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SCSL-03-01-T
(30979-30989)

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THE SPECIAL COURT FOR SIERRA LEONE

Trial Chamber II

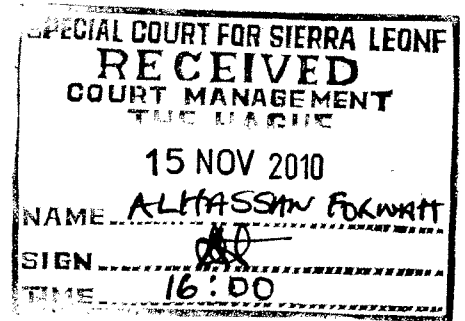
Before: Justice Julia Sebutinde, Presiding
Justice Richard Lussick
Justice Teresa Doherty
Justice El Hadji Malick Sow, Alternate

Registrar: Ms. Binta Mansaray

Date: 15 November 2010

Case No.: SCSL-03-01-T

THE PROSECUTOR
-v-
CHARLES GHANKAY TAYLOR



PUBLIC

**DEFENCE MOTION SEEKING LEAVE TO APPEAL THE DECISION ON THE
DEFENCE MOTION REQUESTING AN INVESTIGATION INTO CONTEMPT OF COURT
BY THE OFFICE OF THE PROSECUTION AND ITS INVESTIGATORS**

Office of the Prosecutor:
Ms. Brenda J. Hollis

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. Following its oral decision handed down 22 October 2010,¹ dismissing the *Defence Motion Requesting an Investigation into Contempt of Court by the Office of the Prosecution and its Investigators*, the Trial Chamber, on 12 November 2010, issued a reasoned written decision on the same.² The Defence hereby seeks leave to appeal that decision as the Decision is replete with errors of law and/or fact which give rise to exceptional circumstance and occasion irreparable prejudice.
2. Generally, the Trial Chamber erred in law and/or fact in finding that the Defence Motion:
 - a. amounts to a request for a general audit of the Prosecution's operations since the inception of the court in 2002, in that it does not sufficiently identify the persons subject of the contempt allegations and their corresponding contemptuous acts;
 - b. is time-barred due to undue delays in bringing forth action for contempt; and
 - c. does not contain any credible allegations of contempt that satisfy the very low "reason to believe" evidentiary threshold under Rule 77; and
 - d. could not have requested an analysis of improper inducements under Rule 77 because Rule 39(ii) was the appropriate mechanism.

II. APPLICABLE LAW

3. Rule 73(B) sets out the legal standard for leave to appeal: It provides that:

"Decisions rendered on such motions [brought by either party for appropriate ruling or relief after the initial appearance of the accused] are without interlocutory appeal. However in exceptional circumstances and to avoid irreparable prejudice to a party, the Trial Chamber may give leave to appeal. Such leave should be sought within 3 days of the decision and shall not operate as a stay of proceedings unless the Trial Chamber so orders."

¹ *Prosecutor v. Taylor*, SCSL-03-1-T, Transcript, 22 October 2010, p. 48338.

² *Prosecutor v. Taylor*, SCSL-03-01-T-1118, Decision on Defence Motion Requesting an Investigation into Contempt of Court by the Office of the Prosecution and its Investigators, 11 November 2010 ("**Decision**"). The procedural history to this Impugned Decision includes *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 ("**Motion**"); *Prosecutor v. Taylor*, SCSL-03-01-T-1097, Prosecution Response to Defence Motion Requesting an Investigation into Contempt of Court by the Office of the Prosecution and its Investigators, 4 October 2010 ("**Response**"); *Prosecutor v. Taylor*, SCSL-03-01-T-1102, Defence Reply to Prosecution Response to Defence Motion Requesting an Investigation into Contempt of Court by the Office of the Prosecution and its Investigators, 11 October 2010 ("**Reply**").

4. Rule 73(B) is a restrictive provision³ and an interlocutory appeal does not lie as of right. The rationale behind this rule is that criminal trials must not be heavily encumbered and consequently unduly delayed by interlocutory appeals.⁴ The party seeking leave to appeal must meet the conjunctive conditions of “exceptional circumstances” and “irreparable prejudice” before the Trial Chamber can exercise its discretion.⁵
5. There is no comprehensive or exhaustive definition of “exceptional circumstances” as the “notion is one that does not lend itself to a fixed meaning [and it cannot be] plausibly maintained that the categories of ‘exceptional circumstances’ are closed of fixed”.⁶ Exceptional circumstances will depend on circumstances each case. Instances may include where the question is one of general principle to be decided for the first time; where the interests of justice *might* be interfered with (there is no requirement to prove that such interference *will* definitely arise); where further decision is conducive to the interests of justice; or where the question is of fundamental legal importance.⁷
6. Irreparable prejudice arises where the Trial Chamber’s decision is not remediable on final appeal. The Appeals Chamber has noted that although most decisions will be capable of disposal at final appeal “the underlying rationale for allowing such appeals is that certain matters cannot be cured or resolved by final appeal against judgment.”⁸

III. SUBMISSIONS

Grounds of Appeal

7. The Trial Chamber’s preliminary and dispositive finding that the Defence Motion amounts to a request for a general audit of the Prosecution’s operations since 2002, in that it does not sufficiently identify the persons subject of the contempt allegations

³ *Prosecutor v. Sesay et al.*, SCSL-2004-15-PT, Decision on the Prosecutor’s Application for Leave to File an Interlocutory Appeal against the Decision on the Prosecution Motion for Joinder, 13 February 2004, para. 11 (“**RUF LTA Joinder Decision**”).

⁴ *Id.*

⁵ RUF LTA Joinder Decision, para. 10.

⁶ *Prosecutor v. Sesay et al.*, SCSL-2004-15-T-357, Decision on Defence Applications for Leave to Appeal Ruling of 3 February 2005 on the Exclusion of Statements of Witness TF1-141, 28 April 2005, para. 21 (“**RUF LTA Exclusion Decision**”).

⁷ RUF LTA Exclusion Decision, para. 26.

⁸ *Prosecutor v. Norman et al.*, SCSL-04-14-T-669, Decision on Prosecution Appeal against Trial Chamber Decision of 2 August 2004 Refusing Leave to File an Interlocutory Appeal, 17 January 2005, para 29.

and their corresponding contemptuous acts, amounts to an error of law and/or fact in that, *inter alia*:

- a. As matter of law, Rule 77 does not prevent a general audit of the Prosecution's operations where the Prosecution has systematically adopted and applied practices that amount to acts of contempt as alleged in the Motion. Indeed, there is nothing to stop the Trial Chamber from ordering an investigation against the Office of the Prosecutor (OTP), as a *legal persona* constituted under Article 15 of the Statute and Rule 37 of the Rules, apart and separate from the natural persons employed in the Prosecution.
- b. The degree of specificity the Trial Chamber imports into Rule 77 has no basis in law to the extent that the Chamber fails to appreciate that a request for an investigation of contempt of court, unlike criminal proceedings, *stricto sensu*, is not an end in itself but merely the beginning of a process that could end in criminal proceedings. The instant stage of the process⁹ is merely an investigation and could either establish no case for contempt or sufficient grounds to issue an indictment. An investigation naturally requires a degree of flexibility.¹⁰ A request for an investigation thus naturally lacks the specificity of an Indictment.¹¹
- c. The Defence Motion considered as a whole, including the Affidavits thereto, sufficiently identifies most of the persons subject of contempt and the corresponding contemptuous allegations. The Trial Chamber's finding thus erroneously emphasizes form over substance. That some of the persons are not

⁹ The three-step process is clearly defined in Rule 77 itself and also in *Prosecutor v. Brima et al*, SCSL-03-01-AR77-315, Decision on Defence Appeal Motion Pursuant to Rule 77(J) on both the Imposition of Interim Measures and an Order Pursuant to Rule 77(C)(iii), 23 June 2005 ("**AFRC Contempt Appeals Decision**"), paras. 25-27.

¹⁰ When the Defence was the subject of a contempt investigation, it acknowledged that an investigation must necessarily follow the evidence where it leads. *Prosecutor v. Taylor*, SCSL-03-01-T-668, Confidential Defence Response to Prosecution Motion for an Investigation by Independent Counsel into Contempt of the Special Court for Sierra Leone and for Interim Measures, 13 November 2008, paras. 12, 13, 19 and 28.

¹¹ Compare, however, the relative specificity of the Defence's request for an investigation to the predominantly unspecified and unlimited categories of persons with whom the Prosecution alleges Charles Taylor to have been part of a joint criminal enterprise.

identified with sufficient specificity does not detract from those who are clearly identified.¹²

- d. In any event, the Trial Chamber's preliminary dispositive finding that the Defence Motion should fail for lack of specificity contradicts its subsequent approach on the Merits¹³ whereby the Chamber goes on to consider the specific allegations in the Motion and Annexes with respect to the persons named therein. That the Trial Chamber should issue a decision whose reasoning is internally contradictory amounts to an error of law.
8. The Trial Chamber's other preliminary and general dispositive finding that the Defence Motion is time-barred due to undue delays in bringing forth action for contempt¹⁴ amounts to errors of law and/or fact in that, *inter alia*:
- a. In finding delay, the Trial Chamber solely and erroneously focused on the time at which the contemptuous conduct occurred,¹⁵ and not the time at which the Defence learned of the contemptuous conduct such that it could be in a position to raise it. Had the Trial Chamber evaluated the question of delay from the time the Defence became aware of the contemptuous conduct, it would not have made findings of undue delay. Indeed, in a separate but related Motion relating to DCT-032, Justice Sebutinde, dissenting, found that the Defence had acted diligently in bringing the complaint in relation to that witness.¹⁶
 - b. Significantly, the Defence never suggested that the individual acts complained of did not in and of themselves amount to acts of contempt at the time of

¹² Decision, para. 29 (the Trial Chamber notes those people who are sufficiently specified). For example, allegations against Brenda Hollis are contained in the affidavit of DCT-133 and relate, *inter alia*, to payment of inducements and discussions of a bribe with a potential witness. Allegations against David Crane are contained in the affidavit of DCT-102 and relate to, *inter alia*, allegations of threats and intimidation of a witness.

¹³ Decision, paras. 32 – 149.

¹⁴ Decision, paras. 25 and 26.

¹⁵ For ex., Decision, paras. 24, 45 (the Trial Chamber notes that the alleged assault occurred 8 years ago but does not consider that the Defence was only told about it in August 2010), 50, 56, 89, 98, 104, 110 (the Trial Chamber notes that DCT-097 was paid by the Prosecution in 2005 and 2006, but knows that the Defence only received disclosure of these amounts in September 2010), 116, 117, 121, 127 (the Trial Chamber erroneously queries why the Defence did not cross-examine Abu Keita in January 2008 in relation to information about promises of relocation found in a newspaper article (Exhibit D-468) which is dated 29 September 2009, some 20 months after he testified), and 145.

¹⁶ *Prosecutor v. Taylor*, SCSL-03-01-T-1104, Decision on Public with Confidential Annexes A-D Defence Motion for Disclosure of Exculpatory Information Relating to DCT-032, 20 October 2010, Separate Concurring Opinion of Justice Julia Sebutinde, para. 3.

commission.¹⁷ Rather, that taken individually and as isolated events, the Defence was prepared to overlook the Prosecution's acts of malfeasance.¹⁸ However, the systematic and cumulative effect of the Prosecution's misconduct elevated those acts to the level of warranting investigation due to the prejudicial impact on the Defence case. That the Trial Chamber misconstrued this argument and went on to make a dispositive finding on it amounts to an error of law and/or fact.

9. The Trial Chamber's deliberations and findings on the Merits also contain a plethora of errors of fact and/or law in that, *inter alia*:
- a. The Trial Chamber erred in law by applying a much higher standard to the otherwise very low "reason to believe" threshold under Rule 77. The Chamber's credibility analysis went beyond what was necessary and contradicts the Appeals Chamber's finding that this stage should not be a summary trial concerned with the veracity of the allegations.¹⁹
 - b. The Trial Chamber made an error of law by importing a further requirement that there must be a link between the alleged act of contempt and a witness' unwillingness to testify when assessing a witness' credibility and/or prejudice to the Defence.²⁰ This erroneously narrows the definition of what could constitute "interference with the administration of justice" as conduct enumerated under Rule 77(A).
 - c. Furthermore, in conducting a summary trial, the Trial Chamber, contrary to established principles of procedure,²¹ erred in law by allowing the Prosecution, a party to the proceedings and subject of the Defence Motion, to put forward bald and self-serving assertions of fact as legal submissions,²² and proceeded to rely on

¹⁷ Decision, para. 25.

¹⁸ Reply, para. 10 and FN 10.

¹⁹ AFRC Contempt Appeals Decision, paras. 16-17 (finding that the evidentiary standard of "reason to believe", which is different and lower than that of a *prima facie* case, had been met where the Trial Chamber relied on two statements that were "not on oath and cried out for cross-examination" because "at this initiating stage, the court is not concerned with their veracity").

²⁰ Decision, paras. 51, 60, 64, 89, 98, 104, 111, 117, and 121.

²¹ AFRC Contempt Appeals Decision, para. 11 (stating that the Court should not be drawn into a summary trial at this stage, but recognizing that the opposing party is entitled to provide evidence that "entirely refuted the allegation" such that a "demonstrably mistaken allegation should be exposed at once").

²² For example, Decision, paras. 54, 69, 87, 94, 102, and 120.

such assertions as gospel truth without evaluating it.²³ In so doing, the Trial Chamber made another error of in law in that it applied different standards for the Defence and the Prosecution regarding the assessment and credibility of the evidence.²⁴

- d. Furthermore, the Trial Chamber erred in law and fact by reading into the record evidence that was not adduced by either party with respect to findings relating to DCT-102,²⁵ Abu Keita,²⁶ and DCT-192.²⁷ This level of ‘judicial activism’ in factual findings favorable to the Prosecution contrasted with the Trial Chamber’s close scrutiny of the perceived factual inadequacies of the Defence Motion.²⁸ The Trial Chamber’s show of double standards leaves an impression of partiality and that in and of itself constitutes an error of law.
10. The Trial Chamber’s findings on the question of improper inducements generally,²⁹ also contain a number of errors in law and/or fact, in that, *inter alia*:
- a. The Trial Chamber’s finding³⁰ that allegations of contempt of court under Rule 77 and allegations of abuse of discretion under Rule 39(ii) in relation to improper payments to witnesses are mutually exclusive is fundamentally flawed. Quite to the contrary, the two rules are complementary in that certain acts which amount to

²³ For example, Decision, paras. 56, 72, 77, 89, 98, 104, 110, and 121.

²⁴ While the Chamber readily accepted, *albeit* erroneously, evidence from the Prosecution bar, it for instance, took issue at paragraph 71 with the fact that the declaration of DCT-097 was unattested. Such show of double standards creates an impression of partiality

²⁵ Decision, para. 60 (“... the Trial Chamber notes that the so-called “offer” of \$90,000 [to DCT-102] was part of the costs of relocation and finds that the Defence have not demonstrated that this was excessive”. This factual finding absolutely has no basis on the facts, nor could it be inferred from the facts that were before the Chamber.); also para. 47 (the Trial Chamber erroneously found that DCT-102 stated that he was “later interviewed by David Crane” which is contrary to the witness’ assertion in his affidavit. This tainted the Chamber’s understanding of his entire evidence).

²⁶ Decision, para. 127 (the Trial Chamber noted that the fact that Abu Keita testified openly was an indication that he was not concerned about his security and was “consistent with the Prosecution position that it did not promise him relocation”. However, in its Response, the Prosecution never said that they did not promise him relocation, nor could that factual finding be reasonably inferred from the Prosecution’s glaring silence on that point).

²⁷ Decision, para. 45 (the Trial Chamber finds that DCT-192 was never a potential witness in this trial, where in fact it is clear DCT-192 was a potential Defence witness in this trial and a potential Prosecution witness in the CDF Trial when the assault occurred. Rule 77(A)(iv) encompasses acts of contempt against potential witness and does not state the contempt had to occur in respect of the same trial).

²⁸ See, for ex, Decision, paras. 72, and 110.

²⁹ Decision, paras. 37 - 40.

³⁰ Decision, para. 40.

abuse of discretion could also elevate to the level of criminality sanctioned under Rule 77.

- b. The Trial Chamber also committed an error of law and/or fact by finding that unchallenged evidence of negotiations by the Prosecutor on two separate occasions of an amount of money requested by a potential witness in exchange for testimony³¹ or money paid at the witness' instigation,³² did not constitute offering a bribe under Rule 77(A)(iv). That the requested money was never paid and the witness never testified, or that it was the witness who requested money to begin with, is immaterial and is certainly not dispositive.
- c. The Trial Chamber committed an error of law and/or fact by misconstruing the Defence allegation with respect to *unsolicited offers* of security and/or relocation as inducement. The Trial Chamber could not properly find that this was a legitimate and appropriate exercise of the Prosecution's discretion under Rule 39(ii) without any information of any prior security risks, threat assessments, etc done by the Prosecution before making such offers.³³

Exceptional Circumstances and Irreparable Prejudice

11. *In casu*, the foregoing errors of law and/or fact individually and collectively, when considered against the nature and gravity of the dismissed allegations against the Prosecution amount to exceptional circumstances in that: the interests of justice *might* be interfered with, and/or because further decision is conducive to the interests of justice, and/or because the case raises a question of fundamental legal importance.
12. The impact of allegations in this case goes beyond the individuals identified in the Motion. The Motion impacts on the integrity of the Office of the Prosecutor as organ

³¹ Decision, paras. 82-83 (the Trial Chamber's finding of fact that there is no evidence that DCT-133 and Brenda Hollis negotiated a fee for the witness' evidence clearly ignores the totality of evidence before the Court and the Prosecution's own record of money disbursed to DCT-133/TF1-575, at Annex 2 of their Response. Brenda Hollis' words that the Prosecution did not pay for evidence (since such had to be disclosed to the Defence) did not match her actions, as she sent DCT-133 \$500 and had a follow-up meeting with him at which price was discussed, further and apart from ongoing tacit and implied assurances by others in the OTP that DCT-133 would in fact receive money, if only after the trial. All this uncontested evidence speaks to offers of a bribe).

³² Decision, para. 145 (the Trial Chamber found that where the witness requested money, it could not be considered bribery for the Prosecution to pay the money).

³³ For example, Decision, paras. 78, 100/104, and 109/112.

of the court;³⁴ moreover, one that is charged with wide discretionary powers and is consequently expected to maintain the highest standard of competence and integrity. Challenges to the Prosecution's integrity undermine the integrity and lawfulness of the entire judicial process against the Accused. The Trial Chamber's errors of law and/or fact considered against this background thus elevate the dismissal to one of exceptional circumstances.

13. Further/alternatively, this case raises novel and fundamental questions of law and/or fact. The case raises, for the first time, allegations of contempt of court against members of the Prosecution individually and collectively in circumstances wherein the alleged acts of contempt could have far-reaching implications on the integrity of the Special Court in general and the case against Mr Taylor in particular.
14. The Trial Chamber's adherence to procedural technicalities vis-à-vis the Defence's substantive and far-reaching concerns at the Prosecution's conduct³⁵ also raises a question of fundamental legal importance and makes further decision conducive to the interests of justice.
15. An independent investigation is the only way through which the Prosecution's malfeasance can be investigated fully, after which any effect of such misconduct could be fully assessed during Judgement deliberations. There are no other processes or remedies available to the Defence and indeed the Court to fully assess the propriety or otherwise of the conduct complained of.³⁶ Furthermore, this issue cannot be remedied on Appeal or through a re-trial. The Defence would therefore suffer irreparable prejudice if the matter is not considered now.
16. The Prosecution's conduct which included threats, intimidation, bribes, and inducements has already prejudiced the Defence in that it induced some of the

³⁴ Allegations against Brenda Hollis and David Crane not only relate to them in their individual capacities but also in the official capacity as the embodiment of the Office of the Prosecutor as an organ of the Court.

³⁵ See Reply, para. 13 and FN 12 citing *Haradinaj* Appeal, para. 40 (the Appeals Chamber chastised the Trial Chamber for placing "undue emphasis" on respecting deadlines instead of appreciating the gravity of witness intimidation and taking steps to safeguard the fairness of the proceedings).

³⁶ While the cross-examination of some of the Prosecution witnesses went some way to establish Prosecution malpractices especially with respect to witness payments, and while other instances could have been revealed through Defence evidence, had the Defence chosen to call some of the witnesses concerned, both processes still do not provide an exhaustive forensic investigation, as would an independent investigation. This is precisely because the witnesses would only be privy to the limited facts relating to them. No witness for instance could speak to the internal workings of the Prosecution.


witnesses or potential witnesses to give false information against the Accused. The fact that some potential witnesses “exploited” or “defrauded” or “took advantage of” the Prosecution’s benefits regime to the point of giving false information is noted by the Trial Chamber.³⁷ Indeed that is the crux of the Defence case. The Prosecution was a willing party to, encouraged, or was complicit in this process, which, *inter alia*, ultimately deprived the Defence of untainted witnesses. An investigation into contempt is therefore the only way through which the full impact and implications of this prejudice can be assessed. The Defence would therefore suffer irreparable prejudice if this matter is not resolved at this stage.

17. The Defence submits that because much of the evidence of contempt by the Prosecution was never led in court, as most of the potential witnesses had been compromised by the Prosecution, the full impact and implications of the Prosecution’s contemptuous conduct cannot be considered adequately “at the stage of final deliberations, taking into account the evidence adduced and the cross-examination of the witnesses in question”.³⁸

IV. CONCLUSION AND RELIEF REQUESTED

18. The Defence has met the conjunctive requirements for leave to appeal and thus leave must be granted.

Respectfully Submitted,



Courtenay Griffiths, Q.C.
Lead Counsel for Charles G. Taylor
Dated this 15th Day of November 2010,
The Hague, The Netherlands

³⁷ Decision, paras. 77, 111 and 145.

³⁸ Decision, para. 40 (stating that such would be the appropriate recourse under Rule 39(ii) and arguments relating to abuse of discretion).

Table of Authorities

Prosecutor v. Taylor

Prosecutor v. Taylor, SCSL-03-01-T-1118, Decision on Defence Motion Requesting an Investigation into Contempt of Court by the Office of the Prosecution and its Investigators, 11 November 2010

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Other Special Court Cases

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Prosecutor v. Sesay et al., SCSL-2004-15-PT, Decision on the Prosecutor's Application for Leave to File an Interlocutory Appeal against the Decision on the Prosecution Motion for Joinder, 13 February 2004

Prosecutor v. Sesay et al., SCSL-2004-15-T-357, Decision on Defence Applications for Leave to Appeal Ruling of 3 February 2005 on the Exclusion of Statements of Witness TF1-141, 28 April 2005

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