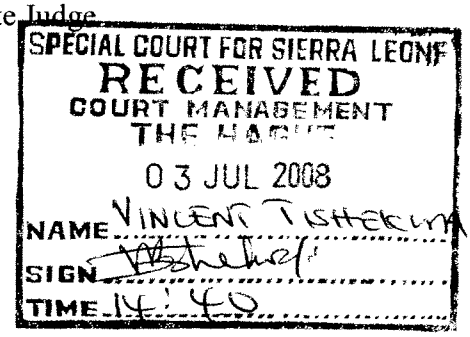
5552) SCSL-03-01-T (18261 — 18266) 18261

SPECIAL COURT FOR SIERRA LEONE
OFFICE OF THE PROSECUTOR
Freetown – Sierra Leone

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

Registrar: Mr. Herman von Hebel

Date filed: 3 July 2008



THE PROSECUTOR **Against** **Charles Ghankay Taylor**

Case No. SCSL-03-01-T

PUBLIC

PROSECUTION REPLY TO "CONFIDENTIAL DEFENCE RESPONSE TO 'PROSECUTION APPLICATION FOR LEAVE TO APPEAL DECISION TO VARY THE PROTECTIVE MEASURES OF TF1-168'"

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

Counsel for the Accused:
Mr. Courtenay Griffiths Q.C.
Mr. Andrew Cayley
Mr. Terry Munyard
Mr. Morris Anyah

I. INTRODUCTION

1. The Prosecution files this Reply to the *"Confidential Defence Response to 'Prosecution Application for Leave to Appeal Decision to Vary the Protective Measures of TF1-168'"*.[1]
2. The Response identifies three grounds on which the Defence assert that the high threshold for leave to appeal has not been satisfied by the Prosecution. In relation to these three grounds, the Prosecution replies as follows.

II. ARGUMENTS

Failure to establish Exceptional Circumstances

3. The Defence argument that the Decision[2] is not based on an error of law which gives rise to exceptional circumstances ignores the binding jurisprudence of this Court recently confirmed by the Appeals Chamber. In making this argument, the Defence erroneously assert that the considerations which apply when a witness unilaterally waives the protective measures which he or she has been granted are the same as those which apply when a party seeks to remove protective measures from a witness by Court order, without the consent of the witness and so contrary to the witness' request.[3] These two scenarios are not comparable. In the first, a witness voluntarily assumes risk, notwithstanding the general prevailing security situation. In the second, the witness is unwilling to assume the risk, hence the need for the strict test required by the Appeals Chamber. In view of these two differing scenarios, there has been no inconsistency in approach by the Prosecution in relation to the stance it has taken as regards the test which must be applied when rescinding protective measures.
4. Further, contrary to the Defence's arguments, the fact that the Trial Chamber states that it has considered the submissions of the Parties does not amount to the required evaluation of the evidence provided by the parties.[4] In its oral decision, the majority of the Trial Chamber made no finding that there had been a substantial change in circumstances

---

[1] *Prosecutor v. Taylor*, SCSL-03-01-T-548, "Confidential Defence Response to 'Prosecution Application for Leave to Appeal Decision to Vary the Protective Measures of TF1-168", 30 June 2008 ("**Response**").
[2] "Decision" is defined in para. 1 of the Application (see *Prosecutor v. Taylor*, SCSL-03-01-T-544, "Confidential Prosecution Application for Leave to Appeal Decision to Vary the Protective Measures of TF1-168", 20 June 2008 ("**Application**")).
[3] Response, para. 7.
[4] Response, para. 8. See also Response, paras. 9 & 10 which continue this argument.

regarding the security of the witness, as required by the Appeals Chamber. Indeed, as the Trial Chamber orders that TF1-168 be permitted to testify subject to lesser measures, it is clear that the Chamber still considers, contrary to the Defence's submissions,[5] that there are security risks facing the witness which require that his identity be protected from public disclosure.

5. The Defence accusation that the Prosecution "verges dangerously close" to using exaggerated language in the Application which could imply deceit rather than error on the part of the Trial Chamber is without merit.[6] The Prosecution in no way implied deceit on the part of the majority, and strongly refutes such an unfounded and serious allegation. First, the Prosecution notes that the Defence make the allegation but fail to state what deceit rather than error is implied by the Prosecution. Second, the Defence ignore the context in which the questioned language is found. The Prosecution statement that there was "no evaluation of the evidence provided by the Defence"[7] refers to the majority's oral decision, which gives no evaluation of the Defence evidence as is required by the Appeals Chamber.[8]

6. The Defence's final argument under this ground regarding re-litigation should also be dismissed as unfounded. The Prosecution does not re-litigate the main thrust of the submission but instead sets out in paragraph 11 its arguments regarding why the identified error of law is one which reaches the high threshold required by Rule 73(B) and so gives rise to exceptional circumstances. Whether or not witness protection issues give rise to issues of fundamental importance and so constitute "exceptional circumstances" for the

---

[5] *Prosecutor v. Taylor*, SCSL-03-01-T-533, "Defence Motion Pursuant To Rule 75 (G) To Rescind Closed Session Protective Measures Granted Orally In Other Proceedings For Witness TF1-168", 9 June 2008, see in particular paras. 26 and 27.

[6] Response, para. 11.

[7] Application, para. 10.

[8] See *Prosecutor v. Sesay et al.*, SCSL-04-15-T-1146, "Decision on Prosecution Appeal of Decision on the Sesay Defence Motion Requesting the Lifting of Protective Measures in Respect of Certain Prosecution Witnesses", 23 May 2008, in particular: (i) para. 37 which states "... where ... a party wishes to rescind protective measures previously granted to a witness, it should present supporting evidence capable of establishing on a preponderance of probabilities that the witness is no longer in need of such protection. The Trial Chamber must thus be satisfied that there is a change in the security situation facing the witness such as a diminution in the threat level faced by the witness that justifies a variation of protective measures orders"; and (ii) para. 38 which provides that "The Trial Chamber was therefore first required to determine whether the Sesay Defence had satisfied this obligation, warranting a variation of the protective measures orders, and then to determine the nature and extent of the variations to be ordered. A perusal of the Trial Chamber's decision, however, shows that it includes no evaluation of whether the Defence provided supporting evidence demonstrating that the witnesses at issue are no longer in need of the protection afforded to them by the protective measures ordered by it" (emphasis added).

purposes of Rule 73(B) is not a question which has been considered by the Chamber in the context of the parties' earlier submissions, the earlier submissions obviously not being an application for leave to appeal under Rule 73(B).

Failure to establish Irreparable Prejudice

7. The Defence's arguments that the Decision does not give rise to irreparable prejudice rely on case law which is not on point with the current issue.[9] The current issue concerns the inability of the Prosecution to call a key witness during the Prosecution case to give evidence relevant to core issues at trial. This issue is directly on point with the successful application for leave to appeal which was made during the AFRC Trial and concerning the evidence of TF1-150.[10] However, the Defence ignore this directly relevant jurisprudence and, in support of their position, instead refer to an unsuccessful application which was made regarding rebuttal evidence.[11] It is evident that the ability of the Prosecution to lead evidence in chief is distinguishable from its ability to lead evidence in rebuttal and so the differing decisions of this Chamber are reconcilable on this basis.

Dissent

8. The Prosecution relies on its submissions in the Application in relation to the Defence's argument under this head.

[9] Response, para. 13.
[10] *Prosecutor v. Brima et al.*, SCSL-04-16-T-414, "Decision on Prosecution Application for Leave to Appeal Decision on Oral Application for Witness TF1-150 to Testify without being Compelled to Answer Questions on Grounds of Confidentiality", 12 October 2005.
[11] *Prosecutor v. Brima et al*, SCSL-04-16-T-588, "Decision on Prosecution Application for Leave to Appeal Decision on Confidential Motion to call Evidence in Rebuttal", 23 November 2006.

III. CONCLUSION

9. The arguments and assertions set out in the Response are without merit.

10. As the Prosecution has satisfied the threshold required by Rule 73(B) in order for leave to appeal to be granted, it respectfully requests that the Trial Chamber grant leave to appeal the Decision.

Filed in The Hague,
3 July 2008
For the Prosecution,

Brenda J. Hollis
Senior Trial Attorney

LIST OF AUTHORITIES

SCSL Cases

Prosecutor v. Taylor, Case No. SCSL-03-01-T

Prosecutor v. Taylor, SCSL-03-01-T-533, "Defence Motion Pursuant To Rule 75 (G) To Rescind Closed Session Protective Measures Granted Orally In Other Proceedings For Witness TF1-168", 9 June 2008

Prosecutor v. Taylor, SCSL-03-01-T-544, "Confidential Prosecution Application for Leave to Appeal Decision to Vary the Protective Measures of TF1-168", 20 June 2008

Prosecutor v. Taylor, SCSL-03-01-T-548, "Confidential Defence Response to 'Prosecution Application for Leave to Appeal Decision to Vary the Protective Measures of TF1-168", 30 June 2008

Prosecutor v. Sesay, Kallon, Gbao, SCSL-04-15-T

Prosecutor v. Sesay, Kallon, Gbao, SCSL-04-15-T-1146, "Decision on Prosecution Appeal of Decision on the Sesay Defence Motion Requesting the Lifting of Protective Measures in Respect of Certain Prosecution Witnesses", 23 May 2008

Prosecutor v. Brima et al., SCSL-04-16-T

Prosecutor v. Brima et al., SCSL-04-16-T-414, "Decision on Prosecution Application for Leave to Appeal Decision on Oral Application for Witness TF1-150 to Testify without being Compelled to Answer Questions on Grounds of Confidentiality", 12 October 2005

Prosecutor v. Brima et al, SCSL-04-16-T-588, "Decision on Prosecution Application for Leave to Appeal Decision on Confidential Motion to call Evidence in Rebuttal", 23 November 2006