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SCSL-12-02-A
(464-475)

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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

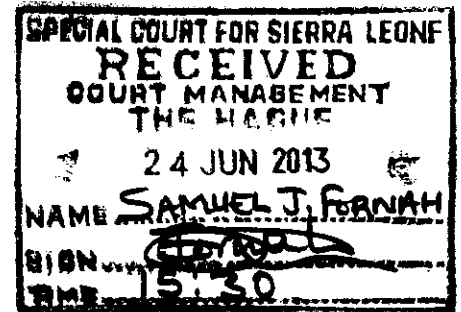
Date filed: 24 June 2013

THE INDEPENDENT COUNSEL

v.

PRINCE TAYLOR

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



PUBLIC

APPELLANT'S REPLY TO INDEPENDENT COUNSEL'S RESPONSE TO
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 Reply to the Independent Counsel's Response to the Appellant's Application for Additional Evidence Pursuant to Rule 115 (the "Response"). The Independent Counsel's Response was filed on 17 June 2013.¹ This Reply is filed in accordance with Rule 115 and Rule 7(C) which provides that the Appellant's Reply "shall be filed within 5 days of service of the response by the Registry".
2. The Independent Counsel argues in his Response that the Appellant's request for additional evidence to be heard by the Appeals Chamber should be rejected on the basis that the Appellant has failed to satisfy the requirements of Rule 115.
3. The Appellant submits that the Respondent's arguments are without any merit. They are based on a manifestly incorrect assertion that the Appellant "elected" not to call Lawyer X as a witness in the defence case, and hence should be barred from calling any additional evidence from him on appeal. The true position is that Lawyer X *was* called as a witness by the Defence, but he was not called as a live witness as his evidence was admitted in writing by agreement between the parties. The Appellant's submission is that the Independent Counsel should not have been permitted to challenge Lawyer X's evidence in his closing submissions when he had agreed Lawyer X's evidence without the need for cross-examination.² It is for this reason that the Appellant submits that the Appeals Chamber should hear the evidence that Lawyer X would, and should, have given in response to the challenges made by Independent Counsel as these challenges were relied on by the Trial Chamber to convict the Appellant.
4. The Appellant submits that the exclusion of this additional evidence would result in a miscarriage of justice because the evidence directly undermines the challenges made by the Independent Counsel. The additional evidence contradicts the findings made by the Trial Chamber on the basis of the Independent Counsel's challenges and the

¹ Appellant's Counsel did not receive a copy of the Response from the Registry after it was filed on 17 June 2013. Appellant's Counsel was informed of the Response by Mr. Prince Taylor on Friday afternoon, 21 June 2013 when he was able to contact Counsel by telephone from the detention unit. Appellant's Counsel immediately contacted the Principal Defender's Office to obtain a copy of the Response which was then sent to Appellant's Counsel by the Principal Defender's Office on Friday evening, 21 June 2013. Counsel has since been in contact with the Registry and the Response has been served on Counsel today, 24 June 2013.

² This submission is incorporated in Ground 3 of the Appellant's Appeal.

view formed by the Trial Chamber of Lawyer X's evidence without having heard his evidence on these matters.³

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The requirements of Rule 115 have been satisfied

5. The Appellant respectfully submits that the Appeals Chamber should grant the application under Rule 115 to hear Lawyer X's additional evidence as part of the present appeal proceedings (together with any rebuttal evidence which the Independent Counsel may wish to call) as each of the requirements of Rule 115 has been satisfied.

The additional evidence was not "available" at trial

6. The Independent Counsel asserts that the additional evidence was available at trial because the Appellant "deliberately and voluntarily chose" not to call Lawyer X as a witness at trial.⁴ This completely mischaracterised the position.
7. The Appellant did not close his case without calling Lawyer X "despite the Trial Chamber's efforts to accommodate" the Appellant's request to hear Lawyer X's testimony live by video-link from The Hague.⁵ The Independent Counsel seeks to convey that it was the Appellant's 'fault' that Lawyer X's was not called to give live evidence.⁶ As the Independent Counsel knows full well, the only reason why Lawyer X did not give live testimony is because his evidence in written form was agreed by the parties and was admitted as such as agreed evidence.
8. The Appellant did not make the arrangements to have video-link testimony because Lawyer X's testimony was admitted by agreement between the parties. As stated on the record by Defence Counsel:

"[O]ver the weekend between the parties we've been able to agree his [Lawyer X's] evidence to be admitted in statement form together with a number of annexes. So there will be no need any longer to call him as a

³ As identified in the Appellant's Reply of 12 June 2013, paras 9-16 and the Application pursuant Rule 115 of 12 June 2013, paras 9-12.

⁴ Response, paras. 8-17.

⁵ Response, para. 12.

⁶ Response, para. 17.

witness or to arrange a video link. It will be done in the Defence case as a stipulation and all the materials will be provided at that stage".⁷

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9. The Trial Chamber clearly accepted that the evidence was agreed evidence and admitted as such:

"Defence Counsel: If there are any issues that this witness [Lawyer X] needs to be questioned about, then he must be called ... If there are matters that are going to be put about what he said or hasn't said in any way whatsoever, he's got to have an opportunity to answer them. This is agreed evidence [referring to Lawyer X's statement]. There can be no doubt. When Mr. Gardner says he agrees it, he agrees it as it stands there.

*Justice Doherty: That's correct. It's agreed. It's in by consent. It's all in there."*⁸

10. Just as the evidence of the five Prosecution witnesses was agreed and admitted accordingly as undisputed evidence, so was the evidence of Lawyer X agreed as evidence which was unchallenged. There was thus no need for it to be heard live because it would not be cross-examined by the Independent Counsel. As Defence Counsel stated for the record: Lawyer X's statement *"is agreed between the parties, and it's for that reason as your Honour knows that he's not being called for cross-examination."*⁹

11. If the position had been any different (i.e. had the Respondent stated that he wished to challenge any aspect of Lawyer X's testimony or if the Trial Chamber had indicated that it wished to question him on any aspect of his evidence), the Appellant would have without any hesitation called Lawyer X to testify. It is demonstrably false to claim, as the Independent Counsel does, that the Appellant "elected" not to call Lawyer X as a witness at trial. He was called as a witness by the Defence with his evidence being admitted in writing - as though it were given orally - by agreement.

12. Indeed, Counsel for the Appellant made it clear on several occasions that the Independent Counsel could not have it both ways: he could not agree to the admission of the evidence and then still challenge it when he had voluntarily foregone the

⁷ Transcript of 14 January 2013, p. 73.

⁸ Transcript of 18 January 2013, p. 522.

⁹ Transcript of 17 January 2013, p. 472.

opportunity to cross-examine Lawyer X.¹⁰ Put simply, the evidence was either agreed or it was not. There was no other way for Lawyer X's evidence to be admitted in writing. It was admitted in the same way as all other agreed evidence in the case (including the evidence of the five Prosecution witnesses, the payment of Le200,000, and the unsigned cheque for Le30,000) i.e. as evidence that the parties agreed could be admitted in the trial as undisputed agreed facts. Indeed, the Independent Counsel has referred in the Response to the evidence of the Prosecution witnesses as being admitted as a "stipulation" by agreement between the parties.¹¹ The Independent Counsel has not sought to suggest that any distinction can be made between the admission of the evidence of Lawyer X and that of the five Prosecution witnesses. The Chamber is entitled to admit evidence agreed between the parties so that this evidence need not be called live in the trial. This procedure both narrows the issues in dispute about which live evidence must be heard to be subject to cross-examination and saves time so that witnesses are not called who will not be questioned. Of course, counsel are always entitled to comment on agreed evidence and make submissions about such evidence in their closing speeches, but that is obviously different to disputing evidence that has been agreed. It is not permissible to go behind the basis on which the evidence has been admitted and to challenge it as this would undermine the entire purpose of admitting the evidence by agreement. The Independent Counsel would rightly be able to object if the Defence, for example, having agreed the admission of the bank records of the payment of Le200,000, had then proceeded to submit in the defence closing submissions that the records were not properly authenticated or were fabricated.

13. Similarly, the Defence did not seek to challenge the credibility of the five Prosecution witnesses whose evidence was admitted in writing. This is because their evidence had been admitted by agreement. The Independent Counsel would surely have objected if Defence Counsel had nevertheless sought to argue that the Trial Chamber should disregard the evidence of these witnesses as being unreliable. He would have contended, and rightly so, that Defence Counsel should not have admitted their evidence by agreement, and instead should have in fairness called them to be cross-examined. The fundamental principle being that the witness should have an opportunity to respond to challenges which go to their reliability and credibility. Most importantly, the Trial Chamber would not be in a position to assess their

¹⁰ Transcripts of 17 January 2013, pp. 461-462, 468-476, 504-505, 508-509 and of 18 January 2013, pp. 520-523.

¹¹ Response, para. 27.

reliability and credibility without having heard from the witness on the points about which the witness is challenged. The Appellant asks that the Independent Counsel should act in the same way in respect of Lawyer X as for the five Prosecution witnesses whose evidence was admitted by agreement in writing. There is simply no basis to treat them any differently or to make any distinction.

14. The Respondent has thus incorrectly claimed that he did not “agree” Lawyer X’s evidence.¹² Whether or not the Independent Counsel believes he did not “agree” this evidence, that is the basis upon which it was admitted - as a stipulation in the same way as evidence relied on by the Independent Counsel was admitted by stipulation between the parties. As noted above, the Trial Chamber confirmed that Lawyer X’s evidence was admitted as agreed evidence.¹³ The Independent Counsel has provided no reference in the transcript where he stated for the record that the evidence was not to be admitted by agreement or that he did not agree with the contents of Lawyer X’s statement.¹⁴ In any event, by not requiring Lawyer X to attend to be cross-examined, the Independent Counsel waived his right to challenge the reliability and credibility of Lawyer X’s statement.

15. The Independent Counsel nevertheless disputed Lawyer X’s evidence in his closing address for the first time¹⁵, as he now does in his submissions in the appeal. The Appellant certainly did object at the time¹⁶ to these challenges being made in the closing submissions after all the evidence in the trial had been admitted.¹⁷ It is for this reason that the Appellant argues that Lawyer X should be given the opportunity to be heard in response to the Independent Counsel’s challenges and the findings of the Trial Chamber. The evidence that he would give would be *additional* to his written statement that was admitted by agreement. It should be heard by the Appeals Chamber as the Trial Chamber made findings based on the Independent Counsel’s closing submissions and on its own assessment of the evidence which were adverse to the Appellant.¹⁸ Had the Trial Chamber heard Lawyer X’s testimony (i.e. additional

¹² Response, paras 30-33.

¹³ At para. 9.

¹⁴ Response, para. 31.

¹⁵ Transcript of 17 January 2013, pp. 500-511.

¹⁶ Transcripts of 17 January 2013, pp. 461-462, 468-476, 504-505, 508-509 and of 18 January 2013, pp. 520-523.

¹⁷ The case was only left open until 22 January 2013 (after the Independent Counsel had left Freetown) to deal with two administrative matters of admitting the written responses of two character witnesses, which had been agreed before Independent Counsel’s departure, and to ensure that Lawyer X’s notes had been admitted in the correct order as the pages were not numbered: see transcript of 22 January 2013.

¹⁸ As identified in the Appellant’s Reply of 12 June 2013, paras 9-16 and the Application pursuant to Rule 115 of 12 June 2013, paras 9-12.

evidence) in respect of the matters about which it made its findings, the Appellant submits that it would have had a decisive impact on the outcome of the trial. In the Appellant's submission, it would have made it quite impossible to reconcile the evidence of Mr. Senessie with Lawyer X's testimony as the Trial Chamber sought to do in its reasoning.¹⁹

16. As set out in the Reply of 12 June 2013 and the Application under Rule 115 of 12 June 2013, the additional evidence that Lawyer X would provide, which is not in his statement, would directly address the findings made by Trial Chamber about Lawyer X's evidence.²⁰ This additional evidence could not have been included in the written statement as Lawyer X was not notified about the specific challenges that would be made to his evidence - it having been agreed between the parties - and the findings that would be made about these matters. If it had been known that submissions and findings would be made that went beyond his agreed evidence - and about which he could and should have given evidence - he would have been called at trial to give this evidence live and have been subjected to cross-examination.

17. The Chamber, with the consent of the Independent Counsel, followed the exact procedure in respect of the character witnesses at trial that the Appellant submits should be adopted for Lawyer X.²¹ At trial the Independent Counsel sought to submit a document that he claimed was relevant to the evidence of two of the character witnesses whose statements he agreed could be admitted without calling them for cross-examination. The Trial Chamber admitted the document, but allowed the witnesses to respond in writing to the document. These responses were then admitted into evidence so that the witnesses had a fair opportunity to answer to the document used against them by the Independent Counsel.²² In other words, instead of cross-examination, the Chamber allowed the witnesses to respond in writing. However, the Independent Counsel neither required Lawyer X to attend for cross-examination, nor sought to give him an opportunity to respond in writing to the challenges the

¹⁹ The Appellant submits in his appeal that even without the additional evidence, no reasonable Trial Chamber could have found that Lawyer X's testimony was reconcilable with Mr. Senessie's evidence. The contradictions were manifest and unmistakable. Were the Appeals Chamber against the Appellant on this ground of appeal, then the admission of the additional evidence assumes an even greater importance. The Appellant submits that the additional evidence demonstrates without any doubt that Mr. Senessie's evidence could not be relied on to convict the Appellant.

²⁰ Appellant's Reply of 12 June 2013, paras 9-16 and the Application pursuant to Rule 115 of 12 June 2013, paras 13-19.

²¹ Referred to by the Independent Counsel in Response, para. 16.

²² Transcript of hearing of 17 January 2013, pp. 479-487.

Independent Counsel relied on in his closing submissions and which formed the basis of the Trial Chamber’s findings.

18. In any event, as submitted by the Appellant, even if the evidence is found to have been “available” at trial, the additional evidence of Lawyer X should be admitted in the interests of justice given the decisive effect it would have on the findings of the Trial Chamber.²³

The additional evidence is credible

19. The Independent Counsel argues that the additional evidence cannot be regarded as credible on the basis that the Trial Chamber found Lawyer X to be an incredible witness.²⁴ However, the Trial Chamber never made any finding adverse to Lawyer X’s credibility. At most, the Trial Chamber questioned why Lawyer X had travelled to Freetown to meet Senessie when there was a potential conflict of interest, but the Trial Chamber did not as a result of this finding conclude that Lawyer X’s evidence was not credible. This is one of the very issues about which Lawyer X should be permitted to provide evidence so as to have an opportunity to answer the criticism levelled at him.

20. The Independent Counsel wrongly claims that Lawyer X “was not aware that he had a professional conflict in representing Senessie before he boarded the plane to Sierra Leone for Senessie’s initial appearance”.²⁵ Lawyer X clearly stated in his statement that before he travelled to Freetown, having spoken with Independent Counsel he was aware of a potential conflict and consulted with the Principal Defender on the best course of action. It was decided he should travel to Freetown to meet Mr. Senessie.²⁶ The finding of the Trial Chamber, which is cited in the Response, was that Lawyer X *was* aware of the conflict before he travelled to Freetown.²⁷

21. Lawyer X’s additional evidence is plainly reasonably capable of belief and reliance. The Independent Counsel has not identified a single reason to justify the exclusion of the additional evidence.

²³ See paras. 22-26 below.

²⁴ Response, paras. 18-24.

²⁵ Response, para. 22.

²⁶ D5, paras 12-13 (Confidential Annex A to the Response).

²⁷ Response, para. 22, citing the Judgement in Contempt Proceedings at para. 173.

The exclusion of the additional evidence would result in a miscarriage of justice

22. The Independent Counsel argues that the Appellant has failed to show that the additional evidence would affect the verdict because there was other evidence that corroborated Mr. Senessie's account.²⁸
23. As submitted by the Appellant in Ground 1 of his appeal, Mr. Senessie's evidence was not independently corroborated by other reliable evidence in the trial, including the evidence of the five Prosecution witnesses. There was no evidence that any of these witnesses had ever met with the Appellant. Their evidence was that they had been told *by* Senessie that the Appellant wanted to meet with them. None of them could say whether what Senessie had told them was the truth or not. They merely told the Court what they had been told by Senessie. The Independent Counsel refers to TFI-585's telephone call - her evidence is that she was told by Senessie that she was speaking to the Appellant. She was not able to verify in her evidence whether she was in fact speaking to the Appellant or not, and there is no independent evidence which was admitted that proves who TFI-585 actually spoke to on the phone.²⁹
24. These arguments will be determined under Ground 1 in the appeal. They do not fall for consideration in the present motion. The critical point for present purposes is that the Trial Chamber found that it could rely on Senessie's evidence to convict the Appellant despite the fact, as submitted by the Appellant, that Senessie's evidence was directly contradicted by Lawyer X's evidence. The Trial Chamber did so by concluding that the conflicts between their evidence did not go so far as to undermine Senessie's credibility.³⁰ As noted above, the Appellant has appealed against these findings. The Appellant submits in the present motion that had the Trial Chamber heard the additional evidence of Lawyer X, and had he been questioned, about each of the topics on which the Chamber made findings to support its conclusion, the Chamber could not have reached the same conclusion. As set out in the Appellant's Reply and the Application of 12 June 2013³¹, Lawyer X's additional evidence about these topics which would have gone beyond his agreed written evidence - had he had

²⁸ Response, paras 30-33.

²⁹ For the Appellant's full submissions on this matter see Appellant's Appeal Submissions, 21 May 2013, paras 35-65.

³⁰ Judgement in Contempt Proceedings, paras 180-181.

³¹ Appellant's Reply of 12 June 2013, paras 9-16 and the Application pursuant to Rule 115 of 12 June 2013, paras 13-19.

the opportunity to give evidence in response to the matters which the Independent Counsel challenged for the first time in his closing submissions³² - would have undermined Senessie's credibility. In other words, the Chamber's crucial finding that it could "not reject Senessie's evidence on the basis of the conflicting evidence between Lawyer X and Senessie"³³ would have been decisively affected by the additional evidence. In particular, Lawyer X's additional evidence would be that there was no misunderstanding on the part of Senessie about the advice that he was given by Lawyer X. He was not advised to plead guilty and he was not placed in a position in which he had no alternative but to sign the endorsement (as found by the Chamber). The Appeals Chamber is respectfully requested to hear this evidence.

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25. Moreover, the additional evidence would have had a decisive impact on the Independent Counsel's case (which was accepted by the Trial Chamber in convicting the Appellant) that it was the Appellant who instructed Senessie every step of the way in committing the contempt and concealing it thereafter.³⁴ Senessie's evidence was that the Appellant had told him to plead not guilty and to sack Lawyer X when Lawyer X had purportedly sought to force Senessie to plead guilty.³⁵ Lawyer X's evidence would have been that there was no misunderstanding (whether because of language or for any other reason) about what he advised Senessie - he did not advise him to plead guilty and he did not give Senessie "no alternative" but to sign the endorsement in order to continue representing him.³⁶ Lawyer X's evidence would have directly undermined Senessie's claim that he was controlled by the Appellant and that he had to sack Lawyer X on the Appellant's instructions because Lawyer X was trying to force him to plead guilty. It should be taken into account that Senessie claimed in his evidence that Lawyer X had told him that he (Lawyer X) thought that it was Mr. Taylor who was involved in committing the crimes³⁷ - a claim that is flatly denied by Lawyer X³⁸.

26. The Respondent is therefore wrong to claim that the Appellant has not shown that the exclusion of the additional evidence would result in a miscarriage of justice. Were Senessie's evidence rejected on the basis of the conflicts with Lawyer X's evidence,

³² Transcript of 17 January 2013, pp. 500-511.

³³ Judgement in Contempt Proceedings, para. 181.

³⁴ Appellant's Appeal Submissions, 21 May 2013, paras 71-80.

³⁵ Transcript of 14 January 2013, p. 120 and see Transcript of 15 January 2013, pp. 289-321.

³⁶ Appellant's Reply of 12 June 2013, paras 9-16 and the Application pursuant to Rule 115 of 12 June 2013, paras 13-19.

³⁷ Transcript of 15 January, pp. 318-319.

³⁸ D5, para. 22.

the Appellant should have been acquitted. It is not a question of the Appellant merely repeating the arguments about Senessie's credibility that were made at trial - the point is that the additional evidence should have resulted in a finding that the Independent Counsel had not proved his case beyond reasonable doubt.

Conclusion

27. For all of these reasons, the Appellant submits that the Respondent's grounds for opposing the Appellant's request for the additional evidence to be heard by the Appeals Chamber should be dismissed. The Appeals Chamber is respectfully requested to grant the Appellant's request to hear the additional evidence pursuant to Rule 115, together with any rebuttal evidence that the Independent Counsel may wish to submit.

Dated 24th 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

Appellant's Application under Rule 115, SCSL-12-02-A, 12 June 2013

Respondent's Response to Appellant's Application under Rule 115, SCSL-12-02-A, 17 June 2013

2. Independent Counsel v Prince Taylor, SCSL-2012-02-T

Trial Chamber, Judgement in Contempt Proceedings, SCSL-2012-02-T, 11 February 2013

Trial transcripts, SCSL-2012-02-T, 14, 15, 16, 17, 18 and 22 January 2013