses;<sup>5</sup>
- 2) irreparable prejudice exists in that:
  - a. the Defence will not have another chance to cross-examine the four Prosecution witnesses regarding post-testimonial benefits, including the hope of relocation, and as such the Trial Chamber will not have the opportunity to assess the credibility of these witnesses within the context of such a crucial matter;<sup>6</sup>
  - b. this will not be remediable on final appeal;<sup>7</sup>

<sup>1</sup> SCSL-03-01-T-1173.

<sup>2</sup> SCSL-03-01-T-1167.

<sup>3</sup> Motion, paras 9-10.

<sup>4</sup> Motion, para. 12.

<sup>5</sup> Motion, para. 13.

<sup>6</sup> Motion, para. 15.

<sup>7</sup> Motion, para. 15.

RECALLING the “Order for Expedited Filing”, dated 31 January 2011 wherein the Trial Chamber ordered expedited filing schedules for a response and a reply in relation to the Motion;<sup>8</sup>

NOTING the “Prosecution Response to Defence Motion Seeking Leave to Appeal the Decision on Defence Motion to Recall Four Prosecution Witnesses and to Hear Evidence from the Chief of WVS Regarding Relocation of Prosecution Witnesses”, filed on 2 February 2011 (“Response”),<sup>9</sup> wherein the Prosecution submits that the Motion should be dismissed on the basis that:

- 1) The Defence has failed to establish “exceptional circumstances” in that:
  - a. the mere fact that the Defence has identified purported errors does not of itself give rise to exceptional circumstances and irreparable prejudice<sup>10</sup>;
  - b. the Defence argument that the refusal to allow witnesses to be tested with “new information” amounts to an interference with justice is unsupported<sup>11</sup>
  - c. the Defence argument in paragraph 10 of the Motion relies on a series of misstatements about the evidence and therefore must fail;<sup>12</sup>
  - d. the Defence erroneously argues that the Trial Chamber failed to given adequate consideration to “factors in the interests of the Accused” or his fair trial rights, when, as explicitly stated in the Impugned Decision and deliberately ignored by the Defence, the threshold of good cause involves the “right of the accused to be tried without undue delay . . . and whether failure to cross-examine the witness would violate the fair trial rights of the Accused”;<sup>13</sup>
  - e. the fact that other tribunals are looking into issues related to witnesses in their cases does not establish “exceptional circumstances” in this case and ignores this Court’s jurisprudence;<sup>14</sup>
- 2) The Defence has failed to establish “irreparable prejudice” in that;
  - a. the purpose of the Motion is to bring more evidence before the Trial Chamber regarding the credibility of the four Prosecution witnesses and to challenge the

<sup>8</sup> SCSL03-01-T-1176.

<sup>9</sup> SCSL03-01-T-1181.

<sup>10</sup> Response, para 3

<sup>11</sup> Response, para 5

<sup>12</sup> Response, para. 7.

<sup>13</sup> Response, para. 9.

<sup>14</sup> Response, para. 10.

Prosecution's *modus operandi* in relation to its witnesses, but these issues have already been more than adequately canvassed by the Defence;<sup>15</sup>

b. the Impugned Decision is remediable on final appeal;

NOTING FURTHER that the Prosecution submits that the Defence submissions which do not relate to the criteria for certification set forth in Rule 73(B) but instead focus on the merits of potential arguments at the appeal stage should be ignored;<sup>16</sup>

NOTING ALSO the "Defence Reply to Prosecution Response to Defence Motion Seeking Leave to Appeal the Decision on Defence Motion to Recall Four Prosecution Witnesses and to Hear Evidence from the Chief of WVS Regarding Relocation of Prosecution Witnesses", filed on 3 February 2011, ("Reply");<sup>17</sup>

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

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.

NOTING therefore that (i) as a general rule, interlocutory decisions are not subject to appeal; (ii) Rule 73(B) involves a high threshold that must be met before the Trial Chamber can exercise its discretion to grant leave to appeal; (iii) a party seeking leave to appeal against an interlocutory decision must show "exceptional circumstances" and "irreparable prejudice"; (iv) the two prong test prescribed under Rule 73(B) is conjunctive and not disjunctive;<sup>18</sup> (v) even where the conjunctive test is satisfied, leave to appeal remains in the discretion of the Trial Chamber;<sup>19</sup>

<sup>15</sup> Response, para. 13.

<sup>16</sup> Respons, paras 3-4.

<sup>17</sup> SCSL03-01-T-1184.

<sup>18</sup> *Prosecutor v Brima, Kamara, Kanu*, SCSL4-16-T, Decision on Joint Defence Request for Leave to Appeal from Decision on Defence Motions for Judgement of Acquittal Pursuant to Rule 98 of 31 March 2006, 4 May 2006.

<sup>19</sup> Rule 73(B) states that "in exceptional circumstances and to avoid irreparable prejudice to a party, the Trial Chamber may give leave to appeal"; also, see for example *Prosecutor v. Popovic et al.*, IT-05-88-T, Decision on Gvero Motion Seeking Certification to Appeal the Decision on the Extension of Time for Filing the Final Trial Brief, 15 July 2009; *Prosecutor v. Stanasic & Zupljanin*, IT-08-91-T, Decision Denying Mico Stanasic's Motion for Certification to Appeal the Oral Decision Accepting Christian Nielsen as an Expert and Requesting for a Stay of Proceedings, 20 October 2009, para 3.

RECALLING the Appeals Chamber rulings that “[a]s a general principle, interlocutory appeals are a rare exception”<sup>20</sup> and that “[i]n 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>21</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>22</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>23</sup>

NOTING that in support of its argument that exceptional circumstances exist, the Defence submits that it put to Abu Kieta in cross examination that “he and his family could be relocated to The Netherlands if he agreed to cooperate with the Prosecution. Kieta denied the allegation”.<sup>24</sup> The Defence further submits: “Now the Defence has the information to show that a key prosecution witness lied under oath”. In fact, the record shows that the cross examination referred to was directed at statements allegedly made by Abu Kieta to another person regarding that other person’s relocation.<sup>25</sup> It is not true to say that Keita denied the allegation about his own relocation, since such

<sup>20</sup> *Prosecutor v. Taylor*, SCSL-03-01-T-1166, Decision on Public Defence Notice of Appeal and Submissions Regarding the Decision on the Defence Motion Requesting an Investigation into Contempt of Court by the Office of the Prosecutor and its Investigators, 21 January 2011.

<sup>21</sup> *Prosecutor v. Norman, Fofana and Kondewa*, SCSL-2004-14-AR73, Decision on Amendment of the Consolidated Indictment, 16 May 2005, para. 43.

<sup>22</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>23</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.

<sup>24</sup> Motion, para 10

<sup>25</sup> Transcript p.2153, lines 13-26:

- Q. Mr Keita, I put it to you that when you met Idrissa Kargbo you told him that you had mentioned his name to the Office of the Prosecutor during your interviews with them and you wanted him to go along with what you had told them, true or false?
- A. False.
- Q. I put it to you that you told Mr Kargbo that if he went along with what you told them he would be able to get asylum when he came to the Netherlands, true or false?
- A. False.

an allegation was not put to him. The submission by the Defence is therefore knowingly or recklessly misleading and is in breach of Counsel's duty to the Court.

CONSIDERING that the Trial Chamber has permitted evidence throughout the trial on the treatment of witnesses by the Prosecution and that the Defence had ample opportunity to raise issues of relocation during the cross-examination of the four witnesses in question, or at least before it closed its case;

FINDING therefore that the Defence has not shown the existence of exceptional circumstances, in that it has not demonstrated that the Impugned Decision has resulted in an interference with the cause of justice, nor that such decision gives rise to an issue of fundamental legal importance;

CONSIDERING ALSO that, in addition to the Defence having already had the opportunity to test the credibility of the four witnesses in question by cross-examination, there is already extensive evidence before the Trial Chamber relating to the treatment of witnesses by the Prosecution, including payments to and relocation of witnesses;


FINDING therefore that the Defence has failed to establish that the Impugned Decision has resulted in irreparable prejudice;

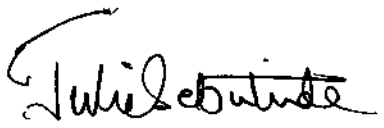
FOR THE ABOVE REASONS

HEREBY DISMISSES THE MOTION.

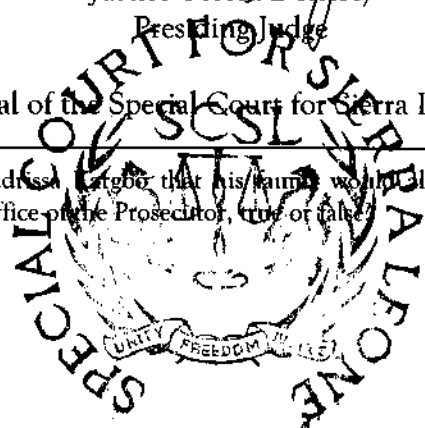
Done at The Hague, The Netherlands, this 4<sup>th</sup> day of February 2011.

  
Justice Richard Lussick

  
Justice Teresa Doherty  
Presiding Judge

  
Justice Julia Sebutinde

[Seal of the Special Court for Sierra Leone]



Q. I put it to you that you told Idissa Katgor that his family would also be relocated to the Netherlands if he co-operated with the Special Court's Office of the Prosecutor, true or false?  
A. False.