735) SCSL-03-01-T (24215 – 24224) 24215

SPECIAL COURT FOR SIERRA LEONE

TRIAL CHAMBER II

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

Registrar: Herman von Hebel

Case No.: SCSL-03-1-T

Date: 18 February 2009

PROSECUTOR

v.

Charles Ghankay TAYLOR

DECISION ON CONFIDENTIAL DEFENCE APPLICATION FOR DISCLOSURE OF DOCUMENTS IN THE CUSTODY OF THE PROSECUTION PURSUANT TO RULE 66 AND RULE 68

Office of the Prosecutor:
Brenda J. Hollis
Nicholas Koumjian
Mohamed Bangura

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

TRIAL CHAMBER II ("Trial Chamber") of the Special Court for Sierra Leone ("Special Court");

SEISED of the "Confidential Defence Application for Disclosure of Documents in the Custody of the Prosecution Pursuant to Rule 66 and Rule 68", filed on 18 June 2008 ("Motion"),[1] wherein the Defence seeks:

1. An Order pursuant to Rule 68(B) of the Rules of Procedure and Evidence ("Rules"), for the disclosure by the Prosecution of "all handwritten notes and records taken by Prosecution Counsel and / or its investigating officers during the interviews, statements and prepping or proofing sessions" including all handwritten notes and records taken by the Prosecution counsel and / or its investigating officers during proofing sessions from 16th, 19th and 21 May 2008 with Witness TF1-539 and any other Prosecution witness, regardless of whether they have already appeared or are yet to appear;"[2] or, in the alternative,
2. An Order pursuant to Rule 66 (A) (iii) granting the Defence leave to inspect the said handwritten notes and records;[3]

NOTING the "Confidential Prosecution Response to 'Defence Motion for Disclosure of Exculpatory Material Pursuant to Rule 68 *(sic)* of the Rules of Procedure and Evidence'", filed on 30 June 2008 ("Response"),[4] wherein the Prosecution opposes the Motion as being without legal merit and submits that it should be denied on the grounds that:

1. There are no handwritten interview notes in respect of Witness TF1-539 to be disclosed in so far as the information obtained in the investigator's notes during the proofing sessions between 16 and 21 May was put in typed form and disclosed to the Defence on 3 June 2008;[5]
2. All investigator's notes of interviews with witnesses, where available, have been disclosed to the Defence as required by Rule 66 A (iii) in typed as well as handwritten form;[6]
3. Handwritten notes taken by trial attorneys during proofing sessions qualify as "internal documents prepared by a party in connection with the investigation or in preparation of the case" under Rule 70(A) and are therefore not subject to disclosure, but where Rule 68 material is contained in an attorney's work product it is permissible to extract that information and disclose it in an undiluted form to protect the Rule 70(A) privilege;[7]
4. The blanket application for disclosure of all handwritten notes taken by Prosecution counsel and/or investigators is without merit insofar as:
    i. the Defence has failed to make a *prima facie* showing under Rule 68(B) that all the material sought under the blanket request is in fact exculpatory evidence, the

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[1] SCSL-03-01-T-542.
[2] Motion, paras. 1-6, 12-18.
[3] Motion, paras. 1-6, 19-22.
[4] SCSL-03-01-T-549.
[5] Response, paras.3, 32
[6] Response, paras. 5-9, 34
[7] Response, paras. 4, 20-27.

Prosecution has disclosed all exculpatory evidence within the meaning Rule 68, and Rule 68 does not prescribe any particular form of disclosure;[8]

ii. the Defence misapplies Rule66 (A) (iii) by requesting disclosure of material. The Rule provides instead, for inspection of documents. The Defence has not demonstrated that the Prosecution is in breach of its obligations under the Rule or that the documents requested are material to the preparation of its case as required by this Rule.[9] Should the Defence wish to inspect documents under Rule66 (A) (iii), this should be done by way of a request directly to the Prosecution without need for a written motion;[10]

NOTING the "Confidential Defence Reply to Prosecution Response to Defence Application for Disclosure of Documents in the Custody of the Prosecution Pursuant to Rule 66 and 68", filed on 7 July 2008 ("Reply")[11] wherein the Defence avers that:

1. The distinction made by the Prosecution between handwritten notes of witness statements by an investigator vis-à-vis those made by an attorney is false because any statement or declaration made by a witness in relation to an event he witnesses and recorded in any form by an official in the course of an investigation or where the witness has established that handwritten notes were taken by the investigators and / or Prosecution, the statement, declaration or notes are considered 'witness statements' and must be disclosed if within the custody and control of the Prosecution and if material to the Defence case;[12]

2. The Defence is not seeking disclosure of investigators' or attorneys' notes that do not contain witness statements and / or those that contain internal Prosecution work product, as such privileged information may easily be redacted or separated from the materials that are subject to disclosure;[13]

3. The Prosecution is obliged to make the witness statement available to the Defence in the form in which it was recorded and where possible, copies of the original handwritten notes should be disclosed with those portions that are protected under Rule 70 (A) redacted as necessary;[14]

4. The Defence has satisfied the three pre-conditions for an order under Rule 68 with regard to the interview notes of Witness TF1-539, namely specificity; the potentially exculpatory nature of the material and the Prosecution's custody and control of the same;[15]

5. In the alternative, the Defence is entitled at the very least under Rule 66 (A) (iii), to inspect all contemporaneously recorded notes, handwritten and typed, of proofing sessions within the

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[8] Response, paras. 4,12-13, 18-19
[9] Response, paras. 4, 10-11, 14-17
[10] Response, para. 15
[11] SCSL-03-01-T-554.
[12] Reply, paras. 4-6
[13] Reply, paras. 7-9
[14] Reply, paras. 10-11
[15] Reply, paras. 12-13

control of the Prosecution, as such documents are material to the adequate preparation of the Defence case, in particular for purposes of cross-examination of witnesses.[16]

MINDFUL of Article 17 of the Statute of the Special Court ("Statute") and of Rules 66, 68, 70 and 73;

HEREBY DECIDES the Motion based solely on the written submissions of the parties, as follows:

I. APPLICABLE LAW

1. The Trial Chamber takes note of the following applicable legal provisions:

Article 17: Rights of the accused

1. [...]

2. [...]

3. [...]

4. In the determination of any charge against the accused pursuant to the present Statute, he or she shall be entitled to the following minimum guarantees, in full equality:

a. To be informed promptly and in detail in a language which he or she understands of the nature and cause of the charge against him or her;

b. [...]

c. [...]

d. [..]

e. To examine, or have examined, the witnesses against him or her and to obtain the attendance and examination of witnesses on his or her behalf under the same conditions as witnesses against him or her;

Rule 66: Disclosure of materials by the Prosecutor *(amended 29 May 2004)*

(A) Subject to the provisions of Rules 50, 53, 69 and 75, the Prosecutor shall:

(i) [...]

(ii) [...]

(iii) At the request of the defence, subject to Sub-Rule (B), permit the defence to inspect any books, documents, photographs and tangible objects in his custody or control, which are material to the preparation of the defence, upon a showing by the defence of categories of, or specific, books, documents, photographs and tangible objects which the defence considers to be material to the preparation of a defence, or to inspect any books, documents, photographs and tangible objects in his custody or control which are intended for use by the Prosecutor as evidence at trial or were obtained from or belonged to the accused.

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[16] Reply, paras. 14-16

(B) Where information or materials are in the possession of the Prosecutor, the disclosure of which may prejudice further on going investigations, or for any other reasons may be contrary to the public interest or affect the security interests of any State, the Prosecutor may apply to a Judge designated by the President sitting *ex-parte* and *in camera*, but with notice to the defence, to be relieved from the obligation to disclose pursuant to sub-Rule (A). When making such an application, the Prosecutor shall provide, only to such Judge, the information or materials that are sought to be kept confidential.

Rule 68: Disclosure of Exculpatory Evidence *(amended 14 March 2004)*

(A) [...]

(B) The Prosecutor shall, within 30 days of the initial appearance of the accused, make a statement under this Rule disclosing to the defence the existence of evidence known to the Prosecutor which in any way tends to suggest the innocence or mitigate the guilt of the accused or may affect the credibility of prosecution evidence. The Prosecutor shall be under a continuing obligation to disclose any such exculpatory material.

Rule 70: Matters not Subject to Disclosure (*amended 7 March 2003*)

(A) Notwithstanding the provisions of Rules 66 and 67, reports, memoranda, or other internal documents prepared by a party, its assistants or representatives in connection with the investigation or preparation of the case, are not subject to disclosure or notification under the aforementioned provisions.

[...]

II. DELIBERATIONS

2. The Trial Chamber recalls the following testimony of Witness TF1-539 in which reference was made during cross-examination, to the proofing sessions of the witness on the following days, namely, 16th, 19th and 21st May 2008:

> "Q. Tab 3 please. Now this is another prepping session. This time last month in Freetown presumably, were you interviewed by a lady called Shyamala, yes?
>
> A. Yes
>
> Q. The document we are looking at says "Witness made the following corrections and clarifications to his previous statements on 16, 19 and 21 May 2008." Do you remember being prepped over three different dates just about three weeks ago?
>
> A. Yes, and for you to know that like I was saying, it was only the ones that they showed me that I was able to correct....
>
> Q. You told us when I just started asking you questions that when Shyamala got something wrong, when she was reading back her notes of the interview, she scratched out what she had got wrong. Do you remember telling us that?...When you said she scratched out, what did you mean...?
>
> A. Well, when she started reading, the ones that she read to me and if there were problems, I will tell her that this did not happen this way and this did not happen this way...

Q. When she scratched out a mistake, how did she scratch out the mistake ?

A. With a pencil. She drew a line across..."[17]

3. The current Defence application for disclosure and / or inspection of handwritten notes and records of interview arises out of the above testimony. Based on that testimony, the Defence maintains that generally, there are inconsistencies between what witnesses say during their interviews and proofing sessions with the Prosecution, and their subsequent testimony in court. The Defence maintains that it is entitled to the material in order to use it during cross-examination to challenge the credibility of the witnesses and that such material is potentially exculpatory and should be routinely disclosed by the Prosecution pursuant to Rule 68 (B) or alternatively, that the Defence should be permitted pursuant to Rule 66 (A) (iii), to inspect the said Prosecution records. The Chamber examines the merits of the Defence application, as follows:

Disclosure of Exculpatory Material under Rule 68(B)

4. Under this head, the Defence maintains that it is entitled to disclosure of certain material (namely, *(i)* all handwritten notes and records taken by Prosecution Counsel during the proofing sessions from 16th, 19th and 21 May 2008 with Witness TF1-539; and *(ii)* all handwritten notes and records taken by the Prosecution counsel and / or its investigating officers during the interviews, statements and prepping or proofing sessions, of any other Prosecution witness, regardless of whether they have already appeared or are yet to appear), on the grounds that such material is potentially exculpatory in nature.

5. In underlining the Prosecution's obligations to disclose exculpatory material, this Court has previously held that "Rule 68 requires the Prosecution to disclose continuously exculpatory evidence, that is, 'evidence that in any way leads to suggest the innocence of the accused, or evidence that in any way tends to mitigate the guilt of the accused or evidence favourable to the accused that may affect the credibility of the prosecution evidence;'"[18] and that "in order to establish that the Prosecution has breached its Rule 68 disclosure obligations, the Defence must *(1)* specify the targeted evidentiary material; *(2)* make a *prima facie* showing that the targeted evidentiary material is exculpatory in nature; *(3)* make a *prima facie* showing that the material is in the Prosecution's custody and control, and *(3)* show that the Prosecution has in fact, failed to disclose the targeted exculpatory material."[19]

6. Furthermore, this Court has recognised that "notes taken by Counsel from the Office of the Prosecutor during proofing sessions may contain a combination of material, some of which is disclosable under Rules 66 and 68, and some of which may not be subject to disclosure in accordance with Rule 70 (A). It is our view that any new evidence elicited during these proofing sessions must be disclosed on a continuing basis in accordance with Rules 66 and 68. Furthermore, we hold that those portions of the notes that relate to the internal preparation for the Prosecution case that constitute work product, however, are not

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[17] *Prosecutor v. Taylor*, Case No. SCSL-03-01-T, Transcript 12 June 2008, pages 11685, ln 21 to 11687, ln 9

[18] *Prosecutor v. Sesay et al*, SCSL-04-15-T-363, Decision on Sesay Motion Seeking Disclosure of the relationship Between Governmental Agencies of the United States of America and of the Office of the Prosecutor, 2 May 2005, para. 35

[19] Ibid, para. 36; *Prosecutor v. Sesay et al*, SCSL-04-15-T-436, Decision on Gbao and Sessay Joint Application for the Exclusion of the Testimony of Witness TF1-141, 26 October 2005, para. 24

disclosable."[20] The Court has further described the procedure adopted by the Prosecution to separate disclosable and non-disclosable material by reducing the disclosable material to the form of a witness statement that is then disclosed to the Defence, as a reasonable one." [21]

7. Lastly, regarding allegations of bad faith, this Chamber has held that, "The premise underlying disclosure obligations, is that the parties should act *bona fides* at all times. There is authority from the evolving jurisprudence of the International Criminal Tribunals that any allegation by the Defence as to a violation of the disclosure rules by the Prosecution should be substantiated with prima facie proof of such a violation."[22]

(i) General Disclosure of all handwritten notes and records taken by the Prosecution counsel and / or its investigating officers during witness interviews, statements and prepping or proofing sessions:

8. In light of the above principles, the Trial Chamber accepts in absence of evidence to the contrary, the Prosecution assertion that it has disclosed all exculpatory evidence within the meaning of Rule 68,[23] and that it has acted in good faith at all times in continuing to comply with its disclosure obligations.[24] The Chamber further notes the Prosecution submissions that "handwritten notes taken by trial attorneys during proofing sessions qualify as "internal documents prepared by a party in connection with the investigation or in preparation of the case"[25] and that in order "to ensure compliance with disclosure obligations and also to protect the Rule 70 (A) privilege, the Prosecution has established the practice of putting into typed form all new details or incidents divulged during a proofing session as well as potential Rule 68 information. This practice provides the Defence with a summary of the relevant information obtained and respects the Prosecution's right to maintain the privacy of work product under Rule 70 (A)."[26] This is a practice that the Trial Chamber has previously found to be reasonable.

9. In determining whether or not the Defence application meets the Rule 68 threshold, we note with respect to this category of materials, firstly, the Defence submission that it "does not seek disclosure of investigators' or attorney's notes that do not contain witness statements nor those that contain internal prosecution work product."[27] The Defence concedes that these are privileged material not subject to disclosure under Rule 70 (A). Secondly, we note the Defence submission that "Given that the Prosecution admits to the practice of taking handwritten notes during proofing sessions, and considering that all such notes will contain similar corrections or highlight inconsistencies, there is *prima facie* evidence that the handwritten notes are potentially exculpatory".[28] By this statement, the Defence assumes or

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[20] *Prosecutor v. Sesay et al*, SCSL-04-15-T-436, Decision on Gbao and Sessay Joint Application for the Exclusion of the Testimony of Witness TF1-141, 26 October 2005, para. 34

[21] *Prosecutor v. Brima et al*, SCSL-04-16-T-246, Decision on Joint Defence Motion on Disclosure of all Original Witness statements, interview notes and Investigator's notes Pursuant to Rules 66 and / or 68, 4 May 2005, para. 18

[22] Ibid. para. 16

[23] Response, paras. 13, 18

[24] Response, para. 31

[25] Response, paras. 4, 20-27.

[26] Response, para. 26

[27] Reply, para. 8

[28] Reply, para. 13

surmises that an inconsistency alluded to in the proofing sessions of one witness (TF1-539), is proof that all other handwritten notes and records of interviews and proofing sessions with other witnesses must contain similar inconsistencies. We opine that this assumption is not only false but also falls short of demonstrating *prima facie* the exculpatory nature of the material.

10. Thus with respect to this general category of materials we find that the Defence has neither demonstrated *prima facie* that the "handwritten notes and records taken by the Prosecution counsel and / or its investigating officers during the interviews, statements and prepping or proofing sessions, of any other Prosecution witness" in this case are exculpatory nor that the Prosecution has indeed failed to disclose them in breach of Rule 68.

(ii) Disclosure of all handwritten notes and records taken by the Prosecution counsel and / or its investigating officers during the proofing sessions from 16th, 19th and 21 May 2008 with Witness TF1-539

11. With regard to this second category of material, it is apparent from the excerpts of the witness' testimony quoted above that there are clear inconsistencies between his testimony in court and some of his statements made during the said proofing sessions, which inconsistencies could affect the witness' credibility, to benefit of the Accused. Accordingly, the Prosecution is obliged under Rule 68 to disclose the material or information containing these inconsistencies. We note however, the Prosecution submissions that "There are no handwritten interview notes in respect of Witness TF1-539 to be disclosed in so far as the information obtained in the investigator's notes during the proofing sessions between 16 and 21 May was put in typed form and disclosed to the Defence on 3 June 2008".[29] The Defence does not deny receiving this disclosure but merely requests the original "handwritten notes" which, the Prosecution assert, contain privileged information.

12. Consistent with our earlier holding, we find that the Prosecution disclosure of 3 June 2008 complies with its obligations and established practice under Rule 68. Furthermore, the Defence had the opportunity to cross-examine Witness TF1-539 regarding the said interviews and proofing sessions and his evidence in this regard is on the record. We find therefore, that with regard to this category of material, the Defence has not made a *prima facie* showing of bad faith or breach of Rule 68 (B) on the part of the Prosecution.

Inspection of Material under Rule 66 (A) (iii)

13. In the alternative, the Defence applies for an order permitting it to inspect "all handwritten notes taken during sessions with Prosecution witnesses"[30] or alternatively, "all contemporaneously recorded notes, handwritten and typed, of proofing sessions within the Prosecution's control"[31] pursuant to Rule 66 (A) (iii) on the grounds that it is material to the adequate preparation of the Defence case, in particular for purposes of cross-examination of witnesses.[32] The Prosecution reiterates its response that it has already disclosed all non-

[29] Response, paras.3, 32
[30] Motion, para. 21
[31] Motion, para. 22
[32] Motion, paras. 4-6, 19-22,33, Reply, paras. 14-16

privileged information to the Defence and adds that "should the Defence wish to inspect documents, this should be done by way of a request directly to the Prosecution" rather than soliciting an order from the Chamber compelling the Prosecution to allow the inspection.[33]

14. Regarding the scope of Rule 66 (A) (iii) this Court has previously held,

> "Although sub-Rule 66 (A) (iii) deals essentially with items of a "tangible" nature, such as books, documents, photographs and tangible objects, which are in the custody or control of the Prosecution, and which may be tendered as exhibits, the language of that sub-Rule, with the use of the words "documents" and "tangible objects", given the definition of "documents" as previously stated, is sufficiently broad to include witness statements recorded in the form of written statements, interview notes, audio and video tape recordings and / or transcripts of the recordings. Hence in our opinion, pursuant to sub-Rule 66 (A) (iii) the Defence may be permitted to inspect documents in custody or control of the Prosecution, which may consist of witness statements and / or interview notes given by witnesses..."[34] and that "...it is only proper to consider the Defence request for permission to inspect these documents only if the initial request to the Prosecution was unsuccessful."[35]

15. Regarding the threshold of Rule 66 (A) (iii) this Court has held,

> "If the Defence believes that the Prosecution has withheld evidence material to its preparation, it can challenge the Prosecution by reasserting its rights to the evidence. At that point there are three alternatives for the Prosecution: (i) hand over the requested evidence, (ii) deny that it has the requested evidence in its possession; or (iii) admit that it has the evidence but refuse to allow the Defence to inspect it. It is only if there is a dispute as to materiality that the Trial Chamber would become involved and act as referee between the parties in order to make this determination. We therefore emphasize that when presenting this issue to the Trial Chamber, the Defence should be guided by the above definitions of materiality. The Defence however, may not rely on unspecified and unsubstantiated allegations of a general description of the information, but must make a *prima facie* showing of materiality and that the requested evidence is in the custody or control of the Prosecution."[36], and that the Rule "...imposes on the Prosecution the responsibility of making the initial determination of materiality of evidence within its possession and if disputed, requires the Defence to specifically identify evidence material to the preparation of the Defence that is being withheld by the Prosecutor."[37]

16. The Trial Chamber is guided by the above principles. Given the Prosecution position that it has continuously disclosed all non-privileged information to the Defence, the Trial Chamber is of the view that the Prosecution has discharged its responsibility of "making the initial determination of materiality of evidence within its possession". Consequently, if the Defence disputes this, it is required to specifically identify the evidence it asserts is material to the preparation of its case and that is withheld by the Prosecution. The Trial Chamber notes firstly, that the Defence has not specifically identified the material it wishes to inspect but rather makes a general reference to "all handwritten notes taken during sessions with

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[33] Response, paras. 14-17

[34] *Prosecutor v. Norman et al.* , SCSL-04-14-T-618, Decision on Application by the Second Accused Pursuant to Sub-Rule 66 (A) (iii), 14 June 2006, para.15

[35] Ibid, para. 17

[36] *Prosecutor v. Sesay et al*, SCSL-04-15-T-189, Sesay- Decision on Defence Motion for Disclosure Pursuant to Rules 66 and 68 of the Rules, 9 July 2004

[37] Ibid. para. 28

Prosecution witnesses" or alternatively, "all contemporaneously recorded notes, handwritten and typed, of proofing sessions within the Prosecution's control." Secondly, the Prosecution rightly observes, the Defence did not make a prior request to the Prosecution for inspection of the required material, choosing rather, to approach the Trial Chamber directly for an order compelling the Prosecution to permit the inspection.

17. In the circumstances, the Trial Chamber finds that the Defence has not met the required threshold of materiality under Rule 66 (A) (iii) in failing to specifically identify the material it wishes to inspect and in failing to make the initial request for inspection to the Prosecution. It would be premature at this stage for the Trial Chamber to inject itself into the process and accordingly, the Defence alternative application must also fail.

FOR THE ABOVE REASONS THE TRIAL CHAMBER

DISMISSES the Motion in its entirety.

Done at The Hague, The Netherlands, this 18th day of February 2009.

Justice Teresa Doherty

Justice Richard Lussick
Presiding Judge

Justice Julia Sebutinde

[Seal of the Special Court for Sierra Leone]