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SCSL-03-01-T
(26590-26602)

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SPECIAL COURT FOR SIERRA LEONE
OFFICE OF THE PROSECUTOR

TRIAL CHAMBER II

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

Acting Registrar: Ms. Binta Mansaray

Date filed: 25 November 2009

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

Case No. SCSL-03-01-T

PUBLIC
PROSECUTION REPLY TO DEFENCE RESPONSE IN RELATION TO THE APPLICABLE LEGAL STANDARDS GOVERNING THE USE AND ADMISSION OF DOCUMENTS BY THE PROSECUTION DURING CROSS-EXAMINATION

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I. INTRODUCTION

1. The Prosecution files this Reply to the "Defence Response to the Public Prosecution Motion in relation to the Applicable Legal Standards Governing the Use and Admission of Documents by the Prosecution during Cross-Examination" filed on 23 November 2009 ("**Response**").[1]

2. The position statement contained in the Response does not accord with the relevant jurisprudence and is unsupported by any jurisprudence additional to that referenced in the Prosecution's Motion.[2] The Defence is proposing a procedure that is unknown in the current practice of international criminal tribunals. The proposed limitations on cross-examination suggested by the Defence would in fact deprive the Prosecution of a fair trial. The Defence makes unfounded suggestions that the Prosecution is attempting to further a strategy to deny the Accused his fair trial rights and seeks to place pressure on the Trial Chamber with thinly-veiled threats of delay should the established law be confirmed and the Prosecution's Motion granted.

II. ARGUMENT

Guidelines on the Use and Admission of Documents

3. The Defence's assumptions in paragraph 12 of the Response about the nature of the material sought to be used in cross-examination are misguided. The *Prlic* definition of "fresh evidence", which was explicitly adopted by the Prosecution, includes both material that was not available during the Prosecution's case-in-chief and material that was available but not intended to be used.[3]

4. The guidelines requested by the Prosecution are not "unnecessary"[4] as the Prosecution currently finds itself in the position of being restricted in its cross-examination of the Accused and precluded from using documents which are relevant

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[1] *Prosecutor v. Taylor*, SCSL-03-01-T-862, "Defence Response to the Public Prosecution Motion in relation to the Applicable Legal Standards Governing the Use and Admission of Documents by the Prosecution during Cross-Examination", 23 November 2009 ("**Response**").

[2] *Prosecutor v. Taylor*, SCSL-03-01-T-860, "Prosecution Motion in Relation to the Applicable Legal Standards Governing the Use and Admission of Documents by the Prosecution during Cross-Examination", 17 November 2009 ("**Prosecution's Motion**"). The Defence makes no reference at all to jurisprudence from the ICTR. Of the three ICTY cases cited by the Defence that were not referenced in the Prosecution's Motion (out of five ICTY cases cited in total), the *Delalic* decision and Appeals Judgement are not directly on point, see footnote 11 below, and the portions of the *Galic* Appeals Judgement (footnote 21 of the Response) relied upon refer to the right of an accused to testify.

[3] Prosecution's Motion, para. 1, footnote 1.

[4] Response, paras 3, 17 and 18.

in order to challenge the credibility of the Accused in relation to 7,230 transcript pages of examination-in-chief.

5. The Prosecution does not dispute the principle that documents in its possession that are clearly relevant and substantially probative of guilt are to be adduced during its case-in-chief.[5] However, the Prosecution cannot be expected, as part of a focused case, to guess what will be the Defence evidence and introduce all material relevant to the Accused's credibility during its case-in-chief before knowing the scope of the Accused's testimony.[6]

6. The Prosecution agrees with the Defence that the international criminal procedure relating to the use and tendering of fresh evidence is clear.[7] However, the Response conflates the very matters that the procedural guidelines seek to distinguish. First, the Response conflates the use of a document during cross-examination and its admission into evidence.[8] Secondly, despite acknowledging the distinction between fresh evidence used to test the credibility of the Accused and fresh evidence probative of the Accused's guilt, which was drawn by the Trial and Appeals Chambers in *Prlic*[9] and by Justice Sebutinde in the current case, the Response conflates these two categories.[10] It should furthermore be noted that the question of the applicable procedures relating to cross-examination are distinct from those applicable to the presentation of a rebuttal case or the re-opening of the Prosecution's case.[11]

7. Contrary to the Defence assertion[12] that no distinction can be derived from the *Prlic* case between the "presentation stage" and the "admissibility stage", the oral decision cited in paragraph 23 of the Prosecution's Motion and rendered subsequent to the *Prlic* Appeals Chamber decision, clearly distinguishes between the applicable

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[5] See Response, paras 10 and 13.
[6] See Response, para. 7.
[7] See Response, para. 17.
[8] Response, para. 16.
[9] *Prosecutor v. Prlic*, IT-04-74-AR73.14, "Decision on the Interlocutory Appeal against the Trial Chamber's Decision on Presentation of Documents by the Prosecution in Cross-Examination of Defence Witnesses", 26 February 2009 ("***Prlic* Appeal Decision**"); *Prosecutor v. Prlic*, IT-04-74-T, "Decision on Presentation in Cross-Examination of Defence Witnesses", 27 November 2008, ("***Prlic* Trial Chamber Decision**").
[10] Response, paras 14 and 16.
[11] See in particular Response, para. 13. The case of *Prosecutor v. Delalic*, IT-96-21, "Decision on the Prosecution's Alternative Request to Reopen the Prosecution's Case", 19 August 1998, concerned the issues of rebuttal and the re-opening of the prosecution's case. This was also the subject of the cited portions of the *Delalic* Appeals Judgement in footnote 15 of the Response.
[12] Response, para. 16.

procedure at the point at which Prosecution counsel puts a document to a witness during cross-examination and the later stage at which the Prosecutor may request admission of that document. This Trial Chamber drew exactly the same distinction in the AFRC Decision.[13]

8. The Defence acknowledges that the AFRC Decision "accords with the case-law"[14] but then tries unsuccessfully to distinguish the case. The Defence does not explain why the use of documents to discredit an accused's evidence would be different with respect to a defence of alibi than it would be for any other part of an accused's evidence. In the AFRC case, a new document was properly used to challenge the evidence of the Accused Brima and arguments as to the admissibility of the document were properly heard at the conclusion of the questioning. Further, the document was not tendered exclusively or specifically in relation to an alibi defence being put forward by Brima[15] and the fact that it had come into the possession of the Prosecution at a late stage was simply one matter to be considered at the admissibility stage. The Defence suggestion that an oral decision made by this Trial Chamber is less authoritative than appellate jurisprudence from another tribunal[16] is inapposite since the appellate jurisprudence on this issue accords with the AFRC Decision.

9. The Trial Chamber's request for written pleadings could not have been intended to prevent the "inevitable and necessary argument over the admissibility of individual documents"[17] at future oral hearings. The Trial Chamber is not in a position to assess the arguments for admission of each document unless and until a party moves for such admission and the context of the cross-examination and re-examination is known.

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[13] See Prosecution's Motion, paras 4-7. The RUF case provides a further example of the adoption of a two-stage procedure regarding the use and admissibility of fresh evidence, with the proper time for legal submissions being the time at which counsel intends to tender the document for admission into evidence. *Prosecutor v. Sesay, Kallon, Gbao*, Transcript, 5 June 2007, pp. 3-8. Trial Chamber I maintained its general practice of flexibility with regard to the admissibility of evidence, also as it concerned the admission of fresh evidence during the defence case, leaving the question of weight to be determined at the appropriate stage: *Prosecutor v. Sesay, Kallon, Gbao*, Transcript, 26 June 2007, p. 59.

[14] Response, para. 28.

[15] See Prosecution arguments as to admissibility in *Prosecutor v. Brima*, Transcript, 29 June 2006, pp. 74-76.

[16] Response, footnote 39.

[17] Response, para. 4.

10. According to the established procedure, when it comes to the question of the admission of fresh evidence, an individual determination is required for each new document based on applicable factors, including the purpose for which the individual document is tendered. It is not possible for the Prosecution to present arguments in relation to each piece of fresh evidence that may be considered for use in cross-examination before the cross-examination is completed. Some documents that the Prosecution is currently considering using may become unnecessary or irrelevant depending upon the further testimony of the Accused. An example of the varied, spontaneous and proper purpose for which a document may be relevant to cross-examination arose in the current proceedings with the Lomé Peace Accord. In the case of that particular document, the Accused asked to be shown a copy,[18] presumably to refresh his recollection of its contents.

11. At paragraph 15 of the Response the Defence advocates that the Trial Chamber should adopt a procedure in relation to the impeachment of witnesses based on the practice in England and Wales. Later the Defence suggests that the ICTY Appeals Chamber Decision in *Prlic* should be read in light of the provisions of *Archbold*. This attempt to introduce the law of England and Wales through the backdoor is misguided, apart from being illogical in the current context where the Defence is not obliged to disclose witness statements. First, it goes without saying that the rules of procedure and evidence in the courts of England and Wales do not apply before the SCSL. Secondly, the Defence fails to state the position in England and Wales correctly. Although as a principle of general practice all evidentiary matter the prosecution intends to rely upon as probative of the defendant's guilt should be adduced before the close of the prosecution case if available then;[19] this principle does not extend to evidence of matters which go only to the credit of the defendant.[20] The Defence apparently resorts to discussing the rules of procedure applicable in a national jurisdiction because there is no international jurisprudence, from either the SCSL or the other ad hoc tribunals, to support its position.

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[18] *Prosecutor v. Taylor*, Transcript, 11 November 2009, p. 31618, lines 26-27.
[19] *Archbold* 2008, 4-335, referring to *R v. Rice* [1963] 1 Q.B. 857, 47 Cr.App.R.79, CCA.
[20] *Archbold* 2008, 4-337, stating that the principle in Rice does not extend to evidence of a matter which goes only to the credit of the defendant: *R v Halford*, 67 Cr.App.R.318, CA.

Prior Disclosure of Documents to be used during Cross-Examination

12. At paragraphs 19 – 21 of the Response, the Defence refers to the issue of disclosure. The Defence seeks full disclosure of all new documents in the Prosecution's possession.[21] The Defence does not cite any provision of the Rules of Procedure and Evidence under which it is entitled to such disclosure and this demand is unsupported by any case law. The jurisprudence, in particular that of the appellate chambers of the ad hoc tribunals, supports the Prosecution position that it is not required to disclose fresh evidence used during cross-examination for the purpose of impeachment.[22]

13. The fresh evidence which the Prosecution seeks to **use** during cross-examination is for the purpose of impeaching the Accused. In all instances where the Prosecution subsequently seeks **admission** of such evidence it will do so for the purpose of impeaching the Accused. The Prosecution has introduced the evidence in its possession which it seeks to rely upon to establish the guilt of the Accused during the Prosecution phase of the case. Thus, only in a limited number of instances will the Prosecution request that fresh evidence be admitted not only for the purpose of impeachment but also to prove guilt. It will be for the Trial Chamber to determine whether such evidence should in exceptional circumstances and in the interests of justice also be admitted for the purpose of establishing guilt. It is at the time that the Prosecution seeks admission of fresh evidence for this purpose that the Prosecution will have to justify why exceptional circumstances exist and why it would be in the interests of justice to admit such evidence. At this juncture the Defence will have an opportunity to make any objection regarding the admission of the evidence it sees fit, including in relation to disclosure. This is exactly the procedure contemplated by the Appeals Chamber of the ICTY in *Prlic* and as such was not a procedure determined

[21] Response, paras 21 and 31.

[22] See Prosecution's Motion, para 24 and the jurisprudence cited at footnote 36. See *Prlic* below and also the Decisions of the Appeals Chamber of the ICTR, especially *Prosecutor v. Bagosora* et al., ICTR-98-41-AR73 "Decision on Interlocutory Appeal Relating to Disclosure under Rule 66(B) of the Tribunal's Rules of Procedure and Evidence", Appeals Chamber, 25 September 2006, para 10: "The Appeals Chamber observes that this plain reading of Rule 66(B) of the Rules does not create a broad affirmative obligation on the Prosecution to disclose any or all documents which may be relevant to its cross-examination".

by the ICTY to "make a mockery of the traditional rules of evidence" as the Defence intimates.[23]

14. The ICTY Appeals Chamber in *Prlic* affirmed the procedure adopted by the Trial Chamber in that case in relation to its approach towards the admissibility of fresh evidence **going to the guilt of the Accused**. In assessing whether exceptional circumstances existed, and whether the **admission** of such evidence was in the interests of justice, the Trial Chamber provided that "it would proceed with the assessment of such requests on a case-by-case basis, after having permitted the Defence to challenge the evidence, particularly bearing in mind the potential infringement on the rights of the accused caused by the sought admission".[24] As regards exceptional circumstances, the Trial Chamber stated that the Prosecution would have to explain when the document came into its possession and by what means, when it was disclosed and why it had not been introduced during the Prosecution phase of the case.[25] In relation to the interests of justice, the Defence has the opportunity to make submissions as to disclosure and any prejudice suffered by the Accused. It is notable that the Appeals Chamber indicated that the Defence would have to be exacting about the actual prejudice suffered by the Accused in relation to the admission of such evidence and that it could not simply rely on potential prejudice as a matter of principle. [26] Further, in striking a balance between the rights of the accused and the decision to admit such evidence a Trial Chamber will also consider the available measures to address any prejudice.[27] It is clear from the Appeals Chamber and Trial Chamber decisions in *Prlic* that these issues fall for determination at the **admissibility stage**.

15. Contrary to the Defence assertions,[28] the proposed approach does not render the trial unfair. Under the approach in *Prlic*, the Accused's rights are fully protected.[29] Where

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[23] Response, para. 20.
[24] *Prlic* Appeal Decision, para. 24 affirming and referring to the approach of the Trial Chamber.
[25] Ibid.
[26] *Prlic* Appeal Decision, para. 26, where the Appeal Chamber explains that in that appeal, the appellants failed to meet the burden of showing that the Trial Chamber had erred in exercising its discretion to admit documents going to the guilt of the Accused by merely referring to potential prejudice as a matter of principle. The Appeals Chamber rejected the appellant's general allegations and re-emphasized that "[t]he mere fact that [the admitted evidence] was probative of the Prosecution's case does not mean that the [a]ccused] were prejudiced".
[27] *Prlic* Appeal Decision, para. 25.
[28] Response, paras 19 and 20.

the Trial Chamber concludes that the admission of fresh evidence would infringe the rights of the Accused, it can decline to admit it, or limit the purpose for which it is admitted.[30]

16. As regards notice of new documentation to be used during cross-examination to opposing counsel, the prior practice in this case has been that the issue is one of professional courtesy. Prior to the start of the trial, the parties agreed that a party would provide documents to be used during cross-examination to opposing counsel on the morning that it intended to use them.[31] However, in reality the Defence rarely provided any documents at this stage other than the witnesses' prior prosecution statements, and documents were simply provided to the Prosecution at the same time as they were put to the witness during cross-examination.[32] When the Prosecution objected to this practice during the cross-examination of TF1-334 on 29 April 2008, the Presiding Judge stated that the provision of documents in advance by the cross-examining party was an issue of professional courtesy and was not one for the court to decide.[33]

Anticipatory Relief sought by the Defence

17. The Defence seeks various forms of relief in the event that the Prosecution's Motion is granted.[34] In relation to request (a), the Prosecution has set out above its position regarding disclosure. In relation to requests (b) and (c), the Defence appears to envision a 30 day period for review of the documents during which time counsel

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[29] Footnote 21 of the Response appears to make reference to the case of *Prosecutor v. Prlic*, IT-04-74-AR73.10, "Decision on Prosecution's Appeal against Trial Chamber's Order on Contact between the Accused and Counsel during an Accused's Testimony pursuant to Rule 85(C)", 5 September 2008, para. 11. It is notable that neither this decision nor the jurisprudence relevant to the use of documents in cross-examination has considered self-incrimination as a relevant factor in connection with the principles governing the use of documents to challenge the credibility of the Accused who testifies or any other witness. The Response does not point to any authority according the Accused a special status in terms of how documents may be used in cross-examination.

[30] *Prlic* Appeal Decision, para. 29. See also para. 21 of the Prosecution's Motion which referred to the *Krstic* case as assisting in defining the boundaries of admissible fresh evidence.

[31] Minutes of Mock Trial and Trial Management Meeting held on 28 November 2007, ICC Courtroom II, 1030 – 1430 hrs. This agreement was subsequently affirmed by the Defence, see *Prosecutor v. Taylor*, Transcript, 14 February 2008, pp. 3831 – 3834.

[32] *Prosecutor v. Taylor*, Transcript, 14 February 2008, pp. 3831 – 3834 and *Prosecutor v. Taylor*, Transcript, 29 April 2008, pp. 8803 - 8805.

[33] *Prosecutor v. Taylor*, Transcript, 29 April 2008, pp. 8803 – 8805. The Presiding Judge (at that time) stated that "there is no ruling in this court as to when documents of this nature are revealed to the Prosecution, or another party. Counsel is entitled to put matters in cross-examination and he has stated now as a matter of courtesy and professionalism he will disclose this as soon as possible".

[34] Response, para. 31.

would have unrestricted access to the Accused in order to provide legal advice in relation to the documents. A recent decision of this Trial Chamber makes it clear that Defence Counsel should not discuss the testimony of the Accused with the Accused for the course of his testimony.[35] The procedure proposed by the Defence would in effect allow the Accused to prepare responses in advance to evidence which is intended to challenge his credibility. Such a procedure would result in rehearsed testimony that would defeat the purpose of cross-examination. The Defence has provided no justification for an adjournment and any request for extra time should only be entertained on a document-by-document basis. The Defence request (d) is misconceived as the Defence will have an adequate opportunity to re-examine the Accused.

18. The Defence declaration that it will seek leave to appeal an unfavourable decision and request a stay of trial proceedings pending a resolution of the matter by the Appeals Chamber is premature. The parties may exercise their rights under the Statute and Rules following a decision of the Trial Chamber.

III. CONCLUSION

19. The guidelines proposed by the Prosecution cannot at the same time "add little to what is already in existence" and "so infringe the fairness of the trial that they should be dismissed".[36] The Defence has failed to undermine the arguments put forward in the Prosecution's Motion, as supported by extensive reference to the relevant jurisprudence. For the reasons contained in the Prosecution's Motion and this Reply, the relief sought by the Prosecution should be granted.

Filed in The Hague,

25 November 2009,

For the Prosecution,

pp

Brenda J. Hollis
Principal Trial Attorney

[35] *Prosecutor v. Taylor*, SCSL-03-1-T-861, "Decision on Prosecution Motion for an Order Restricting Contact between the Accused and Defence Counsel during Cross-Examination", 20 November 2009.
[36] Response, para. 18.

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Archbold 2008, 4-335 - 4-337 (referring to *R v. Rice* [1963] 1 Q.B. 857, 47 Cr.App.R.79, CCA and *R v Halford*, 67 Cr.App.R.318, CA) (copies of these cases have not been provided but the relevant passages of *Archbold* are attached).

the jury as the defendant was going to assert that the burglary admission was also fabricated and rely upon the previous acquittal in support of that defence. The trial judge however refused to admit evidence of the acquittal. The conviction was quashed on the basis that the jury should have been told of the acquittal and, applying *Sambasivam v. Public Prosecutor, Federation of Malaya* [1950] A.C. 458, PC (*ante*, § 4–159), told that it was conclusive evidence that he was not guilty of arson and that his confession to that offence was untrue. However, in *R. v. Terry* [2005] 2 Cr.App.R. 7, CA, it was held that in the latter respect *Hay* went further than was necessary and was inconsistent with the reasoning of the House of Lords in *R. v. Z.* [2000] 2 A.C. 483 (*ante*, § 4–160) which had qualified the principle expounded in *Sambasivam*. It was held that where a defendant's guilt or innocence of an offence for which he was not on trial had potential relevance to his guilt or innocence of the offence for which he was on trial, the fact that he had been acquitted of the other offence was not conclusive evidence of his innocence of it; and his acquittal did not mean that all relevant issues had been resolved in his favour.

4–332 The principle to be derived from *Cooke*, *ante*, seems to be that where there is a clear inference from a verdict that the jury has rejected a witness's testimony, on the basis that they do not believe him (as opposed to thinking he might have been mistaken), and that witness's credibility is directly in issue in a subsequent trial, evidence of the outcome of the first trial is relevant. For further refinement of this principle, see *R. v. Edwards* [1991] 1 W.L.R. 207, CA, *post*, § 13–17.

4–333 In *R. v. Doosti*, 82 Cr.App.R. 181, CA, a previous acquittal was held to be relevant in re-examination after the defendant had been cross-examined about a previous conviction which had occurred on the same occasion as the acquittal. He had been acquitted of the more serious charge. It was one which in nature and circumstance was akin to the one for which he was then being tried—indeed the officers in each case were the same. Clearly it was only fair that if the Crown chose to elicit that part of the picture of the accused's credibility favourable to them, the defendant was entitled to reveal the rest of the picture favourable to him—his and the officer's credibility being a central issue in the case.

4–334 The facts in *Cooke* and *Doosti* were distinguished in *R. v. H. (J.R.)*, 90 Cr.App.R. 440, in which there had been many possible reasons for the previous acquittal apart from a rejection of the complainant's evidence. Lord Lane C.J. said that fairness to both sides, rather than any remote, abstruse legal principle, was the matter which had to actuate a judge's reasoning. Coupled with fairness, was the necessity for the judge to ensure that the jury whom he was assisting did not have their minds clouded by issues which were not the true issues they had to determine. The danger was that the jury would have been spending their time not in determining what they believed to be true from the evidence they had heard, but that they would be deflected from that course by consideration of what had actually actuated the first jury to reach the conclusions it did. *R. v. H.* was followed in *R. v. Y.* [1992] Crim.L.R. 436, CA, and in *Terry*, *ante*, Lord Lane C.J.'s observations on fairness were said to have been echoed by Lord Hobhouse in *R. v. Z.*, *ante*, at p. 510A–E.

XIV. EXTENT TO WHICH EVIDENCE OTHER THAN DEFENCE EVIDENCE MAY BE ADDUCED AFTER THE PROSECUTION HAVE CLOSED THEIR CASE

A. General Principle

4–335 The general rule that matters probative of the defendant's guilt should be adduced as part of the prosecution's case applies (a) to matters put in cross-examination to a defendant (see *post*), and (b) to the calling of evidence.

In *R. v. Rice* [1963] 1 Q.B. 857, 47 Cr.App.R. 79, CCA, it was said that there is a general principle of practice, though no rule of law, which requires that all evidentiary matter the prosecution intend to rely upon as probative of the defendant's guilt should be adduced before the close of the prosecution case if it be available then. Whether evidence subsequently available to the prosecution should be introduced at a later stage is a

matter for the trial judge's discretion, which must be exercised within the limits imposed by the authorities and in such a way and subject to such safeguards as seem to him best suited to achieve justice between the Crown and the defendants and between defendants.

This general principle was considered in *R. v. Kane*, 65 Cr.App.R. 270, CA. The court said that even where evidence which could have been led as part of the case for the Crown became available for the first time to the Crown after the close of the Crown's case, the subsequent introduction of that evidence or its exclusion were matters to be referred to and decided by the trial judge. The court was careful to point out that its observations only applied to matters put in cross-examination to a defendant which could and should have been proved as part of the case for the Crown.

The same principle was applied in *R. v. Phillipson*, 91 Cr.App.R. 226, CA and *R. v.* **4–336**
Samson, 92 Cr.App.R. 115, CA, in both of which material which could and should have been part of the prosecution case was introduced for the first time in cross-examination. In the latter case, it was circumstantial evidence of guilt; in the former case it was material which directly undermined the defence (duress) revealed on the face of the papers. In *Phillipson*, the court said that it was not ruling out, in an appropriate case, the "time-hallowed practice" of introducing material for the first time in cross-examination. No clue was given as to when this would be appropriate and it is submitted that it would be unwise to rely on this dictum; it certainly should not be relied upon as justification for not disclosing the matter in the normal way. What is permissible (and is frequently done) is for prosecution counsel to inform the defence that it is not the intention of the prosecution to adduce a particular matter in evidence, but to specify that should the defence take a particular line, then the right is reserved to introduce it. If the defence response is such as to make it apparent that the matter is relevant then the normal rule should apply. What is not permitted is the laying of an ambush.

In *R. v. Hill*, 96 Cr.App.R. 156 at 163, CA, it was said that prosecution counsel is not limited in cross-examination to matters that have previously been established in evidence, provided that the questions are properly formulated without the use of language or other means to invest them with illegitimate weight. See *R. v. Unegel* [2000] 2 Cr.App.R. 361, CA, for an example of cross-examination that offended this principle.

As to certain problems that may arise in the context of an alibi defence, see *ante*, §§ 4–319 *et seq.*

The principle in *Rice* does not extend to evidence of matter which goes only to the **4–337**
credit of the defendant: *R. v. Hulford*, 67 Cr.App.R. 318, CA. (This is *not* a justification for not disclosing such matter.)

Where an agreed summary of a defendant's tape-recorded interviews has been put before the jury as part of the prosecution case, it may, in certain circumstances, be proper to permit counsel to play the tapes to the jury at a later stage if such a course is necessary to resolve an issue that has arisen. Matters can arise which are not anticipated when summaries are agreed and it is wrong that counsel should have their hands tied: *R. v. Sinclair and Peters*, *The Times*, September 21, 1992, CA. However, where the only purpose of playing the tape would be to establish that nothing had been said about a particular matter, it will usually be possible for counsel to agree a formal admission of that fact to avoid the necessity of playing the tape: *ibid.* (This account of the case is based on the transcript (no. 92/1733/X3) in respect of certain details that are not reported accurately in *The Times*.) See also *R. v. Aitken*, *post*, § 4–346

In *R. v. M. (J.)* [1996] 2 Cr.App.R. 56, CA, a video film of a child complainant's evidence in chief had been replayed at the close of the defence case on the application of the prosecution. It was held that, generally speaking, a video of a complainant's evidence should only be played for a second time as the result of a request from the jury, as to which see *post*, § 4–423. The replaying of such film in other circumstances should be discouraged because it is a departure from the normal way in which evidence at a criminal trial is heard and, generally speaking, any departure should only be made if there are exceptional reasons. However, in some circumstances it might be necessary to replay a short part of a video film to enable the jury and witnesses to understand the nature of questions being put on a particular point: *ibid.*