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SCSL-03-01-T
(32373-32383)

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THE SPECIAL COURT FOR SIERRA LEONE

Trial Chamber II

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

Registrar: Ms. Binta Mansaray

Date: 27 January 2011

Case No.: SCSL-03-01-T

THE PROSECUTOR

–v–

CHARLES GHANKAY TAYLOR

PUBLIC

DEFENCE MOTION SEEKING LEAVE TO APPEAL THE DECISION ON DEFENCE MOTION TO RECALL FOUR PROSECUTION WITNESSES AND TO HEAR EVIDENCE FROM THE CHIEF OF WVS REGARDING RELOCATION OF PROSECUTION WITNESSES

Office of the Prosecutor:
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Mr. Courtenay Griffiths, Q.C.
Mr. Terry Munyard
Mr. Morris Anyah
Mr. Silas Chekera
Mr. James Supuwood
Ms. Logan Hambrick, Legal Assistant

I. INTRODUCTION

1. Pursuant to Rule 73(B), the Defence seeks leave to appeal the Trial Chamber's "Decision on Defence Motion to Recall Four Prosecution Witnesses and to Hear Evidence from the Chief of WVS Regarding Relocation of Prosecution Witnesses", dated 24 January 2011.[1]

2. In its Decision, the Trial Chamber denied the Defence Motion to Recall Four Prosecution Witnesses and to Hear Evidence from the Chief of WVS Regarding Relocation of Prosecution Witnesses.[2] It did so on the basis that the Motion was untimely, in that the Defence could have brought the issue to the attention of the Trial Chamber prior to 24 September 2010, and in any event before the close of its case on 12 November 2010.[3] In addition, the Trial Chamber considered other factors, concluding: (i) that relocation was a non-judicial measure under the authority of the Registrar; (ii) that the Defence had the opportunity to raise the issue of relocation during cross-examination of the four witnesses in question; (iii) that recall could jeopardise the safety of the witnesses and/or their dependants; (iv) that the Trial Chamber has no intention of calling Mr Vahidy as a court witness; and (v) that the request to call Mr Vahidy is in effect a request to reopen the Defence case.[4] The Trial Chamber's denial of the Defence's requests for relief overlooks the fundamental and important nature of the requests. This amounts to exceptional circumstances and results in irreparable prejudice to the Defence.

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[1] *Prosecutor v. Taylor,* SCSL-03-01-T-1167, Decision on Defence Motion to Recall Four Prosecution Witnesses and to Hear Evidence from the Chief of WVS Regarding Relocation of Witnesses, 24 January 2011 ("Decision").
[2] *Prosecutor v. Taylor,* SCSL-03-01-T-1142, Defence Motion to Recall Four Prosecution Witnesses and to Hear Evidence from the Chief of WVS Regarding Relocation of Prosecution Witnesses, 17 December 2010 ("Defence Motion").
[3] Decision, p. 5.
[4] Decision, pp. 5-6.

3. Specifically, the Trial Chamber committed several procedural errors and/or errors of law and/or fact including a failure to properly consider and/or give due weight to several factors, in that:
    a. The principal finding of the Trial Chamber regarding the ability of the Defence to raise issues relating to post-testimonial benefits including witness relocation prior to the deadline set for the filing of motions of 24 September 2010, or during the currency of the prosecution case, or during its own case, constitutes an error of law and/or fact. In particular, the Trial Chamber has placed an undue burden on the Defence to "follow-up" its own requests for information in the context of a lack of promptness by the Registry and/or WVS in responding to Defence requests. Such a burden does not find authority in law.
    b. Further or alternatively, the Trial Chamber has erred in its finding that no new information has come to light since 24 September 2010. In the Decision, it failed to take into account that the Defence has received new information from its investigator in West Africa regarding witness relocation.
    c. Further or alternatively, the assignation of witness relocation as a non-judicial measure effectively incapable of judicial oversight is an error of law and to some degree misstates the Defence's concerns as regards the inducement aspect of relocation. The Trial Chamber's authority is not so limited, either by the Statute, the Rules or case law. Indeed, case law suggests the opposite. The Trial Chamber in *Šešelj* has ordered an investigation into, *inter alia*, the offer of relocation to a witness.[5]
    d. Further or alternatively, the consideration by the Trial Chamber that the disclosure of sensitive information relating to relocation could jeopardise the safety of the witnesses and/or their dependants, in isolation from the fair trial rights of the Accused, and in the absence of a consideration of any measures which could be taken to reduce or eliminate such a risk, constitutes an error of law and/or an error in the exercise of the Trial Chamber's discretion.

[5] *Prosecutor v. Šešelj*, IT-03-67-T, Decision in Reconsideration of the Decision of 15 May 2007 on Vojislav Šešelj's Motion for Contempt against Carla Del Ponte, Hildegard Uertz-Retzalaff and Daniel Saxon, 29 June 2010 ("Šešelj Decision").

e. Further or alternatively, the consideration by the Trial Chamber that it had no intention of calling Mr Vahidy as a witness of the court constitutes an error of law and/or an error in the exercise of the Trial Chamber's discretion. The intention of the Trial Chamber, in the absence of any analysis, is not a legal standard.

f. Further or alternatively, the conclusion that the calling of Mr Vahidy for cross-examination constitutes a reopening of the Defence case qualifies as an error of law and/or of fact and/or an error in the exercise of the Trial Chamber's discretion, as the Defence did not indicate that it wanted to call Mr Vahidy as part of its case, but rather for the Chamber to call him under Rule 85(A)(iv).

4. The Defence submits that all the foregoing errors invalidate the Trial Chamber's Decision. Had the Trial Chamber properly applied itself to all the issues before, it would not have come to the decision to dismiss the Motion. Indeed, no reasonable arbiter properly applying itself to all the factual and legal issues that were before the Trial Chamber would have come to that conclusion.

II. APPLICABLE LAW

5. 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."

6. Rule 73(B) is a restrictive provision[6] 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.[7] 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; this is a "high threshold".[8]

7. 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 or fixed".[9] Exceptional circumstances will depend on the circumstances of each case. Instances may include where for instance 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.[10]

8. 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".[11]

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[6] *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.
[7] Id.
[8] Id., para. 10.
[9] *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.
[10] Id., para. 26.
[11] *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.

III. SUBMISSIONS

Exceptional Circumstances

9. The Defence has made improper witness inducement a cornerstone of its case. This has recently been acknowledged by the Appeals Chamber: "the Defence has consistently made the issue of improper payments to witnesses or potential witnesses and sources a live issue in this trial".[12] The Trial Chamber, in the Decision also accepts that "information regarding post-testimony benefits, including the hope of relocation, may have an impact on their credibility".[13] Therefore, the refusal by the Trial Chamber to countenance testing witness credibility vis-à-vis the new information that the Defence has received regarding the promise of relocation to witnesses is startling and amounts to an interference with the interests of justice. Indeed, the cursory dismissal of the Defence's legitimate concerns regarding witness credibility by the Trial Chamber on a technicality amounts to exceptional circumstances.

10. To take one such example, one of the witnesses the Defence wishes to cross-examine is Abu Keita, who testified openly in January 2008, suggesting he had no fear of reprisal or security risks. The Defence put to Keita that he and his family could be relocated to The Netherlands if he agreed to cooperate with the Prosecution.[14] Keita denied the allegation. In September 2009, after testifying, Keita went public with his frustration that the Special Court had reneged on its verbal agreement promising him relocation.[15] In late 2010 that the Defence received information that Keita was/is being relocated by WVS outside of Africa. Thus, contrary to the Trial Chamber's bald assertion, the Defence could not possibly have anticipated the need to cross-examine Keita on the circumstances of *this* relocation at the time of his initial cross-examination. Now the Defence has the information to show a key prosecution witness

[12] *Prosecutor v. Taylor,* SCSL-03-01-T-1168, Decision on Defence Appeal Regarding the Decision on the Defence Motion for Admission of Documents and Drawing of an Adverse Inference Relating to the Alleged Death of Johnny Paul Koroma, 25 January 2011, para. 47.
[13] Decision, p. 6, citing *Prosecutor v. Martic,* IT-95-11-T, Trial Judgement, 12 June 2007, paras. 36-8.
[14] *Prosecutor v. Taylor,* SCSL-03-01-T, Testimony of Abu Keita, 24 Jan 2008, p. 2153.
[15] Exhibit D-468.

lied under oath, which goes towards both his credibility on this one point and the credibility of his entire testimony. Further, it goes to the use of relocation as an inducement to witnesses, as the Defence has argued, since if a witness has testified openly, suggesting he is in no danger as a result of being a witness in the case, why is there a need to relocate him? This is a critical point, and yet the Trial Chamber has refused to engage with it, which indicates interfere with the interests of justice.

11. Equally, the Trial Chamber's failure to consider the credibility, timing or otherwise of the new information received by the Defence (especially in light of the Registry's failure to cooperate in a timely manner), followed by the Trial Chamber's opaque conclusion that "the Defence has presented no new information that would justify its filing of the motion after this [24 September 2010] deadline"[16] amounts to an interference with the interests of justice.

12. In a similar vein, the Trial Chamber's consideration of a number of factors in the absence of any consideration of the merits of the Defence argument, or of the fair trial rights of the Accused, or of the interests of justice, amounts to an interference with the interests of justice. It is telling that having found the Motion was untimely, the Trial Chamber went on to draw conclusions on the grounds that the Defence had ample opportunity to raise issues of relocation during the cross-examination of the four witnesses, that the disclosure of sensitive information could jeopardise the safety of the witnesses and/or their dependants, and that it had no intention of calling Mr Vahidy, yet it failed to raise or consider or draw conclusions concerning any factors in the interests of the Accused, or concerning the Accused's fair trial rights.[17] Notably, the Trial Chamber recalled the threshold of good cause and compelling circumstances for the recall of witnesses; however, it failed to address such points in the same way as it addressed the factors which it considered fell against the recall of the witnesses.[18] All of the above, taken separately or together, reach the threshold that

[16] Decision, p. 5.
[17] Decision, pp. 5-6.
[18] Decision, pp. 5-6.

the interests of justice might be interfered with. That alone constitutes exceptional circumstances.

13. In addition and/or alternatively, the issues at bar are of fundamental importance, both in this case, and in the field of international criminal law in general. The role played by financial compensation/inducements in relation to the credibility of witnesses has been recognised as a subject worthy of consideration and evaluation by the international tribunals. This can be seen from recent decisions in other tribunals, such as the ICTR and ICTY. As cited in the Defence's Motion, the Trial Chamber in *Karemera* granted leave for the recall of a Prosecution witness for further cross-examination in regard to payments or inducements to him because the issue was relevant and probative for assessing that witness's credibility.[19] The ICTY not long ago began its own investigation into the Prosecution's use of financial compensation and the offer of relocation to persuade a witness to testify.[20] The Trial Chamber in *Šešelj* decided the allegation that a witness who testified "that the Prosecution had told him that if he testified, after that he could go to America, that he would get a good salary and would get money" merited investigation.[21] As the Trial Chamber and Appeals Chamber have dismissed a similar motion on this subject by the Defence,[22] it remains the case that this tribunal alone has failed to take action to enunciate the specific legal grounds surrounding the impact of witnesses payments and inducements on credibility, providing no guidance in this case, and no legacy to provide guidance in the future.

14. In addition, the aforementioned errors of law and/or errors of fact and/or errors in the exercise of the Trial Chamber's discretion, taken separately or together, constitute

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[19] *Prosecutor v. Karemera et al,* ICTR-98-44-T, Decision on Joseph Nzirorera's Motion to Recall Prosecution Witnesses ALG, AWD, G and T, 16 April 2009, para. 11.
[20] Šešelj Decision.
[21] Šešelj Decision, p. 4.
[22] *Prosecutor v. Taylor*, SCSL-03-01-T-1166, Decision on Public Defence Notice of Appeal and Submissions Regarding the Decision on the Defence Motion Requesting an Investigation into Contempt of Court by the Office of the Prosecutor and its Investigator, 21 Jan 2011; *Prosecutor v. Taylor*, SCSL-03-01-T-1118, Decision on Public with Confidential Annexes A-J and Public Annexes K-O Defence Motion Requesting an Investigation into Contempt of Court by the Office of the Prosecutor and its Investigatiors, 11 November 2010.

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.

Irreparable Prejudice

15. The case for irreparable prejudice is clear-cut in this instance. The Defence will not have another chance to cross-examine the four prosecution witnesses regarding post-testimonial benefits, including the hope of relocation. As such the Trial Chamber will not have the opportunity to assess the credibility of the four witnesses in question within the context of such a crucial matter. The issue will not be remediable on final appeal.

IV. Conclusion and Relief Requested

16. This Motion meets the conjunctive requirements for leave to appeal and thus leave should be granted.

Respectfully Submitted,

Courtenay Griffiths, Q.C.
Lead Counsel for Charles G. Taylor
Dated this 27th Day of January 2011,
The Hague, The Netherlands

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