

(14514 - 14518)



**SPECIAL COURT FOR SIERRA LEONE**

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**TRIAL CHAMBER II**

**Before:** Justice Teresa Doherty, Presiding Judge  
Justice Richard Lussick  
Justice Julia Sebutinde

**Registrar:** Robin Vincent

**Date:** 8 August 2005

**PROSECUTOR**                      **Against**                      **Alex Tamba Brima**  
**Brima Bazy Kamara**  
**Santigie Borbor Kanu**  
(Case No.SCSL-04-16-T)

**SEPARATE AND DISSENTING OPINION OF JUSTICE SEBUTINDE IN THE DECISION ON THE CONFIDENTIAL JOINT DEFENCE MOTION TO DECLARE NULL AND VOID THE TESTIMONY OF WITNESS TF1-023**

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## SEPARATE AND DISSENTING OPINION OF JUSTICE SEBUTINDE

1. I have had the benefit of reading and digesting the Majority "*Decision on the Confidential Joint Defence Motion to Declare Null and Void the Testimony of Witness TF1-023*" filed on 25 May 2005 ("the Majority Decision"). I do however not agree with the reasoning or conclusions reached by my colleagues in that decision. It is necessary to closely examine the circumstances the facts leading to the order of the trial Chamber of 10 March 2005 directing that the testimony of Witness TF1-023 be heard in closed session.

2. The record of proceedings shows the following: Witness TF1-023 made her oral complaint *in toto* to the Trial Chamber in open court.<sup>1</sup>

- (i) Immediately thereafter, the Prosecution requested to be heard "in the absence of the witness"<sup>2</sup> indicating that she was not sure if the witness was aware of one of the matters she wanted to draw the Court's attention to. (Presumably Ms. Taylor did not wish to unduly influence the witness' ensuing testimony or disposition in court after hearing about this second incident.) Ms. Taylor's application did not indicate a need to exclude the public or press from the proceedings, as envisaged under Rule 79 (A).
- (ii) In response to the Prosecution request, the presiding Judge ordered a brief adjournment "*in order for Witness TF1-023 to be escorted out*".<sup>3</sup>
- (iii) In addition, soon after the witness' exit the Presiding Judge announced that "*in accordance with the Rules of Procedure the session would continue as a closed one, with all communication cut off and curtains closed.*"<sup>4</sup> She stated the reasons for closing the session as "*the serious nature of the allegations and the matters in record on investigation that has been shown to the Bench*".<sup>5</sup> None of the parties raised any objections to the closed session at this stage.
- (iv) The Prosecution proceeded to make their submissions and to tender in evidence a number of supportive documents during the closed session.<sup>6</sup> Defence Counsel for each of the three Accused persons gave a limited response to the Prosecution submissions. (It is particularly interesting to note Mr. Knoops' comment that "*although he could not read the mind of the Bench, he hoped our Ruling would not be more than the Prosecution asked for!*"<sup>7</sup>)

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<sup>1</sup> Transcript of 10 March 2005, Witness TF1-023 at p.3, line 2 - p.4, line 27.

<sup>2</sup> Transcript of 10 March 2005, Taylor at p.5, lines 3 - 17.

<sup>3</sup> Transcript of 10 March 2005, Presiding Judge at p.5, lines 20-22.

<sup>4</sup> Transcript of 10 March 2005, Presiding Judge at p.5, lines 25-28.

<sup>5</sup> Transcript of 10 March 2005, Presiding Judge at p.6, lines 3-6.

<sup>6</sup> Transcript of 10 March 2005, Taylor at p.6, line 9- p.8, line 13.

<sup>7</sup> Transcript of 10 March 2005, Knoops at p.12, lines 7-10.

- (v) After the submissions the Trial Chamber gave its ruling and issued various orders.<sup>8</sup> Thereafter the Trial Chamber entertained a number of post-Ruling comments, submissions and further applications by Counsel. Although these also arose during the closed session, none of the parties objected.
- (vi) When Court reconvened after the recess, Prosecution Counsel was poised to recall Witness TF1-023. The Prosecutor respectfully commented that “it would be appropriate at that stage to open the proceedings”<sup>9</sup> (indicating once again, that as far as the Prosecution was concerned, there was a need to exclude the public and press from the testimony of Witness TF1-023).
- (vii) The Trial Chamber over-ruled the Prosecutor, reminding her that “the Direction of the court was that this witness’ evidence, at least for today, would continue in closed session in light of the statements she made.”<sup>10</sup>
- (viii) At that stage Defence Counsel for the accused Brima rose to seek clarification from the Bench as to the exact nature of the court’s earlier Directive. She indicated her understanding of the earlier directive for a closed session as “covering the Chamber’s inquiry into the Prosecution allegations but not extending to the entire testimony of Witness TF1-023.”<sup>11</sup> She requests that any ambiguity in the Directive be removed by a restatement of the Directive on the record. (For the first time Defence Counsel indicates that while they would not wish to challenge the closed session with regard to the Prosecution allegations of contempt of court, they would be prepared to challenge it if extended to the testimony of Witness TF1-023).
- (ix) Thereupon the Presiding Judge directed that “the evidence of this witness continue in closed session, for her protection.”<sup>12</sup>

3. From the above record of the proceedings it is evident that the closed session preceding the Prosecution submissions on allegations of contempt of court was wholly initiated by the Trial Chamber. While the Prosecution was content with the evacuation of Witness TF1-023 only, the Trial Chamber in addition ordered the exclusion of the public and press. The presiding judge did not cite any particular Rule as its authority for excluding the public and press but generally referred to “the Rules of Procedure”. Although none of the parties challenged this part of the closed session, it none-the-less forms a vital foundation for the extended closed session.

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<sup>8</sup> Transcript of 10 March 2005, Presiding Judge at p.15, line 1- p. 16, line 13.

<sup>9</sup> Transcript of 10 March 2005, Stevens at p.22, lines 20-23.

<sup>10</sup> Transcript of 10 March 2005, Presiding Judge at p.23, lines 23-25.

<sup>11</sup> Transcript of 10 March 2005, Thompson at p.23, line 26- p. 24, line 2.

<sup>12</sup> Transcript of 10 March 2005, Presiding Judge at p.24, lines 3-4.

4. Can it be argued, as the Defence seems to imply, that by ordering a closed or cameral proceeding with regard to the testimony of Witness TF1-023 the Trial Chamber acted in accordance with the provisions of Rule 75 (B) (ii) of the rules? (This would seem to be the nearest justification for an unsolicited closed session that I could find in the Rules. I use the term 'unsolicited' because neither the witness nor the Prosecution thought it necessary to exclude the press and public at this stage.) In other words, could the Trial Chamber be said to have "*held an in camera proceeding in order to determine whether to order that the testimony of Witness TF1-023 be heard in closed session in accordance with Rule 79?*" The answer must lie both in the Prosecution's submissions preceding the closed session as well as the reasons given by the Presiding Judge for ordering the closed session. As far as the Prosecution is concerned, that answer would emphatically have to be in the negative. They did not request for a closed session at any stage, nor did they deem it necessary when making their allegations against the suspected contemnors. They were content with the evacuation of Witness TF1-023 alone whose testimony the Prosecution did not wish to unduly influence by their reports of added threats.

5. The Trial Chamber on the other hand gave its reasons for closing the session as being "*the serious nature of the allegations and the matters in record on investigation that has been shown to the Bench.*" Those reasons did not include "*the determination of whether or not to order that the testimony of Witness TF1-023 be heard in closed session in accordance with Rule 79*". One could argue further that the Chamber made its mind up about the seriousness of the allegations even before hearing from the Prosecution. In conclusion, I am reluctant to find that the Trial Chamber acted in accordance with the provisions of Rule 75 (B) ii when initiating the closed session. This brings me to the next issue.

6. The closed session preceding the continued testimony-in-chief of Witness TF1-023, which is the subject of the Motion, was also wholly initiated by the Trial Chamber. Unlike before, the Trial Chamber made the Directive to hear the testimony of Witness TF1-023 after hearing the submissions from the Prosecution and Defence, and in spite of the Prosecution's and Defence's opposition to the closed session. In my view this closed session was unjustified and unnecessary. The Trial Chamber did not cite any particular Rule as an authority but simply stated that the session should continue as a closed one. My colleagues argue that the Trial Chamber's order was issued under Rule 79 of the Rules. That Rule provided as follows<sup>13</sup>:

"Closed Sessions

(A) The Trial Chamber may order that the press and the public be excluded from all or part of the proceedings for reasons of:

- (i) national security;
- (ii) protecting the privacy of persons, as in the case of sexual offences or cases involving minors; or
- (iii) protecting the interests of justice from prejudicial publicity.

(B) The Chamber shall make public the reasons for its order.

(C) In the event that it is necessary to exclude the public, the Trial Chamber should if appropriate permit representatives of the press and/or monitoring agencies to remain."

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<sup>13</sup> This rule has since been amended by the plenary of judges.

examples of instances when the privacy of a person may be jeopardized are given as “in the case of sexual offences or cases involving minors”. In my view the ambit of that rule is very restricted and should not be loosely apply to extend or vary the protective measures of the witness issued pursuant to Rule 75 of the Rules. In the present case Trial Chamber I has already issued protective measures in respect of Witness TF1-023 which measures are intended to protect her identity. In my view it would be erroneous for trial Chamber II to vary those measures on their own volition, by hearing her testimony in closed session “for her protection”. The matters with regard to which the Trial Chamber ordered the closed session had nothing to do with either the identity or the privacy of Witness TF1-023.

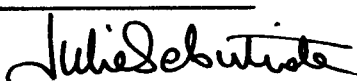

8. I must also add that criminal trials before international tribunals such as the Special Court, are envisaged to be public because not only the immediate Sierra Leonean public is interested in following the trials but also the international community at large. It is therefore imperative that the publicity of criminal proceedings be maintained unless exceptions under the Rules have been strictly complied with. This view is also consistent with the statutory rights of the accused persons pursuant to Article 17 of the Statute of the Special Court.

9. I should also add that Rule 54 which my colleagues rely upon in support of their decision relates to the inherent powers of the court where no other Rule specifically provides for a given situation. However, in my view Rule 54 is inapplicable where Rule 75 clearly governs the issue of closed sessions.

10. Regarding the Defence prayer that the testimony of Witness TF1-023 given during closed session be declared null and void, I think that would not be just in the circumstances. Considering that neither the witness nor the prosecution requested for the closed session; considering further that the Prosecution requested for an open session during the witness’s testimony but was overruled by the presiding judge; and considering further that the defence have not shown any prejudice that they suffered as a result of Witness TF1-023 giving her evidence in chief in closed session, it would be unfair and unjust to nullify the witness’s testimony. In the premises I would deny the Defence application but note that they still have a right to recall this witness for purposes of cross-examination.

11. In the interests of expediting proceedings I hereby authorize the Court Management section to publish this Dissenting Opinion during the court recess.

Done at Freetown, Sierra Leone, this 8th day of August 2005.

  
Justice Julia Sebutinde.  
  
[Seal of the Special Court for Sierra Leone]