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SCSL-11-02-PT
(161-166)

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SPECIAL COURT FOR SIERRA LEONE

TRIAL CHAMBER II

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

Registrar: Ms. Binta Mansaray

Case No.: SCSL-2011-02-PT

Date filed: 11 June 2012

SPECIAL COURT FOR SIERRA LEONE	
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PROSECUTOR **Against** **Hassan Papa Bangura**
Samuel Kargbo
Santigie Borbor Kanu
Brima Bazy Kamara

PUBLIC
PROSECUTOR'S ADDITIONAL STATEMENT
OF ANTICIPATED TRIAL ISSUES
AND REQUEST FOR SUBPOENA

Office of the Independent Counsel:
Mr Robert L. Herbst

Counsel for the Accused:
Mr Melron Nicol Wilson
Chief Charles A. Taku
Mr Kevin Metzger
Mr A.F. Serry Kamal

Office of the Principal Defender:
Ms Claire Carlton-Hanciles

1. This Additional Statement of Anticipated Trial Issues and Request for Subpoena is respectfully submitted in advance of the 16 June 2012 pretrial conference to permit the Court to consider them in advance of the conference, thereby expediting the proceedings. Depending upon the Court's determination of the Lawyer-Client Privilege issues raised herein, we will respectfully request at such conference the issuance of a subpoena, pursuant to RPE 54, to secure the appearance at trial of Andrew Daniels, Esq., who has agreed to accept service of such subpoena by email upon issuance.

LAWYER-CLIENT PRIVILEGE AND THE CRIME-FRAUD EXCEPTION

2. As the Court will recall from our 16 May 2012 Pre-trial Brief, the primary evidence to be presented by the Prosecutor at trial will come from TF1-334, the insider witness at the AFRC trial whom the accuseds attempted corruptly to bribe in order to induce him to recant his testimony, and Mr. Kargbo, who has acknowledged his participation in the corrupt scheme. Additional evidence is available from lawyers whom the accuseds consulted with the intention of carrying out the corrupt scheme, including Mr. Daniels, Ms. Carlton-Hanciles, and Mr. Mansaray. A summary of their anticipated testimony is contained in our earlier-filed Pre-trial Brief and will not be repeated here. Defence counsel have indicated that they intend to object to the admission of such communications on grounds of Lawyer-Client Privilege. The Prosecution respectfully contends that this Court should recognize and apply a Crime-Fraud Exception to the Privilege and admit the communications.
3. RPE 97 broadly provides for Lawyer-Client Privilege ["LCP"] with three limited exceptions, which are not pertinent here. There is no explicit exception for the Crime-Fraud Exception, although the common law relating to LCP derived from national legal systems, including the United Kingdom and the United States, contains such Exception, which would be applied here. Our preliminary research among the international tribunals has so far disclosed no case that has directly considered the issue in this evidentiary context. However, a recent decision from the ITFY does suggest a recognition that the LCP can be abused, and lost, "in an

attempt to . . . “interfere with or intimidate witnesses” or “interfere with the administration of justice[.]” See Rule 65(B) of the Rules of Detention, cited in *Prosecutor v. Radovan Karadzic*, IT-95-4/18-T, Decision on Request for Review of Decision on Privileged Telephone Calls, at 2, 25 March 2012, available at <http://www.icty.org/x/cases/karadzic/presdec/en/120323.pdf>.

4. Where, as here, an issue is not explicitly determined by the Statute, the Agreement and the Rules of this Court, RPE 72*bis* (iii) permits this Court to apply general principles of law derived from other legal systems not otherwise inconsistent with such Statute, Agreement and Rules, or with international customary law or internationally recognized norms and standards. We know of no international customary law, norms or standards inconsistent with the application of the Crime-Fraud Exception. Nor do we know of any such law, norms or standards inconsistent with the admission of communications made in furtherance of a scheme or attempt to bribe or interfere with witnesses, or to interfere with the administration of justice, or to obtain legal advice or assistance in aid of such scheme or attempt. It is clear from the testimony of TF1-334 and Mr. Kargbo, and from the testimony of the lawyers themselves proffered in our Pre-trial Brief, that this is precisely what happened here. Accordingly, we respectfully submit that it is essential to the administration of justice that this Court establish and apply the principle of the Crime-Fraud Exception. The purpose and policies of the Exception are to protect the integrity of the Courts from abuse of the LCP, so that the use of lawyers to perpetrate such offenses is neither facilitated nor encouraged. This Court and other similar international tribunals should have the benefit of the Exception and the policies underlying it.
5. For cases applying the Exception in the United Kingdom, see *R v Cox & Railton (1884) 14 QBD 153* (LPP does not extend to documents which themselves form part of a criminal or fraudulent act, or communications which take place in order to obtain advice with the intention of carrying out an offence). It is irrelevant whether or not the Lawyer is aware that (s)he is being used for that purpose [*Banque Keyser Ullman v Skandia* [1986] 1 Lloyds Rep 336]. It is also not just the client's intention which is relevant for the purpose of ascertaining whether

information was communicated for the furtherance of a criminal purpose. It is also sufficient that a third party intends the lawyer/client communication to be made with that purpose (e.g. where an innocent client is being used by a third party) [*R v Central Criminal Court ex p Francis & Francis* [1989] 1 AC 346]. United States cases applying the Exception are to the same effect. *See, e.g., United States v. Zolin*, 491 U.S. 554, 562 (1989), and *In re Grand Jury Proceedings*, 87 F.3d 377 (9th Cir. 1996).

6. Mr. Daniels's testimony is admissible for an additional reason. At the time of the relevant communications with Mr. Kamara and Mr. Brima, Mr. Brima was not a client and Mr. Kamara appears to have been a former client who was seeking to have Mr. Daniels again assigned as counsel. Thus, an attorney-client relationship may not yet have existed, in which case the LCP would have no application.

REQUEST FOR SUBPOENA

7. Mr. Daniels has advised that he is unwilling to appear to testify without a subpoena. However, he has confirmed by email that he would accept service of such subpoena by email. Accordingly, if the Court determines that his anticipated testimony is admissible, in whole or in part, the Prosecution would respectfully request the issuance of such subpoena under RPE 54.
8. There is clearly a legitimate forensic purpose for his testimony as it contains statements from the accused Kamara that he and others were contemplating having TF1-334 and other insider witnesses change their testimony, and to use such recantation(s) to support a review by which their previous judgment against them might be reversed. These communications directly support the charges against the accuseds and more specifically corroborate the testimony of TF1-334 and Mr. Kargbo that they were told in December 2010 that "a lawyer was coming from Ghana" to speak to TF1-334 about recanting his testimony. The "necessity" requirement is also met as the subpoena is likely to elicit evidence material to an issue in the case which cannot be obtained without issuance of the subpoena.¹

¹ In an exchange of emails between Mr. Daniels and the Prosecutor, Mr. Daniels confirmed the accuracy of the summary of his anticipated testimony contained in the Pre-trial Brief in all

Finally, if the Court determines that the testimony is not LCP-privileged, no other relevant immunity or testamentary privilege would exist in relation to the witness in question, and all requisites for the issuance of the subpoena would be present.

ADMISSIBILITY OF THE ALAGENDRA EMAIL

9. In the Prosecutor's Pre-trial Brief, at 16 and Annex 1, we referred to and attached a 30 November 2010 email from Shayamala Alagendra to Ms. Hollis and Mr. Koumjian of OTP reflecting that Ms. Alagendra had been texted and called by TF1-334 to report the corrupt approach by Mr. Kargbo on behalf of the accused. The Pre-trial Brief suggested that Ms. Alagendra would be called to testify to authenticate the email and testify to the contents of the call. It has since occurred to us that it should not be necessary to bring Ms. Alagendra in from Europe to testify for that limited purpose. TF1-334 will be testifying and subject to cross-examination, and will testify that he contacted Ms. Alagendra to report the contact. The email will therefore be offered in evidence primarily to prove that TF1-334 made a prompt report of the approach. We respectfully submit that the email can be offered through TF1-334, or through the testimony of any member of the OTP prosecutive or investigative staff who can testify to its authenticity as a business record received and maintained in the ordinary course of business. Alternatively, it can be admitted pursuant to RPE 92*bis* as a written statement relevant for the purpose(s) for which it is admitted, whose reliability is susceptible of confirmation and which, for the limited purposes for which it is offered, does not go directly to proof of the acts and conducts of the accused, but rather to the act of TF1-334 in promptly reporting the corrupt approach to OTP. Pursuant to Rule 92*bis* ©, we provided the requisite 10 days notice to the defence, by email of 8 June 2012, of our intent to offer the email in evidence without the testimony of Ms. Alagendra.

essential respects, providing the equivalent of a witness statement by email, albeit unsworn. If the Court were to hold that witness statement admissible, the necessity for Mr. Daniels to appear to testify would be undermined. However, defence counsel have represented to the Prosecutor that they would prefer that Mr. Daniels appear to testify so that he may be subject to cross-examination. Accordingly, the Prosecutor is requesting the subpoena as a preferable means of getting Mr. Daniels's testimony before the Court.

JUDICIAL NOTICE

10. Finally, in our Pre-trial Brief, at 15, we suggested that James Johnson, Esq., might be called to testify that TF1-334 was a critical witness at the AFRC trial who was relied upon heavily by the Court in the AFRC Judgment, and was found credible and reliable therein. We respectfully contend that, as an alternative, we can ask the Court to take judicial notice of that Judgment, the role of TF1-334 as a witness, and the credibility and reliability findings with respect to that witness in the Judgment. By email of 8 June 2012, we similarly notified defence counsel of our intent to request the Court to take such judicial notice.

CONCLUSION

11. It is hoped that by raising these issues now in advance of the 16 June 2012 conference, we can expedite the proceedings and shorten the trial now scheduled to commence on 18 June 2012.

Respectfully submitted,



Robert L. Herbst

Independent Counsel

Dated: 11 June 2012