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SCSL-03-01-T
(30672-30686)

30672



THE SPECIAL COURT FOR SIERRA LEONE

Trial Chamber II

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

Registrar: Ms. Binta Mansaray

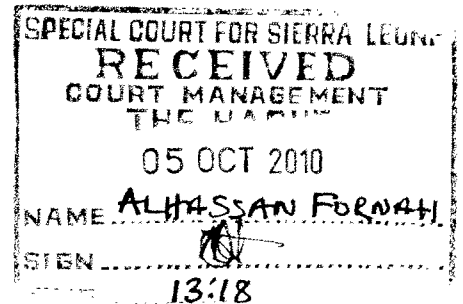
Date: 5 October 2010

Case No.: SCSL-03-01-T

THE PROSECUTOR

-v-

CHARLES GHANKAY TAYLOR



PUBLIC WITH CONFIDENTIAL ANNEX A

**DEFENCE REPLY TO PROSECUTION RESPONSE TO DEFENCE MOTION FOR
DISCLOSURE OF EXCULPATORY INFORMATION RELATING TO DCT-032**

Office of the Prosecutor:

Ms. Brenda J. Hollis
Ms. Leigh Lawrie
Mr. Nathan Quick

Counsel for Charles G. Taylor:

Mr. Courtenay Griffiths, Q.C.
Mr. Terry Munyard
Mr. Morris Anyah
Mr. Silas Chekera
Mr. James Supuwood

I. INTRODUCTION

1. This is the Defence's Reply to the Prosecution's Response¹ to the *Defence Motion for Disclosure of Exculpatory Information Relating to DCT-032*.²
2. The Defence notes that the Prosecution does not challenge most of the factual allegations in the Motion. Specifically, the Prosecution does not dispute that they, with the assistance of DCT-032, carried out an investigation into the death of Johnny Paul Koroma and exhumed two corpses which, upon testing, were discovered to not be the remains of Johnny Paul Koroma. The Prosecution does not dispute paying money to DCT-032, estimated at \$1500, or promising DCT-032 an additional \$5000 if he actually led them to the body of Johnny Paul Koroma. Furthermore, the Prosecution does not dispute that the [then] Prosecutor Stephen Rapp gave a letter of indemnity against prosecution to DCT-032.
3. Rather, the Prosecution contends that the results of the investigation into John Paul Korioma's death, the amount of money paid to DCT-032, and the circumstances surrounding the letter of indemnity to the said witness do not need to be disclosed to the Defence or to the Trial Chamber because such information is not exculpatory within the meaning of Rule 68. The Defence submits that the Prosecution's understanding of what constitutes exculpatory material is fatally flawed and that the Prosecution is not acting in good faith and thus cannot be allowed to operate as if they are above accountability.
4. Therefore the Defence reiterates its request for disclosure as indicated in paragraph 2 of the Motion.

¹ *Prosecutor v. Taylor*, SCSL-03-01-T-1096, Prosecution Response to Public with Confidential Annexes A-D Defence Motion for Disclosure of Exculpatory Information Relating to DCT-032, 1 October 2010 ("**Response**").

² *Prosecutor v. Taylor*, SCSL-03-01-T-1088, Public with Confidential Annexes A-D Defence Motion for Disclosure of Exculpatory Information Relating to DCT-032, 24 September 2010 ("**Motion**").

II. SUBMISSIONS

Evidence relating to the Alleged Death of JPK is Exculpatory in that it Affects the Credibility of Prosecution Evidence and Tends to Suggest the Innocence of the Accused

5. The information sought by the Defence – details of investigations into the death of Johnny Paul Koroma, including DNA test results on corpses alleged to be Johnny Paul Koroma's – is exculpatory in both the broadest and narrowest terms of Rule 68. Under Rule 68, the Prosecution must disclose any evidence which *tends* to suggest the innocence or mitigate the guilt of the accused or *may* affect the credibility of Prosecution evidence. The disclosure sought by the Defence achieves both.
6. The exculpatory nature of the requested evidence is not only defined in relation to the evidence of DCT-032 himself. The evidence is also exculpatory in relation to the Prosecution's case as a whole, in that three linkage witnesses for the Prosecution – Moses Blah, Zig Zag Marzah, and TF1-375³ – implicated subordinates of the Accused in the death of Johnny Paul Koroma. Those same three witnesses suggested that DCT-032 played a role in the death of Johnny Paul Koroma, and that he was killed at the behest of the Accused. The fact that the Prosecution has spoken to DCT-032 and that they followed up on leads, *albeit* false, given to them by DCT-032 regarding the death and burial of Johnny Paul Koroma and cannot confirm, at least from that piece of evidence, that Johnny Paul Koroma is dead, is clearly exculpatory.
7. The Prosecution's argument that no Prosecution evidence is contradicted by the fact that the remains found at the locations indicated by DCT-032 were not in fact those of Johnny Paul Koroma has no merit.⁴ It is deliberately designed to cloud the simple issue before the court that any information which might suggest that Johnny Paul Koroma is still alive or that he was not killed on the orders of Charles Taylor as alleged by the Prosecution is exculpatory, regardless of the fact that the Prosecution did not lead evidence of a particular burial site in evidence. Even so, the Prosecution

³ Motion, para. 8 and fn 5.

⁴ Response, para. 5.

did lead evidence suggesting that Johnny Paul Koroma was killed in Foya,⁵ and based on the Affidavit of DCT-032,⁶ two bodies presumed to be of Johnny Paul Koroma were exhumed by the Prosecution in Foya and turned out not to be his.

8. The Defence notes that if the requested information did not negatively affect the credibility of its case, the Prosecution would not be going to such great lengths to hide the information. Most importantly, the Defence is concerned about the Prosecution's improper conduct in this matter. Firstly, in that they deliberately withheld from the Defence information concerning the alleged killing and burial of Johnny Paul Koroma in Foya, which, in whole or in part, falsified that allegation. Secondly, in that they continue to defend their improper conduct.
9. The Defence hereby attaches as Confidential Annex A, the so-called "proffer" relating to DCT-032 disclosed to the Defence on 4 June 2010.⁷ The Trial Chamber will note that the first four pages are a summary of information given to the Prosecution by DCT-032 in May, June and July 2008 relating to, among other things, the death and burial of Johnny Paul Koroma. The first full paragraph on page five is a supposed summary of information given to the Prosecution by DCT-032 in October 2008. From the context of that paragraph, it is clear that by October 2008 the Prosecution had already investigated the (false) information that had been given to them by DCT-032 in May, June and July and had found that information not to be true. The Prosecution however purposefully left out that information in the proffer that was disclosed to the Defence.
10. This omission would have been even more glaring if DCT-032 had in fact been called to testify by the Defence. A brief narrative on the background on the issue will provide some context. On 12 June 2009, the Defence, *inter alia*, provided to the Prosecution a summary of the evidence of DCT-032 and gave timely notice of its

⁵ *Prosecutor v. Taylor*, SCSL-03-01-T, Trial Transcript, **Testimony of Moses Blah**, 15 May 2008, p. 9999-10000 (stating that JPK was killed in the forest around Foya airfield in Lofa County); **Testimony of TF1-375**, 25 June 2008, p. 12752; 12755.

⁶ Motion, Annex A, paras. 18, 24-25.

⁷ Motion, Confidential Annex C.

intention to call the witness to rebut the Prosecution's allegations that the said witness (DCT-032) had been involved in the death of Johnny Paul Koroma.⁸ On the 3 May 2010, the Defence further disclosed its intention to call DCT-032 as a reserve witness for coming two weeks.⁹ It was following that notice that the Prosecution disclosed the proffer referred to above (Confidential Annex A hereto), "so as to avoid any delay in cross-examination".¹⁰ From this disclosure, it was very clear that the Prosecution intended to use the information in the proffer in order to cross-examine DCT-032 and discredit his evidence for the Defence. It was however convenient for that purpose for the Prosecution not to disclose any information that could lend credibility to the witness's anticipated evidence. As a result, the Prosecution deliberately withheld all exculpatory information relating to the alleged death and burial of Johnny Paul Koroma, in particular, the results of their investigation into the matter which had turned out negative and which if disclosed would only have corroborated the witness's evidence for the Defence. The Defence submits that this selective disclosure of Rule 68 material by the Prosecution violates the Rules of this court, interferes with the administration of justice and cannot be condoned by the Trial Chamber.

Evidence Relating to Payments Made to DCT-032 is Exculpatory in that it Affects the Credibility of Prosecution Evidence

11. The Trial Chamber has recently emphasized that disclosure under Rule 68 has been "liberally construed to apply to all exculpatory material that is in the custody or control of the Prosecutor, and **is not limited to material relating to 'Prosecution witnesses'**".¹¹ Consequently, paragraphs 6-11 of the Prosecution's Response are irrelevant in that they argue an artificial distinction between a potential Prosecution witness and a source.

⁸ *Prosecutor v. Taylor*, SCSL-03-01-T-793, Updated and Corrected Defence Rule 73ter Filing of Witness Summaries, 12 June 2009, Annex A, CMS p. 25505 (Part of the summary states, "W was linked to the death of Johnny Paul Koroma by Prosecution witnesses, but will deny having knowledge of his death").

⁹ *Prosecutor v. Taylor*, SCSL-03-01-T-951, Defence Witness Order for the Week 17-21 May 2010, 3 May 2010 and again in *Prosecutor v. Taylor*, SCSL-03-01-T-966, Defence Witness Order for the Week 7-11 June 2010, 25 May 2010.

¹⁰ Response, para. 9.

¹¹ *Prosecutor v. Taylor*, SCSL-03-01-T-1084, Decision on Defence Motion for Disclosure of Statement and Prosecution Payments Made to DCT-097, 23 September 2010, para. 11 ("**DCT-097 Disclosure Decision**") (emphasis added).

12. The Prosecution's claim that they never considered DCT-032 as a potential witness but only as a source,¹² and therefore payments made to him are not liable to disclosure under Rule 68(B) is rather artificial and convenient, as is the entire Response.
13. While the Prosecution would like to categorize the witness as a source, that is, someone who assisted them to procure independent evidence, the reality is that DCT-032 did more than just point the Prosecution towards independent evidence. In the course of the several months DCT-032 was in contact with the Prosecution,¹³ he gave them substantive evidence, *albeit* false, going to material allegations in this case. A source would for instance only have shown the Prosecution the grave site of Johnny Paul Koroma. In this case however, DCT-032 was asked substantive questions going to his background, his role in the conflict, and his alleged links to the death of Johnny Paul Koroma.
14. Furthermore, and most importantly, based on his Affidavit, members of the Prosecution told DCT-032 that if the exhumed body(ies) turned out to be that of Johnny Paul Koroma, they would want him to testify.¹⁴ In the plainest sense of the phrase, this makes him a potential Prosecution witness.¹⁵ Consequently, given the standard set forth in the ICTR *Karemera* Disclosure Decision recently cited by this Trial Chamber¹⁶ payments made and promised to DCT-032 should be disclosed.
15. In any event, neither the definition nor the scope of the *Karemera* Disclosure Decision is exhaustive. Consequently, there is nothing to bind the Trial Chamber within the four corners of that decision. This Trial Chamber should be capable of

¹² Response, paras. 6 and 9.

¹³ See Confidential Annex A attached.

¹⁴ Motion, Confidential Annex A, paras. 3 and 17.

¹⁵ The Defence submits that this representation to the witness by the Prosecution is sufficient to make him a potential witness.

¹⁶ *Prosecutor v. Karemera, Ngirumpatse and Nzirorera*, ICTR-98-44-PT, Decision on Defence Motion for Full Disclosure of Payments to Witnesses, 23 August 2005, para. 7, cited favorably in DCT-097 Disclosure Decision, at para. 21.

determining on the facts before it, whether DCT-032 was a mere source or a potential witness. Furthermore, whether that distinction is in any event relevant for purposes of the Prosecution's disclosure obligations in situations where the exculpatory nature of the information is not in doubt.

16. The Defence further notes from the Prosecution's own practice that the line between source and (potential) witness is not as clear cut as the Prosecution argues in this case. For instance, based on disbursement records and testimony of Varmuyan Sheriff, King Perry, Dauda Aruna Fornie and TF1-375, these witnesses were used both as witnesses, who actually testified in court, and as sources who led them to other witnesses.¹⁷
17. The Defence reiterates that the payments made and promised to DCT-032 are beyond those reasonably required for the management of witnesses. This is true not just in terms of the amounts disbursed but in regard to the purposes for which the Prosecution gave the money and made promises of relocation and reward to DCT-032.¹⁸ Certainly the expenses go beyond those legitimately set out in Rule 39(ii) as providing for the safety, support and assistance of potential witnesses and sources.

Evidence Relating to the Letter of Indemnity is Exculpatory in that it Affects the Credibility of Prosecution Evidence

18. In arguing against the disclosure of the letter of indemnity from Stephen Rapp to DCT-032, the Prosecution again relies on the false distinction between DCT-032 as a potential Prosecution witness and as a source. The same arguments above apply hereto. The Defence however further submits that the letter should be further testament to DCT-032's status as more than just a source. It is curious that the Prosecutor should write such a significant letter to a mere source.

¹⁷ See *Prosecutor v. Taylor*, SCSL-03-01-T-1090, Corrigendum to Defence Motion Requesting an Investigation into Contempt of Court by the Office of the Prosecution and its Investigators, 27 September 2010, Public Annex N. Also, the Affidavit of DCT-032 suggests that testifying Prosecution witnesses Moses Blah and Zig-Zag Marzah also acted as sources by way of linking the Prosecution to DCT-032. See Motion, Confidential Annex A, paras. 5 and 7.

¹⁸ Motion, Confidential Annex A, paras. 6, 8-12, 18-19 and 23.

19. The Defence submits that the letter is exculpatory in that it served as an incentive for DCT-032 to cooperate and to fabricate a story that fed into the Prosecution case.

III. CONCLUSION AND RELIEF REQUESTED

20. The Defence is justified in its request to the Trial Chamber to order disclosure of the information enumerated in paragraph 2 of the Motion under Rule 68 and in its request for the Trial Chamber to draw adverse inferences in light of the Prosecution's failure to disclose the same. The court should not allow the Prosecution to hide behind semantics or specious legal reasoning to evade its legal obligations.

Respectfully Submitted,



Courtenay Griffiths, Q.C.
Lead Counsel for Charles G. Taylor
Dated this 5th Day of October 2010,
The Hague, The Netherlands

Table of Authorities

Prosecutor v. Taylor

Prosecutor v. Taylor, SCSL-03-01-T-1096, Prosecution Response to Public with Confidential Annexes A-D Defence Motion for Disclosure of Exculpatory Information Relating to DCT-032, 1 October 2010

Prosecutor v. Taylor, SCSL-03-01-T-1090, Corrigendum to Defence Motion Requesting an Investigation into Contempt of Court by the Office of the Prosecution and its Investigators, 27 September 2010

Prosecutor v. Taylor, SCSL-03-01-T-1088, Public with Confidential Annexes A-D Defence Motion for Disclosure of Exculpatory Information Relating to DCT-032, 24 September 2010

Prosecutor v. Taylor, SCSL-03-01-T-1084, Decision on Defence Motion for Disclosure of Statement and Prosecution Payments Made to DCT-097, 23 September 2010

Prosecutor v. Taylor, SCSL-03-01-T-966, Defence Witness Order for the Week 7-11 June 2010

Prosecutor v. Taylor, SCSL-03-01-T-951, Defence Witness Order for the Week 17-21 May 2010, 3 May 2010 and again in

Prosecutor v. Taylor, SCSL-03-01-T-793, Updated and Corrected Defence Rule 73ter Filing of Witness Summaries, 12 June 2009

ICTR

Prosecutor v. Karemera, Ngirumpatse and Nzirorera, ICTR-98-44-PT, Decision on Defence Motion for Full Disclosure of Payments to Witnesses, 23 August 2005
<http://www.unictr.org/Portals/0/Case%5CEnglish%5CKaremera%5Ctrail%5C230805.pdf>



SPECIAL COURT FOR SIERRA LEONE
DOKTER VAN DER STAMSTRAAT 1 • 2265 BC LEIDSCHENDAM • THE NETHERLANDS
PHONE: +31 70 515 9701 or +31 70 515 (+Ext 9725)

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CONFIDENTIAL DOCUMENT CERTIFICATE

This certificate replaces the following confidential document which has been filed in the Confidential Case File.

Case Name: **The Prosecutor – v- Charles Ghankay Taylor**

Case Number: **SCSL-03-01-T**

Document Index Number: **1098**

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Application

Order

Indictment

Reply

Motion

Correspondence

Document Title:

Public with confidential Annex A Defence reply to Prosecution response to Defence motion for disclosure of exculpatory information relating to DCT-032

Name of Officer:

Alhassan Fornah

Signed: