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SCSL-04-15-A
(5103-5110)

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SPECIAL COURT FOR SIERRA LEONE

IN THE APPEALS CHAMBER

Before: Hon. Justice Renate Winter, President,
Hon. Justice Jon Kamanda,
Hon. Justice George Gelaga King
Hon. Justice Emmanuel Ayoola, and
Hon. Justice Shireen Avis Fisher

Acting Registrar: Ms. Binta Mansaray

Date filed: 31 August 2009

SPECIAL COURT FOR SIERRA LEONE	
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THE PROSECUTOR

v.

ISSA HASSAN SESAY

Case No. SCSL-04-15-A

PUBLIC

**Request that the Pre-Hearing Judge Present to the Appeals Chamber
Exhibit MFI-134 from *Prosecutor v. Taylor***

Office of the Prosecutor

Mr. Vincent Wagona
Mr. Reginald Fynn

Defence Counsel for Issa Sesay

Mr. Wayne Jordash
Ms. Sareta Ashraph
Mr. Jared Kneitel

Defence Counsel for Morris Kallon

Mr. Charles Taku
Mr. Orgetto Kennedy

**Court-Appointed
Counsel for Augustine Gbao**

Mr. John Cammegh
Mr. Scott Martin

INTRODUCTION

1. Pursuant to Rule 115 or the Appeals Chamber's inherent power,¹ the Sesay Defence seeks to introduce evidence from *Prosecutor v. Taylor* for consideration on Sesay's appeal. In particular, the Defence seeks the introduction of Exhibit MFI-134 (DCT-195).² Exhibit MFI-134 is an 11 May 2000 letter from Mr. Sesay to Mr. Taylor concerning Sesay's dedication to peace and his belief that the United Nations peacekeeping forces attacked the RUF in May 2000. The requested additional evidence should be considered together with the evidence at trial and Sesay's submissions on appeal.

LEGAL STANDARD

2. For evidence to be admissible under Rule 115, it must be shown that the evidence was not available at trial or discoverable through the exercise of due diligence by the moving party³ and that the interests of justice require the admission of that evidence. In determining whether the interests of justice require the admission of the requested additional evidence, the Pre-Hearing Judge should consider whether the evidence is: i) relevant to a material issue; ii) credible; and iii) *could* have been a decisive factor in reaching the decision at trial.⁴ Applying *in dubio pro reo*, any doubt should be resolved in favour of the Appellant.⁵

Availability, Relevance, and Credibility

3. For proposed additional evidence to be tendered on appeal, it must be demonstrated that the evidence was not available at trial in any form or discoverable through the exercise of due diligence.⁶ Further, the evidence must be relevant to a material issue and credible.⁷ Evidence is relevant if it "relates to findings material to the Trial Chamber's decision."⁸ Evidence is credible if it appears to be reasonably capable of belief or reliance.⁹
4. The Defence submits that this standard does not take into consideration whether the evidence is dispositive of guilt or innocence or whether the Trial Chamber would have preferred the

¹ The Defence recognizes that Rule 115 ordinarily requires that any additional evidence be introduced not later than the deadline for filing appeal submissions in reply (Rule 115(a)). Should Rule 115 not be applicable here, the Defence requests that the Appeals Chamber exercise its inherent power to admit the proposed additional evidence for consideration on appeal.

² Referred to in *Prosecutor v. Taylor* on 18 August 2009 at pages 27037-45.

³ *Prosecutor v. Krstić*, IT-98-33-A, "Decision on Applications for Admission of Additional Evidence on Appeal," 5 August 2003.

⁴ Rule 115.

⁵ *Prosecutor v. Dusko Tadić*, IT-94-1-A, "Decision on Appellant's Motion for the Extension of the Time-Limit and Admission of Additional Evidence, 15 October 1998, Para. 73.

⁶ *Prosecutor v. Sesay*, SCSL-04-15-A-1312, "Decision on Sesay Motion to Admit Additional Evidence Pursuant to Rule 115," 5 August 2009 (Sesay Rule 115 Decision), Para. 24.

⁷ *Ibid.*, Para. 25.

⁸ *Ibid.*

⁹ *Ibid.* A finding that evidence is credible does not demonstrate that anything about the weight to be accorded such evidence (*Prosecutor v. Stanisic*, IT-03-69-AR65.4, "Decision on Prosecution Appeal of Decision on Provisional Release and Motions to Present Additional Evidence Pursuant to Rule 115," 26 June 2008, Para. 7).

additional evidence (especially not in isolation¹⁰) over the evidence upon which the Trial Chamber based its findings.

5. Rather, the operative question as it pertains to whether evidence should be presented to the Appeals Chamber is whether the party moving to introduce the additional evidence has demonstrated that the evidence “*could* have had an impact on trial.”¹¹ That is, “considered in the context of the evidence given at trial, it could demonstrate that the conviction was unsafe.”¹² In sum, if the proposed additional evidence was not available at trial, is relevant, is credible, and could have affected the verdict, the Pre-Hearing Judge should present the proposed additional evidence to the Appeals Chamber.

EXHIBIT MFI-134

Availability

6. The Taylor Prosecution first disclosed Exhibit MFI-134 to the Sesay Defence on 25 August 2009.¹³ Considering that the Trial Chamber’s Judgment was issued on 25 February 2009 and Exhibit MFI-134 first came into the knowledge and possession of the Sesay Defence on 25 August 2009, it was not available at trial.¹⁴

Credibility

7. Exhibit MFI-134 came from Mr. Taylor’s personal archives. The Defence submits that the exhibit is reasonably capable of belief or reliance.

Relevance

8. Exhibit MFI-134 concerns Sesay’s subjective belief as to whether the RUF or UNASMIL initiated the May 2000 transgressions. The exhibit is therefore relevant to i) the Trial Chamber’s finding as it relates to Sesay’s 6(3) liability for attacks on UNAMSIL peacekeeping forces; ii) Sesay’s *mens rea* as concerns those attacks; and iii) the Trial Chamber’s finding as it relates to the sentence to be imposed upon Sesay.
9. The Defence notes that the Trial Chamber found untenable the Defence submission that “Sesay believed there was a conflict between UNAMSIL and the RUF initiated by UNAMSIL.”¹⁵ Exhibit MFI-134 affects this finding. In MFI-134, Sesay referred to

¹⁰ Sesay Rule 115 Decision, Para. 28.

¹¹ *Ibid.*, Para. 26.

¹² *Ibid.*, Para. 26. “A decision will be considered unsafe if the Appeals Chamber ascertains that there is a realistic possibility that the Trial Chamber’s verdict might have been different if the new evidence had been admitted” (*Stanisic*, Para. 7). “In making this determination, the Appeals Chamber considers the new evidence in the context of the evidence heard at trial and any other evidence already admitted” (*Stanisic*, Para. 7)

¹³ The Taylor Prosecution, via email, informed the Sesay Defence that the exhibit was first disclosed to them on 16 July 2009.

¹⁴ Sesay Rule 115 Decision, Para. 32.

¹⁵ Judgment, Para. 2281.

UNAMSIL crimes found proven in counts 15 and 17 as an unwarranted attack *by* the UNAMSIL forces on the RUF positions in Makeni, Magburaka, and Lunsar.

10. Stated otherwise, the exhibit provides contemporaneous evidence that Sesay believed that the UNAMSIL forces were the aggressors. *See*, Sesay Defence Closing Brief at Paras. 1329-1332 and Sesay Defence Appeal Ground 44 (including Annex H; RUF radio logs). With this belief in mind (especially in view of the “environment of complete indifference and abandonment [in which] the United Nations orchestrated and executed their unwarranted attack on [the RUF] positions”¹⁶), the measures that Sesay took could have been reasonable to prevent or punish. This would have affected the Trial Chamber’s findings pertaining to Sesay’s guilt of Counts 15 and 17.
11. Further, Exhibit MFI-134 demonstrates Sesay’s commitment to the peace process, even in the midst of aggression by the UNAMSIL peacekeepers – the very group of personnel charged with assisting in that peace process. This is evidenced by Sesay’s “demands” that, *inter alia*, 3) an ECOWAS summit be convened to restart disarmament/peace dialogue; 6) the entire country be disarmed; and 7) that hostilities be immediately ceased. Sesay further wrote to Mr. Taylor of Sesay’s profound desire for peace and his cooperation to bring peace back to Sierra Leone.

Affect on Verdict

12. Exhibit MFI-134 affects the Trial Chamber’s findings at Paragraphs 2280-2282 as relates to Sesay’s actual or imputed knowledge of i) the attacks on 1 and 2 May 2000 (in Makeni and Magburaka); ii) the abduction of peacekeepers on 3 May 2000; iii) the attack on 3 May 2000 (in Lunsar); and iv) the attacks on 7 and 9 May.¹⁷
13. Further, the exhibit affects the Chamber’s findings as relates to Sesay’s failure to prevent or punish his subordinates for directing attacks against UNAMSIL personnel and killing four UNAMSIL personnel.¹⁸ Exhibit MFI-134 demonstrates Sesay’s subjective belief that the UNAMSIL peacekeeping personnel initiated the transgressions and had assumed a combative role. Exhibit MFI-134 therefore affects Paragraphs 2283-84 of the Trial Chamber’s Judgment.
14. Lastly, with particular regard to Sesay’s sentence, the Trial Chamber found that Sesay was not entitled to any mitigation for his role during the peace process because he “fail[ed] to prevent or punish the perpetrators of the attacks against the UNAMSIL personnel, a direct

¹⁶ Exhibit MFI-134, second paragraph.

¹⁷ Judgment, Para. 2280.

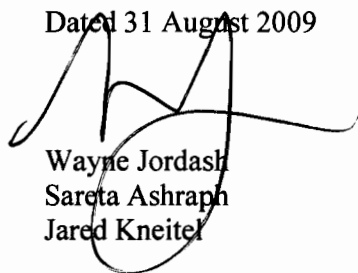
¹⁸ Judgment, Para. 2284.

affront to the international community's own attempts to facilitate peace in Sierra Leone."¹⁹ This is notwithstanding the Trial Chamber's finding that Sesay, on a balance of probabilities, provided a real and meaningful contribution to the peace process in Sierra Leone following his appointment as interim leader of the RUF.²⁰ Exhibit MFI-134 would have affected this finding (Sentencing Judgment, Para. 228).

RELIEF REQUESTED

15. The Defence requests that the Pre-Hearing Judge present Exhibit MFI-134 to the Appeals Chamber for consideration on Sesay's appeal.

Dated 31 August 2009



Wayne Jordash
Sareta Ashraph
Jared Kneitel

¹⁹ Sentencing Judgment, Para. 228.

²⁰ Sentencing Judgment, Para. 228.

Exhibit MFI-134

11 May 2000

H. E. Dakpannah Dr. Charles Gankay Taylor
President
Republic of Liberia

Dear Mr. President:

In view of the developments unfolding in our country, the violations of the Lome Peace Accord by the United Nations, which attacked our positions at Makeni, Magburaka and Lunsar, driving us to the current situation; the non-compliance by President Kabbah and his government of the Lome Peace Accord refusing to appoint RUF representatives to designated government positions, refusing to create a Commission to be chaired by the RUF, while insisting that the United Nations maintain conditions, creating a personal army, minus RUF participation, by including the other factions (Kamajors, SLA-AFRC), refusing to issue a diplomatic passport to our Leader in his capacity as Vice President of the country, plus numerous other affronts, and despite repeated protests by our Leader to the international community, the United Nations and especially the ECOWAS, we have never received the slightest response, even negative.

It is in this environment of complete indifference and abandonment by all parties the United Nations orchestrated and executed their unwarranted attack on our positions.

Mr. President, due to the inability of the United Nations to guarantee our Leader's security as well as that of our other members in Freetown, and the inability of the government to control its own militias, Kamajors and SLA-AFRC, we now face a situation that is more complicated than ever, especially with the direct involvement of the British army.

Mr. President, we have the firm conviction that the situation in our country can only be resolved by the ECOWAS, and not by the United Nations, whose involvement was never envisaged in the Lome Peace Accord.

Here below, Mr. President are the demands we make on behalf of our people:

1. The unconditional release of our Leader who we consider to be detained by the United Nations.
2. The immediate halt to the distribution of weapons to the militias by the United Nations.
3. The convening of an ECOWAS summit to restart the dialogue with the participation of all parties.
4. The immediate reexamination of the Lome Peace Accord in Monrovia.
5. The creation of a National Council of state to govern the country during a transition period until elections are held.
6. The complete disarmament of the country, including the so-called national army, created by President Kabbah, comprising the other factions, without the RUF.
7. The immediate cessation of hostilities, followed by the establishment of a verification committee directed by the ECOWAS.
8. The traveling band should be lifted on all RUF and walk forward to the Lome Peace Accord.

Mr. President, we are convinced that your mediation will achieve an end to the war in our country, given your experience and your abilities, which are recognized by all.

Mr. President, we are your complete disposal to enable you to bring peace back to our country. We assure you of our complete cooperation as well as our profound desire to assist you in attaining this objective.

Respectfully yours,

GENERAL ESSA SEASAY
RUF Flet Commander