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

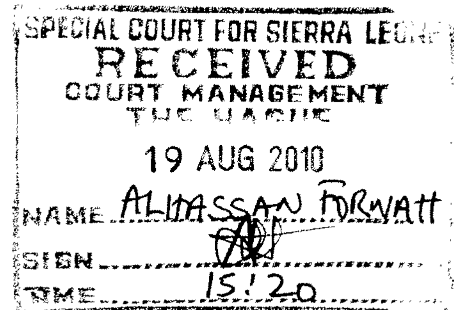
Trial Chamber II

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

Registrar: Ms. Binta Mansaray

Date: 19 August 2010

Case No.: SCSL-03-01-T



THE PROSECUTOR

–v–

CHARLES GHANKAY TAYLOR

PUBLIC

DEFENCE RESPONSE TO PROSECUTION URGENT APPLICATION FOR LEAVE TO APPEAL DECISION EXCLUDING THE USE OF CUSTODIAL STATEMENT OF ISSA SESAY

Office of the Prosecutor:
Ms. Brenda J. Hollis
Mr. Nicholas Koumjian
Ms. Kathryn Howarth

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 Defence objects to the Prosecution's *Urgent Application for Leave to Appeal the Decision Excluding the Use of Custodial Statement of Issa Sesay,* filed on 16 August 2010.[1] The Defence files this Response in compliance with the Trial Chamber's *Order for Expedited Filing* of 17 August 2010.[2]
2. The Prosecution's application must fail because it does not meet the well-established conjunctive test of exceptional circumstances and irreparable prejudice required for leave to appeal.
3. The Prosecution alleges that the Trial Chamber committed two errors of law in excluding the custodial statement of Issa Sesay from 10 March 2003: 1) there is no legal basis to exclude the use of Sesay's statement in the current case, and 2) it was not in the interests of justice to prohibit the use of the statement in its cross-examination of Sesay.
4. The Defence submits that the Trial Chamber did not commit any error of law when it exercised its discretion to, on the basis of the factual findings of Trial Chamber I, exclude the statement. The Trial Chamber properly exercised its discretion when it determined that the use and/or admission of the statement which goes to the guilt of the accused, given the circumstances in which the statement was obtained, would not be in the interests of justice.
5. Contrary to the Prosecution's argument, it would not be in the interest of justice for a court of law to admit any evidence, so fraught with irregularities as the 10 March 2003 statement, which was obtained involuntarily, out of "fear of prejudice and hope of advantage",[3] and which is probative of guilt of the current accused. Under Rule 95, admitting such evidence, even for the limited purpose of impeaching a witness, would bring the administration of justice into disrepute. Furthermore, the probative value of such evidence is manifestly outweighed by its prejudicial effect, and the Trial Chamber correctly excluded it as part of its inherent jurisdiction.
6. Further and/or alternatively, the evidence in the statement which the Prosecution intended to use, even if only for impeachment purposes, was so intricately connected to the proof of guilt

[1] *Prosecutor v. Taylor,* SCSL-03-01-T-1050, Urgent Application for Leave to Appeal the Decision Excluding the Use of Custodial Statement of Issa Sesay, 16 August 2010 ("**Application**").
[2] *Prosecutor v. Taylor,* SCSL-03-01-T-1051, Order for Expedited Filing, 17 August 2010.
[3] *Prosecutor v. Sesay, Kallon, Gbao*, SCSL-04-15-T-1188, Written Decisions – Decision on the Admissibility of Certain Prior Statements of the Accused Given to the Prosecution, 30 June 2008, para. 66 ("***Voir Dire* Decision**").

of the current accused, the evidence was properly excluded in accordance with the Fresh Evidence Test as laid out by this Trial Chamber in its Decision on Documents of 30 November 2009.[4]

II. APPLICABLE LEGAL PRINCIPLES

7. Given the restrictive nature of interlocutory appeals under Rule 73(B), the Prosecution must meet a very high standard before leave to appeal can be granted. Trial Chamber I has stated, "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."[5]
8. In addition to the Trial Chamber's general trial management functions under Rule 54, Rule 89(B) gives the Trial Chamber the discretion to apply rules of evidence which best favour a fair determination of the matter before it and are consonant with the spirit of the Statute and the general principles of law. Rule 95 requires the Trial Chamber to exclude evidence that would bring the administration of justice into serious disrepute. Pursuant to its inherent jurisdiction, the Trial Chamber also has the discretion to exclude evidence whose "probative value is manifestly outweighed by the need to ensure a fair trial".[6]
9. Rule 94 gives the Trial Chamber the latitude to *propio motu*, after hearing the parties, take judicial notice of adjudicated facts from other proceedings before the Special Court relating to a matter at issue in the current proceedings.
10. The Fresh Evidence Test applied by the Trial Chamber in reaching the Impugned Decision states that use of a document during cross-examination which contains fresh evidence and is probative of guilt of the Accused, will not be permitted unless (a) it is in the interests of

[4] *Prosecutor v. Taylor,* SCSL-03-01-T-865, Decision on Prosecution Motion in Relation to the Applicable Legal Standards Governing the Use and Admission of Documents by the Prosecution During Cross-Examination, 30 November 2009 ("**Decision on Documents**").
[5] *Prosecutor v. Sesay, Kallon, Gbao,* SCSL-2004-15-PT, Decision on the Prosecution's Application for Leave to File an Interlocutory Appeal Against the Decision on the Prosecution Motion for Joinder, 13 February 2004.
[6] *Voir Dire* Decision, para. 37. See also *Prosecutor v. Taylor,* SCSL-03-01-T-1045, Decision on Defence Motion to Exclude Custodial Statements of Issa Sesay, J. Sebutinde Dissenting, 12 August 2010, para. 12 ("**Sebutinde Dissent**").

justice, and (b) it does not violate the rights of the Accused. Furthermore, such a document will not be admitted into evidence unless the Prosecution can establish "exceptional circumstances", taking into consideration (i) when and by which means the Prosecution obtained these documents, (ii) when it disclosed them to the Defence, and (iii) why they are being offered only after the conclusion of the Prosecution case.[7] This is the test that the Trial Chamber, by a majority, determined to be applicable to the issue of whether Sesay's custodial statements could be used or admitted in this trial.[8]

11. The Appeals Chamber should only intervene where the Trial Chamber has abused its inherent discretion to make decisions concerning the conduct of trial and the admission (or exclusion) of evidence.[9]

III. ARGUMENT

The Trial Chamber Did Not Commit an Error of Law

12. In reaching the Impugned Decision, the Trial Chamber correctly applied the Fresh Evidence Test set out in its Decision on Documents of 30 November 2009, yet the Prosecution argues that there was no legal basis to exclude the use of Issa Sesay's 10 March 2003 interview in the current case.[10]

13. The Fresh Evidence Test makes it clear that the Trial Chamber shall exclude fresh evidence which is probative of guilt of the accused if its use is not in the interests of justice and would violate the rights of the accused. As part of this analysis, the Prosecution must establish exceptional circumstances, wherein the Trial Chamber may consider when and by what means the Prosecution obtained the fresh evidence.

14. The Trial Chamber took all of these factors into consideration when reaching the Impugned Decision. In Justice Lussick's oral decision,[11] he stated that the material very clearly goes to proof of guilt of the accused,[12] that it would not be in the interests of justice for the material

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[7] Decision on Documents, para. 27.

[8] *Prosecutor v. Taylor,* SCSL-03-01-T-1045, Decision on Defence Motion to Exclude Custodial Statements of Issa Sesay, 12 August 2010, p.3.

[9] *Prosecutor v. Sesay, Kallon, Gbao,* SCSL-04-15-AR73-924, Decision on Prosecution Motion Regarding the Objection to the Admissibility of Portions of Evidence of Witness TF1-371, 13 December 2007, para. 8-9.

[10] Application, para. 12.

[11] *Prosecutor v. Taylor,* SCSL-03-01-T, Trial Transcript, 13 August 2010, p. 46255 – 46266.

[12] The fact that the material goes to guilt of the current accused is acknowledged by the Prosecution. *Prosecutor v. Taylor,* SCSL-03-01-T, Trial Transcript, 13 August 2010, p. 46254, l. 25 to p. 46255, l. 2; p. 46256, l. 17-18, 25-26.

to be used against the accused by cross-examining the witness on the material, and that it would violate the fair trial rights of the accused to do so. Justice Lussick also noted that the Chamber was aware of the way in which the 10 March 2003 statement was obtained involuntarily from the witness [by the Prosecution].[13] Thus, under the Fresh Evidence Test, the Trial Chamber was fully entitled to exercise its discretion to exclude the use of the 10 March 2003 statement.

15. The Trial Chamber was also fully entitled to judicially note the factual findings of Trial Chamber I in reaching this conclusion in the Impugned Decision. The Prosecution suggest that the Trial Chamber erred by adopting *legal* findings adjudicated in another case,[14] yet the Impugned Decision does not actually say that it adopted the legal findings of Trial Chamber I. Rather the Impugned Decision makes its own legal findings based on the factual findings adjudicated by Trial Chamber I (which the Justices are able to do pursuant to Rule 94(B)) and then acknowledges that Trial Chamber I also made the same legal findings based on the same underlying factual findings. As the doctrine of judicial notice serves two purposes, judicial economy and consistency of case law,[15] the Trial Chamber was well within its rights to judicially note the factual findings of Trial Chamber I, who reached its conclusion after a time-consuming and exhaustive *voir dire*.

16. The Prosecution has a very narrow reading of Trial Chamber I's decision. The Prosecution attempts to restrict the decision of Trial Chamber I by asserting that Trial Chamber I excluded Sesay's statements solely on the basis of his right against self-incrimination.[16] However, Trial Chamber I also stated more generally that "as a matter of law, statements by an accused person obtained in a custodial setting which are not voluntary must be excluded under Rule 95".[17] Thus the Prosecution's argument that there is a distinction between Sesay an accused and Sesay as a witness must fail. The circumstances under which the statements

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[13] This is obviously a reference to the sequence of filings before the Court as to the exclusion of Issa Sesay's Custodial Statements (as set out in the Application at paragraphs 3-6). The relevant filings, which the Trial Chamber has had ample time to consider, make reference to all of the *voir dire* transcripts and testimony that was available to Trial Chamber I as well as the few short references by Sesay in this trial as to the circumstances under which the statements were obtained from him.

[14] Application, para. 12.

[15] *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, 17 June 2010, paras. 26-27.

[16] Application, para. 12.

[17] *Voir Dire* Decision, para. 38.

were obtained have not changed by virtue of the fact that Sesay is now a witness rather than an accused. Justice Sebutinde has previously endorsed this Defence submission, stating that:

> "[...] it is the circumstances in which a statement is made and not the identity of the maker, that ultimately determine its admissibility. In the present case, it is the circumstances in which the Sesay Statements were originally made, and not the role that Sesay subsequently assumed in this trial, that should determine their admissibility and/or use in cross-examination".[18]

17. Consequently, the Trial Chamber did not err[19] in finding that it was not in the interests of justice to allow the Prosecution to 10 March 2003 statement, probative of the guilt of the current accused, for purposes of cross-examination of Sesay as a witness in this case. Allowing the use of such a statement, when the Trial Chamber was aware of the circumstances in which it was obtained, would have brought the administration of justice into disrepute.

There are No Exceptional Circumstances

18. The Impugned Decision does not prevent the Prosecution from effectively cross-examining Sesay.[20] If the Prosecution simply wish to show that Sesay has been inconsistent as a witness, they can seek recourse through his testimony in the RUF Trial and testimony given during examination-in-chief during the Taylor Trial. The concept of "fairness" to the Prosecution should not be so expansive that it would allow them to purposefully manipulate the investigative process to their advantage and later be allowed to rely on the fruits of that manipulation.
19. On balance, allowing the Prosecution to put prior inconsistent statements to Sesay from his 10 March 2003 statement which was obtained involuntarily by this same Prosecution, does not outweigh the need of the Trial Chamber to protect the integrity of the judicial process. Indeed, the Trial Chamber properly decided to exclude evidence whose potential probative value during cross-examination was manifestly outweighed by the need to ensure a fair trial.
20. The application of this jurisprudence by the Trial Chamber does not give rise to a serious issue of fundamental legal importance[21] which needs further explication by the Appeals

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[18] Sebutinde Dissent, para. 14.
[19] See Prosecution position in Application, para. 13.
[20] Application, para. 14.
[21] Application, para. 17.

Chamber of the Special Court. The only issue which arises here is the discretionary application by the Trial Chamber of settled law. In this regard, the Defence refers to its submissions above, especially at paragraphs 14 and 15.

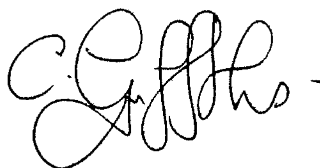
There is No Risk of Irreparable Prejudice

21. The Prosecution is not at risk of irreparable prejudice due to the Impugned Decision.[22] The Prosecution has skilled counsel, adept at the art of cross-examination and has plenty of additional, properly obtained material, in the form of sworn testimony in his previous trial, upon which to cross-examine Sesay. There are many ways to test the accuracy and veracity of Sesay's testimony in the Taylor Trial without resort to the tainted 10 March 2003 Statement.

IV. CONCLUSION

22. The Defence submits that the application for leave to appeal must fail because the Prosecution has not alleged any meretricious error of law and has not met the Rule 73(B) test for exceptional circumstances and irreparable prejudice.

Respectfully Submitted,



Courtenay Griffiths, Q.C.
Lead Counsel for Charles G. Taylor
Dated this 19th day of August 2010
The Hague, The Netherlands

[22] Application, para. 18.

Table of Authorities

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Prosecutor v. Taylor, SCSL-03-01-T-1051, Order for Expedited Filing, 17 August 2010

Prosecutor v. Taylor, SCSL-03-01-T-1050, Urgent Application for Leave to Appeal the Decision Excluding the Use of Custodial Statement of Issa Sesay, 16 August 2010

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