391

SCSL-03-01-T
(14429-14435)

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SCSL

THE SPECIAL COURT FOR SIERRA LEONE

In Trial Chamber II

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

Registrar: Mr. Herman von Hebel

Date: 14 January 2008

Case No.: SCSL-2003-01-T

THE PROSECUTOR

–v–

CHARLES GHANKAY TAYLOR

PUBLIC

DEFENCE RESPONSE TO PROSECUTION MOTION FOR ADMISSION OF PART OF THE PRIOR EVIDENCE OF TF1-362 & TF1-371 PURSUANT TO RULE 92*ter*

Office of the Prosecutor
Ms. Brenda J. Hollis
Ms. Leigh Lawrie

Counsel for Charles G. Taylor
Mr. Courtenay Griffiths Q.C.
Mr. Terry Munyard
Mr. Andrew Cayley
Mr. Morris Anyah

I. Introduction and Procedural History

1. This is the Defence Response to the 14 December 2007 *Prosecution Motion for Admission of Part of the Prior Evidence of TF1-362 & TF1-371 Pursuant to Rule 92ter.*[1]

2. In its *Motion for Extension of Time Pursuant to Rule 7*bis *in Respect of Two Prosecution Motions: SCSL-03-01-T-372 and SCSL-03-01-T-375* filed on 8 January 2008, the Defence requested until 14 January 2008 to respond to the Prosecution Motion.[2]

3. Because the Defence have not received any decision from the Trial Chamber in this regard, the Defence file the present Response in a good faith effort to assist the Trial Chamber in considering the issues raised in the Prosecution Motion.

4. In its Motion, the Prosecution requested to admit relevant parts of the prior trial transcripts and related exhibits given by witnesses TF1-362 and TF1-371 in the *Prosecutor v. Sesay, Kallon and Gbao,* SCSL-04-15-T ("RUF") trial before Trial Chamber I.[3] The Prosecution proposes to examine TF1-362 and TF1-371 in chief *viva voce* on:

   (A) Matters not considered in the transcripts to be admitted under Rule 92*ter;* and

   (B) Points intended to clarify matters contained in the transcripts and related exhibits.[4]

   As required by Rule 92*ter*, the Prosecution stipulates that each witness will:

   (A) be present in court;

   (B) be available for cross-examination and any questioning by the Judges; and

   (C) is expected to attest that the relevant parts of the prior trail transcripts to be admitted hereunder accurately reflect what the witness would say if examined.[5]

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[1] *Prosecutor v. Taylor,* SCSL-03-01-T-375, Prosecution Motion for Admission of Part of the Prior Evidence of TF1-362 & TF1-371 Pursuant to Rule 92ter, 14 December 2007 ("Motion").
[2] *Prosecutor v. Taylor,* SCSL-03-01-T-382, Motion for Extension of Time Pursuant to Rule 7bis in Respect of Two Prosecution Motions: SCSL-03-01-T-372 and SCSL-03-01-T-375, 8 January 2008, para. 10.
[3] Motion, para. 1.
[4] Motion, para. 2.
[5] Motion, para. 3.

5. The Defence object to the admission of prior trial transcripts and related exhibits of witnesses TF1-362 and TF1-371 and wish to hear from both witnesses through *viva voce* testimony on all aspects of their statements. At a minimum, the Defence expect to be able to cross-examine both witnesses in a manner of its own choosing.

II. Submissions

The Evidence is Relevant

6. The Defence agree that the proposed testimony of TF1-362 and TF1-371 as summarized by the Prosecution in paragraphs 11 and 12 of the Motion is relevant. Therefore, the material satisfies the requirement for admission set out in Rule 89(C), which gives the Trial Chamber discretion to admit relevant evidence.

Rule 92ter(i)-(iii) Conditions Met

7. The Defence also agree that because the Prosecution intends to call both TF1-362 and TF1-371 to present *viva voce* testimony in court, because they will be available for full cross-examination, and because the witness are expected to make the required attestations, the conditions imposed by Rule 92*ter* (i)-(iii) have been met.

Agreement of Both Parties Is Necessary but Does Not Exist

8. The plain language of Rule 92*ter* states that only "with the agreement of the parties" may the Trial Chamber admit, in whole or in part, the evidence given by a witness in prior proceedings before the Special Court, if the conditions set forth in Rule 92*ter* (i)-(iii) are met. The Prosecution misconstrues this plain language and suggests that what the Rule really requires is that an objecting party show "good cause" for its objection.[6]

[6] Motion, para. 14.

9. Unlike Rule *92bis,* which does not qualify the Trial Chamber's discretion to admit information in lieu of oral testimony, Rule 92*ter* specifically states that the Trial Chamber only has discretion to admit prior testimony if the parties are first in agreement.

10. The Defence accept that the purpose of Rule 92*bis* may be to facilitate a "fair, efficient, and expeditious trial", and the Defence are not trying to "obstruct the orderly progression of the case".[7] However, the purpose of Rule 92*bis* says nothing about the purpose of Rule 92*ter,* which is the provision at hand. Even if the purpose of the two Rules is similar, the Defence still are under no obligation to agree to the admission of evidence against its client in this manner.

*Prosecution Reliance on Rule 92*ter *is Excessive*

11. The Defence have serious concerns that the Prosecution is attempting to make the trial against Mr. Taylor a paper case. In its Pre-Trial Conference Materials filed on 4 April 2007,[8] which contains the currently operative witness list, the Prosecution indicated that it wishes to call no less than 75 linkage and crime base witnesses through the mechanism of Rule 92*bis,* without calling the witnesses live at all.[9] Additionally, the Prosecution indicated that it wishes to call eight other witnesses through a combination of Rule 92*bis* submissions and *viva voce* testimony, of the variety that are the subject of the current Motion.[10]

12. The excessive Prosecution reliance on submitting prior testimony of witnesses instead of hearing oral submissions anew threatens the fair trial rights of Mr. Taylor. Specifically, Article 17(2) of the Statute of the Special Court states that the Accused shall be "entitled to a fair and public hearing", subject only to measures ordered for the protection of victims and witnesses. This entitlement of the Accused to a public hearing does not allow the

[7] Motion, para. 14.
[8] *Prosecution v. Taylor,* SCSL-03-01-PT-218, Public Rule 73*bis* Pre-Trial Conference Materials, 4 April 2007 ("Pre-Trial Conference Materials").
[9] Pre-Trial Conference Materials, Part 1, pages 8-12.
[10] Pre-Trial Conference Materials, Part 1, pages 8-12. The Defence accept that in these instances, the Prosecution means Rule 92*ter,* and not Rule 92*bis* as indicated in the chart, due to recent changes in the Rules. See Motion, footnote 2.

Prosecution, even with the consent of the Trial Chamber, to unilaterally admit prior testimony of a witness, just on the basis that the Prosecution wants to trial to move faster and more expeditiously. Allowing the Prosecution to present evidence in the manner they have indicated would essentially deprive Mr. Taylor of a public hearing.

Limitations on Cross-Examination is Not Proper

13. If the Trial Chamber does decide to admit the prior testimony and relevant exhibits of these two witnesses, the Defence strongly object to the limitations on cross-examination requested by the Prosecution. In paragraphs 10 and 14 of its Motion, the Prosecution suggest that cross-examination of witnesses on prior testimony admitted pursuant to Rule 92*ter* should be "limited to relevant questions which are not unduly cumulative to the prior cross examination".

14. The Defence do not intend to ask questions of any witness on cross-examination that are unduly cumulative. However, the Taylor Defence will not be bound by or limited to the questions that prior Defence counsel asked such witnesses on cross-examination before the Special Court. According to Article 17(4)(e), the Accused has the right to "examine, or have examined, the witnesses against him or her and to obtain the attendance and examination of witnesses...under the same conditions as witnesses against him or her". The Defence is not attempting to limit the cross-examination of Defence witnesses by the Prosecution, and the Prosecution should not attempt to limit the scope or extent of cross-examination of Prosecution witnesses by the Defence.

15. Furthermore, other Defence counsel would not have had the same investigative material nor the same motivation for cross-examining these witnesses on the issues raised in prior testimony.

16. In previous decisions by the Special Court, where a Trial Chamber allowed prior testimony to be admitted under Rule 92*bis* (before the existence of Rule 92*ter*), the Trial Chamber never placed any limits on the right of the Defence to cross-examination.[11]

17. The Defence also believe that if the witnesses are required to orally testify again in regard to the events discussed in his or her prior testimony, it will enable to the Defence and the Trial Chamber to better evaluate the credibility and consistency of the witnesses. The Defence should have the opportunity to cross-examine these witnesses in the event that they give an inconsistent statement while testifying the second time around.

III. Conclusion

18. For the above reasons, the Defence object to the admission of prior trial transcripts and related exhibits of witnesses TF1-362 and TF1-371 and wish to hear from both witnesses through *viva voce* testimony on all aspects of their statements. If the Trial Chamber is inclined to admit this prior testimony, despite the Defence objection, than the Defence request that the Prosecution's limitation on cross-examination be disregarded.

Respectfully Submitted,

For Courtenay Griffiths, Q.C.
Lead Counsel for Charles G. Taylor
Dated this 14th Day of January 2008
Freetown, Sierra Leone.

[11] See, ex, *Prosecutor v. Sesay, Kallon, and Gbao,* SCSL-04-15-T-557, Decision on the Prosecution Notice Under 92*bis* to Admit the Transcripts of Testimony of TF1-256, 23 May 2006, pg. 5; *Prosecutor v. Sesay, Kallon, and Gbao,* SCSL-04-15-T-559, Decision on the Prosecution Notice Under 92*bis* to Admit the Transcripts of Testimony of TF1-334, 23 May 2006, pg. 7; and *Prosecutor v. Sesay, Kallon, and Gbao,* SCSL-04-15-T-448, Decision on the Prosecution Confidential Notice Under 92*bis* to Admit the Transcripts of Testimony of TF1-023, TF1-104, and TF1-169, 9 November 2006, pg. 5.

Table of Authorities

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Prosecution v. Taylor, SCSL-03-01-PT-218, Public Rule 73*bis* Pre-Trial Conference Materials, 4 April 2007

Prosecutor v. Taylor, SCSL-03-01-T-375, Prosecution Motion for Admission of Part of the Prior Evidence of TF1-362 & TF1-371 Pursuant to Rule 92ter, 14 December 2007

Prosecutor v. Taylor, SCSL-03-01-T-382, Motion for Extension of Time Pursuant to Rule 7bis in Respect of Two Prosecution Motions: SCSL-03-01-T-372 and SCSL-03-01-T-375, 8 January 2008

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