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SCSL-12-02-A
(433-441)

SPECIAL COURT FOR SIERRA LEONE

APPEALS CHAMBER OF THE SPECIAL COURT

Before: Justice Emmanuel Ayoola, Presiding
Justice Renate Winter
Justice Jon Moadeh Kamanda

Registrar: Ms. Binta Mansaray

Date filed: 12 June 2013

THE INDEPENDENT COUNSEL

v.

PRINCE TAYLOR

(Case No. SCSL-12-02-A)

PUBLIC

APPELLANT'S APPLICATION FOR ADDITIONAL EVIDENCE PURSUANT TO RULE 115

Independent Counsel:
Mr. William L. Gardner
Mr. Benjamin Klein

Counsel for Prince Taylor:
Mr. Rodney Dixon

Principal Defender
Ms. Claire Carlton-Hanciles

Introduction

1. The Appellant files this application pursuant to Rule 115 for additional evidence to be presented before the Appeals Chamber in the present Appeal. The Appellant applies for additional evidence from Lawyer X to be heard by the Appeals Chamber. The Appellant makes this filing in accordance with the Appeals Chamber's Order of 4 June 2013 in which the Appeals Chamber deemed the Appeal to have been properly filed within the extended time granted and ordered that the time limits for making any further filings would run from the date of this Order.[1]

2. The Appellant submits that the additional evidence of Lawyer X (as summarised below) (i) is relevant and credible and (ii) it could have been a decisive factor in the Trial Chamber's findings about the credibility and reliability of the key prosecution witness, Mr. Eric Senessie, and thus in the decision that the Trial Chamber reached on the basis of this evidence that the Appellant was guilty.

3. The Appellant further submits that the evidence was in effect not available at trial as Lawyer X was not called to testify during the trial, his evidence having been agreed and admitted without cross-examination. In any event, even if the Appeals Chamber decides that this additional evidence was available at trial, the Appellant submits that it should be admitted in the interests of justice and because it would amount to a miscarriage of justice if it were to be excluded and not taken into consideration (as has been recognised in the case law of the SCSL and other international courts).

Applicable law and jurisprudence

4. The SCSL's jurisprudence has recognised that Rule 115 is applicable provided that "the new evidence goes to prove an underlying fact that was at issue in the original trial." The proposed new evidence must be "additional to evidence adduced at trial in respect of what [can be] variously termed, 'a fact that was considered at trial,' 'a fact which was known at trial' or 'facts put in issue at trial.'" In other words, Rule 115 "deal[s] with the situation where a party is in possession of material that was not

[1] *Independent Counsel v Prince Taylor*, SCSL-12-02-A, Appeals Chamber, Order on Re-Filing of Appeal on behalf of Prince Taylor with Application for the Appeal to be Filed Out of Time, 4 June 2013.

before the court of first instance and which is additional evidence of a fact or issue litigated at trial."[2]

5. It is also clearly emphasised in the case law that a miscarriage of justice rendering a conviction unsafe may result "where the evidence before the Trial Chamber appears to be reliable but, in the light of additional evidence presented upon appeal, is exposed as unreliable." Rule 115 "serves to address potential situations where a factual determination made by the Trial Chamber is objectively incorrect because the Trial Chamber did not have before it evidence that is later discovered."[3]

6. The Appeals Chamber of the SCSL has held that Rule 115 must be applied in a manner consistent with the corresponding procedure at the ICTY and ICTR.[4] Before the ICTY the Appeals Chamber has held that even if the evidence was available at trial it may nonetheless be admitted in appeal if the applicant can establish that its exclusion would lead to a miscarriage of justice. It was specifically stated that the Appeals Chamber "maintains an inherent power to admit such evidence even if it was available at trial, in cases in which its exclusion would lead to a miscarriage of justice".[5]

7. The requirements of Rule 115 before the SCSL have thus been set out as follows:

> "First, the applicant must demonstrate that the proposed additional evidence tendered on appeal was not available to him at trial in any form, or discoverable through the exercise of due diligence [subject to the inherent power of the Appeals Chamber to admit the evidence even if available at trial] ...
>
> Second, the applicant must show that the evidence is both relevant to a material issue and credible. Evidence is relevant if it relates to findings material to the Trial Chamber's decision. Evidence is credible if it appears to be reasonably capable of belief or reliance ...

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[2] *Prosecutor v. C. Taylor*, Decision on Defence Motion to Present Additional evidence Pursuant to Rule 115, 18 January 2013, paras 7-8.
[3] *Prosecutor v. C. Taylor*, Decision on Defence Motion to Present Additional evidence Pursuant to Rule 115, 18 January 2013, para. 9.
[4] *Prosecutor v. C. Taylor*, Decision on Defence Motion to Present Additional evidence Pursuant to Rule 115, 18 January 2013, para. 7.
[5] *Prosecutor v. Jelisic*, Decision on Request to Admit Additional Evidence, IT-95-10, 15 November 2010. Also see, Prosecutor v. Kupreskic et al, Appeals Judgement, IT-95-16-A, 23 October 2011, paras 44-54.

> If the applicant is able to satisfy these prongs of the test, then he must demonstrate that the evidence could have had an impact on the verdict. In other words, the evidence must be such that, considered in the context of the evidence given at trial, it could demonstrate that the conviction was unsafe ...
>
> Although Rule 115 of the Rules does not explicitly provide for this, the ICTY and ICTR Appeals Chambers consider that even if relevant and credible evidence were available at trial, it may nonetheless be admitted on appeal if the applicant can establish that the exclusion of it would lead to a miscarriage of justice. That is, it must be demonstrated that had the additional evidence been admitted at trial, it would have affected the verdict.
>
> Whether the evidence was available at trial or not, evidence shall not be assessed in isolation, but in the context of the totality of the evidence given at trial."[6]

8. As highlighted in all of the applicable case law, the interests of justice and whether the exclusion of the evidence could result in a miscarriage of justice is the fundamental principle underlying Rule 115.

Findings of the Trial Chamber

9. The Trial Chamber made the following findings in respect of the evidence of Lawyer X that was admitted at the trial:

   - The line of questioning of Senessie about Lawyer X "did not go to the role of the accused" and the cross-examination was intended to undermine Senessie's credibility. "I come to the view submitted by Independent Counsel to ask why, when it was so obvious to Lawyer X that he had a potential professional conflict did he come to the Special Court for the purpose of defending what could well be a potential conflict situation".[7]

[6] *Decision on Sesay Request to Admit Exhibit MFI-134 from Prosecutor v Taylor*, 14 October 2009, paras. 6-11.
[7] Judgement in Contempt Proceedings, para. 173.

- "I note ... that there was no interpreter present [in the meeting on 14 July 2011 between Lawyer X and Senessie] ... and the record of interview was conducted in English".[8]

- "I accept that Senessie may well have interpreted this [Lawyer X advising about the Independent Counsel's offer of a plea agreement] as advice to plead guilty".[9]

- Senessie's "competency in English, particularly legal English, is unclear to me".[10]

- "Lawyer X makes it clear he cannot continue on the case or appear unless Senessie signed a waiver acknowledging that Lawyer X had a professional relationship and a friendship with the Accused, causing Lawyer X a potential conflict. Senessie had little choice if he was to be represented the next day" [11] and "I accept that he felt that he had no alternative but to sign".[12]

- The evidence "presents a picture of a person for whom English was not the first or even second language, facing a difficult personal situation and being presented with a potential conflict on the part of a man who was sent to advise him. I do not reject Senessie's evidence on the basis of the conflicting evidence between Lawyer X and Senessie."[13]

10. Contrary to the Trial Chamber's statement, Senessie's evidence about Lawyer X is clearly related to the conduct of the Accused. Even the Chamber noted as much in finding that Senessie had been advised by the Appellant, "a man who he knows has seven years' experience with the Special Court" to plead not guilty.[14]

11. As submitted by the Appellant in the appeal submissions, Senessie's evidence, which was accepted by the Chamber, was that he was under the control and instruction of the Appellant (a man who had experience of court proceedings); that Senessie acted like a "sheep". This finding was critical and integral to the Chamber's overall

[8] Judgement in Contempt Proceedings, para. 174.
[9] Judgement in Contempt Proceedings, para. 176.
[10] Judgement in Contempt Proceedings, para. 177.
[11] Judgement in Contempt Proceedings, para. 178.
[12] Judgement in Contempt Proceedings, para. 179.
[13] Judgement in Contempt Proceedings, para. 181.
[14] Judgement in Contempt Proceedings, para. 178.

conclusion that Senessie was instructed by the Appellant to interfere with the Prosecution witnesses.

12. Furthermore, had Lawyer X's additional evidence (as specified below) been heard it would have made it abundantly clear that the Chamber could not have found that there was any way of reconciling the fundamental conflicts between the evidence of Lawyer X and Senessie.[15] The evidence of Senessie could not have been accepted in whole or in any part. The additional evidence would thus have lent decisive support to the Defence's primary submission that Senessie could not be relied on at all to convict the Appellant.

Additional evidence of Lawyer X

13. As set out in detail in the Appellant's Notice, Submissions based on the Grounds of Appeal[16], and Reply[17], Lawyer X's evidence was admitted by agreement without cross-examination. Had the Appellant known that the Chamber would make the findings set out above which were not addressed in the agreed evidence of Lawyer X, the Defence would have called Lawyer X to testify at the trial to give evidence about these matters.

14. Lawyer X would have testified that (i) language was not a barrier in the meeting and that Senessie fully understood the nature of their discussions (Mr. Senessie has never claimed that he did not comprehend the legal discussions with Lawyer X. He adamantly and repeatedly stated that Lawyer X tried to force him to plead guilty and that they argued about this matter at length); (ii) there was no misunderstanding at all about his explanation to Senessie about the Independent Counsel's offer of a plea agreement: Lawyer X certainly did not in any way advise Senessie to plead guilty; and, (iii) Lawyer X did not give Senessie "no alternative" but to sign the endorsement in order to continue representing him.

15. Lawyer X's additional evidence will cover each of these points and further explain them. In addition, Lawyer X will explain why it was that he came to Freetown even though a potential conflict could arise. He has been criticised by the Chamber for his conduct without having been given the opportunity to answer the allegations. These

[15] The Appellant submits that, in addition, as set out in his appeal, no reasonable Trial Chamber could have reconciled the evidence as presently before the Trial Chamber (leaving aside the additional evidence).
[16] Submissions of 21 May 2013, paras 71-80.
[17] Reply of 12 June 2013, paras 9-16.

criticisms have been relied on by the Chamber to seek to diminish the conflicts between the evidence of Lawyer X and Senessie and to reconcile them for the purposes of making it possible still to rely on Senessie's evidence to convict the Appellant.

Requirements of Rule 115 have been satisifed

16. The Appellant submits that the requirements of Rule 115 had been met to admit the additional evidence of Lawyer X. The Appeals Chamber is requested to hear Lawyer X's evidence live and to take it into consideration when determining whether to grant the appeal. The Independent Counsel will have the opportunity to cross-examine Lawyer X, as should have occurred at the trial, and the Appeals Chamber can ask any questions. His oral evidence as a whole can then be weighed in relation to all of the evidence at trial to determine whether the Appellant's conviction has occasioned a miscarriage of justice.

17. In respect of each of the Chamber's findings (as set out above), Lawyer X could have given evidence that would have directly contradicted the findings made. The Appellant submits that it must be in the interests of justice to permit such evidence to be heard on appeal to ensure that a miscarriage of justice is not occasioned. Lawyer X's additional evidence should have resulted in the Chamber making a different assessment about the credibility of Senessie and about his evidence in respect of the role of the Appellant as an "instructor" of Senessie. The Appellant submits that it would have been impossible for the Trial Chamber to reconcile the wholly divergent evidence of Lawyer X and Senessie.

18. Even if the Appeals Chamber were of the view that the evidence was available at the trial, in accordance with the case law set out above, the Appeals Chamber is urged to rely on its inherent power to admit the evidence. The Appellant submits that to exclude it would result in a miscarriage of justice as the evidence of Senessie would stand (despite that it is flatly contradicted by Lawyer X, and is unreliable for all of the numerous other reasons explained in the Appellant's grounds of appeal) and remain the sole basis for the Appellant's conviction.

19. The additional evidence is thus plainly relevant and is credible, there being no reason to find that it is not reasonably capable of belief or reliance, and is decisive to the findings of the Trial Chamber that led to the outcome of a guilty verdict.

Conclusion

20. Accordingly, the Appellant respectfully requests the Appeals Chamber to grant his request to hear the evidence of Lawyer X in the present appeal as additional evidence that is relevant and decisive to the Trial Chamber's finding of guilt.

Dated 12th June 2013

Rodney Dixon
Counsel for Mr. Prince Taylor

Index of Authorities

1. ***Independent Counsel v Prince Taylor, SCSL-2012-02-A***

Appellant's Notice of Appeal, SCSL-12-02-A, 21 May 2013

Appellant's Submissions based on the Grounds of Appeal. SCSL-12-02-A, 21 May 2013

Independent Counsel's Response to Notice of Appeal and Appellant's Submissions, SCSL-12-02-A, 7 June 2013

Appellant's Reply, SCSL-12-02-A, 12 June 2013

Appeals Chamber's Order on Re-Filing of Appeal on behalf of Prince Taylor with Application for the Appeal to be Filed Out of Time, 4 June 2013

2. ***SCSL Documents:***

SCSL, Rules of Procedure and Evidence

SCSL, Practice Direction on Filing Documents before the Special Court, 27 February 2003 (last amended 16 January 2008).

SCSL, Practice Direction for Certain Appeals before the Special Court, 30 September 2004

3. ***SCSL Jurisprudence***

Prosecutor v. Taylor, SCSL-03-01-A-1376, Decision on Defence Motion to Present Additional evidence Pursuant to Rule 115, 18 January 2013, paras. 8-9.
http://www.sc-sl.org/LinkClick.aspx?fileticket=iz%2fwOK9%2fysU%3d&tabid=191

Prosecutor v. Sesay et al., SCSL-04-15-A-1319, Decision on Sesay Request to Admit Exhibit MFI-134 from *Prosecutor v. Taylor*, 14 October 2009, paras. 6-11.
http://www.sc-sl.org/scsl/Public/SCSL-04-15-RUF%20APPEAL%20DOCS/SCSL-04-15-A-1319.pdf

4. ***ICTY Jurisprudence:***

Prosecutor v. Kupreskic et al, IT-95-16-A, Appeals Judgement, 23 October 2011, paras. 44, 50-54.
http://www.icty.org/x/cases/kupreskic/acjug/en/kup-aj011023e.pdf

Prosecutor v. Jelisic, IT-95-10, Decision on Request to Admit Additional Evidence, IT-95-10, 15 November 2010.
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