1214)

SCSL-03-01-T
(34793-34801)

34793

THE SPECIAL COURT FOR SIERRA LEONE

Appeals Chamber

Before:	Justice Jon M. Kamanda, Presiding Justice Emmanuel Ayoola Justice Renate Winter Justice George Gelaga King Justice Shireen Avis Fisher
Registrar:	Ms. Binta Mansaray
Date:	23 February 2011
Case No.:	SCSL-03-01-T

THE PROSECUTOR

–v–

CHARLES GHANKAY TAYLOR

PUBLIC

DEFENCE REPLY TO PROSECUTION RESPONSE TO DEFENCE NOTICE OF APPEAL AND SUBMISSIONS REGARDING THE DECISION ON LATE FILING OF DEFENCE FINAL TRIAL BRIEF

Office of the Prosecutor:
Ms. Brenda J. Hollis
Mr. Nicholas Koumjian
Mr. Mohamed A. Bangura
Ms. Leigh Lawrie
Ms. Ruth Mary Hackler
Ms. Ula Nathai-Lutchman
Mr. Nathan Quick

Counsel for Charles G. Taylor:
Mr. Courtenay Griffiths, Q.C.
Mr. Terry Munyard
Mr. Morris Anyah
Mr. Silas Chekera
Mr. James Supuwood
Ms. Logan Hambrick

I. INTRODUCTION

1. The Defence hereby replies to the Prosecution *Response to Public Defence Notice of Appeal and Submissions Regarding the Decision on Late Filing of Defence Final Trial Brief.*[1] The Prosecution's lengthy but repetitive Response is substantively inadequate. It ultimately fails to persuasively argue why it is not in the interests of justice for the Appeals Chamber to order the Trial Chamber to accept the late filing of the Defence Final Trial Brief and schedule a new date for Defence closing arguments, given that the Majority's rejection of the brief, leading to the Defence's inability to participate in closing arguments, was so unfair and unreasonable as to constitute an abuse of the Trial Chamber's discretion.

II. PROCEDURAL HISTORY

2. Through the Procedural Background section of the Response, the Prosecution attempts to portray the Defence as having acted in a dilatory and frivolous manner by filing motions and appeals after a deadline imposed by the Trial Chamber to the effect that all remaining Defence motions should be filed by 24 September 2010.[2] Justice Sebutinde has squarely refuted such a characterization of the Defence applications.[3] The Defence further notes that as necessary, the Defence sought and was granted permission to file after the 24 September 2010 deadline.[4] At no point did the Trial Chamber find that the Defence had acted improperly by raising and seeking

---

[1] *Prosecutor v. Taylor,* SCSL-03-01-T-1211, Public with Annexes A-G Prosecution Response to Public Defence Notice of Appeal and Submissions Regarding the Decision on Late Filing of Defence Final Trial Brief, 21 February ("**Response**"); see also *Prosecutor v. Taylor,* SCSL-03-01-T-1209, Public Notice of Appeal and Submissions Regarding the Decision on Late Filing of Defence Final Trial Brief, 17 February 2011 ("**Appeal**"). This is done on an expedited basis in accordance with *Prosecutor v. Taylor,* SCSL-03-01-AR73-1203, Order for Expedited Filing, 14 February 2011. Other short form citations are carried over from the Appeal.

[2] Response, paras. 5-6.

[3] Certification, Sebutinde Separate Opinion, paras. 4 and 5 ("In my view, none of the above defence applications can be described as 'frivolous' or 'a ploy by the defence to delay the trial'").

[4] See, for example, *Prosecutor v. Taylor,* SCSL-03-01-T-1108, Defence Motion for Admission of Documents and Drawing of an Adverse Inference Relating to the Alleged Death of Johnny Paul Koroma, 27 October 2010, para. 6 and *Prosecutor v. Taylor,* SCSL-03-01-T-1119, Decision on Defence Motion for Admission of Documents and Drawing of an Adverse Inference Relating to the Alleged Death of Johnny Paul Koroma, 11 November 2010, para. 19.

adjudication of issues which had risen *ex improviso*.[5] Consequently, the Prosecution submissions in this regard are unwarranted and do not assist the Appeals Chamber in resolving the instant Appeal.

3. The Prosecution suggests that by not requesting a stay of proceedings until after the Judicial Recess (and despite having been prevented from requesting a stay during the Judicial Recess) the Defence was not acting in good faith. The Prosecution emphasizes that this is especially true given the fact that it was the Defence who suggested 14 January 2011 as the date for submission of the parties' final briefs. At risk of stating a trite proposition, the Defence replies that hindsight is always 20/20. Certainly, had the Defence anticipated at the Status Conference on 22 October 2010 that numerous issues relating to the admission of evidence and the integrity of the proceedings would arise between then and the date of filing, it would not have suggested 14 January 2011 as the deadline. Likewise, had the Defence known about the contents of certain US Embassy Code Cables and the questions they would raise about the integrity and independence of three organs of the Special Court prior to the Judicial Recess, the Defence would have requested a stay of proceedings at an earlier time. Suffice to say, the Defence, at every juncture, did its best to respond to serious issues that it was confronted with in a timely and efficient manner, making every attempt to comply with the Scheduling Order and file its final brief by 14 January 2011. It was only when it became clear that several underlying issues would remain unresolved by the deadline that the Defence urgently and reasonably requested a stay and/or extension of one month.[6]

---

[5] Though the Trial Chamber did find one motion to recall witnesses untimely as the Trial Chamber determined that the Defence had not presented any new information that would justify its filing of the motion after the 24 September deadline. *Prosecutor v. Taylor*, SCSL-03-01-T-1167, Decision on Public with Annexes A-H and Confidential Annexes I-J Defence Motion to Recall Four Prosecution Witnesses and to Hear Evidence from the Chief of WVS Regarding Relocation of Prosecution Witnesses, 24 January 2011, p. 5.

[6] The Defence notes that it filed its Motion for Stay and other motions on an urgent basis and that the Trial Chamber therefore could have issued an expedited filing schedule despite it not being specifically requested by the Defence. In fact, at para. 8 of the Motion for Stay, the Defence sought "urgent adjudication of this matter given the advanced stage of the proceedings and the current Scheduling Order", which is essentially a request for an expedited filing schedule.

III. SCOPE OF APPEAL

4. The Prosecution, in an attempt to limit the scope of the Appeal, posits an erroneous interpretation of the Certification decision.[7] In the Certification decision, the Majority considered both the Defence request for leave to appeal and its ancillary and related request for a stay of proceedings until resolution of the instant Appeal, in order to preserve the Defence's right to present a closing argument prior to the close of proceedings.[8] The Majority cited Defence and Prosecution arguments going to the merits of the issue of waiver of the closing arguments, and thus it is an issue that is properly now before the Appeals Chamber.

IV. STANDARD OF REVIEW ON APPEAL

5. There is no dispute that a Trial Chamber has the responsibility to judiciously exercise its discretion in relation to the conduct of proceedings before them. The question, in part, then becomes whether the Majority has in this instance abused its discretion. The Prosecution relies on the ICTR case of *Ndayambaje et al* to suggest that the Trial Chamber's discretion is almost unassailable.[9] However, even that case acknowledges that factors such as the "complexity of the case" and whether the appellant was allowed a "fair opportunity to present its defence" should be taken into account when determining whether the Trial Chamber has abused its discretion.[10] Additionally, the Appeals Chamber stated that "where the Trial Chamber exercises this discretion, it must be subject to the full respect of the rights of the party concerned".[11]
6. In the ICTY case of *Prlic et al*, the Appeals Chamber further found, while determining whether the Trial Chamber had abused its discretionary powers, that "[t]he Trial Chamber's duty to ensure the fairness and expeditiousness of proceedings will often entail a delicate balancing of interests. This is particularly so in a trial of

---

[7] Response, para. 18.
[8] Certification, p. 3.
[9] Response, para. 19 citing *Prosecutor v. Ndayambaje et al.*, AC, Decision on Joseph Kanyabashi's Appeal against the Decision of Trial Chamber II of 21 March 2007 concerning the Dismissal of Motions to Vary his Witness List, 21 August 2007.
[10] Ibid, para. 24.
[11] Ibid, para. 26.

this scope and complexity, for which there is little precedent."[12] While the Appeals Chamber may disagree with a decision of the Trial Chamber without finding that the Trial Chamber has abused its discretion, the Appeals Chamber must still ensure that the Trial Chamber in exercising its discretion has adequately protected the rights of the accused.

V. GROUNDS AND SUBMISSIONS IN REPLY TO THE RESPONSE TO THE APPEAL

Ground One: Improper Focus on CMS Deficient Filing Form

7. The CMS Deficient Filing Form affixed to the filing of the Defence Final Brief on 3 February 2011 explicitly stated that the reasons for the late filing of the Defence Final Brief are addressed in the brief itself; thus the Majority committed an error of law and/or procedure by resolving the issue of the late filing on the face of the CMS filing form alone without reference to the related request in the brief.
8. The Prosecution states that there was no "new application" made by the Defence therein;[13] to the contrary, the Defence in paragraph 1 of the Final Trial Brief made reference to the fact that the filing was in compliance with Rule 86 and therefore, it should not be rejected by the Trial Chamber. This was a new consideration that the Majority failed to consider.
9. The Prosecution relies on Article 12 of the Practice Direction in support of its arguments.[14] However, the Majority has already noted that the provisions of Article 12 of the Practice Direction are "inapplicable" as the Trial Chamber had ordered a specific time limit for the filing of the final briefs.[15] As such, the Defence argument that the Majority should have not rejected its final brief without properly considering the substantive application in the first part of its final brief, has even more force.

---

[12] *Prosecutor v. Prlic*, IT-04-74-AR73.4, Decision on Prosecution Appeal concerning the Trial Chamber's ruling reducing time for the Prosecution Case, 6 February 2007, para. 16.
[13] Response, para. 22
[14] Response, para. 22.
[15] Decision, p. 2.

Ground Two: Failure to Consider Prosecution Position

10. In its Motion to Substitute, the Prosecution stated that while the Defence Final Trial Brief should not be accepted in the interests of justice, the Prosecution would not oppose the admission of the Defence Final Brief if it would assist the Trial Chamber.[16] In light of this stated position and the Prosecution's suggested way forward should the Trial Chamber accept the brief, the Defence fails to see how the Majority should not have been expected to give it some consideration when deciding to reject the Defence Final Trial Brief.[17] In any event, the Defence submits that a purposeful decision not to consider the Motion to Substitute raises questions about the Majority's approach to the issue as a whole.

Ground Three: Determination that the Defence was in Flagrant Breach of a Court Order

11. The Defence submits that these matters are adequately canvassed in its Appeal and in reply to under other grounds herein.

Ground Four: Imposition of Drastic and Disproportionate Penalty

12. The Prosecution points to the range of decisions which have been reached regarding the acceptance or rejection of late-submitted filings to emphasize that the Trial Chamber has wide-discretion in this regard.[18] Yet the Prosecution is unable to find even one instance in which a Trial Chamber has exercised its discretion to completely reject a final trial brief filed by either party. This supports the Defence position that such total rejection was not an option that was "reasonably open" to the Majority. It is submitted that this is especially true when considered in the context of the critical stage of the proceedings and the Defence's inability to file a comprehensive and well-reasoned final brief by the deadline due to outstanding decisions from the Trial and Appeals Chambers.

13. The Prosecution's attempt to paint Mr. Taylor as having made an informed, calculated, deliberate and strategic "waiver" of his right to file a closing brief, with

[16] Motion to Substitute, para. 2.
[17] *Contra* Response, paras. 24-25.
[18] Response, para. 36, citing to Appeal, paras. 52-55.

the benefit of a full complement of experienced counsel and legal assistants[19] misses the point. The Trial Chamber's decision refusing a stay of proceedings prior to the filing deadline did not provide the Accused an adequate remedy, in that he could have prejudiced his own case by filing submissions, later to be revised or countermanded by a future complementary filing.

14. Under these circumstances, consideration must be given by the Trial Chamber to the proportionality of rejecting an entire final trial brief filed 20 days late, which ties together over three years of evidence, over 50,000 pages of transcripts, and over 1,000 exhibits for the benefit of the Trial Chamber before they retire to deliberate the accused's fate. Far from being simply a summary of the evidence on record, the Final Trial Brief is a persuasive, analytical piece which should guide the judges as to how to critically evaluate the Prosecution's case. The Defence has properly relied on Judge Antonetti's designation of the filing of the parties' final briefs as a "decisive phase of the trial". While the Prosecution bears the burden of proof and the Trial Chamber cannot shirk its responsibility to carefully examine the sufficiency of the Prosecution's case with or without the assistance of the Defence's Final Trial Brief, the Trial Chamber should put itself in the best position to scrutinize this complex and poorly-constructed case; the Trial Chamber should be guided by the submissions of the Defence on behalf of the accused.

15. Any resulting "prejudice" to the Prosecution flowing from the Trial Chamber's decision to accept a late-filed Final Trial Brief with the imposition of a lesser penalty or sanction could have been cured as the Prosecution suggested – by accepting a revised and refined Prosecution Final Trial Brief. Furthermore, the Trial Chamber could have pushed the dates for closing arguments back to allow the parties and the judges to have sufficient time to read and consider each others' submissions. It appears, however, that the Majority was more set on putting the Accused in his place and adhering to a set schedule than considering what was proportionate and in the interests of justice.

[19] Response, para. 37.

Ground Five: Impact of the Request for Leave to Appeal and Stay of Proceedings

16. The Prosecution does not sufficiently address Defence submissions as to how the interplay of the Scheduling Order, the pending leave to appeal the Trial Chamber's refusal of stay, and Rules 68(A) and (B) should have resulted in the Majority accepting the Defence's Final Brief despite the late-filing. Consequently, the Defence reiterates its original submissions in this regard.

Allegations of Bias

17. At paragraphs 45-46 of its Response, the Prosecution seeks to appeal to the emotion of the judges by highlighting alleged disrespectful behaviour on the part of the Defence. The Defence trusts the Appeals Chamber to be impartial and academic in its assessment of both the conduct of the Trial Chamber judges and the Defence in this regard. The Defence simply recalls that the test of whether a judge has been biased or pre-determined in respect to an issue is as per the language of *Karemera et al,* "what must be shown is that the rulings are, or would reasonably be perceived as attributable to a pre-disposition against the applicant and not genuinely related to the application of law". [20]

VI. CONCLUSION

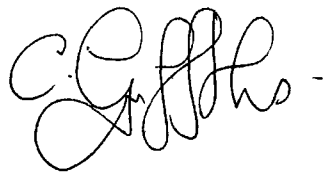
18. In its Appeal and Reply, the Defence has identified a number of errors of law and/or fact and/or procedure leading to the abuse of its discretion by the Majority in its Decision which resulted in its refusal to accept the Defence's Final Trial Brief. Thus, the Appeals Chamber should overturn that decision.[21] Furthermore, as the Defence's inability to participate in closing arguments was predicated by this refusal, the Appeals Chamber should direct the Trial Chamber to set a new date to allow the Defence to present closing arguments.

---

[20] *Prosecutor v. Karemera,* ICTR-98-44-T. Decision on Motion by Karemera for Disqualification of trial Judges, 17 May 2004, para. 13.

[21] *Contra* Certification, Lussick Dissenting Opinion, para. 22 (wherein Justice Lussick states "...since it is within the discretion of the Trial Chamber to refuse to accept a document filed late in deliberate contravention of a court order, it is unlikely that the Appeals Chamber would intervene").

Respectfully Submitted,



Courtenay Griffiths, Q.C.
Lead Counsel for Charles G. Taylor
Dated this 23rd Day of February 2011,
The Hague, The Netherlands