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SCSL-11-01-A
(201-220)

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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: 23 JULY 2012

PROSECUTOR V. ERIC KOI SENESSIE

PUBLIC WITH CONFIDENTIAL ANNEXES A AND B

DEFENCE MOTION FOR REVIEW

Office of Independent Counsel
William L. Gardner

Counsel for Eric Senessie
Ansu B. Lansana

Office of the Principal Defender:
Claire Carlton-Hanciles

SPECIAL COURT FOR SIERRA LEONE
RECEIVED
COURT RECORDS
NAME... *Frances Ngabeh-Saint*
SIGN... *[Signature]*
TIME... *15:50*

I. INTRODUCTION

- 1. The Defence files this Motion on behalf of the Applicant, Eric Senessie, pursuant to Rule 120 of the Rules of Procedure and Evidence¹ requesting a Review of the Applicant's case in the light of new facts discovered, which said facts were not known to the Chamber at the time of the proceedings before it.

II BACKGROUND

- 2. On 3 February 2011 the Prosecution filed a Motion² requesting an investigation into contempt of the Special Court for Sierra Leone involving interference with some Prosecution witnesses by the Accused and/ or a certain Prince Taylor. Another Motion³ was filed on 7 February 2011, albeit in respect of alleged interference with other prosecution witnesses. On 24 February 2011 the Prosecution filed a third Motion⁴.
- 3. On 25 February 2011, after the Defence had filed a Response⁵ to the first and second Prosecution Motions, arguing that the Prosecution's request for a contempt investigation must fail, the Trial Chamber delivered a Decision⁶ directing the Registrar to appoint an independent Counsel to investigate

¹ Special Court for Sierra Leone Rules of Procedure and Evidence as Amended on 16 November 2011. (Hereinafter referred to as "The Rules")

² Prosecutor v. Taylor, SCSL-03-01 T-1185, Public with Confidential Annexes A to E & public Annex F Urgent Prosecution Motion for an Investigation into Contempt of the Special Court for Sierra Leone.

³ Prosecutor v. Taylor, SCSL-03-01 T-1192, Public with Confidential Annexes A & B & Urgent Prosecution Motion for an Investigation into Contempt of the Special Court for Sierra Leone.

⁴ Prosecutor v. Taylor, SCSL-03-01 T-1215, Public with Confidential Annexes A & B Urgent Prosecution Motion for an Investigation into Contempt of the Special Court for Sierra Leone.

⁵ Prosecutor v. Taylor, SCSL-03-01 T-1201, Public with Confidential Annexes A and B Defence Response to Urgent Prosecution Motion for an Investigation into Contempt of the Special Court, 11 February 2011

⁶ Prosecutor v. Taylor, SCSL-03-01 T-1218, Decision on Public with Confidential Annexes A to E and Public Annex F Urgent Prosecution Motion for an Investigation into Contempt of the Special Court for Sierra Leone and Public

4. allegations that a person or persons, including Eric Senessie and/or Prince Taylor may be in contempt of the Special Court. The Chamber further directed that the independent Counsel so appointed should report to the Chamber as to whether there are sufficient grounds for instigating contempt proceedings.
5. Upon receipt of the independent Counsel's report the Trial Chamber decided that there were sufficient grounds to proceed against Eric Senessie for contempt of court and ordered that an Order in Lieu of Indictment⁷ be issued in respect of Eric Senessie.
6. On 15 July 2011, Eric Senessie was arraigned before Trial Chamber II, with Justice Teresa Doherty presiding, and pleaded not guilty to the nine-count charges preferred against him. The said charges entailed 4 counts of offering bribes to prosecution witnesses and 5 counts of interfering with Prosecution witnesses.
7. On 11 June 2012 the trial of Eric Senessie commenced and on 22 June 2012, the Trial Chamber II rendered an oral Summary Judgment. 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 Taylor⁸ trial to recant their testimony in January-February of 2011.

with Confidential Annexes A & B Urgent Prosecution Motion for an Investigation into Contempt of the Special Court for Sierra Leone.

⁷ Prosecutor v. Taylor, SCSL-03-01 T-1249, Decision on Report of Independent Counsel.

⁸ Prosecutor v. Taylor, SCSL-03-01-T-1276

8. Following the pronouncement of Judgment and pursuant to Rule 101 of the Rules, the Independent Counsel filed his Sentencing Recommendation on 26 June 2012⁹. 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” on the grounds that Mr. Senessie (“Accused”) had knowingly and wilfully interfered with the administration of justice, and had been convicted on all four counts of offering a bribe to a witness, and on four of the five counts of attempting to influence prosecution witnesses.

9. On behalf of Mr. Senessie, and pursuant to Rule 100 (A) of the Rules, the Defence filed a Sentencing Brief, in response to the Independent Counsel’s Sentencing Recommendations and submitted relevant information to assist the Trial Chamber in determining an appropriate sentence.¹⁰

10. Prior to the Trial Chamber’s pronouncement of sentence Eric Senessie, in his allocutus, informed the Chamber that there were certain facts the Chamber had not known and which he considered vital and imperative to disclose. He informed the Chamber that he had indeed contacted the Prosecution witnesses but on the instructions of Prince Taylor and proceeded to give details of those instructions and how he executed them. He further informed the Chamber that he was used by Prince Taylor and regretted his actions.¹¹

⁹ Prosecutor v. Senessie Case No. SCSL-2011-01-T. (Sentencing Recommendation.) Para 10 P. 5

¹⁰ Prosecutor v. Senessie Case No. SCSL-2011-01-T. Defence Response to Independent Counsel’s Sentencing Recommendation. 2 July 2012.

¹¹ A sworn Affidavit by Eric Senessie detailing calls from Prince Taylor instructing him to contact the prosecution witnesses is provided as an annex to this Motion. Annex A.

11. After considering the Independent Prosecutor's Sentencing Recommendation and the Defence Response thereto, and further, after hearing Eric Senessie's allocutus and the Defence Counsel's oral rendition of his Response to the Independence Prosecution Sentencing Recommendation the Presiding Judge sentenced the Eric Senessie to a two-year term in prison.
12. Given the nature of Eric Senessie's revelations in his allocutus, the Defence has deemed it wise to waive its right of appeal and, instead, avail of Rule 120 of the Rules which provides for an application for review.

III THE LAW APPLICABLE TO REVIEWS

13. Rule 120 of the Rules provide as follows:

"Where a new fact has been discovered which was not known at the time of the proceedings before the Trial Chamber or Appeals Chamber and which could have been a decisive factor in reaching the decision, the convicted person or, within twelve months after the appeal judgment has been pronounced, the Prosecutor may submit an application for a review of the judgment."
14. The parameters for determining what case qualifies for review was laid down in the case of Barayagwiza V. Prosecutor in which the Appeals Chamber held that "... in order for a Chamber to carry out a review, it must be satisfied that four criteria have been met. There must be a new fact; this new fact must not have been known by the moving party at the time of the original proceedings; the lack of discovery of the new fact must not have been through the lack of due diligence on the part of the moving party; and

it must be shown that the new fact could have been a decisive factor in reaching the original decision".¹²

15. The Defence does concede that the first two criteria seemingly disqualify the Applicant in the sense that the facts constituting his revelations were known to him at the time of the original proceedings, and he withheld them and made no disclosure thereof during the proceedings. That notwithstanding, the said facts were not known to his Counsel or, indeed, the Trial Chamber and the Defence is of the view that had such facts been known to the Chamber before or during the proceedings, they would have proved a decisive factor in determining the Trial Chamber's verdict and/or sentence.
16. There is jurisprudence before the ICTR¹³ that the requirement that "the additional fact could not have been discovered through the exercise of due diligence" is directory rather than mandatory in nature. This ensures that that Appeals Chamber is vested with considerable latitude in determining applications for review.
17. Another jurisprudence that safeguards the dispensation of justice in review applications is the overriding principle of "decisive factor". Where a Chamber is faced with a new fact "which is of such strength that it would affect the verdict, it is required to examine whether or not the new fact is a decisive factor, even though the second and third criteria ... are not formally met."¹⁴ This effectively means that even though the Applicant does not satisfy the other two requirements for a review, the established jurisprudence at the ICTY is that the Appeals Chamber may grant a motion for review based solely on the existence of a new fact that could have been decisive in reaching the original decision.

¹² Baravagwiza V Prosecutor, Decision on Prosecutor's Request for Review or Reconsideration, March 31, 2000, para. 41.

¹³ *Ibid*, para 65.

¹⁴ Prosecutor V. Tadic, Decision on Motion for Review, July 30, 2002, para. 27.

18. Jurisprudence from the ICTY and the ICTR is recognized by the Statute of the Special Court for Sierra Leone as a guide¹⁵ to both the Trial and Appeals Chambers, and the Defence heavily relies on the above authorities in that regard.

III DEFENCE SUBMISSIONS

19. It is the Defence's submission that in the light of the new facts revealed by the Applicant in his allocutus it can be legally asserted that he was acting as an innocent agent for Prince Taylor, the erstwhile Investigator for the Taylor Defence Team.
20. The Defence further submits that although the Applicant bears responsibility for his actions, the overbearing actions of Prince Taylor, coupled with his hoodwinking of the Applicant into believing that Prosecution was after him (Prince Taylor) and not him (the Applicant) the Applicant injudiciously withheld these facts from his Counsel and from the Chamber in the vain hope of protecting himself and Prince Taylor.
21. This undue influence partially contributed to the Applicant's actions and the Defence further submits that the Applicant's situation is much akin to that in *Thornton v. Mitchell*¹⁶ in which a bus driver was acquitted of driving without due care and attention as he had relied on signals from his conductor in reversing the bus. Because of the conductor's negligence, two pedestrians

¹⁵ See Article 20 of the Statute of the Special Court for Sierra Leone.

¹⁶ *Thornton v. Mitchell* [1940] 1 All AER 339.

were injured, one fatally. Although the *actus reus* could be attributed to the driver, he lacked the requisite *mens rea* for the prosecution to secure a conviction.

22. Like the bus driver in *Thornton v. Mitchell*, the Applicant can reasonably be described as an innocent agent. Of the two individuals, it was Prince Taylor who had the specific intent of interfering with the Special Court's administration of justice and not the Applicant who merely committed the *actus reus* of contacting the prosecution witnesses on the instructions of Taylor.
23. The Defence, therefore, humbly invites the Appeals Chamber to consider the principle of innocent agency from the standpoint of the following revelations:
 - i) The Applicant did not know of the prohibitions governing contacts with witnesses before the Special Court, but Prince Taylor knew. Instead of contacting the witnesses himself, he chose someone who was unaware of the said prohibitions;
 - ii) After the said contacts had been reported to the Prosecution investigators and a Motion filed and an investigation ordered, Prince Taylor hoodwinked the Applicant into believing he (the Applicant) was not the target but him (Prince Taylor) and misled him into non-cooperation with the Independent Investigator and pleading not guilty to the charges preferred against him.

24. This undue influence considerably contributed to the Applicant's actions and it is, therefore, the Plea of the Defence that the matter be reviewed with a view to either reducing the penalty meted out to the Applicant viz. the 2 years imprisonment or asking that he pays a fine instead of serving a custodial sentence.
25. The Defence particularly implores the Appeals Chamber to consider proceeding in accordance with Rule 121 (ii) of the Rules in the event that it is disposed to countenancing this application.

Faithfully Submitted,



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Ansu B. Lansana Esq.
Counsel for the Applicant

INDEX OF AUTHORITIES

Special Court for Sierra Leone Rules of Procedure and Evidence as Amended on 16 November 2011.

SCSL Cases

Prosecutor v. Taylor, SCSL-03-01 T-1185, Public with Confidential Annexes A to E & public Annex F Urgent Prosecution Motion for an Investigation into Contempt of the Special Court for Sierra Leone.

Prosecutor v. Taylor, SCSL-03-01 T-1192, Public with Confidential Annexes A & B & Urgent Prosecution Motion for an Investigation into Contempt of the Special Court for Sierra Leone.

Prosecutor v. Taylor, SCSL-03-01 T-1201, Public with Confidential Annexes A and B Defence Response to Urgent Prosecution Motion for an Investigation into Contempt of the Special Court, 11 February 2011

Prosecutor v. Taylor, SCSL-03-01 T-1218, Decision on Public with Confidential Annexes A to E and Public Annex F Urgent Prosecution Motion for an Investigation into Contempt of the Special Court for Sierra Leone and Public with Confidential Annexes A & B Urgent Prosecution Motion for an Investigation into Contempt of the Special Court for Sierra Leone.

Prosecutor v. Taylor, SCSL-03-01 T-1249, Decision on Report of Independent Counsel.

ICTR Case

Barayagwiza V. Prosecutor, Decision on Prosecutor's Request for Review or Reconsideration, March 31, 2000, para. 41.

ICTY Case

Prosecutor V. Tadic, Decision on Motion for Review, July 30, 2002, para. 27

UK Case

Thornton v. Mitchell [1940] 1 All AER 339.

Prosecutor V. Senessie SCSL-11-01-T



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Court Management Section – Court Records

CONFIDENTIAL DOCUMENT CERTIFICATE

This certificate replaces the following confidential document which has been filed in the *Confidential* Case File.

Case Name: **Independent Counsel- v- Eric Senessie**
Case Number: **SCSL-11-01-A**
Document Index Number: **022**
Document Date **23 July 2012**
Filing Date **23 July 2012**
Document Type: Public with **Confidential Annexes A and B**
Number of Pages: **3** Page Numbers from: **211-220**

- Application
- Order
- Indictment
- Decision
- Motion**

Document Title:

Public with Confidential Annexes A and B Defence motion for review

Name of Officer:

Samuel Fornah

Signed 