026)

SCSL-11-01-REV
(255 – 266)

255

SPECIAL COURT FOR SIERRA LEONE

APPEALS CHAMBER

Before:	Justice Shireen Avis Fisher, President Justice Emmanuel Ayoola, Vice President Justice George Gelega King Justice Renate Winter Justice Jon Kamanda Justice Philip Nyamu Waki, Alternate Judge
Registrar:	Ms. Binta Mansaray
Date filed:	13 August 2012

PROSECUTOR **v.** **Eric Koi SENESSIE**

Case No. SCSL-2011-01-REV

PUBLIC WITH CONFIDENTIAL ANNEX A

INDEPENDENT COUNSEL'S RESPONSE TO DEFENCE MOTION FOR REVIEW

Office of Independent Counsel:
Mr. William L. Gardner

Defence Counsel for Eric Senessie:
Mr. Ansu B. Lansana

Office of the Principal Defender:
Ms. Claire Carlton-Hanciles

Independent Counsel's Response to Defence Motion for Review

I. BACKGROUND

1. On August 10, 2012, Defendant Eric Senessie ("Defendant") filed his Defence Motion for Review ("Motion") requesting, pursuant to Rule 120 of the Special Court of Sierra Leone Rules of Procedure and Evidence ("SCSL Rules"), "[r]eview of the [Defendant's] case in the light of new facts discovered[.]"[1] Since the procedural history of this case is well known to the Court and has been summarized in the Defendant's Motion,[2] it will not be repeated here.

II. APPLICABLE LAW AND STANDARD OF REVIEW

2. Rule 120 of the SCSL Rules provides:

> 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 judgement has been pronounced, the Prosecutor may submit an application for a review of the judgement.

3. The Rules of Procedure and Evidence for the International Criminal Tribunal for the former Yugoslavia ("ICTY" and "ICTY Rules") and the Rules of Procedure and Evidence for the International Criminal Tribunal for Rwanda ("ICTR" and "ICTR Rules") contain analogs to Rule 120 of the SCSL Rules. Rule 119(A) of the ITCY Rules provides in relevant part:

> Where a new fact has been discovered which was not known to the moving party at the time of the proceedings

---

1 Prosecutor v. Senessie, Case No. SCSL-2011-01-T, SCSL Trial Chamber, Defence Motion for Review, at para. 1 (10 August 2012) ("Motion"). The Defendant's original Defence Motion for Review was filed in the Trial Chamber on July 23, 2012. The Defendant refiled his Motion in the Appeals Chamber on August 10, 2012 pursuant to an order by the Trial Chamber granting him leave to amend and refile his Motion. See Prosecutor v. Senessie, Case No. SCSL-2011-01-T, SCSL Trial Chamber, Order on Public and Confidential Annexes A and B Defence Motion for Review, at 1 (9 August 2012).

2 Motion at paras. 2-11.

> before a Trial Chamber or the Appeals Chamber, and could not have been discovered through the exercise of due diligence, the defence or, within one year after the final judgement has been pronounced, the Prosecutor, may make a motion to that Chamber for review of the judgement.

Rule 120(A) of the ITCR Rules similarly provides:

> Where a new fact has been discovered which was not known to the moving party at the time of the proceedings before a Trial Chamber or the Appeals Chamber and could not have been discovered through the exercise of due diligence, the Defence or, within one year after the final judgement has been pronounced, the Prosecutor, may make a motion to that Chamber for review of the judgement.

4. As explained by the ICTR Appeals Chamber, a party seeking review under Rule 120 of the ICTR Rules must establish four critical elements:

> 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.[3]

A "new fact," according to the ICTY Appeals Chamber, is a fact that "must not have been among the factors that the deciding body could have taken into account in reaching its verdict."[4] The key issue in determining whether a fact is "new" is "whether the deciding body knew about the fact or not in arriving at its decision."[5]

---

3 Barayagwiza v. Prosecutor, Case No. ICTR-97-19-AR72, ICTR Appeals Chamber, Decision (Prosecutor's Request for Review or Reconsideration), at para. 41 (31 Mar. 2000). The Defendant approvingly quotes this same text in paragraph 14 of his Motion.

4 Prosecutor v. Blaskic, Case No. IT-95-14-R, ICTY Appeals Chamber, Decision on Prosecutor's Request for Review or Reconsideration, at para. 14 (23 Nov. 2006) (quotation marks omitted) (citing Prosecutor v Jelisic, Case No. IT-95-10-R, ICTY Appeals Chamber, Decision on Motion for Review, at page 3 (2 May 2002)).

5 Id. (alterations and internal quotation marks omitted) (citing Prosecutor v. Tadic, Case No. IT-94-1-R, ICTY Appeals Chamber, Decision on Motion for Review, para. 25 (30 July 2002); Niyitegeka v. Prosecutor, Case No. ICTR-96-14-R, ICTR Appeals Chamber, Decision on Request for Review, at para. 6 (30 June 2006)).

As further explained by the ICTY Appeals Chamber, "the test for determining whether a fact proffered in a review proceeding is actually 'new' is as follows: the key concern is that it must not have been in issue during the original proceedings."[6]

5. In its motion for review, the moving party bears the burden of establishing its purported "new facts."[7] The Court's role is to "compare those alleged new facts against the previously litigated facts as found in the plain language of the final judgement or decision at issue and the record underlying that final judgement or decision."[8] Where the allegedly "new facts" are identical to facts already at issue, then review is not available.[9]

6. If the Court finds that the allegedly "new facts" are, indeed, new facts, the court must be satisfied that the three remaining criteria have been met before carrying out a review. Thus, as noted above, the movant must show that: (1) the new facts must not have been known by the movant at the time of the original proceedings; (2) the lack of discovery of the new facts must not have been the result of a lack of movant's due diligence; and (3) the new facts could have been a "decisive factor in reaching the original decision."[10]

III. ARGUMENT

A. The Defendant has not established a "new fact" warranting a Rule 120 review.

7. As a threshold matter, the Defendant has failed to show that "new facts"—which were not specifically identified in the Motion—trigger a review under Rule 120 of the SCSL Rules.[11] The Defendant's allegedly "new fact" appears to be his revelation at

---

6 Blaskic, Decision on Prosecutor's Request for Review or Reconsideration, at para. 15.
7 Id. at para. 17.
8 Id.
9 Id.
10 Barayagwiza, Decision (Prosecutor's Request for Review or Reconsideration), at para. 41.
11 The Defendant shot himself in the foot by "conced[ing] that the first two criteria [for a Rule 120 review] seemingly disqualify the [Defendant] in the sense that the facts constituting his revelations

the July 4, 2012 Sentencing Hearing that Prince Taylor approached the Defendant about committing the unlawful acts that resulted in the Defendant's contempt convictions.[12] Defendant appears to claim in his Motion that, as a result of this allegedly new fact, "it can be legally asserted that [the Defendant] was acting as an innocent agent for Prince Taylor, the erstwhile Investigator for the [Charles] Taylor Defense Team," when unlawfully confronting the Charles Taylor prosecution witnesses.[13]

8. The Defendant's eleventh-hour assertion that Prince Taylor approached him about committing the acts that led to his contempt convictions should not be treated as a new fact. Both Independent Counsel and counsel for the Defendant elicited testimony from witnesses at trial regarding the involvement of Prince Taylor in this case. In fact, several of the witnesses specifically testified that Prince Taylor sent the Defendant to confront them.[14]

9. As observed by the Appeals Chambers for both the ICTR and the ICTY: "[A] distinction exists between a fact and evidence of that fact. The mere subsequent discovery of evidence of a fact which was known at trial is not itself a new fact within

---

were known to him at the time of the original proceedings, and he withheld them and made no disclosure thereof during the proceedings." Motion at para. 15. The Defendant makes a similar statement two paragraphs later, observing that "[he] does not satisfy the other two requirements for a review[.]" Id. at para. 17.

12 Prosecutor v. Senessie, Case No. SCSL-2011-01-T, SCSL Trial Chamber, Sentencing Hearing Transcript, at pp. 4-5 (4 July 2012).

13 Motion at para. 19.

14 See, e.g., Prosecutor v. Senessie, Case No. SCSL-2011-01-T, SCSL Trial Chamber, Trial Transcript, at p. 9 (10 June 2012) (statement by witness Mohammed Kabba that "[the Defendant] was trying to say, Well, the Defence, Mr Prince Taylor, had given him a mission to talk to us, the Prosecution, because he has learned that we did not have any benefit from our travels"); id at p. 11 (statement by witness Mohammed Kabba that "[w]hat Mr Senessie said when we were together was that it was Prince Taylor who gave him this mission to talk to us, the Defence - oh, no, us being the Prosecution, so that we should try very hard to talk on behalf of the Pa so that he will be free, or even if convicted, his sentence should not be long"); id at p. 37 (statement by witness Mohammed Kabba that "[the Defendant] said it was Prince Taylor who had given him that mission for him to get in touch with me"); id. at 51 (statement by witness TFI-585 that "[the Defendant] said he had been sent by Prince Taylor"); id. at 79 (statement by witness TFI-585 that "[Prince Taylor] had told me that he had sent Senessie. He said what they was doing they had no right to do, but they just had to do it.").

the meaning of Rule 119 of the [ICTY] Rules" or Rule 120 of the ICTR Rules."[15] Several witnesses at trial stated that Prince Taylor sent the Defendant to confront them. Senessie's acknowledgement of this fact at the July 4, 2012 Sentencing Hearing should not be construed as a new fact but rather corroborating evidence of a fact which was disclosed at trial.

B. Assuming, *arguendo*, that the Defendant has presented a new fact, the Defendant is precluded from obtaining a Rule 120 review because the averred fact was known to the Defendant prior to and throughout the course of the trial.

10. Even if the Court were to find that the allegedly new fact—that Taylor approached the Defendant about committing the unlawful acts that resulted in the Defendant's contempt convictions—qualifies as a new fact for the purposes of Rule 120 of the SCSL Rules, such a finding does not automatically trigger a Rule 120 review. In order to obtain a review under Rule 120 of the SCSL Rules, the "new fact must not have been known by the moving party at the time of the original proceedings."[16] Thus, in the instant case, the Defendant must show that, at the time of his trial, he did not know that Prince Taylor approached him about committing the crimes that led to his convictions.

11. The Defendant cannot satisfy this insuperable "lack of knowledge" requirement. The Defendant admits in his Motion that he "injudiciously withheld" information regarding Prince Taylor's involvement "from his Counsel and from the Chamber in the vain hope of protecting himself and Prince Taylor."[17] In other words, the Defendant acknowledges that he was fully aware at trial of the allegedly new fact but

---

15 Barayagwiza, Decision (Prosecutor's Request for Review or Reconsideration), at para. 42 (internal quotation marks omitted) (quoting Prosecutor v. Tadic, Case No. IT-94-1-A, ICTY Appeals Chamber, Decision on Appellant's Motion for the Extension of the Time-Limit and Admission of Additional Evidence, para. 31 (15 Oct. 1998)).

16 Barayagwiza, Decision (Prosecutor's Request for Review or Reconsideration), at para. 41.

17 Motion at para. 20.

deliberately chose to conceal said fact from the Court. Thus, Defendant cannot meet the second criterion outlined in Barayagwiza for obtaining a Rule 120 review.

C. Assuming, *arguendo*, that the Defendant has presented a new fact and established that he did not know said fact at the time of trial, the Defendant is still precluded from obtaining a Rule 120 review because the fact was not a "decisive factor" in the Court's judgement.

12. Even if the Defendant is found to have satisfied the first two Barayagwiza criteria, he cannot satisfy the fourth criterion, which requires that a movant for review show that the new facts could have been a "decisive factor in reaching the original decision."[18] The Defendant recognizes the "decisive factor" requirement in his Motion and claims that, had unspecified new 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."[19] The Defendant does not, however, explain *why* such facts would have been decisive.

13. As explained in paragraph 8 and footnote 13, *supra*, the Court was presented with trial testimony about Prince Taylor's connection to the Defendant. More specifically, two witnesses informed the Court that Prince Taylor had sent or otherwise instructed the Defendant to confront them.[20] Despite this testimony, the Court convicted the Defendant of eight counts of contempt by knowingly and wilfully interfering with the Court's administration of justice: four counts of offering a bribe to four persons who had given evidence before the Court, and four counts of interfering with the Court's administration of justice by attempting to otherwise interfere with persons who had given evidence before the Court.[21]

---

18 Barayagwiza, Decision (Prosecutor's Request for Review or Reconsideration), at para. 41.
19 Motion at para. 15.
20 See page 8 and footnote 13, *supra*.
21 Prosecutor v. Senessie, Case No. SCSL-2011-01-T, SCSL Trial Chamber, Sentencing Judgement, at para. 1 (12 July 2012).

14. The Defendant appears to argue that Prince Taylor's actions call into question the Defendant's specific intent as it relates to his contempt convictions.[22] The Defendant claims: "Like the bus driver in Thornton v. Mitchell, the [Defendant] 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]

15. In its June 21, 2012 Judgement, the Court found that the Defendant acted "knowingly and wilfully" with respect to each of the eight counts for which he was convicted.[24] The Court reached this decision despite having heard evidence that Prince Taylor had sent or otherwise instructed the Defendant to confront the Charles Taylor prosecution witnesses. The fact that Prince Taylor may have "had the specific intent of interfering with the Special Court's administration of justice" does not preclude a finding by the Court that the Defendant also had that intent. The Defendant's claim, moreover, that he did not know the prohibitions governing contact with Court witnesses is of no import. The Defendant was charged and convicted of bribing the witnesses and interfering with the administration of justice, not of having "contacts with witnesses[.]"[25] Accordingly, the Defendant has not met his burden of showing that the allegedly new fact would have decisively affected the Court's judgement in this case.

D. The Defendant is improperly seeking to use his Rule 120 motion as a way for seeking review of his sentence.

15. As a final matter, it should be observed that the Defendant does not appear to be seeking "a review of the judgement," as called for by Rule 120 of the SCSL Rules,

---

22 Motion at para. 23(1) ("The [Defendant] did not know of the prohibitions governing contacts with witnesses before the Special Court.")

23 Motion at para. 22.

24 See generally Prosecutor v. Senessie, Case No. SCSL-2011-01-T, SCSL Trial Chamber, Judgement Transcript, (21 June 2012).

25 Motion at para. 23(1).

but rather a review of his sentence. In the penultimate paragraph of the Motion, the Defendant requests "that the matter be reviewed with a view to either reducing the penalty meted out to the [Defendant] viz. the 2 years imprisonment or asking that he pays a fine instead of serving a custodial sentence."[26] To the extent that the Defendant is using Rule 120 of the SCSL Rules as a vehicle for reviewing his sentence, such request should be denied. It should be noted, moreover, that the Defendant "has deemed it wise to waive its right of appeal[.]"[27]

III. CONCLUSION

16. The Defendant has failed to establish entitlement to review pursuant to Rule 120 of the SCSL Rules. Accordingly, the Motion should be denied.

Respectfully Submitted,

WL Gardner

William L. Gardner
Independent Counsel

---

26 Motion at para. 24.
27 Id. at para. 12.

INDEX OF AUTHORITIES

Special Court for Sierra Leone Cases and Court Transcripts

***Prosecutor v. Senessie*, Case No. SCSL-2011-01-REV**

Prosecutor v. Senessie, Case No. SCSL-2011-01-REV, SCSL Appeals Chamber, Defence Motion for Review (10 August 2012).

***Prosecutor v. Senessie*, Case No. SCSL-2011-01-T**

Prosecutor v. Senessie, Case No. SCSL-2011-01-T, SCSL Trial Chamber, Order on Public and Confidential Annexes A and B Defence Motion for Review, at 1 (9 August 2012).

Prosecutor v. Senessie, Case No. SCSL-2011-01-T, SCSL Trial Chamber, Sentencing Judgement (12 July 2012).

Prosecutor v. Senessie, Case No. SCSL-2011-01-T, SCSL Trial Chamber, Sentencing Hearing Transcript (4 July 2012).

Prosecutor v. Senessie, Case No. SCSL-2011-01-T, SCSL Trial Chamber, Judgement Transcript (21 June 2012).

Prosecutor v. Senessie, Case No. SCSL-2011-01-T, SCSL Trial Chamber, Trial Transcript (10 June 2012).

Special Court for Sierra Leone Rules

Special Court of Sierra Leone Rules of Procedure and Evidence

International Criminal Tribunal Cases

Barayagwiza v. Prosecutor, Case No. ICTR-97-19-AR72, ICTR Appeals Chamber, Decision (Prosecutor's Request for Review or Reconsideration) (31 Mar. 2000), available online at http://ictr-archive09.library.cornell.edu/ENGLISH/cases/Barayagwiza/decisions/dcs20000331.html.

Prosecutor v. Blaskic, Case No. IT-95-14-R, ICTY Appeals Chamber, Decision on Prosecutor's Request for Review or Reconsideration (23 Nov. 2006), available online at http://www.icty.org/x/cases/blaskic/acdec/en/061123.pdf.

International Criminal Tribunal Rules

Rules of Procedure and Evidence for the International Criminal Tribunal for the Former Yugoslavia

Rules of Procedure and Evidence for the International Criminal Tribunal for Rwanda

SPECIAL COURT FOR SIERRA LEONE
JOMO KENYATTA ROAD • FREETOWN • SIERRA LEONE
PHONE: +39 0831 257000 or +232 22 297000 or +39 083125 (+Ext)
UN Intermission 178 7000 or 178 (+Ext)
FAX: +232 22 297001 or UN Intermission: 178 7001

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-REV**
Document Index Number: **026**
Document Date **13August 2012**
Filing Date **13 August 2012**
Document Type: Public with **Confidential Annex**
Number of Pages: Page Numbers from: **265-266**

☐ Application
☐ Order
☐ Indictment
☐ Decision
■ **Response**

Document Title:
Public with Confidential annex A independent Counsel's response to Defence motion for review

Name of Officer:

Samuel Fornah
Signed: