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SCSL-03-01-T
(31068-31075)

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THE SPECIAL COURT FOR SIERRA LEONE

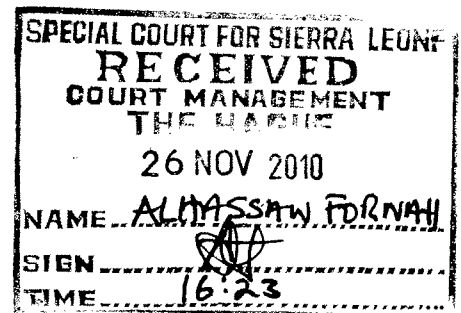
Trial Chamber II

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

Registrar: Ms. Binta Mansaray

Date: 26 November 2010

Case No.: SCSL-03-01-T



THE PROSECUTOR

-v-

CHARLES GHANKAY TAYLOR

PUBLIC

**DEFENCE REPLY TO PROSECUTION RESPONSE TO 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. This is the Defence Reply to the Prosecution Response¹ to the *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*.²

II. SUBMISSIONS

Exceptional Circumstances

2. The main thrust of the Prosecution's argument on exceptional circumstances is that neither the context nor the substance of the alleged errors of law and/or fact in the impugned decision, in and of themselves, gives rise to exceptional circumstances. Indeed, that the context in which the decision is made does not alter this principle.³ The suggestion by the Prosecution in this regard, that exceptional circumstances, could be some extraneous legal notion divorced and independent of the errors in the impugned decision and the context of that decision, is pure legal nonsense.
3. While the jurisprudence suggests that the probability of an erroneous ruling does not *of itself* constitute exceptional circumstances, there is nothing in the jurisprudence to suggest that the Trial Chamber could not consider these factors alongside other factors, such as in this case where there are multiple probable errors made in relation to serious allegations of contempt. The Prosecution itself, in the RUF Trial, has

¹ *Prosecutor v. Taylor*, SCSL-03-01-T-1126, Public with Confidential Annexes 2 & 3 Prosecution Response to 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, 23 November 2010 (“**Response**”).

² *Prosecutor v. Taylor*, SCSL-03-01-T-1121, 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, 15 November 2010 (“**Motion**”). The procedural history includes *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**”); *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 (“**Original 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 (“**Original 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 (“**Original Reply**”).

³ Response, para. 4.

previously made a similar point, arguing that, the possibility of an erroneous ruling, “combined with the ‘important issues raised in [the] application’ [...], together result in ‘exceptional circumstances.’”⁴

4. Indeed, Trial Chamber I has granted leave to appeal where it was convinced of the “controversial nature of the specific issues addressed [...]” especially where the issues raised “may impact on the Accused [sic] right to a fair trial and the presentation of the Prosecution case”.⁵ Trial Chamber I has also granted leave to appeal a decision where the “substantiality of the issue raised in the context of international criminal law”,⁶ and again where the “seriousness” of the issues raised,⁷ contributed to the finding of exceptional circumstances. The Defence therefore reiterates that alleged errors of law or facts considered against the context in which the decision is made could give rise to exceptional circumstances.
5. Consequently, the fact that the impugned decision concerns the conduct and integrity of the Prosecution, collectively and individually, elevates the seriousness of the issues at stake and contributes to the exceptional circumstances requirement. In this context, it is indeed tragic that the Prosecution should downplay its statutory duty of *uberrimae fidei*, which as already argued, underlies the integrity of the entire judicial

⁴ *Prosecutor v. Sesay et al*, SCSL-04-15-T-839, Decision on Prosecution’s Application for Leave to Appeal Majority Decision Regarding the Objection to the Admissibility of Portions of Evidence of Witness TF1-371, 15 October 2007, p. 3-4, citing *Prosecutor v. Sesay et al*, SCSL-04-15-T, Prosecution Application for Leave to Appeal Majority Decision on Oral Objection Taken by Counsel for the Third Accused to the Admissibility of Portions of the Evidence of Witness TF1-371 filed publicly by the Office of the Prosecutor, 21 August 2006, para. 19 (the important issues raised were identified as “related to the interaction between rules concerning relevance and admissibility of evidence at a late stage in a party’s case, disclosure and the yardstick of fundamental fairness”. The Prosecution’s Application for leave to appeal was granted).

⁵ *Prosecutor v. Norman et al*, SCSL-04-14-T-312, Decision on Prosecution Application for Leave to Appeal “Decision on the First Accused’s Motion for Service and Arraignment on the Consolidated Indictment”, 15 December 2004, p. 3

⁶ *Prosecutor v. Sesay et al*, SCSL-04-15-T-839, Decision on Prosecution’s Application for Leave to Appeal Majority Decision Regarding the Objection to the Admissibility of Portions of Evidence of Witness TF1-371, 15 October 2007 (where Prosecution evidence had been stricken from the record).

⁷ *Prosecutor v. Sesay et al*, SCSL-04-15-T-1001, Decision on Prosecution Application for Leave to Appeal Decision on the Sesay Defence Motion Requesting the Lifting of Protective Measures in Respect of Certain Prosecution Witnesses, 25 February 2008, para. 16 (the “serious” issues concerned the disclosure of unredacted statements of protected witnesses who had information relevant to both the RUF defence and the Taylor prosecution); *Prosecutor v. Sesay et al*, SCSL-04-15-T-910, Decision on Leave to Appeal Decision on Sesay and Gbao Motion for Voluntary Withdrawal or Disqualification of Justice Bankole Thompson from the RUF Case, 6 December 2007, para. 4 (the “serious” issue concerned the disqualification of one of the judges).

- process.⁸ The argument underlines everything wrong with the Prosecution's investigative conduct: a failure to appreciate its position of authority and trust, and the need to conduct itself in a manner that is in keeping with that authority and trust.
6. At paragraph 6 of the Response, the Prosecution argues that the Defence does not raise any novel or fundamental question of law. Rather, that the Defence has shifted its original argument to now include the "Office of the Prosecutor" as a subject of the contempt allegations.⁹ The Prosecution's argument however blatantly disregards the plain language and title of the original Defence Motion, which argued that, there was "reason to believe that the *Prosecution* and its Investigators have knowingly and willfully interfered with the administration of justice"¹⁰, and consequently requested a "thorough investigation of these instances in order to establish the full extent of the *Prosecution's* investigatory misconduct",¹¹ and an investigation into "[t]he conduct of the *Prosecution*, including all its employees or agents...".¹² In making such a claim, the Prosecution also purposefully ignores the fact that the Defence requested that the *Prosecution's Witness Management Unit* be investigated by the independent counsel.¹³ The Prosecution's argument at paragraph 6 therefore has no basis in law or fact and must be dismissed.
7. At paragraph 7, the Prosecution contends that, in dismissing the Original Motion, the Trial Chamber only applied settled law, and that the Defence's argument that there is a novel or fundamental question of law at issue is frivolous. This is not correct. The Defence does not contest that timing must be taken into account when determining whether to order an investigation into contempt. This is settled law. What the Defence contests is that the time of reference is the date that the conduct occurred and not the date that the conduct came to the attention of the Defence, such that the Defence could have been in a position to do anything about it. This is not settled law.¹⁴ Further, that blind adherence to procedural technicalities such as timing, whether settled or not, should not frustrate the interests of justice.

⁸ Response, para. 6.

⁹ Response, para. 6.

¹⁰ Original Motion, para. 2.

¹¹ Original Motion, para. 12, see also paras. 13-14.

¹² Original Motion, para. 30(i).

¹³ Original Motion, paras. 19 and 31(ii).

¹⁴ Motion, para. 8(a) and 14.

Irreparable Prejudice

8. The Prosecution's apprehension of the impact a contempt investigation might have on the trial and its case is quite palpable from its Response.¹⁵ With respect to the Prosecution's two arguments at paragraph 10: Firstly, regarding the argument that the Defence is still trying to delay the present proceeding, contrary to its prior assurances, the Defence submits that the Prosecution's argument has no merit at all. Essentially, the Prosecution's argument seeks to foreclose any further litigation which may naturally arise simply because the court has issued a closing brief filing schedule. With respect to the second argument that the Defence is trying to sneak in evidence through the backdoor, the argument overlooks the Trial Chamber's Decision which has dismissed this point.¹⁶
9. The Defence does not presume that the investigation will result in one finding or another.¹⁷ The Defence however submits that this is the most appropriate stage for an investigation of this nature. If an investigation is not conducted at this stage, it may not be possible at a later stage, which would deprive the Trial Chamber and the parties of the ability to ascertain what truly transpired during the investigative and trial phases of the proceedings. Certification has previously been granted where the evidence being sought may no longer be obtainable due to the passage of time, such that the Accused may be prevented from having these issues adequately explored and addressed later during an Appeal.¹⁸
10. The Defence stands by its assertions that the allegations of contemptuous conduct against the Prosecution, whether by witnesses before the court or potential witnesses, has a direct impact on the integrity of the proceedings and the Accused's right to a fair trial.¹⁹ Indeed, allegations of misconduct by the Prosecution relating to witnesses and the obtaining of evidence, is of itself sufficient to corrupt the integrity of the

¹⁵ Response, paras. 8-11.

¹⁶ Decision, para. 35.

¹⁷ Response, para. 11.

¹⁸ *Prosecutor v. Norman et al*, SCSL-04-14-T-643, Decision on Motions by the First and Second Accused for Leave to Appeal the Chamber's Decision on their Motions for the Issuance of a Subpoena to the President of the Republic of Sierra Leone, 28 June 2006, para. 13 (wherein the Trial Chamber found that the possibility that evidence sought might not be obtainable and admitted as evidence on appeal created a risk of irreparable prejudice and thus certified the appeal).

¹⁹ Response, para. 12.

proceedings. Trial Chamber I has found that “irreparable prejudice may ensue to the integrity of the judicial system”, not just to the parties, where issues of fundamental legal importance are raised that could not be cured through the final disposition of the trial, should leave to appeal not be granted.²⁰

11. At paragraphs 12 and 14, the Prosecution argues that as the Defence elected not to call most of the individuals who provided affidavits or information attached to its Original Motion, it cannot claim prejudice that the evidence of these individuals is not before the court. The argument however erroneously presupposes that the Defence has an obligation to call witnesses at all, much less witnesses whose anticipated testimony and prior statements are contradictory due to alleged interference by the Prosecution and its investigators. Indeed the argument is self serving. This is a classic example of the Prosecution molding clay pigeons just to shoot them down.

III. CONCLUSION AND RELIEF REQUESTED

12. 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 26th Day of November 2010,
The Hague, The Netherlands

²⁰ *Prosecutor v. Norman et al*, SCSL-04-14-T-312, Decision on Prosecution Application for Leave to Appeal “Decision on the First Accused’s Motion for Service and Arraignment on the Consolidated Indictment”, 15 December 2004, p. 3 (application for leave to appeal granted).

Table of Authorities

Prosecutor v. Taylor

Prosecutor v. Taylor, SCSL-03-01-T-1126, Public with Confidential Annexes 2 & 3 Prosecution Response to 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, 23 November 2010

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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

Other Special Court Cases

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Prosecutor v. Sesay et al, SCSL-04-15-T-839, Decision on Prosecution's Application for Leave to Appeal Majority Decision Regarding the Objection to the Admissibility of Portions of Evidence of Witness TF1-371, 15 October 2007

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

Prosecutor v. Norman et al, SCSL-04-14-T-643, Decision on Motions by the First and Second Accused for Leave to Appeal the Chamber's Decision on their Motions for the Issuance of a Subpoena to the President of the Republic of Sierra Leone, 28 June 2006

Prosecutor v. Norman et al, SCSL-04-14-T-312, Decision on Prosecution Application for Leave to Appeal "Decision on the First Accused's Motion for Service and Arraignment on the Consolidated Indictment", 15 December 2004