1127)

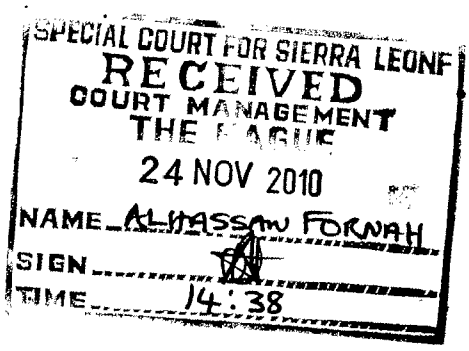
SCSL-03-01-T
(31051 - 31056)

31051

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:	24 November 2010
Case No.:	SCSL-03-01-T



THE PROSECUTOR

–v–

CHARLES GHANKAY TAYLOR

PUBLIC

DEFENCE REPLY TO PROSECUTION RESPONSE TO DEFENCE MOTION SEEKING LEAVE TO APPEAL THE DECISION ON THE 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
Mr. Nick 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. This is the Defence Reply to the Prosecution Response[1] to the *Defence Motion Seeking Leave to Appeal the Decision on the Defence Motion for Admission of Documents and Drawing of an Adverse Inference Relating to the Alleged Death of Johnny Paul Koroma*.[2]

II. SUBMISSIONS

Exceptional Circumstances

2. The Prosecution argues that exceptional circumstances cannot exist where exculpatory evidence offered by the Defence is not admitted into evidence under Rule 92*bis*, because all Defence evidence is presumably exculpatory.[3] However, the Prosecution argument fails to take into account that it is not only the exculpatory nature of the material (which has been confirmed as such by the Trial Chamber[4]), but the fact that the exculpatory material stemmed from the Prosecution's Rule 68 disclosure violation and was not disclosed until very late in the proceedings.[5] The Defence emphasizes that when considered in context, the Trial Chamber's refusal to admit exculpatory evidence does amount to exceptional circumstances, which *might* interfere with interests of justice.
3. The Prosecution argues that the question of fundamental legal importance regarding which the Defence seeks leave to appeal was an issue of the Defence's own creation.[6] This cannot be the case as the majority of the Trial Chamber determined that an

[1] *Prosecutor v. Taylor*, SCSL-03-01-T-1124, Prosecution Response to "Public with [sic] Defence Motion Seeking Leave to Appeal the Decision on the Defence Motion for Admission of Documents and Drawing of an Adverse Inference Relating to the Alleged Death of Johnny Paul Koroma", 19 November 2010 ("**Response**").
[2] *Prosecutor v. Taylor*, SCSL-03-01-T-1122, Public Defence Motion Seeking Leave to Appeal the Decision on the Defence Motion for Admission of Documents and Drawing of an Adverse Inference Relating to the Alleged Death of Johnny Paul Koroma, 15 November 2010 ("**Motion**").
[3] Response, para. 5.
[4] *Prosecutor v. Taylor*, SCSL-03-01-T-1119, Decision on 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, 11 November 2010 ("**Decision**"), para. 25.
[5] Motion, para. 11.
[6] Response, para. 6.

affidavit, which said nothing about the acts or conduct of the Accused at all, but which contradicted evidence of other Prosecution witnesses relating to an alleged murder committed by subordinates of the Accused on his orders, goes to proof of the acts and conduct of the Accused.[7] *Arguendo,* the affidavit can only go to proof of the acts and conduct of the Accused in that it shows the Accused did not do something, or omitted to do something, ie order the killing of Johnny Paul Koroma and involve DCT-032 in that killing. Thus the Defence is correct in submitting that determining what constitutes an "omission" under Rule 92*bis* jurisprudence, when considered in the context of the Accused's ability to admit exculpatory evidence, raises an issue of fundamental legal importance, which has never been considered on Appeal.[8]

4. The Prosecution points out that the Trial Chamber has previously made a ruling to the effect that acts and conduct of the Accused applies to omissions,[9] and suggests that since the Defence did not seek leave to appeal this decision, it cannot do so now.[10] There is no waiver of the right to seek leave to appeal, as long as any application is made within the requisite three day period of the decision in question. In any event, the Trial Chamber has previously granted the Prosecution leave to appeal an issue where it found that a "continued erroneous interpretation [...] 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".[11] Therefore, the fact that multiple decisions are affected by this continued erroneous interpretation of the law supports the Defence contention that guidance from the Appeals Chamber is necessary.

5. The Prosecution suggests at paragraph 7 that the plain language of Rule 92*bis* and case law make it clear that the prohibition of information going to *prove or disprove* acts and conduct of the Accused applies to evidence introduced by both parties.[12]

---

[7] Decision, para. 25.
[8] Motion, para. 12.
[9] *Prosecutor v. Taylor,* SCSL-03-01-T-1099, Decision on Public with Annex A Defence Motion for Admission of Documents Pursuant to Rule 92*bis* – Newspaper Article, 5 October 2010.
[10] Response, para. 6.
[11] *Prosecutor v. Taylor,* SCSL-03-01-T-691, Decision on Public Prosecution Application for Leave to Appeal Decision Regarding the Tender of Documents, 10 December 2008, p. 4.
[12] Response, para. 7.

However, the Defence notes that it is not trying to *prove* or *disprove* anything, as the Defence in fact has no burden of proof.

6. The Prosecution makes an overly restrictive interpretation of the purpose of Rule 92*bis* in arguing that it was primarily, and thus only, intended for the admission of "crime base" evidence which would expedite the proceedings.[13] The fact that Rule 92*bis* was primarily intended for the admission of crime base evidence does not exclude the possibility that other, non-crime base material could be admitted.[14] The proceedings can also be expedited through the admission of material pertaining to events outside the scope of the Indictment, such as the exculpatory information currently at issue.
7. The Prosecution errantly supposes that the fact that DCT-032 was available and/or willing to testify has any bearing on whether his affidavit should be admitted under Rule 92*bis*, or on whether the refusal of that admission gives rise to exceptional circumstances.[15] In so arguing, the Prosecution imports an additional requirement into Rule 92*bis*. In fact, Rule 92*bis* has no requirement that the witness be unavailable before information from him is admitted into evidence (in fact, such a scenario is addressed instead by Rule 92*quarter*).

Irreparable Prejudice

8. The Trial Chamber is the primary arbiter of fact and the evidentiary issues implicated by the Decision are best settled at this stage of the proceedings. The Prosecution suggests that should the Trial Chamber make a finding that the Accused was involved in the killing of Johnny Paul Koroma, the Appeals Chamber could later admit and consider the excluded documents.[16] This argument fails to consider that the Trial Chamber is best placed to evaluate evidence in its complete context, having heard the bulk of the evidence live.

---

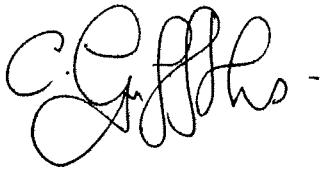
[13] Response, para. 8.
[14] For instance, the Trial Chamber most recently admitted under Rule 92*bis* Exhibits D-475-478 pertaining to the identity of Defence investigators at the Special Court. See *Prosecutor v. Taylor*, SCSL-03-01-T, Status Conference Transcript, 12 November 2010.
[15] Response, para. 9.
[16] Response, paras. 12-13.

9. The Prosecution argues that decisions regarding the admission of evidence generally and the non-admission of exculpatory evidence specifically are the same in that the decision is capable of being cured on final appeal. This is obviously untrue. It is much easier to disregard evidence that has errantly been admitted then to later admit and attempt to consider evidence that was errantly excluded.
10. The Defence further notes that the purported wrongful non-admission of documents has been certified leave to appeal by the ICTY in *Prosecutor v. Prlic.*[17]

III. CONCLUSION AND RELIEF REQUESTED

11. The Defence submits that it has met the conjunctive requirements for leave to appeal the Trial Chamber's Decision, which contains a number of errors of law and/or fact.

Respectfully Submitted,



Courtenay Griffiths, Q.C.
Lead Counsel for Charles G. Taylor
Dated this 24th Day of November 2010,
The Hague, The Netherlands

[17] *Prosecutor v. Prlic et al,* IT-04-74-T, Decision on Praljak Defence Requests for Certification to Appeal the Decisions of 16 February and 17 March 2010, 1 April 2010.

Table of Authorities

Prosecutor v. Taylor

Prosecutor v. Taylor, SCSL-03-01-T-1124, Prosecution Response to "Public with [sic] Defence Motion Seeking Leave to Appeal the Decision on the Defence Motion for Admission of Documents and Drawing of an Adverse Inference Relating to the Alleged Death of Johnny Paul Koroma", 19 November 2010

Prosecutor v. Taylor, SCSL-03-01-T-1122, Public Defence Motion Seeking Leave to Appeal the Decision on the Defence Motion for Admission of Documents and Drawing of an Adverse Inference Relating to the Alleged Death of Johnny Paul Koroma, 15 November 2010

Prosecutor v. Taylor, SCSL-03-01-T-1119, Decision on 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, 11 November 2010

Prosecutor v. Taylor, SCSL-03-01-T-1099, Decision on Public with Annex A Defence Motion for Admission of Documents Pursuant to Rule 92*bis* – Newspaper Article, 5 October 2010

Prosecutor v. Taylor, SCSL-03-01-T-691, Decision on Public Prosecution Application for Leave to Appeal Decision Regarding the Tender of Documents, 10 December 2008

ICTY Case

Prosecutor v. Prlic et al, IT-04-74-T, Decision on Praljak Defence Requests for Certification to Appeal the Decisions of 16 February and 17 March 2010, 1 April 2010 http://www.icty.org/x/cases/prlic/tdec/en/100401_1.pdf