

1032)

SCSL-03-01-T
(29592-29597)

29592



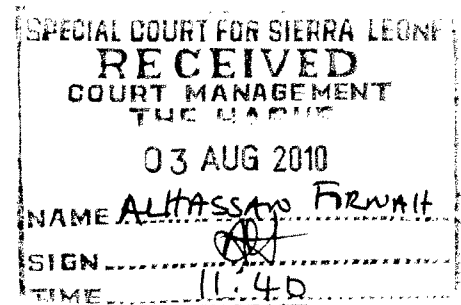
**SPECIAL COURT FOR SIERRA LEONE
OFFICE OF THE PROSECUTOR**

TRIAL CHAMBER II

Before: Justice Julia Sebutinde, Presiding
Justice Richard Lussick
Justice Teresa Doherty
Justice El Hadji Malick Sow, Alternate Judge

Registrar: Ms. Binta Mansaray

Date filed: 3 August 2010



THE PROSECUTOR

Against

Charles Ghankay Taylor

Case No. SCSL-03-01-T

PUBLIC

**PROSECUTION RESPONSE TO URGENT DEFENCE MOTION FOR STAY OF EVIDENCE PENDING
DISCLOSURE OF THE STATEMENT OF NAOMI CAMPBELL**

Office of the Prosecutor:
Ms. Brenda J. Hollis
Ms. Sigall Horovitz

Counsel for the Accused:
Mr. Courtenay Griffiths, Q.C.
Mr. Terry Munyard
Mr. Morris Anyah
Mr. Silas Chekera
Mr. James Supuwood

I. INTRODUCTION

1. The Prosecution opposes as unfounded the “Urgent Defence Motion for Stay of Evidence Pending Disclosure of the Statement of Naomi Campbell” (“**Motion**”), filed on 30 July 2010, by which it requests the Trial Chamber to stay the hearing of the evidence of Witness Naomi Campbell, until the Prosecution obtains and discloses her statement.¹ The Motion is without merit and should be dismissed.
2. On the basis of Ms. Campbell’s lack of cooperation with the Prosecution, the Chamber granted the Prosecution request to subpoena her as a witness to testify about a gift of diamond or diamonds she received from the Accused.² The Prosecution listed Ms. Campbell as a witness on this issue because she was the recipient of the gift, so is a material witness to the incident. However, in many ways she is more akin to a Court witness.³ Even after the subpoena order was served on Ms. Campbell’s representative, through her counsel, she declined further Prosecution requests to speak with her.
3. The Prosecution has obtained no statement of this witness, as “statement” is defined in the jurisprudence of the Special Court.⁴ The witness has not provided information to the Prosecution. The witness has not signed or otherwise adopted a statement. Further, as Ms. Campbell has declined requests to speak to the Prosecution, the Prosecution has no interview or proofing notes in relation to the witness.

¹ *Prosecution v. Taylor*, SCSL-03-01-T-1023, “Urgent Defence Motion for Stay of Evidence Pending Disclosure of the Statement of Naomi Campbell”, 30 July 2010.

² *Prosecution v. Taylor*, SCSL-03-01-T-996, Decision on Prosecution Motion for the Issuance of a Subpoena to Naomi Campbell, 30 June 2010, p. 5.

³ Practice at the ICTY envisions a situation when an uncooperative Court witness is subpoenaed and not interviewed before testifying. See *Prosecutor v. Krajisnik*, IT-00-39-T, Finalized Procedure on Chamber Witnesses; Decision and Orders on Several Evidentiary and Procedural Matters, 24 April 2006, Annex, para. 5 (“Should the witness refuse to cooperate...the Chamber may decide to subpoena the witness to testify before the Chamber. In such a case there will be no preliminary interview...”).

⁴ *Prosecutor v. Brima et al.*, SCSL-04-16-T-246, Decision on Joint Defence Motion on Disclosure of all Original Witness Statements, Interview Notes and Investigators’ Notes Pursuant to Rules 66 and/or 68, 4 May 2005, para. 16 (referring to *Prosecutor v. Norman et al.*, Case No. SCSL-2004-14-PT-152, Decision on Disclosure of Witness Statements and Cross-examination, 16 July 2004, para. 10, the Chamber held: “*What is a Witness Statement*: Any statement or declaration made by a witness in relation to an event he or she witnessed and recorded in any form by an official in the course of an investigation, falls within the meaning of a “witness statement” under Rule 66(A)(i)”).

II. THE APPLICABLE LAW

4. Rule 66 of the Rule of Procedure and Evidence (“**Rules**”) holds as follows:
 - (A) Subject to the provisions of Rules 50, 53, 69 and 75, the Prosecutor shall:
 - (i) Within 30 days of the initial appearance of an accused, disclose to the Defence copies of the statements of all witnesses whom the Prosecutor intends to call to testify and all evidence to be presented pursuant to Rule 92 *bis* at trial.
 - (ii) Continuously disclose to the Defence copies of the statements of all additional prosecution witnesses whom the Prosecutor intends to call to testify, but not later than 60 days before the date for trial, or as otherwise ordered by a Judge of the Trial Chamber either before or after the commencement of the trial, upon good cause being shown by the Prosecution. Upon good cause being shown by the Defence, a Judge of the Trial Chamber may order that copies of the statements of additional prosecution witnesses that the Prosecutor does not intend to call be made available to the defence within a prescribed time.
5. This Chamber has held that “Rule 66 requires disclosure of all witness statements **in the possession of the Prosecution**, regardless of their form or source, save for any material covered by Rule 70 (A)”.⁵ (Emphasis added).

III. ARGUMENTS

6. The Prosecution is under no statutory or other obligation to obtain a statement from each and every witness, particularly in the present circumstances, where the witness has been uncooperative with the Prosecution, and did not agree to be interviewed by the Prosecution. The Defence does not provide any legal basis to support its claim that the Prosecution is under an obligation to obtain statements from its witnesses, including uncooperative ones. As noted in the previous paragraph, Rule 66 imposes an obligation on the Prosecution to disclose witness statements which are in its possession. The Prosecution cannot be expected to disclose a statement which it does not have in its possession, or which does not exist.
7. Although it relates to a situation where the Prosecution had received information from the witness, the ICTR Appeals Chamber’s ruling in the *Niyitegeka* Appeal Judgment may be helpful in resolving the issue raised in the Motion. In that ruling, the ICTR Appeals Chamber addressed the Prosecution’s disclosure obligations under Rule 66(A)(ii). It rephrased the Accused-Appellant’s claim as follows:

⁵ *Ibid*, para. 16.

25. The Appellant also submits that the Trial Chamber erred in law in permitting the Prosecution to call witnesses in circumstances where no reasonable explanation was given for the unavailability of the original statements made by the witnesses to the Prosecution investigators. The Appellant claims that the unavailability of the original statements deprived him of the opportunity to cross-examine the witnesses effectively.⁶

Responding to this claim, the ICTR Appeals Chamber held:

35. ... The Prosecution is obliged to make the witness statement available to the Defence in the form in which it has been recorded. **However, something which is not in the possession of or accessible to the Prosecution cannot be subject to disclosure: *nemo tenetur ad impossibile* (no one is bound to an impossibility).**" (Emphasis added).

37. In the present case, the Appellant has not sufficiently demonstrated that additional records exist that have not been disclosed to the Defence. **Without a showing of the availability of such records it has not been established that the Prosecution did not fulfil its duty to disclose pursuant to Rule 66(A)(ii) of the Rules. On the contrary, as discussed above, the Senior Trial Attorney confirmed that the Prosecution has no such documents in its possession, and the Appellant has shown no reason to doubt this representation.** (Emphasis added).

8. Assuming *arguendo* there is a requirement that the Prosecution must make an effort to obtain a witness statement, in the present case such requirement has been met. Both before and after the Chamber issued the subpoena, the Prosecution attempted to speak to Ms. Campbell but she declined through her counsel. The Defence reliance on ICTR jurisprudence regarding "will say" statements is misplaced as those cases deal with situation where the Prosecution has information from the witness. However, to the extent that jurisprudence is relevant to the present circumstances, the Prosecution summary of Ms. Campbell's anticipated evidence meets the requirement of "laying out the scope of what the witness is expected to cover in clear terms".⁷
9. The Prosecution has no statement of Ms. Campbell to disclose. The summary disclosed by the Prosecution provides sufficient notice to the Defence as to her anticipated testimony. Ms. Campbell will testify in court, and will be subject to cross-examination.

⁶ *Prosecutor v. Niyitegeka*, Case No. ICTR-96-14-A, Appeals Judgment, 9 July 2004, para. 25.

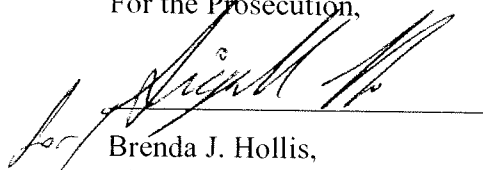
⁷ Motion, para. 15, quoting *Prosecutor v. Nyiramasuhuko et al.*, Case No. ICTR-98-42-T, Decision on Pauline Nyiramasuhuko's Extremely Urgent Motion for Exclusion of Evidence or Subsidiarily for Further Disclosure Regarding Witness DEDE's Expected Testimony, 19 September 2006, para. 7.

IV. CONCLUSION

10. For the above reasons, the Prosecution respectfully requests the Chamber to dismiss the Defence Motion in its entirety.

Filed in The Hague,
3 August 2010,

For the Prosecution,


for _____
Brenda J. Hollis,
The Prosecutor

INDEX OF AUTHORITIES

SCSL

Prosecutor v. Taylor

Prosecution v. Taylor, SCSL-03-01-T-996, Decision on Prosecution Motion for the Issuance of a Subpoena to Naomi Campbell, 30 June 2010.

Prosecution v. Taylor, SCSL-03-01-T-1023, “Urgent Defence Motion for Stay of Evidence Pending Disclosure of the Statement of Naomi Campbell”, 30 July 2010.

Prosecutor v. Brima et al.

Prosecutor v. Brima et al., SCSL-04-16-T-246, Decision on Joint Defence Motion on Disclosure of all Original Witness Statements, Interview Notes and Investigators’ Notes Pursuant to Rules 66 and/or 68, 4 May 2005

Prosecutor v. Norman et al.

Prosecutor v. Norman et al., Case No. SCSL-2004-14-PT-152, Decision on Disclosure of Witness Statements and Cross-examination, 16 July 2004, para. 10.

ICTY

Prosecutor v. Krajisnik, IT-00-39-T, Finalized Procedure on Chamber Witnesses; Decision and Orders on Several Evidentiary and Procedural Matters, 24 April 2006.

<http://icr.icty.org/LegalRef/CMSDocStore/Public/English/Decision/NotIndexable/IT-00-39/MS05542R0000150284.TIF>

ICTR

Prosecutor v. Niyitegeka, Case No. ICTR-96-14-A, Appeals Judgment, 9 July 2004.

http://www1.unn.edu/humanrts/instree/ICTR/NIYITEGEKA_ICTR-96-14/NIYITEGEKA_ICTR-96-14-A.html

Prosecutor v. Nyiramasuhuko et al., Case No. ICTR-98-42-T, Decision on Pauline Nyiramasuhuko’s Extremely Urgent Motion for Exclusion of Evidence or Subsidiarily for Further Disclosure Regarding Witness DEDE’s Expected Testimony, 19 September 2006.

<http://www.unicttr.org/Portals/0/Case/English/Nyira/decisions/190906.pdf>