630) SCSL-03-01-T (21175-21182) 21175

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: 13 October 2008

SPECIAL COURT FOR SIERRA LEONE
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THE PROSECUTOR **Against** **Charles Ghankay Taylor**

Case No. SCSL-03-01-T

PUBLIC

PROSECUTION REPLY TO "DEFENCE RESPONSE TO 'URGENT PROSECUTION APPLICATION FOR LEAVE TO APPEAL ORAL DECISION REGARDING PROTECTIVE MEASURES FOR WITNESS TF1-062'"

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

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

I. Introduction

1. The Prosecution files this Reply to the "*Defence Response to 'Urgent Prosecution Application for Leave to Appeal Oral Decision Regarding Protective Measures for Witness TF1-062'*", dated 6 October 2008.[1]

2. The Response is without merit for the reasons considered below.

3. The Prosecution notes the Defence objection to the request for an expedited filing schedule.[2] However, the Prosecution maintains this request as it is in the latter stages of its case and so, for planning purposes and to ensure the most efficient presentation of evidence, it would be of assistance if a decision on this application were issued on an urgent basis.

II. Argument

Error of Law

4. The Defence arguments disputing that the Trial Chamber erred in reaching the Decision[3] are without merit and should be dismissed as they are based on a conflation of the two alternative requests for relief made in the Prosecution's motion concerning TF1-215.[4] In the TF1-215 Motion, the Prosecution sought: (i) reconsideration of the decision made on 6 May 2008 regarding TF1-215; or in the alternative (ii) leave to appeal this decision.[5] The Chamber dismissed the Prosecution's first request but granted the second.[6] In response to the current Application, the Defence mistakenly rely on the Chamber's observations made in regard to the first request as support for their argument that the Decision does not involve an error of law.[7] However, they ignore the pertinent point which is that in the TF1-215 Decision the Chamber did grant the Prosecution's application for leave to appeal, thereby endorsing the existence of an alleged error of law.

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[1] *Prosecutor v Taylor*, SCSL-03-01-T-620, "Defence Response to 'Urgent Prosecution Application for Leave to Appeal Oral Decision Regarding Protective Measures for Witness TF1-062", 6 October 2008 ("**Response**").
[2] Response, para. 4.
[3] "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**")).
[4] *Prosecutor v Taylor*, SCSL-03-01-T-501, "Urgent Prosecution Application for Reconsideration of Oral Decision regarding Protective Measures for witness TF1-215 or in the Alternative Application for Leave to Appeal Oral Decision Regarding protective Measures for Witness TF1-215", 8 May 2008 ("**TF1-215 Motion**").
[5] TF1-215 Motion, para. 1.
[6] *Prosecutor v Taylor*, SCSL-03-01-T-595, "Decision on Public with Confidential Annexes B & E Urgent Prosecution Application for Reconsideration of Oral Decision regarding Protective Measures for witness TF1-215 or in the Alternative Application for Leave to Appeal Oral Decision Regarding protective Measures for Witness TF1-215", 15 September 2008 ("**TF1-215 Decision**"), p. 4.
[7] Response, para. 10.

5. Further, the incorporation by reference of the Defence's prior submissions responding to the Prosecution's motion concerning TF1-215[8] again demonstrates the Defence's misunderstanding of the issue to be addressed in the application concerning TF1-062. The Defence do not identify which paragraphs of their prior response they seek to rely on in relation to the current issue but instead incorporate by reference their arguments made "regarding the alleged error of law".[9] In the prior response, there is no section addressing the alleged error of law, although there is a section addressing whether the Prosecution identified a "clear error or reasoning".[10] However, such submissions were made by the Defence in response to the Prosecution's alternative request for reconsideration of the TF1-215 decision[11] and so are not relevant to the current Application which does not seek reconsideration and so does not need to establish that a clear error of reasoning has occurred.[12]

6. Notwithstanding the foregoing, the Defence, by relying on their submissions contained in the TF1-215 Response, effectively acknowledge that the issues raised in the TF1-215 Motion regarding the Prosecution's request for leave to appeal are the same as those raised in the Application, thus contradicting their later, contrary arguments.

Distinctions between witnesses TF1-215 and TF1-062

7. The Defence arguments regarding the alleged distinctions between TF1-215 and TF1-062[13] again fail to address the pertinent issues to be considered in an application for leave to appeal and also erroneously assert that the weight or importance of evidence is to be judged based on the mode of evidence presentation. These artificial distinctions should be dismissed as both irrelevant and inaccurate.[14] The first distinction which is identified in paragraphs 13 and 14, that TF1-062 was not a witness in the RUF Trial, is both irrelevant and legally inaccurate as it fails to consider the effect of Rule 75(F). That Rule, requires that any

[8] *Ibid*, para. 11.
[9] *Ibid*.
[10] See paras. 19 – 30 of *Prosecutor v Taylor*, SCSL-03-01-T-512, "Response to Urgent Prosecution Application for Reconsideration of Oral Decision regarding Protective Measures for witness TF1-215 or in the Alternative Application for Leave to Appeal Oral Decision Regarding protective Measures for Witness TF1-215 and Its Corrigendum", 22 May 2008 ("**TF1-215 Response**").
[11] TF1-215 Motion, para. 1.
[12] Indeed, the Defence made separate submissions in response to the Prosecution's alternative request for leave to appeal (see TF1-215 Response, paras. 31 – 33).
[13] Response, paras. 13 – 16.
[14] *Ibid*, paras. 13 - 15.

measures **ordered** apply *mutatis mutandis* in all subsequent proceedings. There is no requirement that the witness actually have testified in the first proceedings.

8. In relation to the second distinction,[15] differences in modes of evidence presentation are not relevant to the issue of whether exceptional circumstances have been established. Additionally, a concomitant part of this erroneous Defence assertion is without merit: that evidence submitted via Rule 92*bis* is less important, i.e., should be given less weight, than evidence presented *viva voce*. Such is not the legal reality. Rule 92*bis* provides a means of submitting relevant evidence in a more judicially efficient manner, nothing more, nothing less. Therefore, evidence admitted under Rule 92*bis* must be given the same critical consideration and evaluation by the Chamber when reaching its judgment as evidence submitted through live testimony.

9. Finally, as regards the third purported distinction which compares the importance of TF1-215 and TF1-062 to the Prosecution case, this issue is dealt with more fully below in the section concerning "Irreparable Prejudice".

Irreparable Prejudice

10. As discussed above, the Defence assertions that a witness' importance to the case can be measured by reference to the chosen mode of evidence presentation are without merit.[16] Whether the evidence of a witness who is the subject of a motion for leave to appeal is to be admitted via *viva voce* testimony or pursuant to a successful application under Rule 92*bis* is irrelevant to the question of irreparable prejudice.

11. In addition to being legally flawed, the Defence's arguments that no prejudice will be suffered if TF1-062 does not testify,[17] are also based on misrepresentations of previous Prosecution submissions. The extract identified by the Defence in support of their claim that the Prosecution has itself admitted that TF1-062 is not a key witness fails to provide information on the context in which the statement was made. In fact the statement was made by the Prosecution in relation to specific portions of evidence identified by the Defence in objections made to a Rule 92*bis* notice as being irrelevant. It is notable, however, that none of these "irrelevant" portions related to the evidence of TF1-062. Further, the statement was

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[15] *Ibid*, paras. 13 & 15.
[16] *Ibid*, para. 17.
[17] *Ibid*, para. 18.

made in the context of submissions regarding whether evidence went to proof of either the acts and conduct of the Accused or a critical element of the Prosecution's case so as to require cross-examination. The Defence, therefore, have misrepresented the Prosecution's position as regards TF1-062 and indeed rely on submissions which had no bearing on the evidence of TF1-062.

12. The Defence argument that there may be other witnesses who are able to testify to similar events and allegations[18] is also similar to an argument rejected in the *Sesay* Appeal Decision.[19] The argument does not mitigate the prejudice suffered by the Prosecution as a result of being unable to call TF1-062. While other witnesses may testify about similar events, each witness offers unique testimony based on his or her own personal experiences of specific individual events. Therefore, other witnesses would not cover the same specific areas of testimony of TF1-062 and the Prosecution is prejudiced by not calling this specific witness. Furthermore, the Prosecution has a right to present relevant evidence of its choice, and, consistent with that right, made a determination to call TF1-062 in light of the other evidence that it has and will present at trial.

13. Finally, it is disingenuous of the Defence to say that any Prosecution witness is anything other than an important or key witness as they have insisted that they have the right to cross examine each one, even those who make no reference to any senior RUF or AFRC commander or to the Accused.[20]

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[18] *Ibid.*

[19] *Prosecutor v. Sesay et al.*, SCSL-04-15-T-1146, Appeals Chamber, "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, para. 37. ("***Sesay* Appeal Decision**").

[20] See the Defence objections to all the Notices filed by the Prosecution under Rule 92*bis* to date including: *Prosecutor v. Taylor*, SCSL-01-03-T-579, "Public with Confidential Annex A Defence Objection to 'Prosecution Notice under Rule 92*bis* for the Admission of Evidence Related to *inter alia* Kono District – TF1-218 & TF1-304'" 9 September 2008; *Prosecutor v. Taylor*, SCSL-01-03-T-589, "Public with Confidential Annex A Defence Objection to 'Prosecution Notice under Rule 92*bis* for the Admission of Evidence Related to *inter alia* Kono District' and Other Ancillary Relief," 12 September 2008; *Prosecutor v. Taylor*, SCSl-01-03-T-598, "Public, With Confidential Annex A Defence Objection to 'Prosecution Notice Under Rule 92*bis* for the Admission of Evidence Related to *Inter Alia* Kono District – TF1-195, TF1-197, TF1-198 & TF1-206' and Other Ancillary Relief", 17 September 2008; *Prosecutor v. Taylor*, SCSL-01-03-T-597, "Public, with Confidential Annex A Defence Objection to 'Prosecution Notice under Rule 92*bis* for the Admission of Evidence Related to *inter alia* Freetown & Western Area – TF1-023 & TF1-029' and Other Ancillary Relief", 17 September 2008; and *Prosecutor v. Taylor*, SCSL-01-03-T-619, "Public with Confidential Annex A Defence Objection to 'Prosecution Notice under Rule 92*bis* for the Admission of Evidence Related to *inter alia* Freetown and Western Area – TF1-024, TF1-081, and TF1-084," 6 October 2008.

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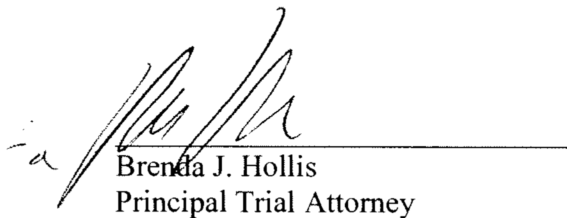
III. Conclusion

14. For the reasons given above, the Response is without merit. Accordingly, the Prosecution requests that the Trial Chamber urgently grant the Prosecution leave to appeal the Decision.

Filed in The Hague,

13 October 2008

For the Prosecution,



Brenda J. Hollis
Principal Trial Attorney

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Prosecutor v Taylor, SCSL-03-01-T-501, "Urgent Prosecution Application for Reconsideration of Oral Decision regarding Protective Measures for witness TF1-215 or in the Alternative Application for Leave to Appeal Oral Decision Regarding protective Measures for Witness TF1-215", 8 May 2008

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Prosecutor v. Taylor, SCSL-01-03-T-619, "Public with Confidential Annex A Defence Objection to 'Prosecution Notice under Rule 92*bis* for the Admission of Evidence Related to *inter alia* Freetown and Western Area – TF1-024, TF1-081, and TF1-084," 6 October 2008

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