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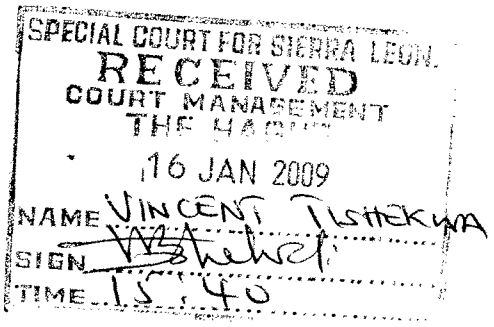
SCSL-03-01
(24002–24010)

24002

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

APPEALS CHAMBER

Before:	Justice Renate Winter, Presiding Justice Emmanuel Ayoola Justice Jon M. Kamanda Justice George Gelaga King
Registrar:	Herman von Hebel
Date filed:	16 January 2009



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

Case No. SCSL-03-01-T

PUBLIC

PROSECUTION REPLY TO DEFENCE RESPONSE TO PROSECUTION NOTICE OF APPEAL AND SUBMISSIONS CONCERNING THE DECISION REGARDING THE TENDER OF DOCUMENTS

Office of the Prosecutor:
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I. INTRODUCTION

1. The Prosecution files this Reply[1] to the *"Public Defence Response to Prosecution Notice of Appeal and Submissions Concerning the Decision Regarding the Tender of Documents"*.[2]

2. The Response is without merit as discussed below.

II. ARGUMENT

Part A: Statement of Facts

3. At paragraph 4 of the Response, the Defence incorrectly states that "the Prosecution could not demonstrate how the witness was qualified to answer questions about the document". The Prosecution clearly pointed out that the locations mentioned in the mining records were locations directly tied to the witness' testimony and that some of the names of commanders mentioned therein were persons the witness had mentioned as having been involved in mining.[3] In addition, the witness had testified that he was the mining commander in the period immediately preceding that covered by these records; he explained how RUF mining operations were carried out, how rough stones were separated by colour, weighed; and how the RUF recorded information about diamonds found at various sites, including the colour and weight of the stones in terms of carats and "percentage". Although the document was made in the period after the witness had been the mining commander, he clearly had already testified to matters that were relevant to understanding the subject matter of the document.

4. Contrary to its assertions in paragraph 5, the Defence never raised relevance as the grounds for its objection. [4] Rather, it argued that questions relating to authenticity

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[1] This Reply is filed pursuant to Practice Direction for Certain Appeals Before the Special Court, 30 September 2004 ("**Practice Direction**"), para. 13 which provides that "[t]he appellant may file a reply within four days of the filing of the response."
[2] *Prosecutor v. Taylor,* SCSL-03-01-T-708, "Public Defence Response to Prosecution Notice of Appeal and Submissions Concerning the Decision Regarding the Tender of Documents", 12 January 2009 ("**Response**").
[3] *Prosecutor v Taylor*, SCSL-03-01-T-700, "*Prosecution Notice of Appeal and Submissions Concerning the Decision Regarding the Tender of Documents*", 5 January 2009, ("**Appeal**") para. 10.
[4] Appeal, para 27.

and reliability must be asked. [5] Similarly, the Trial Chamber did not question the relevance of the document.[6]

Part B: Standard of Review

5. The standard articulated by the Defence is of no assistance in this matter. [7] The Prosecution did not allege an error of fact, but rather an error of law and an error of fact and law. In essence, the applicable test regarding errors of fact and law is whether the conclusion reached by the Trial Chamber is either patently incorrect or one which no reasonable trier of fact could have reached.[8]

Part C: Grounds of Appeal and Submissions

Ground 1: Foundational Requirements

6. At paragraph 12 of the Response, the Defence correctly accepts that neither probative value nor reliability is a requirement for admission under Rule 89(C). The additional argument, that some further "foundation" is required for admission of a document, is contrary to that acceptance and incorrect as a matter of law.

7. At paragraph 13 of the Response, the Defence appears to equate the requirement for foundation with the rule against leading questions, suggesting that "a foundation in this instance was necessary to ensure that the Prosecution did not lead the witness in regard to the content of the document". First, the Defence did not object on the basis of leading. Second, the Prosecution proposed to proceed without showing the document to the witness, so there could be no issue of leading. Third, assuming, *arguendo,* that the Defence objection in the instant case was based upon leading; then this objection was premature as no question had been asked of the witness concerning

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[5] Response, para. 5.
[6] Ibid, and also Response, para 6, in which the Defence notes that the Trial Chamber did not consider the relevance of the document.
[7] Appeal, para.18 addresses the applicable standard of review in relation to errors of law and para. 19 addresses the applicable standard of review in relation to mixed errors of fact and law.
[8] *Prosecutor v Strugar*, Case No. IT-01-42-A, Judgment, 17 July 2008, paras. 252 and 269. See also, *Prosecutor v. Karemera*, ICTR-98-44-AR73.11, "Decision on the Prosecution's Interlocutory Appeal Concerning Disclosure Obligations", 23 January 2008, para.7, and *Prosecutor v. Bizimungu*, ICTR-99-50-AR73.7, "Decision on Jerome-Clement Bicamumpaka's Interlocutory Appeal Concerning Request for a Subpoena", 22 May 2008, para. 8.

the document. Simply showing a witness a document is not leading; it is the questions that follow placing a document before a witness which would determine whether or not counsel is improperly leading the witness. Many questions could be asked of a witness where the answer is not suggested in the document. For example, the document may list a location and the witness could be asked to explain where that location is, or the document may list a name only and the witness could be asked what he knows about the person, his rank, background etc. Had the Prosecution been permitted to show the document to the witness, any leading question relating to that document could have been disallowed by the Trial Chamber.

8. The Defence argument at paragraph 15 of the Response is based upon a flawed understanding of the relevant case law and should be dismissed. In the Sesay Decision, the Trial Chamber admitted a report into evidence under Rule 89(C).[9] Contrary to what is intimated in the Response, the Trial Chamber did not admit the document "through" a witness. Indeed, the Defence in that case objected to the admission of the document on the basis that the Prosecution "should have sought to introduce the Report through a witness" but did not do so.[10] The Trial Chamber also noted that the Prosecution did not seek to tender the Report as an exhibit during the re-examination of the witness but considered that "there is no requirement in international criminal law to produce documents though a witness".[11] The Trial Chamber therefore, quite rightly, approached the issue of admissibility of the report solely on the basis of its relevance; finding that the Report was relevant and therefore admissible.

9. Similarly, in the Fofana Bail Appeals Decision, the Appeals Chamber's determination that the witness statements in question were admissible under Rule 89(C) was based upon relevance alone. The Defence misrepresents this decision when it suggest that "the Appeals Chamber noted that witnesses *would then have to be* made available for the purposes of further clarification and cross-examination in relation to the

[9] *Prosecutor v. Sesay, Kallon, Gbao*, SCSL-04-15-T-620, "Decision on Prosecution Motion to Admit into Evidence a Document Referred to in Cross-Examination, 2 August 2006 ("**Sesay Decision**").
[10] Sesay Decision, p. 2.
[11] Ibid., p.3.

documents".[12] The Appeals Chamber noted that "it was *open to the judge to invite* Mr Kobba to present the State's submission in person" and noted that Rule 65(B) required either written or oral submissions by the State of Sierra Leone.[13]

10. The Appeals Chamber also held that "the Judge was correct to admit under Rule 89(C) the declaration of the Chief of Investigations, having found it relevant".[14] The Appeals Chamber did not qualify this aspect of its Decision by requiring that the Chief of Investigations *would have to be* made available for the purposes of cross-examination. Rather, in light of the Appellant's objections that the declaration was both partisan and hearsay, objections which the Appeals Chamber noted went to weight, the Appeals Chamber commented that "it was *open to the defence to ask Mr White to be called* and to cross-examine him or controvert his evidence by calling their own witnesses or by arguing that it was speculative or rumour-based, in order to undermine its weight".[15]

11. As regards the declaration of Ms Fortune, the Appeals Chamber's determination that her declaration ought properly to have been admitted on the basis of its relevance to the proceedings, is likewise not qualified as the Defence argues.

12. Whilst the Defence could properly argue that the Appeals Chamber observed that witnesses *could have* been made available for the purposes of clarification and cross-examination, the Appeals Chamber did not make it a precondition for admission of the documents that the witnesses *would have to be* made available for these purposes.

13. The Defence erroneously argues at paragraph 16 that the Trial Chamber "maintain a careful approach to the admission of documentary evidence" to maintain "only a certain calibre of evidence" above and beyond relevance.[16] The Appeals Chamber has previously stated that "although the probative value of particular items in isolation may be minimal, the very fact that they have some relevance means that they must be

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[12] Response, para. 7, referring to paras. 28-30 of *Prosecutor v. Fofana, Kondewa*, SCSL-04-14-AR65-371, "Fofana – Appeal Against Decision Refusing Bail", 11 March 2005 ("**Fofana Bail Appeals Decision**"), emphasis added.
[13] Fofana Bail Appeals Decision, para. 28.
[14] Ibid., para. 29.
[15] Ibid., emphasis added. Notably, these suggestions are disjunctive.
[16] Response, para. 16.

available for counsel to weave into argument and for the Judge to have before him in deciding what to make of the overall factual matrix".[17] Similarly, Trial Chamber I has stated that "Rule 89(C) vests the Trial Chamber with a discretionary power to admit any relevant evidence and to exclude evidence that is not relevant", thus requiring only relevance for admissibility.[18] Further, the argument is misplaced as the Trial Chamber did not deny admission based on the "calibre" of the evidence but rather on the legal position that a foundation beyond relevance had not been established to admit the document through the witness, and without a witness a document can only be admitted under Rule 92*bis*.

Ground 1: Lex specialis

14. The accusation made by the Defence at paragraph 22 of the Response is disingenuous. It is acknowledged that the Prosecution previously filed a motion requesting the admission of documents other than witness statements and transcripts under Rule 92*bis*.[19] However, this motion was filed by the Prosecution *prior* to the publication of the amendment to Rule 92bis and this matter was specifically brought to the attention of the parties,[20] and acknowledged by way of a Decision of the Trial Chamber. [21]

Ground 2:

15. At paragraph 24 of the Response, the Defence suggests that the foundation requested by Defence Counsel would have assisted the Trial Chamber in determining the relevance of the document. This is simply not the case. As addressed at paragraph [4]

[17] Fofana Bail Appeals Decision, para. 23.
[18] Sesay Decision, p.3.
[19] *Prosecutor v Taylor*, SCSL-03-01-T-241, "Public Prosecution's Motion for Admission of Material Pursuant to Rules 89(C) and 92bis", 17 May 2007.
[20] *Prosecutor v Taylor*, SCSL-03-01-T-340, "Urgent & Public Prosecution Motion for an Extension of Time to File a Reply to the "Defence Response to 'Prosecution's Motion for Admission of Material Pursuant to Rules 89(C) and Rule 92bis", 14 September 2007, at para. 6: "The Response relies upon Rule 92bis as amended on 14 May 2007. The Rule was amended to include the words "including written statements and transcripts that do not go to proof of the acts and conduct of the accused". The amendment, having been made on 14 May 2007, was published on 22 May 2007 and, therefore, was not a part of the Prosecution analysis of the documents submitted with the Motion".
[21] *Prosecutor v Taylor*, SCSL-03-01-T-341, "Decision on Prosecution Motion for an Extention of Time to File a reply to the 'Defence Response to 'Prosecution's Motion for Admission of Material Pursuant to Rules 89(C) and 92 bis', 17 September 2007.

above, Defence Counsel did not object on the basis of relevance and the Trial Chamber erred in failing to consider the relevance of the document.

Part D: Prejudice

16. The Defence argument at paragraph 27 of the Response is without merit. As noted in paragraph 4 above, the questions the Defence wished to have answered relate to authenticity and reliability, not to relevance. Issues of authenticity and reliability are to be assessed at the end of the case, in the context of all the evidence before the Trial Chamber. In addition, there is nothing to indicate the witness would know who wrote the mining record or how it came into the possession of the Prosecution. [22]

IV. CONCLUSION

17. On the basis of the above submissions and those set out in the Appeal, the Impugned Decision,[23] should be set aside. The Trial Chamber should be ordered to admit the document which was the subject of the Impugned Decision, or alternatively, the Trial Chamber should be ordered to evaluate the admissibility of the document based on its relevance alone.

Filed in The Hague,

16 January 2009

For the Prosecution,

Brenda J. Hollis
Principal Trial Attorney

[22] Transcript, page 14246, line 28 to page 14247, line 1.
[23] As defined in paragraph 1 of the Appeal, and cited at footnote 3 of the same.

INDEX OF AUTHORITIES

A. ORDERS, DECISIONS AND JUDGEMENTS

SCSL Cases

Prosecutor v. Taylor, SCSL-03-01-T

1. *Prosecutor v Taylor*, SCSL-03-01-T-241, "Public Prosecution's Motion for Admission of Material Pursuant to Rules 89(C) and 92bis", 17 May 2007.

2. *Prosecutor v Taylor*, SCSL-03-01-T-340, "Urgent & Public Prosecution Motion for an Extension of Time to File a Reply to the "Defence Response to 'Prosecution's Motion for Admission of Material Pursuant to Rules 89(C) and Rule 92bis", 14 September 2007.

3. *Prosecutor v Taylor*, SCSL-03-01-T-341, "Decision on Prosecution Motion for an Extention of Time to File a reply to the 'Defence Response to 'Prosecution's Motion for Admission of Material Pursuant to Rules 89(C) and 92 bis', 17 September 2007.

4. *Prosecutor v Taylor*, SCSL-03-01-T-700, "*Prosecution Notice of Appeal and Submissions Concerning the Decision Regarding the Tender of Documents*", 5 January 2009.

5. *Prosecutor v. Taylor,* SCSL-03-01-T-708, "Public Defence Response to Prosecution Notice of Appeal and Submissions Concerning the Decision Regarding the Tender of Documents", 12 January 2009.

Prosecutor v. Norman, Fofana and Kondewa, SCSL-04-14-T

1. *Prosecutor v. Fofana, Kondewa*, SCSL-04-14-AR65-371, "Fofana – Appeal Against Decision Refusing Bail", 11 March 2005.

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

1. *Prosecutor v. Sesay, Kallon, Gbao*, SCSL-04-15-T-620, "Decision on Prosecution Motion to Admit into Evidence a Document Referred to in Cross-Examination, 2 August 2006.

ICTY Cases

1. *Prosecutor v Strugar*, Case No. IT-01-42-A, Judgment, 17 July 2008.

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1. *Prosecutor v. Bizimungu*, ICTR-99-50-AR73.7, "Decision on Jerome-Clement Bicamumpaka's Interlocutory Appeal Concerning Request for a Subpoena", 22 May 2008.

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2. *Prosecutor v. Karemera*, ICTR-98-44-AR73.11, "Decision on the Prosecution's Interlocutory Appeal Concerning Disclosure Obligations", 23 January 2008.

http://69.94.11.53/default.htm

B. RULES OF PROCEDURE AND EVIDENCE AND PRACTICE DIRECTIONS

1. Practice Direction for Certain Appeals Before the Special Court of 20 September 2004.