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SCSL-03-01-T
(30871-30882)

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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: 4 November 2010

Case No.: SCSL-03-01-T

THE PROSECUTOR

-v-

CHARLES GHANKAY TAYLOR

SPECIAL COURT FOR SIERRA LEONE	
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PUBLIC WITH CONFIDENTIAL ANNEX ONE

**DEFENCE REPLY TO CONFIDENTIAL PROSECUTION RESPONSE TO DEFENCE MOTION
FOR ADMISSION OF DOCUMENTS AND DRAWING OF AN ADVERSE INFERENCE
RELATING TO THE ALLEGED DEATH OF JOHNNY PAUL KOROMA**

Office of the Prosecutor:

Ms. Brenda J. Hollis
Ms. Leigh Lawrie

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. The Prosecution's Response¹ to the Defence's *Motion for Admission of Documents and Drawing of an Adverse Inference Relating to the Death of Johnny Paul Koroma*² is self-serving and does not assist the Trial Chamber in determining the issues at hand. Before delving into the merits or otherwise of the Prosecution's Response, the Defence emphasizes that the Trial Chamber must not lose sight of the primary purpose of the Defence's Motion.
2. This Motion is consequential to the Trial Chamber's order for the Prosecution to disclose exculpatory material following a finding that the Prosecution had violated its disclosure obligations.³ This Motion primarily seeks to place that material – belatedly disclosed⁴ – on the record after the Prosecution had for long deliberately suppressed the disclosure of the information, including evidence that clearly controverts its case against the Accused on the death of Johnny Paul Koroma.⁵
3. Thus, contrary to the Prosecution's contention that the Defence is “cherry picking” evidence⁶ and the Prosecution's attempt to claim a higher quest for the truth,⁷ this Motion directly flows from the Prosecution's dereliction of its disclosure obligation. Likewise, the Defence's request for the Trial Chamber to draw adverse inferences

¹ *Prosecutor v. Taylor*, SCSL-03-1-T-1112, Confidential Prosecution Response to 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, 2 November 2010 (“**Response**”). The Defence notes that there is no reason for the entire Prosecution Response to be filed Confidentially as the substance does not violate any protective measures or disclose confidential material (which is contained in Annexes 1 and 2 of the Response). Thus, the Defence will reply publicly to the arguments made by the Prosecution.

² *Prosecutor v. Taylor*, SCSL-03-1-T-1108, 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, 27 October 2010 (“**Motion**”).

³ *Prosecutor v. Taylor*, SCSL-03-01-T-1104, Decision on Public with Confidential Annexes A-D Defence Motion for Disclosure of Exculpatory Information Relating to DCT-032, 20 October 2010 (“**Decision**”).

⁴ Decision, para. 25 (noting that DCT-032 was interviewed by the Prosecution in May, June, July and October 2008). The material was disclosed on 21 October 2010.

⁵ In its Response at para. 3, the Prosecution argues that the results of the DNA tests are “at best, neutral”. In making this submission, the Prosecution has apparently forgotten that the Prosecution, unlike the Defence, must meet a burden of proof that is beyond a reasonable doubt. Thus evidence that is potentially exculpatory, as the Trial Chamber has determined it is, cannot be said to be neutral.

⁶ Response, paras. 3 and 16.

⁷ Response, para. 16.

flows directly from the Prosecution's dereliction outlined above. The Prosecution therefore has no claim to any higher moral ground in this case. Nor can it play wounded soldier. Had it complied with its disclosure obligations in time, as it ought to have, the parties would not be in the present situation.

4. The Prosecution's primary legal argument is that the exculpatory material, which the Defence seeks to admit under Rule 92*bis* and which is contained in the Motion at Annex A (the Prosecution's results of the Prosecution exhumation of bodies alleged to be that of Johnny Paul Koroma), Annex B (the Prosecution's table of payments totaling approximately \$3125 paid by the Prosecution to witness DCT-032) and Annex C (the Prosecution's letter of indemnity from the Prosecutor written to potential Prosecution witness DCT-032), is irrelevant absent the admission of the Affidavit of DCT-032 (at Annex D).⁸ The Prosecution proceeds to argue that the Affidavit is inadmissible because it comes from an "admitted liar" and does not satisfy the criteria of Rule 92*bis*.⁹ As argued above, in making these and ancillary arguments, the Prosecution simply attempts to deflect attention from the core issue – its deliberate failure to timely disclose exculpatory material which has prejudiced the Accused and warrants a remedy.
5. The Defence submits that each of the four annexed documents is admissible independently under Rule 92*bis*, *a fortiori* and when considered collectively and especially in light of the Prosecution's Rule 68 violation.
6. The Defence submits that the Prosecution's request for admission of their Proffer relating to DCT-032 is not motivated by a "genuine desire or need...to introduce fresh or additional evidence"¹⁰ but is solely in reaction to the Defence Motion and should be dismissed outright.

⁸ Response, para. 4.

⁹ Response, paras. 5-19.

¹⁰ Compare this approach to that of the Prosecution in response to the Defence's request to admit adjudicated facts from the RUF Trial Judgement. *Prosecutor v. Taylor*, SCSL-03-01-T-987, Decision on Defence Application for Judicial Notice of Adjudicated Facts from the RUF Trial Judgement Pursuant to

II. SUBMISSIONS

Documents are Independently and Collectively Relevant and Admissible

7. The DNA and forensic test results are admissible under Rule 92*bis* independently of the Affidavit. As the Trial Chamber has determined, the fact that exhumed bodies presumed to be that of Johnny Paul Koroma later turned out not to be is “relevant to the issue of whether Johnny Paul Koroma is dead or alive, and may affect the credibility of the Prosecution evidence”.¹¹ The Trial Chamber has further recalled that a number of Prosecution witnesses testified regarding the circumstances of Johnny Paul Koroma’s alleged murder.¹²
8. The index of Prosecution payments to potential prosecution witness DCT-032 is admissible under Rule 92*bis* independently from the Affidavit. Throughout the Prosecution¹³ and Defence case,¹⁴ the Defence has examined witnesses about improper payments being made or promises being offered to Prosecution witnesses. The Defence has continuously and vigorously argued that payments to Prosecution witnesses which go beyond that reasonably required for the maintenance of witnesses serve as an inducement to them to distort the truth. In this instance, the Trial Chamber has determined that payments were given to a potential witness “for his own benefit”¹⁵ and “went beyond that reasonably required for the management of a witness and assumed a potentially exculpatory character”.¹⁶ When considered in the context of the Defence contentions regarding payments generally, this is an example

Rule 94(B) and Prosecution Motion for Judicial Notice of Adjudicated Facts from the RUF Judgement, Separate and Partially Dissenting Opinion of Justice Julia Sebutinde, 17 June 2010, para. 5.

¹¹ Decision, para. 28.

¹² Decision, para. 24.

¹³ See, ex. Annex N of *Prosecutor v. Taylor*, SCSL-03-01-T-1090, Corrigendum to Defence Motion Requesting an Investigation into Contempt of Court by the Office of the Prosecution and its Investigators, 27 September 2010. See also, *Prosecutor v. Taylor*, SCSL-03-01-T, Trial Transcript, **Testimony of Varmunya Sherrif**, 14 January 2008, p. 1233; **Testimony of Foday Lansana**, 26 February 2008, p. 4762:14-4763:13; **Testimony of Augustine Mallah**, 18 November 2008, p. 20542:02-20544:03 and 20546:10-14; **Testimony of Abu Keita**, 24 January 2008, p. 2154:12-2156:09; **Testimony of TF1-388**, 14 July 2008, p. 13674:12-13675:15 and 15 July 2008, p. 13701:05-13703:03; **Testimony of TF1-579**, 26 November 2008, p. 21267:10-15; and **Testimony of Alice Pyne**, 23 June 2008, p. 12450:03-10.

¹⁴ See, ex. **Testimony of Sam Kolley**, 3 November 2010.

¹⁵ Decision, para. 26.

¹⁶ Decision, para. 31, referring to *Prosecutor v. Karemera, Ngirumpatse and Nzirorera*, ICTR-98-44-PT, Decision on Defence Motion for Full Disclosure of Payments to Witnesses, 23 August 2005, para. 6.

of improper Prosecution payments that is highly relevant even absent explanation from DCT-032.

9. When considered in tandem with the Affidavit, the effect of the improper Prosecution payments is self-evident; the Trial Chamber has acknowledged that DCT-032 admits that he was “making up a story in order to get money from the Prosecution”.¹⁷ The Prosecution disclosure shows that DCT-032 received over \$3000 primarily in exchange for “source information” but including payments for “lost wages” at a time when DCT-032 says he was not working.¹⁸ The Defence further notes that the Prosecution continued to give money to DCT-032 even after the Prosecution knew DCT-032 had provided them false information regarding the death of JPK. According to the Prosecution disclosure, the last payment to DCT-032 was made in February 2010. The DNA and forensic test results had been in the Prosecution’s possession since February 2009 at the latest.¹⁹ The Defence recalls that Mr Taylor testified about the possibility of calling DCT-032 in September 2009 and again more generally in November 2009.²⁰ The Defence submits that a reasonable inference to be made from this sequence of events is that the Prosecution continued to contact and pay DCT-032 in order to ensure that he did not cooperate with the Defence investigations. The Defence further notes that despite the Prosecution’s knowledge that DCT-032 had provided false information to it, the Prosecution continued contacting and paying him as a “source”, only now to conveniently distance themselves from this “admitted liar”.
10. The letter of indemnity written by the Prosecutor to potential prosecution witness DCT-032 is relevant and is admissible under Rule 92*bis* independently from the Affidavit. The letter is relevant to show the Prosecution’s investigative *modus operandi* and how it recruited insider witnesses. The Trial Chamber is already aware

¹⁷ Decision, para. 31.

¹⁸ Motion, Confidential Annex D, paras. 10-11.

¹⁹ Motion, Confidential Annex A, CMS p. 30826.

²⁰ The specific page references and excerpts are provided in Confidential Annex One.

that the Prosecution has provided similar letters to Witnesses TF1-371, TF1-532, TF1-274 and TF1-561.²¹

11. The Prosecution does not challenge the relevance of the Affidavit.

Documents are Clearly Capable of Corroboration

12. The Prosecution misconstrues the “capable of corroboration” requirement under Rule 92bis.²² Essentially this requirement is meant to ensure that admitted information is sufficiently *reliable*.²³ As this Trial Chamber determined during the AFRC Trial, “it is not necessary to demonstrate the reliability of the evidence before it is admitted”, and the reliability of the evidence should be considered at the end of the trial and should be evaluated and weighed as a whole, taking into account the “context and nature” of the evidence.²⁴

13. There is no dispute about the reliability of the requested evidence in Annexes A-C of the Motion. The Prosecution seems to suggest that the only way the reliability of information can be assessed is by comparison to other evidence already on record. However, the Prosecution’s limited understanding of what goes in to evaluating the reliability of evidence fails to recognize that the context and nature of evidence is also part of that evaluation. In its Motion, the Defence did not address issues of reliability with regard to the disclosed exculpatory material, because the reliability of the information is not in dispute. In fact, all of the disclosed exculpatory material was generated by the Prosecution. Thus, the reliability of the information is not only

²¹ *Prosecutor v. Taylor*, SCSL-03-01-T-516, Decision on Confidential Defence Motion for the Disclosure of Exculpatory Material Pursuant to Rule 68 of the Rules of Procedure and Evidence, 22 May 2008, p. 5.

²² Response, paras. 5-8.

²³ *Prosecutor v. Norman et al*, SCSL-04-14-AR73, Fofana – Decision on Appeal against ‘Decision on Prosecution’s Motion for Judicial Notice and Admission of Evidence’, 16 May 2005, para. 26 (the reliability of a document is not a bar to admission; information may still be admitted where it is capable of corroboration in due course).

²⁴ *Prosecutor v. Brima et al*, SCSL-04-16-T, Decision on Prosecution Tender for Admission into Evidence of Information Contained in Notice Pursuant to Rule 92bis, 18 November 2005, p. 2.

susceptible of confirmation -- it has been *confirmed already* by the Prosecution itself.²⁵

14. The Affidavit is susceptible of confirmation in relation to these documents. The core components of the information provided by DCT-032 to the Defence in September 2010 were never contested by the Prosecution²⁶ and were subsequently confirmed as correct and true by their disclosure. DCT-032 had stated that the Prosecution exhumed two bodies in Lofa County and did DNA testing on those bodies, which made it clear that the bodies were not that of Johnny Paul Koroma.²⁷ The subsequent Prosecution disclosure of the results of the DNA and forensic tests of the exhumed bodies showed conclusively that they did not belong to JPK. DCT-032 had stated that he received approximately \$1500 from the Prosecution.²⁸ The subsequent Prosecution disclosure of the amount of money they had given him was actually double this estimation. DCT-032 had stated that he was provided a letter of indemnity from prosecution by former Prosecutor Stephen Rapp.²⁹ The subsequent Prosecution disclosure of this same letter confirmed this statement as true.³⁰ Thus, the information in the Affidavit bears more than just an *indicia* of reliability and is in large part corroborated by the Prosecution's disclosure.

Prosecution Request for Admission of Proffer Should Be Dismissed

15. The Prosecution does not even attempt to show how the Proffer satisfies any of the criteria of Rule 92*bis* and cannot be said to have discharged its "burden of persuasion" in this regard.³¹

²⁵ See especially the disclosure cover letter written by the Prosecutor, Brenda J. Hollis at Confidential Annex A of the Motion.

²⁶ *Prosecutor v. Taylor*, SCSL-03-01-T-1096, Prosecution Response to Public with Confidential Annexes A-D Defence Motion for Disclosure of Exculpatory Information Relating to DCT-032, 1 October 2010.

²⁷ Motion, Confidential Annex D, paras. 20-21.

²⁸ Motion, Confidential Annex D, paras. 10 and 17.

²⁹ Motion, Confidential Annex D, paras. 16 and 28.

³⁰ See also, FN 21 above.

³¹ Response, para. 5. See also, FN 10 above.

No Need to Call DCT-032 for Cross-Examination

16. The primary purpose of requesting the admission of the Affidavit of DCT-032 is to provide context to the other three Prosecution documents, such that an adverse inference can be drawn on the evidence relating to the Prosecution's disclosure violation. There is little need for the Prosecution to cross-examine DCT-032 on his statement regarding the disclosure violation because this has already been substantiated. Thus the Prosecution cannot be prejudiced.

III. CONCLUSION

17. The Defence is justified in its request, especially in light of the Prosecution's disclosure violation, to admit the materials pursuant to Rule 92*bis* and/or draw an adverse inference relating to the Prosecution allegations surrounding the alleged death of Johnny Paul Koroma.

Respectfully Submitted,



Courtenay Griffiths, Q.C.
Lead Counsel for Charles G. Taylor
Dated this 4th Day of November 2010,
The Hague, The Netherlands

Table of Authorities

Prosecutor v. Taylor

Prosecutor v. Taylor, SCSL-03-1-T-1112, Confidential Prosecution Response to 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, 2 November 2010

Prosecutor v. Taylor, SCSL-03-1-T-1108, 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, 27 October 2010

Prosecutor v. Taylor, SCSL-03-01-T-1096, Prosecution Response to Public with Confidential Annexes A-D Defence Motion for Disclosure of Exculpatory Information Relating to DCT-032, 1 October 2010

Prosecutor v. Taylor, SCSL-03-01-T-1090, Corrigendum to Defence Motion Requesting an Investigation into Contempt of Court by the Office of the Prosecution and its Investigators, 27 September 2010

Prosecutor v. Taylor, SCSL-03-01-T-1088, Public with Confidential Annexes A-D Defence Motion for Disclosure of Exculpatory Information Relating to DCT-032, 24 September 2010

Prosecutor v. Taylor, SCSL-03-01-T-987, Decision on Defence Application for Judicial Notice of Adjudicated Facts from the RUF Trial Judgement Pursuant to Rule 94(B) and Prosecution Motion for Judicial Notice of Adjudicated Facts from the RUF Judgement, Separate and Partially Dissenting Opinion of Justice Julia Sebutinde, 17 June 2010

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Other Special Court Decisions

Prosecutor v. Brima et al, SCSL-04-16-T, Decision on Prosecution Tender for Admission into Evidence of Information Contained in Notice Pursuant to Rule 92bis, 18 November 2005

Prosecutor v. Norman et al, SCSL-04-14-AR73, Fofana – Decision on Appeal against ‘Decision on Prosecution’s Motion for Judicial Notice and Admission of Evidence’, 16 May 2005



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This certificate replaces the following confidential document which has been filed in the Confidential Case File.

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Inference Relating to the Alleged Death of Johnny Paul Koroma**

Name of Officer:

Advera Nsiima Kamuzora

Signed: *Nsiima*