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SCSL-03-01-T
(22931-22937)

22931



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: Herman von Hebel

Case No.: SCSL03-1-T

Date: 10 December 2008

SPECIAL COURT FOR SIERRA LEONE	
RECEIVED	
COURT MANAGEMENT	
THE HAGUE	
11 DEC 2008	
NAME	Adura Nsiima Kamuzo
SIGN	Nsiima
TIME	09:00

PROSECUTOR

v.

Charles Ghankay TAYLOR

DECISION ON PUBLIC PROSECUTION APPLICATION FOR
LEAVE TO APPEAL DECISION REGARDING THE TENDER OF DOCUMENTS

Office of the Prosecutor:

Brenda J. Hollis
Nicholas Koumjian
Leigh Lawrie

Defence Counsel for Charles G. Taylor:

Courtenay Griffiths, Q.C.
Terry Munyard
Andrew Cayley
Morris Anyah

TRIAL CHAMBER II ("Trial Chamber") of the Special Court for Sierra Leone ("Special Court");

SEISED of the "Public Prosecution Application for Leave to Appeal Decision Regarding the Tender of Documents", filed on 25 August 2008 ("Motion"),¹ wherein the Prosecution seeks leave to appeal an oral decision of the Trial Chamber rendered on 21 August 2008 ("Impugned Decision"), which held that documentary evidence not presented through a witness must be tendered pursuant to Rule 92bis of the Rules of Procedure and Evidence ("Rules") rather than Rule 89(C), on the grounds:

- i. that the Trial Chamber erred in law in concluding that documentary evidence not tendered through a witness must be tendered pursuant to Rule 92bis rather than Rule 89(C), this being contrary to the practice of the Special Court, since documents have been admitted under Rule 89(C) alone in the absence of a witness, and parties have not previously been limited to Rule 92bis in order to tender documents without a witness;²
- ii. that the Trial Chamber erred in law by ruling that the tender of a document under Rule 89(C) must be done through a witness, after sufficient foundation has been laid;³
- iii. that the Impugned Decision constitutes an error of law giving rise to exceptional circumstances in that (a) it sets conditions to the admission of evidence, which error will be repeated on each occasion that the Prosecution seeks to tender documents in court in conjunction with or through a witness;⁴ and (b) it gives rise to an issue of fundamental legal importance, in that "[t]he question whether documents tendered in the absence of a witness may only be so tendered under Rule 92bis and not under Rule 89(C) alone, even where the documentary evidence is not being admitted in lieu of oral testimony, is a question of general principle to be determined for the first time at the SCSL";⁵
- iv. that irreparable prejudice will occur if the Prosecution is precluded from using Rule 89(C) to tender relevant evidence in those cases where the evidence is not being tendered through a witness and where such evidence goes to proof of the acts and conduct of the Accused or where the evidence is proximate to the Accused;⁶

NOTING the "Public Defence Response to 'Prosecution Application for Leave to Appeal Decision Regarding the Tender of Documents'", filed on 8 September 2008 ("Defence Response"),⁷ which was filed outside of the time limit prescribed by Rule 7(C) without good cause being shown for the late filing, and which will therefore not be considered;

NOTING the "Public Prosecution Reply to the Defence Response to the Prosecution Application for Leave to Appeal Decision Regarding the Tender of Documents", filed on 15 September 2008 ("Prosecution Reply"),⁸ which, as a consequence of the Defence Response having been ruled out of time, will also not be considered;

¹ SCSL03-01-T-568.

² Motion, paras 15, 17-19.

³ Motion, paras 15-16.

⁴ Motion, para. 16.

⁵ Motion, paras 11-18.

⁶ Motion, para. 20.

⁷ SCSL03-01-T-577.

⁸ SCSL03-01-T-593.

RECALLING the Impugned Decision where the Trial Chamber held as follows:

If the Prosecution wishes to tender a document under Rule 89(C) through a witness, they need to lay foundation and in the instant case there is no sufficient foundation. If a document is to be tendered without a witness, then the application should be made under 92bis of the Rules.⁹

MINDFUL of Rules 26bis, 54, 73(B), 89(C) and 92bis of the Rules;

NOTING that the conditions which must pertain for the Trial Chamber to grant leave to appeal are set out in Rule 73(B), which provides that:

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 jurisprudence of this Court¹⁰ regarding the principles of law governing interlocutory appeals pursuant to Rule 73(B), which may be summarised as follows-

- 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 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-pronged test prescribed under Rule 73(B) is conjunctive and not disjunctive;
- v. The rationale of Rule 73(B) is to avoid international criminal trials becoming encumbered by a multiplicity of interlocutory appeals thereby causing protracted delays in such trials.

CONSIDERING that the Impugned Decision addresses two issues of fundamental legal importance namely:

- i. whether a party can tender a document under Rule 89(C) in the absence of a witness; and,
- ii. when tendering a document through a witness under Rule 89(C), whether the tendering party must first lay sufficient foundation;

NOTING that the jurisprudence of the Appeals Chamber addresses this aspect of Rule 89(C) in a different context,¹¹ and that Rule 92bis has been amended by the Plenary since the Appeals Chamber last directed its attention to it;¹²

⁹ Transcript 21 August 2008, p. 14253.

¹⁰ See *Prosecutor v. Brima, Kamara, Kanu*, SCSL-4-16-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, dated 4 May 2006; see also *Prosecutor v. Brima, Kamara, Kanu*, SCSL-04-16-T, Decision on Prosecution Application for Leave to Appeal Decision on Confidential Motion to Call Evidence in Rebuttal; see also *Prosecutor v. Sesay et al.*, SCSL-2004-15-PT, Decision on the Prosecutor’s Application for Leave to File an Interlocutory Appeal Against the Decision on the Prosecution Motion for Joinder, 13 February 2004.

NOTING FURTHER that Rule 92bis in the Rules of Procedure and Evidence of the International Criminal Tribunals for Rwanda and the Former Yugoslavia differs in many respects from the Special Court Rule 92bis;

CONSIDERING that evidence admitted through Rule 92bis excludes evidence which goes to the acts and conduct of the Accused, and that evidence admitted through Rule 89(C) is received in its entirety provided it is relevant;

NOTING that subsequent to the filing of the Motion the Prosecution has filed eight (8) formal motions requesting the admission of documentary evidence through Rule 89(C);¹³

FINDING that a continued erroneous interpretation of Rules 89(C) and 92bis on this issue could result in irreparable prejudice to the Parties and that the absence of clear legal authority on this point of law constitutes exceptional circumstances;


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


FOR THE ABOVE REASONS, BY A MAJORITY

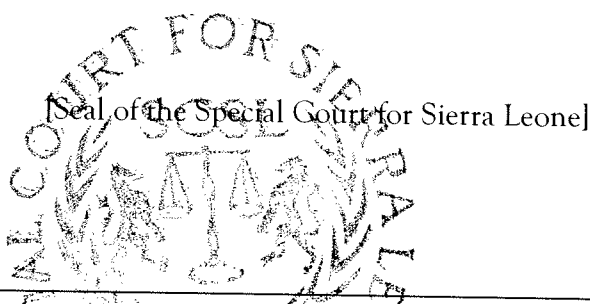
GRANTS the Motion;

The Honourable Justice Julia Sebutinde appends a Separate Dissenting Opinion.

Done at The Hague, The Netherlands, this 11th day of December 2008.


Justice Richard Lussick


Justice Teresa Dolherly
Presiding Judge



¹¹ See *Prosecutor v. Norman, Fofana and Kondewa*, SCSL-04-14-T-37, Fofana - Appeal against Decision Refusing Bail, 11 March 2005

¹² *Prosecutor v. Norman, Fofana and, Kondewa*, Fofana- Decision on Appeal against 'Decision on Prosecution's Motion for Judicial Notice and Admission of Evidence', 16 May 2005

¹³ SCSL-03-01-T-650, SCSL-03-01-T-652, SCSL-03-01-T-659, SCSL-03-01-T-667, SCSL-03-01-T-678, SCSL-03-01-T-681, SCSL-03-01-T-682, SCSL-03-01-T-684; Admission under a combination of Rules 89(C) and 92bis is requested in the alternative;

SEPARATE DISSENTING OPINION OF JUSTICE JULIA SEBUTINDE

Introduction

1. During the hearing of the evidence-in-chief of Prosecution Witness TF1-367, Counsel for the Prosecution attempted to place a document before the witness¹⁴. This procedure was objected to by Counsel for the Defence on the ground that no basis had been provided by the Prosecution for seeking to introduce the document through that particular witness, nor had the Prosecution established that the witness was “in a position to speak to this document”¹⁵. Counsel for the Defence contended that the Prosecution, by not providing some foundation as to how the witness was able to give evidence of the document, was either leading the witness or was arguing for “a position whereby the OTP could download any document from the internet and present it to this tribunal through any witness and in our submission Rule 89 cannot be that wide.”¹⁶ Counsel for the Defence submitted that the Prosecution was in effect “seeking to use this witness to circumvent the provisions of Rule 92bis”, and that, without foundation, Rule 89 alone does not allow the document to be admitted through this witness¹⁷.
2. In response, Counsel for the Prosecution conceded that he had not laid any foundation for placing the document before the witness and instead, maintained that regardless of whether or not the witness knew anything about the document, it contained information relevant to the trial and was therefore admissible under Rule 89(C)¹⁸. Counsel further submitted that “clearly this witness has not – we are not saying that he saw this document, it was created after he was the mining commander but he recognises the places, he recognises some of the names he has told you about in his testimony of – he stated of these places that were mining sites and the names and he has told you how records were kept...So it is directly relevant and it would make more sense when your honours and the parties consider the evidence at the end that this document goes along with this witness’s testimony, because it is most relevant of all the witnesses that we have heard to this witness’s testimony”.¹⁹
3. After considering the submissions, the Trial Chamber delivered the following oral ruling, which has now become the Impugned Decision:

“If the Prosecution wishes to tender a document under Rule 89(C) through a witness, they need to lay foundation and in the instant case there is no sufficient foundation. If a document is to be tendered without a witness, then the application should be made under 92bis of the Rules.”²⁰

¹⁴ Prosecutor v. Taylor, SCSL-03-01-T, Transcript, 21 August 2008 (“Transcript”), page 14245, lines 8 - 10.

¹⁵ Transcript, page 14245, lines 11 - 22.

¹⁶ Transcript, p. 14247, lines 3 - 6.

¹⁷ Transcript, p. 14252, lines 18 - 28.

¹⁸ Transcript, p. 14245, lines 24 - 29, page 14249, lines 17 - 19.

¹⁹ Transcript, p. 14252, lines 1 - 12

²⁰ Transcript 21 August 2008, p. 14253.

The Prosecution seeks leave to appeal from the above decision, pursuant to Rule 73(B). The submissions of the parties with respect to this Motion as well as the applicable law, have been accurately recited in the Majority decision.

Merits of the Motion:

- 4. It is my considered opinion that the Prosecution misconstrued the nature of the issue that was considered by the Trial Chamber in arriving at the Impugned Decision. In my view, no profound legal principle was involved and it certainly did not warrant protracted argument in court followed by a formal motion. All the Trial Chamber asked Prosecution Counsel to do in court was to lay a foundation which would qualify the witness to give evidence about the document concerned. What the Trial asked of Prosecution Counsel was no more than what Counsel routinely do when examining their witnesses in order to avoid suggesting answers to a witness, otherwise known as "leading" the witness. Prosecution Counsel apparently misunderstood the Trial Chamber's ruling as going to the relevance and admissibility of the document in question under Rule 89(C). Such misunderstanding has carried over to the filing of the present Motion.

- 5. As mentioned above, Prosecution Counsel conceded in court that the witness knew nothing about the document. Accordingly, any attempt by Counsel to place the document before the witness and then to ask him about its contents would be nothing short of leading the witness. It is plain from the wording of the Impugned Decision that the Trial Chamber simply over-ruled the Prosecution's attempt to "lead" the witness, Counsel having failed to demonstrate how the witness was qualified to answer questions about the document that was shown to him. Nothing in the Impugned Decision would entitle any reasonable reader to come to any other conclusion. Had Prosecution Counsel complied with the Chamber's ruling by demonstrating how the witness was qualified to speak about the document in question, Counsel would have been permitted to place the document before the witness and to continue with that line of questioning. Prosecution Counsel having chosen not to so proceed, opting instead to tender the document in evidence in lieu of oral evidence, the Trial Chamber was justified in advising Counsel to proceed under the provisions of Rule 92bis. The Trial Chamber did not at that stage consider the relevance or admissibility of the document under Rule 89(C) and made no findings in that regard.

- 6. In my view, the fact that the Prosecution has, since the Impugned Decision, filed several other motions seeking the admission into evidence of various documents in lieu of oral testimony, is beside the point of this particular application for leave to appeal. Each of those subsequent Motions will in any event, be determined on its own merits. It is my considered view that the Rules of Procedure and Evidence of this Court regulating the admission of information or other documentary evidence in lieu of oral testimony are plain and clear in their meaning and application.²¹ In any event, both the Trial Chambers and the Appeals Chamber have already laid down clear guidelines as to the application of Rule 92bis as well as Rule 89(C)²².

²¹ See Rules 92bis, 92ter and 92quater.

²² See *Prosecutor v. Hinga Norman et al*, SCSL-04-14-AR65, Fofana-Appeal Against Decision Refusing Bail, 11 March 2005; *Prosecutor v. Hinga 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; *Prosecution v. Sam Hinga Norman et al.*, SCSL-04-14-T-371, Fofana-Appeal against Decision Refusing Bail, 11 March 2005, para. 24; *Prosecution v. Hinga Norman et al.*, SCSL-04-14-T-714, Decision on Fofana Request to Admit Evidence Pursuant to Rule 92bis, 9 October 2006; *Prosecution v. Sesay, Kallon and Gbao*, SCSL-04-15-T-605, Decision on Prosecution Notice Under Rule 92Bis and 89 to Admit the Statement of TF1-150, 20 July 2006; *Prosecutor V. Brima et al.*, SCSL-04-16-T431, 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.*, Case No. SCSL-03-1-T

7. In conclusion, I am of the opinion that the Prosecution has failed to meet the requirements of Rule 73(B) in that it has failed to establish any exceptional circumstances or irreparable prejudice. I would dismiss the Motion in its entirety.



Justice Julia Sebutinde

[Seal of the Special Court for Sierra Leone]

