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SCSL-03-01-T
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THE SPECIAL COURT FOR SIERRA LEONE

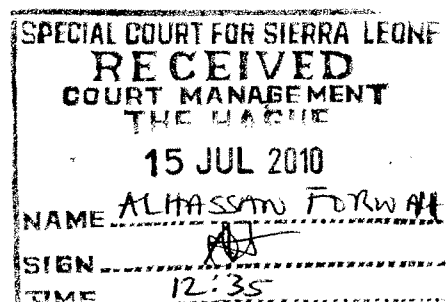
Trial Chamber II

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

Registrar: Ms. Binta Mansaray

Date: 15 July 2010

Case No.: SCSL-03-01-T



THE PROSECUTOR

-v-

CHARLES GHANKAY TAYLOR

PUBLIC

**DEFENCE RESPONSE TO PROSECUTION OBJECTION
TO ALLEGED RULE 92bis STATEMENTS**

Office of the Prosecutor:

Ms. Brenda J. Hollis

Counsel for Charles G. Taylor:

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

I. Introduction

1. This is the Defence response to the *Prosecution Objection to Rule 92bis Statements*.¹
2. In the Motion, the Prosecution objects to the tender of certain documents (five statements)² that were disclosed to them, and which the Defence seeks to use during the course of the evidence of its current witness, DCT-172, Issa Hassan Sesay (“Issa Sesay”).
3. The Prosecution argues that the said documents could only properly be tendered under Rule 92bis of the Rules of Procedure and Evidence of the Special Court. However, the Prosecution further argues that tender under Rule 92bis should be refused on the basis that all the documents in question contain impermissible opinion evidence on the witness’s character – good character evidence.³
4. The Prosecution also argues that the documents cannot be tendered under Rule 89(C), suggesting that such would be without legal basis, and again objecting to the admission of good character evidence.⁴
5. The Defence submits that the Prosecution’s Motion has no merit whatsoever in that it misconstrues the application and legal requirements of both Rules 89(C) and 92bis.

II. Submissions

6. The issue for determination in this case is very simple. The question is simply whether the Defence could use and possibly tender as exhibits the documents in question pursuant to Rule 89(C) through its current *viva voce* witness, Issa Sesay, consistent with the notice given to the Prosecution.⁵
7. Notably, the jurisprudence of the Special Court “favour a flexible approach to the issue of admissibility of evidence”.⁶ As the Appeals Chamber has stated in its *Fofana* Bail Appeals Decision,

“Rule 89(C) ensures that the administration of justice will not be brought into disrepute by artificial or technical rules, often devised for jury trial, which prevent judges from having access

¹ *Prosecutor v. Taylor*, SCSL-03-01-T-1003, Prosecution Objection to Rule 92bis Statements, 12 July 2010 (“**Motion**”).

² Note that while the Prosecution refers to six statements, the statements in issue are only from five people. In regard to the statement given by Alpha Konare, there is both a French and English version.

³ Motion, para. 3; also see paras 7-9.

⁴ Motion, para. 12.

⁵ *Prosecutor v. Taylor*, SCSL-03-01-T-1001, Public with Annex A Defence Notification of Additional Potential Exhibits to be Used in Connection to DCT-172, 5 July 2010.

⁶ *Prosecutor v. Sesay, Kallon, Gbao*, SCSL-04-15-T-618, Decision on Prosecution Notice Pursuant to Rule 92bis to Admit Information into Evidence, 2 August 2006, p. 3.

to information which is relevant. Judges sitting alone can be trusted to give second hand evidence appropriate weight, in the context of the evidence as a whole and according to well-understood forensic standards. The Rule is designed to avoid sterile legal debate over admissibility...”⁷

8. The test favours admissibility, as long as the probative value of the evidence is not outweighed by its prejudicial effect (making it thus inadmissible according to the terms of Rule 95).
9. Rule 89(C), not Rule 92*bis*, governs the admission of documents tendered through a witness. The Appeals Chamber’s decision in our case is instructive on this point.⁸ In the current situation, the Defence seeks to tender the documents in question through Issa Sesay as part of his evidence. Therefore the only questions arising at the admissions stage are whether the requirements for tendering documents through a witness under Rule 89(C) are met, *viz*:
 - i) Whether the documents in question are relevant;⁹ and
 - ii) By extension of the relevance requirement, whether the witness through whom the documents are sought to be tendered is capable of laying sufficient foundation in relation to the documents.¹⁰
10. The Defence submits that all the documents in question are relevant and that Issa Sesay is capable of laying sufficient foundation with respect to each of them. Certainly, Issa Sesay is “competent to give evidence” in relation to the documents.¹¹ Consequently, the documents can be tendered under Rule 89(C) in conjunction with his evidence.
11. In this regard, it is important to note the distinction that was made by Appeals Chamber on the application of Rule 89(C) and Rule 92*bis*; the route conveniently, *albeit*, erroneously prescribed by the Prosecution.
12. As the Appeals Chamber has held, Rule 92*bis* establishes a legal regime designed to afford “specific protection for evidence submitted *in the absence of a witness*” (emphasis added).¹²

⁷ *Prosecutor v. Norman, Kondewa, Fofana*, SCSL-04-15-AR65, Fofana – Appeal Against Decision Refusing Bail, 11 March 2005, para. 26.

⁸ *Prosecutor v. Taylor*, SCSL-03-01-T-721, Decision on Prosecution Notice of Appeal and Submissions Concerning the Decision Regarding the Tender of Documents 6 February 2009 (“**Appeals Chamber Decision**”).

⁹ Appeals Chamber Decision, para. 37.

¹⁰ Appeals Chamber Decision, paras. 38-42.

¹¹ *Prosecutor v. Taylor*, SCSL-03-01-T-724, Decision on Prosecution Motion for Admission of Document Pursuant to Rule 89(C), 9 February 2009, p. 3.

¹² Appeals Chamber Decision, para. 33.

13. Rule 89(C) on the other hand, does not enact any special procedure as does Rule 92*bis*, because under that Rule information can be admitted **as part (not in lieu) of the oral testimony of a witness**, provided it is relevant (emphasis added).¹³
14. The Prosecution's argument might have had some merit if had the Defence sought to introduce the documents in question under Rule 89(C) outside the *viva voce* evidence of any witness. In such an instance, as the Prosecution argues, the Defence should not be allowed to circumvent the stringency of Rule 92*bis* by simply opting to proceed under Rule 89(C).¹⁴
15. As the Defence intends to tender the documents in question through Issa Sesay's testimony under Rule 89(C), it would be academic to be drawn into the debate by the Prosecution on the applicability of Rule 92*bis* to the present case. If the Defence had intended to proceed under Rule 92*bis*, then a notification under Rule 92*bis* would have been made.

The Statements are Relevant to Issa Sesay's Testimony

16. The only question the Trial Chamber must consider now is relevance. Issues regarding reliability and probativity are properly to be considered by the Trial Chamber at the end of the trial as "[e]vidence is admissible once it is shown to be relevant: the question of its reliability is determined thereafter, and it is not a condition for its admission".¹⁵
17. All the documents in question are relevant to the defence case generally and to the witness's evidence specifically, in that:
- a. The documents confirm the witness's account of the role he played during the peace process in Sierra Leone as he will state in his *viva voce* testimony;
 - b. Some of the documents in particular confirm the role the Accused, Charles Taylor, played during the peace process in Sierra Leone,¹⁶ as stated, *inter alios*, by the Accused in his own defence.¹⁷
 - c. This piece of evidence is very important in light of Prosecution allegations, *inter alia*, that Charles Taylor and the RUF were in fact undermining the peace process.¹⁸

¹³ Appeals Chamber Decision, para. 33.

¹⁴ Motion, para. 7 citing Appeals Chamber Decision, para. 33.

¹⁵ Fofana Bail Appeals Decision., para. 24.

¹⁶ See, ex. Alpha Konare's Statement at page 1, Daniel Opande's Statement at page 2, Oluoyemi Adeniji's Statement at page 2.

¹⁷ See, ex., *Prosecutor v. Taylor*, SCSL-03-01-T, Trial Transcript, 5 August 2009.

¹⁸ See, ex., *Prosecutor v. Taylor*, SCSL-03-01-T, Trial Transcript, 14 January 2010, p. 33380, lns. 9-11 (Brenda Hollis suggests to Charles Taylor that he only wanted to be on the Committee of Five or the point person for peace on the Sierra Leonean issue so that he would "be in a position to undermine peace at the same time on the public

- d. The documents therefore go not only to the character and credibility of both Issa Sesay and Charles Taylor as witnesses before this court (which in itself would meet the relevance threshold); they also directly relate to allegations made against both men by Prosecution witnesses in this case.
18. Such issues as that the evidence in the documents amount to hearsay, or the fact that the documents are un-sworn statements, as argued by the Prosecution,¹⁹ are therefore immaterial at this stage. They do not bar admission.
19. Similarly, the fact that the documents in question to an extent contain opinion evidence has no bearing on the question of relevance.
20. Further, the mere fact that there are more reliable pieces of evidence other than documents sought to be tendered is not bar to the tender of such documents once their relevance has been established.

Issa Sesay Can Lay a Sufficient Foundation

21. All the documents in question are statements that were obtained by Issa Sesay's defence team during his trial before Trial Chamber I of the Special Court for Sierra Leone.²⁰ The documents therefore bear a direct relationship with the witness. Further, Issa Sesay is competent to give evidence in relation to the documents on such questions as their origins as well as their authorship.

III. Conclusion

22. The Defence therefore submits that the documents in question can be tendered as part of Issa Sesay's *viva voce* testimony under Rule 89(C). The Prosecution objection under Rule 92*bis* therefore has no basis and must therefore fail.

record you were supposedly supporting peace"). Thus confirmation of Sesay's testimony regarding Charles Taylor's involvement and *bona fides* role in the peace process is highly relevant.

¹⁹ Motion, para. 12.

²⁰ Note that the Defence is allowed access to these statements as a result of this Trial Chambers Decision, *Prosecutor v. Taylor*, SCSL-03-01-T-439, Decision on Defence Motion Pursuant to Rule 75(G) to Modify Sesay Defence Protective Measures Decision of 30 November 2006 for Access to Closed Session Defence Witness Testimony and Limited Disclosure of Defence Witness Names and Related Exculpatory Material, 24 March 2008.

Respectfully Submitted,

CGW

SIVAS CHZKERM

Courtenay Griffiths, Q.C.

Lead Counsel for Charles G. Taylor

Dated this 15th Day of July 2010

The Hague, The Netherlands

Table of Authorities

Prosecutor v. Taylor, SCSL-03-01-T-439, Decision on Defence Motion Pursuant to Rule 75(G) to Modify Sesay Defence Protective Measures Decision of 30 November 2006 for Access to Closed Session Defence Witness Testimony and Limited Disclosure of Defence Witness Names and Related Exculpatory Material, 24 March 2008

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Prosecutor v. Norman, Kondewa, Fofana, SCSL-04-15-AR65, Fofana – Appeal Against Decision Refusing Bail, 11 March 2005

Prosecutor v. Sesay, Kallon, Gbao, SCSL-04-15-T-618, Decision on Prosecution Notice Pursuant to Rule 92*bis* to Admit Information into Evidence, 2 August 2006