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SCSL-03-01-T  
(30990 - 30998)

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**THE SPECIAL COURT FOR SIERRA LEONE**

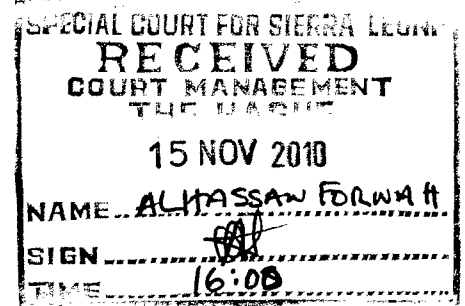
**Trial Chamber II**

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

**Registrar:** Ms. Binta Mansaray

**Date:** 15 November 2010

**Case No.:** SCSL-03-01-T



**THE PROSECUTOR**

-v-

**CHARLES GHANKAY TAYLOR**

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PUBLIC

**DEFENCE MOTION SEEKING LEAVE TO APPEAL THE DECISION ON THE  
DEFENCE MOTION FOR ADMISSION OF DOCUMENTS AND DRAWING OF AN ADVERSE  
INFERENCE RELATING TO THE ALLEGED DEATH OF JOHNNY PAUL KOROMA**

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**Office of the Prosecutor:**  
Ms. Brenda J. Hollis

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

## I. INTRODUCTION

1. On 12 November 2010, the Trial Chamber issued its *Decision on Public with Confidential Annexes A-D Defence Motion for Admission of Documents and Drawing of an Adverse Inference Relating to the Alleged Death of Johnny Paul Koroma*.<sup>1</sup> The majority of the Trial Chamber, Justice Julia Sebutinde dissenting, dismissed the Defence Motion in its entirety.
2. The majority of the Trial Chamber also orally denied the Defence request for an extension of time to file this leave to appeal,<sup>2</sup> so the Defence files this motion in accordance with the three-day time frame set out in Rule 73(B).
3. The Defence does not agree with but does not challenge the Trial Chamber's decision not to admit the forensic reports showing that the exhumed bodies were not that of Johnny Paul Koroma ("JPK")<sup>3</sup> and the Trial Chamber's refusal to draw adverse inferences despite the Prosecution's Rule 68(B) disclosure violation.<sup>4</sup> The Defence however seeks leave to appeal other aspects of the Decision which constituted errors of law and/or fact amounting to exceptional circumstances and resulting in irreparable prejudice. The Trial Chamber erred:
  - a. In finding that the exculpatory information contained in the affidavit of DCT-032, which contradicts the evidence of Prosecution witnesses relating to an alleged murder committed by subordinates of Charles Taylor on his orders,

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<sup>1</sup> *Prosecutor v. Taylor*, SCSL-03-01-T-1119, Decision on Public with Confidential Annexes A-D Defence Motion for Admission of Documents and Drawing of an Adverse Inference Relating to the Alleged Death of Johnny Paul Koroma, 11 November 2010 ("**Decision**"). The procedural history to this Impugned Decision includes *Prosecutor v. Taylor*, SCSL-03-01-T-1104, Decision on Public with Confidential Annexes A-D Defence Motion for Disclosure of Exculpatory Information Relating to DCT-032, 20 October 2010 ("**Disclosure Decision**"); *Prosecutor v. Taylor*, SCSL-03-01-T-1108, Public with Confidential Annexes A-D Defence Motion for Disclosure of Exculpatory Information Relating to DCT-032, 27 October 2010 ("**Motion**"); *Prosecutor v. Taylor*, SCSL-03-01-T-1111, Confidential Prosecution Response to Public with Confidential Annexes A-D Defence Motion for Disclosure of Exculpatory Information Relating to DCT-032, 2 November 2010 ("**Response**"); *Prosecutor v. Taylor*, SCSL-03-01-T-1114, Public with Confidential Annex One Defence Reply to Confidential Prosecution Response to Public with Confidential Annexes A-D Defence Motion for Disclosure of Exculpatory Information Relating to DCT-032, 4 November 2010 ("**Reply**").

<sup>2</sup> *Prosecutor v. Taylor*, SCSL-03-01-T, Status Conference Transcript, 12 November, p. 49115-6.

<sup>3</sup> Decision, paras. 28-30.

<sup>4</sup> Decision, paras. 34-35.

goes to proof of the acts and conduct of the Accused and thus is inadmissible at the request of the Accused under Rule 92bis;<sup>5</sup>

- b. In finding that, if the affidavit of DCT-032 is not admissible, then the other materials submitted have no independent relevance, including the record of disbursements made by the Prosecution to DCT-032<sup>6</sup> and the indemnity letter written by the Prosecution to DCT-032.<sup>7</sup>

## II. APPLICABLE LAW

4. The legal standard for leave to appeal is set out in Rule 73(B) of the Rules which provides that:

“Decisions rendered on such motions [brought by either party for appropriate ruling or relief after the initial appearance of the accused] are without interlocutory appeal. However in exceptional circumstances and to avoid irreparable prejudice to a party, the Trial Chamber may give leave to appeal. Such leave should be sought within 3 days of the decision and shall not operate as a stay of proceedings unless the Trial Chamber so orders.”

5. Rule 73(B) is a restrictive provision<sup>8</sup> and an interlocutory appeal does not lie as of right. The rationale behind this rule is that criminal trials must not be heavily encumbered and consequently unduly delayed by interlocutory appeals.<sup>9</sup> The party seeking leave to appeal must meet the conjunctive conditions of “exceptional circumstances” and “irreparable prejudice” before the Trial Chamber can exercise its discretion.<sup>10</sup>
6. There is no comprehensive or exhaustive definition of “exceptional circumstances” as the “notion is one that does not lend itself to a fixed meaning [and it cannot be] plausibly maintained that the categories of ‘exceptional circumstances’ are closed or fixed”.<sup>11</sup> Exceptional circumstances may exist depending upon particular facts and

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<sup>5</sup> Decision, paras. 25 and 27.

<sup>6</sup> Decision, para. 31.

<sup>7</sup> Decision, para. 32.

<sup>8</sup> *Prosecutor v. Sesay et al.*, SCSL-2004-15-PT, Decision on the Prosecutor’s Application for Leave to File an Interlocutory Appeal against the Decision on the Prosecution Motion for Joinder, 13 February 2004, para. 11.

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*, para. 10.

<sup>11</sup> *Prosecutor v. Sesay et al.*, SCSL-2004-15-T-357, Decision on Defence Applications for Leave to Appeal Ruling of 3 February 2005 on the Exclusion of Statements of Witness TF1-141, 28 April 2005, para. 21.

circumstances, where for instance the question is one of general principle to be decided for the first time, where the interests of justice *might* be interfered with (there is no requirement to prove that such interference *will* definitely arise), where further decision is conducive to the interests of justice, or the question is of fundamental legal importance.<sup>12</sup>

7. Irreparable prejudice arises where the Trial Chamber's decision is not remediable on final appeal. The Appeals Chamber has noted that although most decisions will be capable of disposal at final appeal "the underlying rationale for allowing such appeals is that certain matters cannot be cured or resolved by final appeal against judgment."<sup>13</sup>

### III. SUBMISSIONS

#### Grounds of Appeal

8. The Trial Chamber's majority finding that exculpatory information contained in the affidavit of DCT-032, which contradicts the evidence of Prosecution witnesses relating to an alleged murder committed by subordinates of Charles Taylor on his orders, goes to proof of the acts and conduct of the Accused and thus is inadmissible at the request of the Accused under Rule 92*bis* is an error of law and/or fact in that:
  - a. As matter of law, the majority of the Trial Chamber misconstrued the rationale behind the exclusion of material under Rule 92*bis* which go to proof of the acts and conduct of the Accused, which is a safeguard intended to protect (not frustrate) the fair trial rights of the Accused;<sup>14</sup> and
  - b. As a matter of law, the majority of the Trial Chamber misconstrued the meaning of the phrase "acts and conduct of the Accused" by holding that an omission to act, which is not related to a breach of duty alone, is prohibited from admission under Rule 92*bis*;<sup>15</sup> and
  - c. As a matter of fact, the majority of the Trial Chamber misstated the evidence in finding that "the material in the affidavit relates to DCT-032's denial that

<sup>12</sup> *Id.*, para. 26.

<sup>13</sup> *Prosecutor v. Norman et al.*, SCSL-04-14-T-669, Decision on Prosecution Appeal against Trial Chamber Decision of 2 August 2004 Refusing Leave to File an Interlocutory Appeal, 17 January 2005, para 29.

<sup>14</sup> Decision, Dissenting Opinion of Judge Julia Sebutinde, paras. 3-4 and 5-8.

<sup>15</sup> Decision, Dissenting Opinion of Judge Julia Sebutinde, paras. 9-13.

he was involved in the killing of Johnny Paul Koroma pursuant to the orders of the Accused”,<sup>16</sup> as the affidavit only states that DCT-032 had no knowledge of JPK’s death,<sup>17</sup> had never met JPK,<sup>18</sup> and had fabricated a story about JPK.<sup>19</sup> In the affidavit, DCT-032 says nothing about whether JPK was killed pursuant to the orders of the accused. He simply professes no personal knowledge of JPK or his death. The majority of the Trial Chamber therefore erroneously read evidence into the record.

9. The Trial Chamber’s majority finding that if the affidavit of DCT-032 is not admissible, then all the other materials submitted, including the record of disbursements made by the Prosecution to DCT-032 and the indemnity letter written by the Prosecution to DCT-032, have no independent relevance amounts to an error of law and/or fact in that:
  - a. As a matter of law and/or fact, the majority of the Trial Chamber errantly limited the scope of the relevance of the affidavit of DCT-032 when it determined that “absent the testimony of this witness or the admission of his affidavit, the payments in and of themselves are not relevant to any of the issues in the case, as their sole relevance would have been to corroborate DCT-032’s account of the Prosecution’s conduct in relation to his role in the investigation of the death of Johnny Paul Koroma or to impugn his credibility”,<sup>20</sup> as the record of disbursements contains descriptions by the Prosecution regarding the purpose for which monies were purportedly disbursed, which provides ample context outside that of the affidavit. Furthermore, the Defence has made the issue of improper witness payments a continuing objection throughout the trial<sup>21</sup> and these disbursements are yet another example of an abuse of the Prosecution’s discretion under Rule 39(ii),

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<sup>16</sup> Decision, para. 23.

<sup>17</sup> Motion, Confidential Annex D, para. 9.

<sup>18</sup> Motion, Confidential Annex D, para. 27.

<sup>19</sup> Motion, Confidential Annex D, para. 22.

<sup>20</sup> Decision, para. 31.

<sup>21</sup> Reply, paras. 8-9.

which can be argued in the Final Brief.<sup>22</sup> In this respect, the disbursement records have independent standing from the affidavit.

- b. As a matter of law and/or fact, the majority of the Trial Chamber errantly limited the scope of the relevance of the indemnity letter in finding that “absent the testimony of this witness or the admission of his affidavit, the indemnity letter in and of itself is not relevant to any of the issues in the case, as its sole relevance would have been to corroborate DCT-032’s account of the Prosecution’s conduct in relation to his role in the investigation of the death of Johnny Paul Koroma or to impugn his credibility”<sup>23</sup> as the Defence has also raised the issue of indemnity letters as a continuing objection in this case.<sup>24</sup> The indemnity letter is therefore capable of standing on its own as it relates to a live issue in this case. In this context, the Trial Chamber also erred in that it did not explain how this indemnity letter is not relevant in light of the general Prosecution practice on this issue.

#### Exceptional Circumstances and Irreparable Prejudice

##### **Exceptional Circumstances**

10. The foregoing errors of law and/or fact, individually or collectively, amount to exceptional circumstances in that the interests of justice *might* be interfered with and/or because further decision is conducive to the interests of justice and/or because the case raises a question of fundamental importance.
11. The fact that the Prosecution, for good reasons or otherwise, kept the exculpatory material at issue away from the Accused until very late in the proceedings and now admission into evidence is being erroneously refused could result in the interests of justice might be interfered with. The matter, in the interests of justice, therefore calls for further decision on appeal.

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<sup>22</sup> Decision, Dissenting Opinion of Judge Julia Sebutinde paras. 14 and 16. See also *Prosecutor v. Taylor*, SCSL-03-01-T-1118, Decision on Public with Confidential Annexes A-J and Public Annexes K-O Defence Motion Requesting an Investigation into Contempt of Court by the Office of the Prosecution and its Investigators, 11 November 2010, para. 40 (stating that an alleged abuse of discretion under Rule 39(ii) will be considered at the stage of final deliberations).

<sup>23</sup> Decision, para. 32.

<sup>24</sup> Reply, para. 10.

12. Furthermore, the question of what constitutes acts and conduct of the accused and the meaning of an “omission” under Rule 92*bis* jurisprudence, especially when considered in the context of the accused’s ability to admit exculpatory evidence, raises a question of fundamental legal importance. Alternatively, it raises a question to be determined for the first time on appeal. Furthermore, the fact that there is a carefully and well-reasoned re-occurring split on the bench on this issue suggests that a further decision would be conducive to the interests of justice.
13. The errors of law and/or fact relating to non-admission the affidavit are especially egregious and elevate the exceptional circumstances surrounding it because the majority’s decision to not admit the disbursement record and the indemnity letter were contingent on the admission of the affidavit.

#### **Irreparable prejudice**

14. The failure by the Trial Chamber to admit the exculpatory material at issue and consequently not be able to consider the exculpatory evidence in its Judgement deliberations is not easily remediable upon final appeal. The Defence is irreparably prejudiced in that it will not being able to rely on the evidence relating to Prosecution’s recruitment and payment practices, as well as information that contradicts Prosecution allegations, in its Final Brief. Furthermore, without admitting any of the documents at issue, the Trial Chamber cannot consider any Defence request to draw adverse inferences from the Prosecution’s disclosure violation, which issue the Trial Chamber has left to the Judgement deliberations stage.<sup>25</sup>

#### **IV. CONCLUSION AND RELIEF REQUESTED**

15. The Defence therefore urges the Trial Chamber to exercise its discretion and grant leave to appeal as this would not delay proceedings in this case given a filing schedule relating to the Final Brief and Submissions has already been issued.<sup>26</sup>
16. The Defence submits that it has met the conjunctive requirements for leave to appeal the Trial Chamber’s Decision, which contains a number of errors of law and/or fact.

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<sup>25</sup> Disclosure Decision, para. 33; also Decision, Dissenting Opinion of Judge Julia Sebutinde, paras. 20-21.

<sup>26</sup> *Prosecutor v. Taylor*, SCSL-03-01-T-1105, Order Setting a Date for Closure of the Defence Case and Dates for Filing of Final Trial Briefs and the Presentation of Closing Arguments, 22 October 2010.

Respectfully Submitted,

A handwritten signature in black ink, appearing to read 'C. Griffiths', with a horizontal line extending to the right from the end of the signature.

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**Courtenay Griffiths, Q.C.**  
**Lead Counsel for Charles G. Taylor**  
Dated this 15th Day of November 2010,  
The Hague, The Netherlands



**Table of Authorities**

**Prosecutor v. Taylor**

*Prosecutor v. Taylor*, SCSL-03-01-T-1119, Decision on Public with Confidential Annexes A-D Defence Motion for Admission of Documents and Drawing of an Adverse Inference Relating to the Alleged Death of Johnny Paul Koroma, 11 November 2010

*Prosecutor v. Taylor*, SCSL-03-01-T-1118, Decision on Public with Confidential Annexes A-J and Public Annexes K-O Defence Motion Requesting an Investigation into Contempt of Court by the Office of the Prosecution and its Investigators, 11 November 2010

*Prosecutor v. Taylor*, SCSL-03-01-T-1114, Public with Confidential Annex One Defence Reply to Confidential Prosecution Response to Public with Confidential Annexes A-D Defence Motion for Disclosure of Exculpatory Information Relating to DCT-032, 4 November 2010

*Prosecutor v. Taylor*, SCSL-03-01-T-1111, Confidential Prosecution Response to Public with Confidential Annexes A-D Defence Motion for Disclosure of Exculpatory Information Relating to DCT-032, 2 November 2010

*Prosecutor v. Taylor*, SCSL-03-01-T-1108, Public with Confidential Annexes A-D Defence Motion for Disclosure of Exculpatory Information Relating to DCT-032, 27 October 2010

*Prosecutor v. Taylor*, SCSL-03-01-T-1104, Decision on Public with Confidential Annexes A-D Defence Motion for Disclosure of Exculpatory Information Relating to DCT-032, 20 October 2010

**Other SCSL Cases**

*Prosecutor v. Sesay et al.*, SCSL-2004-15-T-357, Decision on Defence Applications for Leave to Appeal Ruling of 3 February 2005 on the Exclusion of Statements of Witness TF1-141, 28 April 2005

*Prosecutor v. Sesay et al.*, SCSL-2004-15-PT, Decision on the Prosecutor's Application for Leave to File an Interlocutory Appeal against the Decision on the Prosecution Motion for Joinder, 13 February 2004

*Prosecutor v. Norman et al.*, SCSL-04-14-T-669, Decision on Prosecution Appeal against Trial Chamber Decision of 2 August 2004 Refusing Leave to File an Interlocutory Appeal, 17 January 2005