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SCSL-12-02-PT
(382-389)

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SPECIAL COURT FOR SIERRA LEONE

TRIAL CHAMBER II

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

Registrar: Binta Mansaray

Case No.: SCSL-12-02-PT

Date: 21 December 2012

INDEPENDENT
COUNSEL

v.

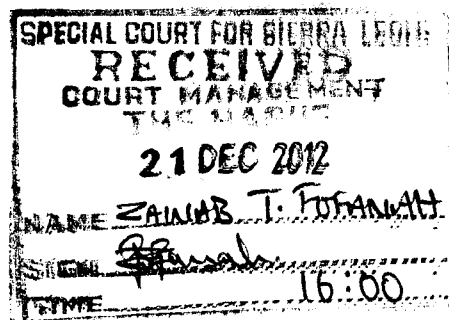
Prince TAYLOR

PUBLIC

DECISION ON INDEPENDENT COUNSEL'S SECOND MOTION FOR *SUBPOENA AD
TESTIFICANDUM*

Independent Counsel:
William L. Gardner

Counsel for the Accused:
Rodney Dixon



I, Justice Teresa Doherty, acting as Single Judge of Trial Chamber II of the Special Court for Sierra Leone ("Special Court");

SEISED of the "*Confidential* Independent Counsel's Second Motion for *Subpoenas ad Testificandum*", filed on 4 December 2012 ("Motion").¹

NOTING the "*Confidential* Defence Response on Behalf of Mr. Prince Taylor to Independent Counsel's Second Motion for *Subpoena ad Testificandum*", filed on 14 December 2012 ("Response").²

NOTING the "*Confidential* Reply to Defence Response on Behalf of Mr. Prince Taylor to Independent Counsel's Second Motion for *Subpoena ad Testificandum*" filed on 18 December 2012

COGNISANT of the provisions of ("Statute") and Rules 8, 54, 71 and 91 of the Rules of Procedure and Evidence ("Rules"), and Art. 4(B) of Practice Direction on dealing with Documents in Hague Sub-Office

HEREBY render this decision based only on the written submissions of the parties:

SUBMISSIONS

Motion

1. Independent Counsel prays in the alternative for subpoenas directed to Courtenay Griffith Q.C., and Logan Hambrick requiring their appearance before the court and an order to the Registrar to take all necessary steps to have the subpoenas executed pursuant Rule 8(C) or, alternatively that a deposition of each of their evidence be taken in accordance with Rule 71. Independent Counsel submits that the subpoenas are warranted as Griffiths and Hambrick's "testimony will provide highly relevant evidence regarding Defendant Prince Taylor's unlawful efforts to contact Charles Taylor prosecution witnesses and influence Eric Senessie to assert an untruthful defense as to those witnesses"³
2. Independent Counsel outlines the procedural history and background leading up to the motion showing that:

¹ SCSL-12-02-PT-025.

² SCSL-12-02-PT-028.

³ Motion, para. 1

- a. Prince Taylor, the Accused herein, worked as a defence investigator in two cases before the Special Court for Sierra Leone from 2004 to December 2010, including on the case of *Prosecutor v. Taylor*. The Defence team in *Prosecutor v. Taylor* included Griffiths as Lead Counsel and Hambrick;
 - b. Griffiths and Hambrick had “numerous interactions” with the Accused during their respective tenures with the Defence team;
 - c. On 17 October 2010 Charles Taylor filed a motion seeking leave to recall four Prosecution witnesses and alleging, inter alia, that the Prosecutor had used inducements “for witness cooperation and/or testimony”.⁴ That motion was supported by a declaration from the Accused stating that he had “sources” who could testify to such inducements. That motion was dismissed on 24 January 2011;⁵
 - d. “In the days immediately following the denial” of that motion five Prosecution witnesses who testified in *Prosecutor v. Taylor* reported that they were approached by Eric Senessie who told them that (Taylor) wanted each of them to return to the Hague and recant their testimony and that they would be rewarded;⁶
 - e. At a subsequent trial of Eric Senessie for contempt of the Special Court for Sierra Leone the said Eric Senessie was convicted and at a sentencing hearing stated he was instructed to contact the witnesses by the Accused;⁷ and
 - f. On 4 October 2012 an order in lieu of indictment was laid against the Accused alleging that he was in contempt of the Special Court.
3. Independent Counsel submits that on the basis of the factual background showing the influence and directions of the Accused on Senessie coupled with the known filings in the Court shows that “only the Defence Team –specifically Courtney Griffiths and Logan Hambrick can answer” or claim that the Defence team had no involvement.⁸ Further the relationship of the Accused and the Defence Team is “at the heart of the matter”.⁹

⁴ Motion, para 5

⁵ Motion, para 3-5

⁶ Motion, para 6

⁷ Motion, para 6-8.

⁸ Motion para 19

⁹ Motion para 19

4. Independent Counsel has contacted both Griffiths and Hambrick by e-mail and sought to interview them but that they have “stonewalled”, in other words not responded positively to his enquiries. He exhibits a series of electronic communications between himself and Griffiths and Hambrick. He submits that both are capable of testifying and that their assertion of privilege is “overbroad”.¹⁰
5. Counsel submits that Griffiths and Hambrick’s evidence is sought in the interests of justice.¹¹ He relies on the Appeals Chamber ruling in *Prosecutor v. Norman* that a party seeking a subpoena to compel the appearance of a person as a witness must show that the measure is necessary for the purpose of an investigation or preparation or conduct of the trial.¹² In the instant case subpoenas are necessary in the interests of justice as Griffiths and Hambrick have relevant evidence put before the Trial Chamber. Independent Counsel enumerates and sets out the issues which he says are relevant.¹³
6. In the alternative, Independent Counsel submits that their evidence can be taken by way of deposition pursuant to Rule 71 and such a procedure “may be more appropriate” although he concedes that he is not aware of any “exceptional circumstances” but points to the location of the proposed witnesses whilst the trial will be held in Sierra Leone.¹⁴

RESPONSE

7. Defence Counsel submits in response on behalf of the Accused that the Motion is premature and it has not demonstrated that the issue of a subpoena is necessary.
8. The correspondence between Griffiths and Hambrick and Independent Counsel shows that Griffiths has not refused to provide the information but has asked questions that have not been answered. The motion is therefore premature.¹⁵
9. Further, Griffiths states that the issues are covered by legal professional privilege. In respect of Hambrick Counsel notes that she asks what questions are to be asked and indicates that she will seek legal advice. Legal privilege must therefore be addressed.¹⁶

¹⁰ Motion, para 25-26, Annexes A & B

¹¹ Motion, para 1

¹² Motion, paras 10-12

¹³ Motion, para 24

¹⁴ Motion, para 28-30

¹⁵ Response, para 2-3

¹⁶ Response, para 4-5

10. Counsel further submits that there is no evidentiary basis and the Motion makes an unsupported allegation that there may be information that the Defence Team were involved, such assertions are “highly speculative and unfounded” and contrary to the case put forward to base the issue of a subpoena.¹⁷

REPLY

11. Independent Counsel renews his application¹⁸ and submits that the subpoenas are not remotely premature as both witnesses have “stonewalled attempts to get their testimony”¹⁹ He sought their testimony and was refused.²⁰

12. Further, Independent Counsel refutes the Defence submission that there is no evidentiary basis and outlines the factual links²¹ and submits that he has met the burden of showing that the subpoena are both necessary and appropriate.

13. Independent Counsel submits that the issue of privilege need not be resolved before the subpoena are issued and the proper and commonly accepted procedure is to question a witness and then determine the validity of any privilege.

APPLICABLE LAW

14. Rule 54 of the Rules states:

At the request of either party or of its own motion, a Judge or a Trial Chamber may issue such orders, summonses, subpoenas, warrants and transfer orders as may be necessary for the purposes of an investigation or for the preparation or conduct of the trial.

DELIBERATIONS

15. I agree with Independent Counsel that the jurisprudence of the Special Court provides that: the party applying the under Rule 54 of the SCSL Rules for a subpoena compelling the appearance of a person as a witness must show that the requested measure is necessary (the ‘necessity’ requirement) and that it is for the purposes of an investigation or for the

¹⁷ Response, para 7-8

¹⁸ Reply, para 1.

¹⁹ Reply, para 2

²⁰ Reply, para 3

²¹ Reply, para 4

preparation or conduct of the trial (the ‘purpose’ requirement);²² that in “order to satisfy the necessity requirement, the subpoena applicant must show ‘that the subpoena is likely to elicit evidence material to an issue in the case which cannot be obtained without judicial intervention;’²³ and “[t]he subpoena applicant must also demonstrate that the information sought from the witness is not obtainable through other means.”²⁴

16. However I also bear in mind that, whilst the court can issue subpoena to have relevant evidence brought before it if a witness will not or cannot otherwise give such evidence voluntarily it is a draconian remedy which carries punitive provisions and the issue of subpoena must be exercised with due care.
17. In examining the Exhibit B I note that Hambrick asks Independent Counsel to send her the questions he “would like (her) to answer” and raises an issue of professional privilege. It is not apparent to me if she refused to answer his subsequent enquiries. Instead it appears that Hambrick’s communication was superseded by the intervention of Griffiths who stated that “enquires should be more properly addressed to me”, and suggested that the enquiries raise legal professional privilege and that Counsel should seek permission of the court to approach “the accused”. Although Griffiths refers to “the accused” in my reading of the e-mail he in fact refers to Charles Taylor and not the accused in this case. Independent Counsel responded suggesting an interview but there appears to have been no response.²⁵
18. I accept Independent Counsel’s submission that Griffiths and Hambrick may have information that is relevant to the case and will assist the court in fact finding. As the background shows such information may be relevant to both the prosecution and defence.
19. Defence Counsel submits the motion is premature. However a closer reading of the e-mails indicate to me Independent Counsel did make clear the issues he wished to discuss and there is neither an agreement nor a refusal on the part of both Griffiths or Hambrick. Independent

²² *Prosecutor v. Norman*, SCSL-04-14-T-617, Trial Chamber, Decision on Motions by Moinina Fofana and Sam Hinga Norman for the Issuance of a Subpoena Ad Testificandum to H.E. Alhaji Dr. Ahmad Tejan Kabbah, President of the Republic of Sierra Leone, 13 June 2006, para. 28; *accord Prosecutor v. Sesay*, SCSL-04-15-T, Trial Chamber, Written Reasoned Decision on Motion for Issuance of a Subpoena to H.E. Dr. Ahmad Tejan Kabbah, Former President of the Republic of Sierra Leone, 30 June 2008, para. 16.

²³ *Prosecutor v. Norman*, SCSL-04-14-T-617, Appeals Chamber, Decision on Interlocutory Appeals Against Trial Chamber Decision refusing to Subpoena The President of Sierra Leone, 11 September 2006, para. 9.

²⁴ *Prosecutor v. Norman*, SCSL-04-14-T-617, Trial Chamber, Decision on Motions by Moinina Fofana and Sam Hinga Norman for the Issuance of a Subpoena Ad Testificandum to H.E. Alhaji Dr. Ahmad Tejan Kabbah, President of the Republic of Sierra Leone, 13 June 2006, para. 30.

²⁵ Confidential Exhibit B.

Counsel was therefore entitled to bring the issue to the attention of the court as it is not at all apparent on the face of the record if Griffith's and Hambrick's replies are tantamount to a refusal.

20. Defence Counsel also submits that legal privilege is in issue. Defence Counsel cannot raise legal privilege on behalf of Griffiths or any member of the Charles Taylor Defence, he is not instructed by them. That is an issue that a lawyer must invoke him/herself. Therefore I cannot rule on it until it is brought properly by those claiming it. However, without in any way pre-determining any issue I note that Rule 97 enshrines lawyer-client privilege and that in the instant case the communications in question were with Prince Taylor who was not a client of either Griffith or Hambrick and that the communications may relate to the crime/fraud exception.
21. Whilst I do not entirely agree with Defence Counsel that the matter is premature, it is over two months since Independent Counsel sought answers from Griffiths and Hambrick so they have had ample time to seek the advice Hambrick refers to and decide if each intends to answer. However I am concerned about granting the drastic remedy the issuing of a punitive subpoena when it is not entirely clear to me that either Griffith or Hambrick have indeed refused to co-operate with Independent Counsel in the investigation and preparation of his case. In the circumstances I direct that the pleadings in this matter be served on them and that Griffiths and Hambrick each inform both Independent Counsel and the Court if each is willing to answer the Independent Counsel's questions.
22. I therefore direct that the pleadings be served on Griffiths and Hambrick by electronic means forthwith and that each indicates to the court by electronic means if each is willing to answer the Independent Counsel's questions, such an answer shall be filed with Court Management Services on or before 2 January 2013.
23. The motion and related pleadings were filed confidentially. Given that they raise issues of evidence to be adduced at trial and do not disclose matters affecting the privacy or security of a witness or victim I consider that they should be made public with the exception of Annexes A and B of the motion which shall remain confidential. I direct accordingly pursuant to Art. 4(B) of Practice Direction on dealing with Documents in Hague Sub-Office.

I HEREBY ORDER that

1. The Motion herein shall be filed publicly save and except Annexes A and B and
2. The Response and Reply herein shall be filed publicly and
3. All pleadings herein, including Confidential Annexes A and B be served on Logan Hambrick and Courtney Griffiths Q.C. by electronic mail.
4. The aforesaid Logan Hambrick and Courtney Griffiths Q.C. inform the Court and Independent Counsel if they are willing to co-operate and answer the questions of Independent Counsel by written answer to be filed with Court Management Services on or before Wednesday 2 January 2013.

Done at The Hague, The Netherlands, this 21st day of December 2012.


Justice Teresa Doherty

