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THE SPECIAL COURT FOR SIERRA LEONE

Appeals Chamber

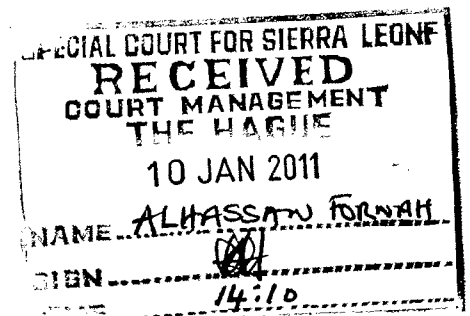
Before: Justice Jon M. Kamanda, Presiding
Justice Emmanuel Ayoola
Justice Renate Winter
Justice George Gelaga King
Justice Shireen Avis Fisher

Registrar: Ms. Binta Mansaray

Date: 10 January 2011

Case No.: SCSL-03-01-T

THE PROSECUTOR
-v-
CHARLES GHANKAY TAYLOR



PUBLIC

**DEFENCE REPLY TO PROSECUTION RESPONSE TO DEFENCE NOTICE OF APPEAL
AND SUBMISSIONS REGARDING 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

Counsel for Charles G. Taylor:

Mr. Courtenay Griffiths, Q.C.
Mr. Terry Munyard
Mr. Morris Anyah
Mr. Silas Chekera
Mr. James Supuwood
Ms. Logan Hambrick, Legal Assistant

I. INTRODUCTION

1. This is the Defence's Reply to the *Confidential Prosecution Response to Defence Notice of Appeal and Submissions Regarding 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*.¹ The Defence stands by its grounds of appeal as argued in its Notice of Appeal and Submissions, filed on 10 December 2010,² and makes the following additional submissions in reply to the Prosecution's Response.
2. This Reply is filed publicly, as the Defence has taken extra care to ensure that the identity of any protected witness is not disclosed.³

II. SCOPE OF THE APPEAL

3. In paragraphs 4-6 of its Response, the Prosecution errantly suggests that aspects of the Defence Appeal go beyond the scope of the Appeal as certified by the Trial Chamber.
4. The argument is erroneous because in its Certification Decision,⁴ the Trial Chamber granted the Defence's motion seeking leave to appeal in its entirety.⁵ There was no suggestion in the Certification Decision that only certain aspects of the Defence

¹ *Prosecutor v. Taylor*, SCSL-03-01-AR73-1141, Confidential Prosecution Response to Defence Notice of Appeal and Submissions Regarding 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, 17 December 2010 ("Response").

² *Prosecutor v. Taylor*, SCSL-03-01-AR73-1133, Public Defence Notice of Appeal and Submissions Regarding 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, 10 December 2010 ("Appeal").

³ This has been done as a matter of routine, but also in light of the Prosecution's concerns as stated in *Prosecutor v. Taylor*, SCSL-03-01-AR73-1135, Confidential with Confidential Annex A Urgent Prosecution Motion to Classify as "Confidential" the 'Public Defence Notice of Appeal and Submissions Regarding 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' due to Protective Measures Violations, 15 December 2010.

⁴ *Prosecutor v. Taylor*, SCSL-03-01-T-1131, Decision on 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 December 2010 ("Certification Decision").

⁵ *Prosecutor v. Taylor*, SCSL-03-01-T-1122, 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 seeking leave to appeal were being granted. Rather, the paragraph of the Certification Decision, as cited by the Prosecution in paragraph 4 of its Response, regarding the interpretation of Rule 92bis and whether the exclusion of evidence going to proof of the acts and conduct of the Accused applied to exculpatory evidence tendered by the Defence, was noted by the Trial Chamber as constituting an “issue of fundamental legal importance” the “continuous erroneous interpretation” of which could result in irreparable prejudice to the Accused. This was not intended by the Trial Chamber to limit the scope of the Appeal, but was an explanation of how the Defence had satisfied the test for leave to appeal, namely showing exceptional circumstances and irreparable prejudice.

5. All the grounds of appeal were raised in the Defence’s motion seeking leave to appeal and were subsequently argued in its Appeal. The Prosecution’s attempt to limit the scope of the Appeal thus is without merit.

III. GROUNDS OF APPEAL AND RELATED SUBMISSIONS

Ground One: Incorrect Conclusion of Fact and Absurd Application of Rule 92bis

6. At paragraph 9 of its Response, the Prosecution suggests that the Defence’s primary criticism is the “specific wording” of the Majority’s conclusion that the Affidavit of DCT-032 goes to “proof of the acts and conduct of the Accused”. This is however a mischaracterization of the Defence’s position. It is not the “specific wording” but the conclusion that the Defence challenges.
7. In the Appeal, the Defence argued⁶ that the Majority has misstated the factual content of the affidavit of DCT-032 in finding that “the material in the affidavit relates to DCT-032’s denial that he was involved in the killing of Johnny Paul Koroma pursuant to orders of the Accused”.⁷ The Trial Chamber’s finding, as challenged by the Defence, reads into the affidavit of DCT-032 a reference to the Accused and/or

⁶ Appeal, para. 19 and 20-23.

⁷ Admission Decision, para. 23.

his orders, which is completely absent from the affidavit itself. Nowhere in the affidavit of DCT-032 does he talk about the Accused's orders to kill Johnny Paul Koroma, or even the killing of Johnny Paul Koroma. Instead, DCT-032 says he "denied any knowledge of JPK or his death" when talking to the Prosecution;⁸ "knew nothing about [the Johnny Paul Koroma story]";⁹ "did not have any knowledge" of where Johnny Paul Koroma was buried;¹⁰ and had "never met Johnny Paul Koroma".¹¹ DCT-032 goes on to state that he "gave in to the pressure" of the Prosecution, and consequently, gave them an "account of JPK's death" that he and one William Obey had concocted.¹²

8. Certainly, the information in the affidavit contradicts evidence of Prosecution witnesses who claim that DCT-032 played a key role in the murder of Johnny Paul Koroma, on the orders of the Accused.¹³ However, this exculpatory information contained in the affidavit does not in and of itself contain proof of the acts and conduct of the Accused. Thus the Defence submits that the context of the Prosecution's evidence vis-à-vis DCT-032's affidavit should not serve as a bar to the admission of exculpatory evidence under Rule 92*bis*.
9. Even though, as the Prosecution notes at paragraph 19 of its Response, the Trial Chamber found DCT-032 to be an alleged subordinate of the Accused,¹⁴ the Majority did not state that it was his subordinate status that made his affidavit inadmissible as proof of the acts and conduct of the accused under Rule 92*bis*.

⁸ Motion for Admission, Confidential Annex D, para. 7.

⁹ Motion for Admission, Confidential Annex D, para. 8.

¹⁰ Motion for Admission, Confidential Annex D, para. 9.

¹¹ Motion for Admission, Confidential Annex D, para. 27.

¹² Motion for Admission, Confidential Annex D, para. 27. It will also be recalled that in June/July 2008, Obey had been sent to DCT-032 by Prosecution Witness Moses Blah (paras. 4-5). The Defence notes that Moses Blah had just returned from testifying in The Hague in May 2008, wherein he had implicated DCT-032 in the killing of Johnny Paul Koroma. The Defence submits it is reasonable to infer that Moses Blah, on behalf of the Prosecution, sent Obey to pressure DCT-032 into concocting a story that would corroborate Moses Blah's account of the killing.

¹³ Admission Decision, paras. 24-25.

¹⁴ Admission Decision, para. 24, citing Disclosure Decision, para. 24.

10. At paragraph 20 of its Response, the Prosecution suggests that the Defence takes issue with the Majority's factual conclusion that the Affidavit contains a denial by DCT-032 that he was involved in the killing of Johnny Paul Koroma. Certainly the Affidavit is a denial that DCT-032 was involved in killing JPK; but the Affidavit is not a denial that he did or did not do anything pursuant to the orders of the Accused, which is what the challenged language in the Majority decision¹⁵ infers. In fact, the orders or lack of orders of the Accused does not even come into the picture since DCT-032 states he does not have any knowledge of Johnny Paul Koroma's death at all.
11. At paragraph 2 of its Response, the Prosecution oddly maligns the Defence's use of the word "absurd" when stating that the Trial Chamber's consideration of irrelevant factors lead to an absurd application of Rule 92bis.¹⁶ The Defence's choice of language was appropriate, given that it was assessing the Trial Chamber's decision in light of an established legal principle regarding statutory interpretation, ie, that "a statute or rule must not be interpreted so as to produce an **absurdity**".¹⁷ The Defence submits that an interpretation of Rule 92bis resulting in the exclusion of evidence, stemming from a disclosure violation, relating to the acts and conduct of an alleged subordinate of the Accused, at the request of the Accused is, indeed, absurd. Such a conclusion places undue and improper reliance on the wider context of the evidence to the detriment of the fair trial rights of the Accused.
12. Contrary to Prosecution arguments at paragraph 32 of its Response, the fact that DCT-032 was available to testify does not negate the fact that his Affidavit could have properly been admitted under Rule 92bis.

¹⁵ Admission Decision, para. 23 ("The material in the affidavit relates to DCT-032's denial that he was involved in the killing of Johnny Paul Koroma *pursuant to the orders of the Accused*") (emphasis added).

¹⁶ Appeal, p. 9.

¹⁷ *Prosecutor v. Norman et al*, SCSL-04-14-T-146, Decision on Motion to Compel Production of Exculpatory Witness Statements, Witness Summaries and Materials Pursuant to Rule 68, 8 July 2004, para 19, cited in *Prosecutor v. Sesay et al*, SCSL-04-15-T-189, Sesay – Decision on Defence Motion for Disclosure Pursuant to Rules 66 and 68 of the Rules, 9 July 2004, para. 16.

13. If the Prosecution arguments at paragraphs 15-18 of the Response, stressing the significance of the evidentiary posture of the contents of the Affidavit vis-à-vis other Prosecution evidence on record, and stressing the proximate nature of the conduct of a subordinate of the Accused, are considered tenable, then by the Prosecution's own submissions: the complete exclusion of the evidence of DCT-032 pursuant to Rule 92*bis* was not the correct outcome for the Trial Chamber to reach. The Prosecution suggests that instead, the Trial Chamber should have made its admission conditional on cross-examination.¹⁸ Indeed, this was the approach taken by the Trial Chamber during the Prosecution case when the Prosecution sought the admission of transcripts of Prosecution witnesses who had testified previously in other trials, but which contained linkage evidence of subordinates which implicated the Accused.¹⁹ Thus it was determined that it would not be *fair to the Accused* to permit evidence pivotal to the Prosecution case to be given in written form.²⁰ In this instance, there is no concern of violating the Accused's right to confrontation through the admission of the written Affidavit, and thus the same concern does not arise.

Ground Two: Independent Relevance of Payments and Indemnity Letter

14. The Prosecution argues that the Defence's submissions regarding the independent relevance of Prosecution payments to DCT-032 and the indemnity letter written to DCT-032 by the Prosecution is outside the scope of the Certification.²¹ The Defence submits this is an erroneous interpretation of the Certification decision and further relies on its submissions at paragraphs 3-5 above.

15. The Defence reiterates that the Majority abused its discretion by failing to appreciate the relevance of the payments and indemnity letter, independent from the admission of the affidavit. The Majority failed to adequately consider the significance of the payments not only in relation to the credibility or otherwise of DCT-032 but to the Prosecution's investigative *modus operandi* and the context within which the

¹⁸ Response, para. 11.

¹⁹ Response, para. 11

²⁰ *Galic* Decision, para. 13.

²¹ Response, para. 33.

payments and indemnity letter were given to DCT-032, ie. the fact that these incentives were given to DCT-032 at a time when the Prosecution needed him to give them a story that would corroborate that of Moses Blah, Zig Zag Marzah and TF1-375. The Defence submits that this casts doubt upon the credibility of the accounts given by Moses Blah, Zig Zag Marzah and TF1-375 regarding DCT-032. The Trial Chamber thus erred in finding that the “sole relevance [of the payments and indemnity letter] would have been to corroborate DCT-032’s account of the Prosecution’s conduct in relation to his role in the investigation of the death of Johnny Paul Koroma or to impugn his credibility”.²²

16. The Prosecution states at paragraph 35 of its Response that the issue of the allegedly improper payments and inducements to witnesses, potential witnesses and sources, is not a “live issue in this trial”. This is an unsupported, optimistic view on the part of the Prosecution. The issue is live because the Defence has made it a central aspect of its Defence case, and the Trial Chamber has not yet ruled on it. For instance, though the Trial Chamber has not made an express statement that these *are* live issues (as it has in the ICC *Lubanga* case²³), likewise the Trial Chamber has not made a ruling that these *are not* live issues, and that there is no cause for concern or room for argument. In fact, the Trial Chamber has stated that it will reserve making its assessment regarding the credibility of prosecution witnesses, and the impact alleged inducements may have had on the truthfulness of their testimony for the final judgement.²⁴ The Trial Chamber has also found that witnesses can and have exploited the Prosecution for money, to the point that they gave the Prosecution false information;²⁵ this necessarily indicates that improper monetary payments can have a

²² Admission Decision, paras. 33 and 34.

²³ See Response, para. 38.

²⁴ *Prosecutor v. Taylor*, SCSL-03-01-T-1118, Decision on Defence Motion Requesting an Investigation into Contempt of Court by the Office of the Prosecutor and its Investigators, 11 November 2010 (“**Contempt Decision**”), para. 134 (regarding the alleged Prosecution payments of \$10,000 to TF1-362), and para. 141 (regarding the release of Foday Lansana and Isaac Mongor from prison and the alleged involvement of the OTP in that process),

²⁵ Contempt Decision, para. 111 (regarding tens of thousands of dollars worth of payments given to potential Prosecution witness DCT-097 and the false information he gave them in exchange).

detrimental effect on the truthfulness of testimony and is thus a live issue for the final judgement.

17. At paragraph 37 of its Response, the Prosecution says there is no “wider issue before the Court concerning the conduct of the Prosecution”. Again, this is an optimistic and perhaps naïve sentiment on the part of the Prosecution. The Defence challenged the propriety of payments to witnesses by the Prosecution throughout the Prosecution case, during cross-examination of Prosecution witnesses. Some of these examples were contained in Annex N of the Defence’s Contempt Motion, which is also for consideration before the Appeals Chamber. In general terms, the Trial Chamber has reserved consideration of Defence allegations regarding the Prosecution’s abuse of discretion with respect to payment of witnesses pursuant to Rule 39(ii) until the stage of final deliberations. Thus, this issue as a whole is in fact “live” and will be squarely before the Trial Chamber as one component of the Defence’s final trial brief, to the fullest extent possible (given that, as currently scheduled, there will not be a decision by the Appeals Chamber on the Defence’s request for an investigation into contempt of court by the time the parties have to file their final briefs).
18. At paragraph 36 of its Response, the Prosecution cites the *Karemera* decision and the Trial Chamber’s recent decision regarding the disclosure regime relating to the exculpatory nature of payments to witnesses. The Prosecution relies on these decisions to suggest that absent a connection to a witness who has testified and whose credibility is to be tested, such information regarding payments and incentives to witnesses is irrelevant. The Prosecution’s deliberately narrower interpretation of those decisions is incorrect on a closer reading. The Prosecution states that “information relating to benefits and promises only potentially falls within the category of exculpatory material where the individual to whom such items relate is a *Prosecution* witness or victim” (emphasis added).²⁶ In contrast, *Karemera* states that “[m]aterial or information within the Prosecutor’s knowledge concerning any benefits paid to and/or promises made to witnesses and victims beyond that which is reasonably

²⁶ Response, para. 36.

required has a different character and should therefore be disclosed as evidence which may affect the *credibility of witnesses...*” (emphasis added).²⁷ Per the language of *Karemera*, the witness to whom the benefits were paid/promised does not necessarily have to be the same as the witness whose credibility is affected, nor does it necessarily have to relate a Prosecution witness. Thus the Prosecution argument must fail.

19. Indeed, the Defence submits the payments and promises made to DCT-032 are as relevant in relation to the testimony of Moses Blah, Zig Zag Marzah and TF1-375²⁸ (and thus the integrity of the Prosecution’s investigations and attempting to mould evidence that would corroborate that of its witnesses whom had already testified), than to DCT-032’s own credibility. The Majority therefore made a discernable error in not taking this factor into account when determining that the payments and indemnity letter lacked relevance absent the affidavit.

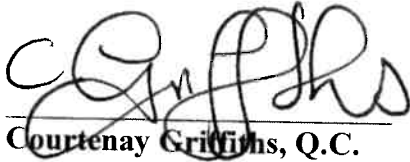
IV. RELIEF REQUESTED

20. The Defence incorporates by reference, all of its arguments in the Appeal, as well as the additional comments made above in submitting that the Majority committed a number of errors of law and/or fact in its Admission Decision which resulted in the dismissal of the Defence’s Motion for Admission of documents which undermine the credibility of Prosecution evidence and provide evidence of Prosecution malfeasance. The Appeals Chamber should consequently exercise its own discretion and order the Trial Chamber to admit into evidence the affidavit of DCT-032, the record of Prosecution payments totaling more than \$3000 made to DCT-032 and the letter of indemnity written by the Prosecution to DCT-032.

²⁷ *Prosecutor v. Karemera et al*, ICTR-98-44-PT, Decision for Full Disclosure of Payments to Witnesses, 23 August 2005, para. 7.

²⁸ This should be abundantly clear per the chronology as laid out in the Appeal, paras. 40-57.

Respectfully Submitted,

A handwritten signature in black ink, appearing to read 'C Griffiths', written over a horizontal line.

Courtenay Griffiths, Q.C.

Lead Counsel for Charles G. Taylor

Dated this 10th Day of January 2011,

The Hague, The Netherlands

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Prosecutor v. Taylor, SCSL-03-01-AR73-1141, Confidential Prosecution Response to Defence Notice of Appeal and Submissions Regarding 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, 17 December 2010

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Prosecutor v. Taylor, SCSL-03-01-AR73-1135, Confidential with Confidential Annex A Urgent Prosecution Motion to Classify as “Confidential” the ‘Public Defence Notice of Appeal and Submissions Regarding 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’ due to Protective Measures Violations, 15 December 2010

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Prosecutor v. Taylor, SCSL-03-01-T-1090, Public with Confidential Annexes A-J and Public Annexes K-O Corrigendum to Defence Motion Requesting an Investigation into Contempt of Court by the Office of the Prosecution and its Investigators, 27 September 2010, Annex N.

Other SCSL Cases

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Prosecutor v. Sesay et al, SCSL-04-15-T-189, Sesay – Decision on Defence Motion for Disclosure Pursuant to Rules 66 and 68 of the Rules, 9 July 2004

Other International Tribunal Cases

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