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SCSL-03-01-T
(29206-29213)

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SPECIAL COURT FOR SIERRA LEONE

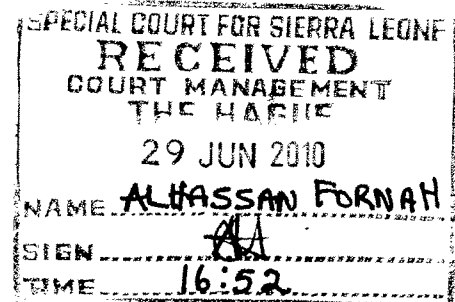
TRIAL CHAMBER II

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

Registrar: Binta Mansaray

Case No.: SCSL-03-1-T

Date: 29 June 2010



PROSECUTOR

v.

Charles Ghankay TAYLOR

DECISION ON PUBLIC WITH CONFIDENTIAL ANNEXES A AND B
PROSECUTION MOTION TO CALL THREE ADDITIONAL WITNESSES

Office of the Prosecutor:

Brenda J. Hollis
Nicholas Koumjian
Sigall Horovitz

Counsel for the Accused:

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

TRIAL CHAMBER II (“Trial Chamber”) of the Special Court for Sierra Leone (“Special Court”);
 SEISED of the “Public with Confidential Annexes A and B Prosecution Motion to Call Three Additional Witnesses”, filed on 20 May 2010 (“Motion”);¹

NOTING the “Public, with Annexes A and B Defence Response to Prosecution Motion to Call Three Additional Witnesses” filed on 31 May 2010 (“Response”);²

NOTING ALSO the “Prosecution Reply to Defence Response to Prosecution Motion to Call Three Additional Witnesses”, filed on 7 June 2010 (“Reply”);³

COGNISANT of the provisions of Article 17 of the Statute of the Special Court for Sierra Leone (“Statute”) and Rules 26bis, 54, 73 and 85(A) of the Rules of Procedure and Evidence (“Rules”);

HEREBY DECIDES AS FOLLOWS based solely on the written submissions of the parties pursuant to Rule 73(A).

I. SUBMISSIONS OF THE PARTIES

Prosecution Motion

1. The Prosecution seeks the Trial Chamber’s leave to re-open its case in order to call three additional witnesses, Ms. Naomi Campbell, Ms. Carol White and Ms. Mia Farrow. The Prosecution submits that it should be permitted to call these witnesses as:

- a) no information about the incident was known to the Prosecution until June 2009, and it has been reasonably diligent and cannot be faulted for failing to obtain the evidence before the close of the Prosecution case;⁴
- b) the proposed evidence is highly probative and material to the Indictment, and also contradicts the Accused’s testimony that he never possessed rough-diamonds;⁵
- c) there are no fairness considerations which substantially outweigh the significant contribution of this evidence to the Prosecution case and the Defence has been on notice of this incident since 4 December 2009 when Mia Farrow’s declaration was disclosed;⁶

¹ SCSL-03-01-T-962.

² SCSL-03-01-T-969.

³ SCSL-03-01-T-972.

⁴ Motion, paras 8-14.

⁵ Motion, paras 15-16.

- d) granting the present motion will not unduly prolong the trial, as the Prosecution can complete the examination-in-chief of all three witnesses within one court day.⁷
2. In the alternative, the Prosecution requests to be granted leave to present the proposed evidence in rebuttal as:
- a) it directly rebuts Defence evidence which arose *ex improviso* during the presentation of the Defence case-in-chief which could not have been reasonably anticipated by the Prosecution;⁸ and
- b) it has significant probative value.⁹

Defence Response

3. In response, the Defence submits that the Prosecution has no legal basis upon which to re-open its case, given that:
- a) the Prosecution must first show that the evidence could not have been found with the exercise of reasonable diligence before the close of its case and it did not act diligently in investigating possible evidence, as the Prosecution had reason to be aware, from the beginning of its case, of the investigative significance of the confluence of the Accused, diamonds and South Africa;¹⁰
- b) the Prosecution's lack of investigative diligence coupled with "luck in receiving tips" does not satisfy the threshold requirement to re-open its case;¹¹
- c) the evidence is inconsistent, highly prejudicial, and tangential to the real issues between the Prosecution and the Defence;¹²
- d) the anticipated testimony is of little probative value and is outweighed by prejudice to the Accused;¹³
- e) the advanced stage of the proceedings and the delay likely to be caused are factors to be considered in evaluation of fairness to the accused,¹⁴
- f) it is unlikely that the three witnesses will appear to give testimony and the proceedings must have some degree of finality.¹⁵

⁶ Motion, paras 15, 17.

⁷ Motion, para. 18.

⁸ Motion, paras 23-27.

⁹ Motion, paras 15-16, para. 22.

¹⁰ Response, paras 6, 8-11.

¹¹ Response, paras 12-13.

¹² Response, paras 14, 18, 20.

¹³ Response, para. 19.

¹⁴ Response, paras 21-23.

4. The Prosecution should not be granted leave to present this evidence in rebuttal, as:
- a) rebuttal evidence may be admitted only to address a new issue and the issues in question are not new or unforeseeable;¹⁶
 - b) rebuttal evidence cannot be used to challenge the credibility of a witness;¹⁷ and
 - c) the proposed evidence is completely lacking in probative value.¹⁸

Prosecution Reply

5. In reply, the Prosecution submits that:
- a) the Trial Chamber has an inherent power to allow a party to re-open its case for newly discovered evidence;¹⁹
 - b) the proposed evidence is probative and relevant to an important issue in dispute in this case²⁰; and
 - c) the Prosecution did exercise due diligence and the probative value of the evidence is not substantially outweighed by the need to ensure a fair trial.²¹

II. APPLICABLE LAW

6. The order of presentation of evidence in a trial is governed by Rule 85(A) which provides:

(A) Each party is entitled to call witnesses and present evidence. Unless otherwise directed by the Trial Chamber in the interests of justice, evidence at the trial shall be presented in the following sequence:

- (i) Evidence for the prosecution;
- (ii) Evidence for the defence;
- (iii) Prosecution evidence in rebuttal, with leave of the Trial Chamber;
- (iv) Evidence ordered by the Trial Chamber.

7. Rule 85(A) recognises the Trial Chamber's discretion to vary the prescribed sequence if it considers that it is in the interests of justice to do so. Moreover, although not specifically provided for

¹⁵ Response, paras 24-25.

¹⁶ Response, paras 26-27.

¹⁷ Response, para. 28.

¹⁸ Response, para. 30.

¹⁹ Reply, para. 2.

²⁰ Reply, paras 3-8.

²¹ Reply, paras 9-12.

in the Rules, international jurisprudence recognises that the Prosecution “may further be granted leave to re-open its case in order to present new evidence not previously available to it”.²²

8. The matters to be considered by the Trial Chamber on an application by a party to re-open its case are twofold. Firstly, the party must meet the threshold test of establishing that the evidence could not, with reasonable diligence, have been obtained and presented during its case in chief. Secondly, if such test is met, the Trial Chamber must be of the view that the probative value of the evidence is not substantially outweighed by the need to ensure a fair trial.²³

9. The aforesaid criteria for the admission of fresh evidence were established by the ICTY Appeals Chamber in the *Celebici* Appeal Judgement, where it held that:

[T]he primary consideration in determining an application for reopening a case to allow for the admission of fresh evidence is the question of whether, with reasonable diligence, the evidence could have been identified and presented in the case in chief of the party making the application. If it is shown that the evidence could **not** have been found with the exercise of reasonable diligence before the close of the case, the Trial Chamber should exercise its discretion as to whether to admit the evidence by reference to the probative value of the evidence and the fairness to the accused of admitting it late in the proceedings. These latter factors can be regarded as falling under the general discretion, reflected in Rule 89(D) of the Rules, to exclude evidence where its probative value is substantially outweighed by the need to ensure a fair trial.²⁴

10. The Rules do not contain a provision equivalent to Rule 89(D) of the ICTY Rules. Nevertheless, a general discretion rests with the Trial Chamber to exclude evidence where its probative value is substantially outweighed by the need to ensure a fair trial.²⁵

11. “Fresh evidence” was defined by the *Celebici* Trial Chamber

not merely as evidence that was not in fact in the possession of the Prosecution at the time of the conclusion of its case, but as evidence which by the exercise of reasonable diligence could not have been obtained by the Prosecution at that time.²⁶

12. In testing for re-opening, reasonable diligence is a threshold inquiry: if a party cannot establish that the evidence could not, with reasonable diligence, have been obtained and presented during its

²² *Prosecutor v. Brima, Kamara and Kanu*, SCSL-04-16-T, Decision on Confidential Prosecution Motion to Reopen the Prosecution Case to Present an Additional Prosecution Witness, 28 September 2006 (“AFRC Re-Opening Decision”), paras 17-18, 21. See also *Prosecution v. Delalić et al.*, IT-96-21-A, Judgement, 20 February 2001 (“*Celebici* Appeal Judgement”), para. 283; *Prosecutor v. Milošević*, IT-02-54-T, Decision on Application for a Limited Re-Opening of the Bosnia and Kosovo Components of the Prosecution Case with Confidential Annex, 13 December 2005, para. 12.

²³ See AFRC Re-Opening Decision, para. 18.

²⁴ *Celebici* Appeal Judgement, para. 283.

²⁵ AFRC Re-opening Decision, para. 19.

²⁶ *Prosecutor v. Delalić et al.*, IT-96-21-T, Decision on the Prosecution’s Alternative Request to Reopen the Prosecution’s Case, 19 August 1998 (“*Celebici* Trial Decision”), para. 26; affirmed in the *Celebici* Appeal Judgement, para. 286.

case-in-chief, the application fails, and the Trial Chamber need not consider the probative value of the evidence.²⁷

13. If the reasonable diligence standard is satisfied, the Trial Chamber still has a general discretion to deny re-opening if the probative value of the proposed evidence is substantially outweighed by the need to ensure a fair trial.²⁸ The principle to be applied in the exercise of this discretion was stated in the *Celebici* Trial Decision²⁹, and affirmed in the *Celebici* Appeal Judgement³⁰ as being that:

Great caution must be exercised by the Trial Chamber lest injustice be done to the accused, and it is therefore only in exceptional circumstances where the justice of the case so demands that the Trial Chamber will exercise its discretion to allow the Prosecution to adduce new evidence after the parties to a criminal trial have closed their case.

14. The burden of proving that the new evidence could not have been obtained by the Prosecution with the exercise of reasonable diligence before the close of its case rests squarely on the Prosecution.³¹

III. DELIBERATIONS

Reasonable Diligence

15. The Prosecution's contention is that it closed its case on 27 February 2009, but did not receive information that the Accused gave Naomi Campbell a diamond until June 2009, and that therefore it was not possible, with reasonable diligence, to obtain and present such evidence during its case-in-chief.³² The Defence, on the other hand, disputes that the Prosecution acted with due diligence. The Defence argues that the Prosecution should have investigated the circumstances of each of the Accused's travels and, in particular, the Accused's trip to South Africa, in order to ascertain whether he was carrying diamonds, where the diamonds came from, who was present with him on each of those trips, and whether the trips resulted in an arms shipment.³³

²⁷ *Prosecutor v. Milosevic*, Case No IT-02-54-T, Decision on Application for a Limited Re-opening of the Bosnia and Kosovo Components of the Prosecution Case With Confidential Annex, dated 13 December 2005, para. 22 ("*Milosevic* Decision").

²⁸ *Celebici Appeal Judgement*, para. 283; See also *Milosevic* Decision, para. 12.

²⁹ *Celebici Trial Decision*, para. 27.

³⁰ *Celebici Appeal Judgement*, para. 288.

³¹ *Celebici Trial Decision*, para. 26; Affirmed in the *Celebici Appeal Judgement*, para. 286; See also *Milosevic Decision*, *op.cit.*, para. 11.

³² Motion, paras 8-14.

³³ Response, paras 8-13.

16. In the Trial Chamber's opinion, the Defence's arguments seek to place unreasonable requirements on the Prosecution and do not have any validity in the absence of a reason for the Prosecution to suspect that the Accused may have given away diamonds on the South African trip. The Trial Chamber accepts that no information to that effect came into the Prosecution's possession until June 2009, well after it had closed its case. The Trial Chamber also accepts that after the Prosecution received such information it made many unsuccessful attempts to contact Ms. Campbell.³⁴

17. Accordingly, the Trial Chamber is satisfied not only that the Prosecution has shown that it could not, with reasonable diligence, have obtained and presented the fresh evidence during its case in chief, but that it subsequently acted with reasonable diligence to obtain such evidence.

Probative Value of the Evidence

18. The Trial Chamber, having perused the declaration of Mia Farrow and the interview notes of Carol White,³⁵ is satisfied that the proposed fresh evidence is highly probative and material to the Indictment.

19. On the question of fairness to the Accused, the Trial Chamber notes that the Defence has not been taken by surprise by the proposed fresh evidence, since Ms. Farrow's declaration was disclosed to the Defence on 4 December 2009³⁶ and the Defence learned of Carol White's evidence even before the Prosecution.³⁷ The Trial Chamber also notes the Prosecution's assurance that "it can complete the direct examination of all three witnesses within one court day",³⁸ and is satisfied that any delay caused by the re-opening of the Prosecution's case would not be of any significant length of time. The Trial Chamber is also satisfied that no injustice would be caused to the Defence by such re-opening in that it will be entitled to test the evidence of the proposed witnesses by cross-examination and may apply for time to make further investigations and call further evidence, if necessary.

20. Accordingly, the Trial Chamber finds that this is an appropriate case for the Trial Chamber to exercise its discretion to allow the Motion, in that the probative value of the proposed fresh evidence is not substantially outweighed by the need to ensure a fair trial.

³⁴ See Motion, paras 8-12.

³⁵ Confidential Annexes A and B to the Motion respectively.

³⁶ Motion, para 17.

³⁷ Motion, para 17.

³⁸ Motion, para 18.

21. In the interests of a fair and expeditious trial, the Trial Chamber is of the view that the best procedure is to allow the Prosecution to re-open its case so that the additional Prosecution witnesses can be interposed between Defence witnesses.

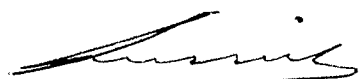
22. In the circumstances, it is not necessary for the Trial Chamber to consider the Prosecution's alternative application to call evidence in rebuttal.

FOR THE ABOVE REASONS, THE TRIAL CHAMBER

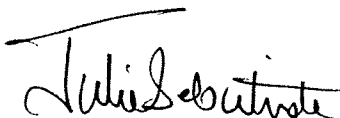
HEREBY GRANTS THE MOTION; and

DIRECTS the Prosecution to call the proposed additional witnesses as soon as practicable and in any event before the close of the Defence case.

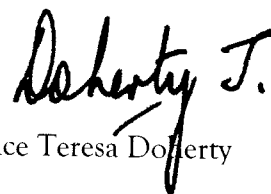
Done at The Hague, The Netherlands, this 29th day of June 2010.



Justice Richard Lussick



Justice Julia Sebutinde
Presiding Judge



Justice Teresa Doherty

