019) SCSL-11-01-T (173 — 185) 173

**SPECIAL COURT FOR SIERRA LEONE**

**TRIAL CHAMBER II**

Before: Justice Teresa Doherty, Presiding Judge
Single Judge, Trial Chamber II

Registrar: Binta Mansaray

Case No: SCSL-2011-01-1

Date: 2 JULY 2012



PROSECUTOR V. ERIC KOI SENESSIE

PUBLIC

**DEFENCE RESPONSE TO INDEPENDENT COUNSEL'S SENTENCING RECOMMENDATION**

**Office of Independent Counsel**
William L. Gardner

**Counsel for Eric Senessie**
Ansu B. Lansana

**Office of the Principal Defender:**
Claire Carlton-Hanciles

## I. INTRODUCTION

1. On 22 June 2012, the Trial Chamber II rendered an oral Summary Judgment in the case of the Independent Prosecutor V Eric Koi Senessie[1]. The Trial Chamber found Mr. Senessie guilty on eight out of nine counts of Contempt Of Court, pursuant to Rule 77 (A) (iv) of the Rules of Procedure and Evidence of the Special Court for Sierra Leone (hereinafter referred to as "the Rules") alleging that he had attempted to bribe and/or influence five prosecution witnesses who testified at the Taylor[2] trial to recant their testimony in January-February of 2011.

2. Following the pronouncement of Judgment and pursuant to Rule 101 of the Rules, the Independent Counsel filed his Sentencing Recommendation on 26 June 2012[3]. The Independent Counsel recommends that Mr.Senessie be sentenced to a term of imprisonment of 5 to 7 years, and "be ordered to pay the maximum fine permitted under [the Rules]: 2 Million Leones"[4] on the grounds that Mr. Senessie ("Accused") had knowingly and wilfully interfered with the administration of justice, and had been convicted on all

[1] Prosecutor v. Senessie Case No. SCSL-2-1-T.
[2] Prosecutor v. Taylor, SCSL-03-01-T-1276
[3] Prosecutor v. Senessie Case No. SCSL-2011-01-T. (Sentencing Recommendation.) Para 10 P. 5
[4] See SCSL Rules, Rule 77(G). This rule has, however, been amended with the imposition of a 900% increase.

four counts of offering a bribe to a witness, and on four of the five counts of attempting to influence prosecution witnesses.

3. On behalf of Mr. Senessie, and pursuant to Rule 100 (A) of the Rules, the Defence files this Sentencing Brief, in response to the Independent Counsel's Sentencing Recommendations as well as to "submit relevant information that may assist the Trial Chamber in determining an appropriate sentence".

## II DEFENCE SUBMISSIONS

### A) SENTENCING THEORY

4. On behalf of Mr. Senessie, and pursuant to Rule 100 (A) of the Rules, the Defence files this Sentencing Brief, in response to the Independent Counsel's Sentencing Recommendations as well as to "submit relevant information that may assist the Trial Chamber in determining an appropriate sentence".

5. What amounts to an "appropriate sentence", the Defence submits, will not necessarily be determined by the number of years imposed, as the

Independent Counsel recommends but rather, and more importantly, by the Trial Chamber's reasoned approach, which should clearly set out the basis upon which that penalty is imposed. An "appropriate sentence", the Defence submits, is one that is objectively reasoned, justifiable in law and speaks to the facts of the case and the circumstances of the Accused. It is not one that is simply designed to have Mr. Senessie sentenced for 5 to 7 years, as recommended by Independent Counsel, to serve as " an appropriate signal to the community that this kind of conduct will not be sanctioned but rather heavily punished"[5]. The Defence appreciates the Prosecution's concern that this Chamber uses the instant trial as an opportunity to establish deterrence. However, taking into consideration the nature and circumstance of the Accused's conduct the Prosecutions recommendation of heavy punishment is a notch too harsh.

6. The defence submits, first and foremost, that the legal art of sentencing is eclectic. It varies from Tribunal to Tribunal and from Judge to Judge. There is never a hard and fast rule in sentencing as each individual case revolves around its peculiarity and the sentencing invariably reflects that peculiarity. The Defence therefore submits that the Federal Sentencing Guidelines Manual of the United States of America annexed to the Independent

[5] Prosecutor v. Senessie Case No. SCSL-2011-01-T. (Sentencing Recommendation.) Para 11 P. 6

Counsel's Sentencing Recommendation be only of persuasive but not determinant value.

## B) MITIGATING CIRCUMSTANCES

7. It is an established principle in law[6] that mitigating circumstances of an offence relate to two major issues: the circumstances of the offence on the one hand and the circumstances of the offender on the other. Although the facts indicating the circumstances of the offences are known to this Chamber, not all of the circumstances of the offender – the Accused, are known or have been established.

### i. <u>The circumstances of the offence:</u>

8. It would be worth mentioning, at the risk of repetition, that the offences for which the Accused has been convicted are more inchoate than substantive in nature. He has been convicted of having offered bribes to prosecution witnesses. However, no amounts were stated and no bribes were ever paid. The Accused himself is a poor rural farmer, carver and evangelist who, by no stretch of the imagination, can be seen to possess the means of providing

[6] Archbold's Criminal Practice 2007.

bribe money to the Prosecution witnesses. In the case of the Prosecutor v.Charles Ghankay Taylor the Trial Chamber found that allegations by DCT-133 that the prosecutor had offered him financial benefit in exchange for testimony were "highly speculative". The Chamber therefore decided that the allegations were not credible in part because DCT-133 was never paid the negotiated fee[7].

9. The Accused has further been convicted of having otherwise interfered with Prosecution witnesses who had testified at The Hague in the Taylor trial to recant their testimonies. However, the dreaded effect of the interference never took place – there was no recantation of testimonies.

10. Another notable circumstance of the offences is the element of entrapment and/or luring the Accused into furthering his action to procure incriminating evidence against him. This is particularly true of TFI 585. On TFI 585's first encounter with the Accused on 27 January 2011 she did not own a phone. However, she encouraged him to pay a second visit and went on to procure a mobile phone against 31 January 2011 for the sole purpose of recording his voice. According to TFI 585, she did that for purpose of procuring

[7] The Prosecutor v. Taylor, SCSL-03-01-T-1118, Decision on Public with Confidential Annexes A –J and Public Annexes K-O Defence Motion requested an Investigation into Contempt of Court by the Office of the Prosecutor and its investigators (November 2010 Contempt Decision) Para. 104,

incriminating evidence against the Accused.[8] This can best be described as entrapment.

11. It has been held in the UK Jurisdiction[9] that entrapment as a result of the conduct of journalists rather than police officers will result in mitigation of sentence. Here, although TFI 585 cannot be described as a journalist, her actions and tactic are no different. The Defence therefore submits that the circumstances of TFI 585's procurement of the Recording and subsequent transcript thereof be treated by the Chamber as a mitigating circumstance.

**ii) <u>The circumstances of the offender</u>**

It has been established before this Chamber that the Accused has been of good comportment from the onset of investigations and all through out his trial in terms of attendance or appearance before this Chamber. The Accused always made himself available to this Chamber whenever required so to do and has never given cause for this Chamber to issue a warrant for his appearance. In addition to this comportment, the Accused has a good reputation in the Kailahun community where he enjoys the following statuses.

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[8] Testimony of TFI-585 on Monday 11 June, 2012, page 55 Lines14 -20
[9] Tonnessen (1998) 2 Cr. App. R. 328 CA cited in Archbold's Criminal Practice 2007, paras. 22-97 at page 1002.

(i) A family man with two wives and eight children;

(ii) A cocoa farmer and carver.

(iii) An evangelist of the New Apostolic Church with approximately 300 -400 members of the congregation;

(iv) Chairman of the RUFP in the Kailahun District;

**Senessie the family man**

12. It has been established before this Chamber that the Accused is a family man with two wives and eight children, the youngest of whom, Fick Senessie, is a 12 year old and still in primary school. The Accused is the sole bread winner for the family and the Defence wishes to bring to the notice of this Chamber that any custodial sentence to the Accused will adversely affect the livelihood of his family and invariably stifle, if not abort, Fick Senessie's educational future.

**Senessie the carver and cocoa farmer**

13. The Accused also happens to be an established cocoa farmer in the Kailahun community. His cocoa plantation spans a land mass of over 20 acres and he is still in the process of planting more cocoa trees. In addition to being a farmer, he is also a gifted carver and he is currently engaged in

carving for entertainment centres and domestic homes in the Kailahun Township.

**Senessie the evangelist** –

In addition to being a family man, the Accused is a lay preacher at the New Apostolic Church with a congregation of 300-400 members to whom he preaches the word of God on Sundays. This is indicative of the fact that the Accused is of moral inclination and cannot be equated with a common criminal or a pervert.

**Senessie the peace maker and democrat**

14. There is evidence before this Chamber that the Accused as head of the Cartographic Office in the Military Intelligence Branch in the RUF played a vital role in ensuring the success of the peace process during the war. He was very instrumental in preventing an attack on the Indian Contingent in Kailahun.[10]

15. In addition to the above, the Accused played a vital role in the transformation of the RUF from a war machine into a political organisation that became known as the Revolutionary United Front Party (RUFP). This underscores the point

[10] Testimony of the Accused – Transcript of Wednesday 13 June, 2012, pages 11 Line 29, page 12 Lines 1-8.

that the Accused is a man of peace who during the peace process had a strong conviction that bullets should be replaced by ballots in determining the will of the people.

16. By reason of the foregoing highlights of the Accused's character, social standing and role in the peace process in Sierra Leone, the Defence implores this Chamber not to impose a custodial sentence but rather impose a sentence of a fine. The Defence is apprehensive that given the socio – cultural milieu the Accused hails from, a custodial sentence will not only smear the image of the Accused but even splodge the image of his entire family for generations to come.

17. Furthermore, a custodial sentence will steep his family and the family of TFI-585 in an unending enmity. This would affect all members of the two families and spread to their friends, relations, extended families and acquaintances. In short the incarceration of the Accused would engender a family feud.

18. Given the above, the Prosecution's recommendation of 5 – 7 years imprisonment would not only affect the Accused personally but would be tantamount to sentencing his family and the family of TFI- 585 to life

animosity. The Defence therefore recommends a fine instead of custodial sentence.

19. There is jurisprudence in International Criminal Tribunals of imposition of fines instead of custodial sentences.[11] Against this backdrop the Independent Counsel's recommendations of a custodial sentence of 5 – 7 years and imposition of a fine is not only disproportionate to the circumstances of the offence and the offender but excessive and ill advised from the stand point of fostering and nurturing peace in the Kailahun community.

**The Nature of the Fine**

20. In the event that this Trial Chamber harkens to the plea of the Defence, the Defence would further implore the Chamber to impose a fine taking into consideration the socio-economic circumstance of the Accused. He is a poor rural farmer and carver with a yearly income that is too meagre to sustain his family. Taking into consideration the recent amendment[12] of Rule 77 (G) of the

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[11] In the case of **Prosecutor v Dusko Tadic, IT-94-1-A-R77-** Judgment on allegations of contempt against prior Counsel Milan Vujin, 31 January 2000, the accused was sentenced to pay a fine of DFI 15,000 to the Registrar of the Tribunal within twenty one days

[12] Rule77 (G) of the Rules of Procedure and Evidence of the Special Court for Sierra Leone was amended by the 18th Plenary of Judges pursuant to Rule 24(i).
to read:
*"The maximum penalty that may be imposed on a person found to be in contempt of the Special Court pursuant to Sub-Rule (C)(i) shall be a term of imprisonment not exceeding six months, or a fine not*

Rules, the Defence is of the legal opinion that the amendment is retrospective in relation to the Accused's offence and therefore should not apply. The Defence is of the view that the stipulated fine at the time of the commission of the offence should be the operative and applicable fine to be imposed on the Accused. The Defence would therefore recommend a fine of Le 2,000,000.00 (Two Million Leones).

21. The above recommendation notwithstanding the Defence is in respectful appreciation of the Trial Judge's vast experience on the Bench and would trust in her legal wisdom to discern the appropriate sentence to impose, taking cognizance of the peculiarity of the Sierra Leonean society as distinct from the world at large.

Faithfully Submitted

Ansu B. Lansana – Counsel for the Accused.

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*exceeding 2 million Leones, or both; and the maximum penalty pursuant to Sub-Rule (C)(iii) shall be a term of imprisonment for seven years or a fine not exceeding* ***20 million*** *Leones, or both."*

## AUTHORITIES

Prosecutor v. Senessie Case No. SCSL-2-1-T.

Prosecutor v. Taylor, SCSL-03-01-T-1276.

Prosecutor v. Senessie Case No. SCSL-2011-01-T. (Sentencing Recommendation.) Para 10 P. 5.

Prosecutor v. Senessie Case No. SCSL-2011-01-T. (Sentencing Recommendation.) Para 11 P. 6.

Archbold's Criminal Practice 2007.

The Prosecutor v. Taylor, SCSL-03-01-T-1118, Decision on Public with Confidential Annexes A –J and Public Annexes K-O Defence Motion requested an Investigation into Contempt of Court by the Office of the Prosecutor and its investigators (November 2010 Contempt Decision) Para. 104.

Prosecutor v. Senessie Case No. SCSL-2-1-T,Testimony of TFI-585 on Monday 11 June, 2012, page 55 Lines14 -20.

Tonnessen (1998) 2 Cr. App. R. 328 CA cited in Archbold's Criminal Practice 2007, paras. 22-97 at page 1002.

Prosecutor v. Senessie Case No. SCSL-2-1-T,estimony of the Accused – Transcript of Wednesday 13 June, 2012, pages 11 Line 29, page 12 Lines 1-8.

In the case of Prosecutor v Dusko Tadic, IT-94-1-A-R77.