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SCSL-03-01-T
(16971-16979)

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THE SPECIAL COURT FOR SIERRA LEONE

In Trial Chamber II

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

Registrar: Mr. Herman von Hebel

Date: 08 May 2008

Case No.: SCSL-2003-01-T

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| SPECIAL COURT FOR SIERRA LEONE | |
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THE PROSECUTOR

-v-

CHARLES GHANKAY TAYLOR

PUBLIC

**DEFENCE RESPONSE TO URGENT PROSECUTION APPLICATION FOR LEAVE
TO APPEAL ORAL DECISIONS REGARDING ALLOWING QUESTIONS
CONCERNING THE LOCATION OF THE FAMILY OF A WITNESS AND FAILING
TO ORDER REDACTION OF THE LOCATIONS**

Office of the Prosecutor:

Ms. Brenda J. Hollis
Ms. Julia Baly
Ms. Kirsten Keith

Counsel for Charles G. Taylor:

Mr. Courtenay Griffiths, Q.C.
Mr. Terry Munyard
Mr. Andrew Cayley
Mr. Morris Anyah

I. INTRODUCTION

1. This is the Defence's Response to the *Urgent Prosecution Application for Leave to Appeal Oral Decisions Regarding Allowing Questions Concerning the Location of the Family of a Witness and Failing to Order Redaction of the Locations*, filed on the 28th April 2008 ("the Application").
2. In the Application, the Prosecution seeks leave of the Trial Chamber to file an interlocutory appeal with the Appeals Chamber challenging the Trial Chamber's three separate oral decisions impacting on the potential identification and location of Prosecution witness TF1-334's relations. The Trial Chamber's first decision allowed questions, during cross examination, relating to the locations of the witness's relatives on the basis of relevance going down to credibility. The Trial Chamber's second decision refused the Prosecution's oral application for those portions of the evidence to be redacted from the public record and the third decision refused yet another oral application by the Prosecution for the Chamber to reconsider its second decision in light of additional evidence that was brought before the court.
3. The Prosecution argues that the Trial Chamber erred in that:
 - i) it improperly exercised its discretion in allowing the Defence to cross-examine witness TF1-334 on the current locations of his family members on the basis of relevance;
 - ii) having allowed the cross examination, not ordering the questions be asked in closed or private session;
 - iii) having allowed the questions in open session, denying the application for the redaction of the locations of the witness's family; and
 - iv) denying a renewed application for the redaction of the said evidence, after additional information was presented.¹

¹ Prosecution Application, para. 2.

4. These issues, the Prosecution argues, give rise to exceptional circumstances and irreparable harm, and leave to appeal should therefore be granted. The Prosecution argues that the novelty of issue of the scope and nature of the Trial Chamber's obligation to ensure the protection of the privacy and security of a witness, where the witness chooses to testify in open court, amounts to exceptional circumstances for which leave must be granted.²
5. Further, that the extent to which the Trial Chamber is obliged to exercise its discretion to disallow certain questions or take measures in order to ensure minimum risk to the privacy and security of a witness as well as the extent of the Chamber's mandatory obligation to control the manner of questioning to avoid harassment or intimidation, pursuant to Rule 75 (C), raise serious issues of fundamental legal importance that must be determined at the appellate level.³
6. Further, that it is in the interest of justice that witnesses should not be deterred from giving evidence for fear of their privacy or security being compromised.⁴ The Trial Chamber's oral decisions in this matter, to the extent that they compromise the privacy and security of the witness, the Prosecution argues, may cause irreparable prejudice to its case in that future witnesses could be deterred from testifying if they are required to expose their families through questions that reveal their locations.⁵
7. The foregoing, the Prosecution argues, amount to proof of exceptional circumstances and irreparable harm for which leave to appeal must be granted. Pending finalisation of the matter, the Prosecution also seeks an urgent interim order for those portions of witness TF1-334's evidence relating to the locations of his relatives to be redacted.⁶
8. The Defence is aware that in these proceedings, the Trial Chamber is not asked to determine the merits of the Prosecution's case which, if leave were granted, would be for the Appeals Chamber to decide but merely to determine whether the Prosecution has made

² Prosecution Application, para. 26.

³ Prosecution Application, paras 27 through 29.

⁴ Prosecution Application, para. 30.

⁵ Prosecution Application, para. 30.

⁶ Prosecution Application, para. 3.

a case for leave to appeal. The Defence however submits that the Trial Chamber still has discretion to refuse leave to appeal if the Appellant's case on appeal is without merit whatsoever.

9. The Defence submits that the Prosecution fails to make out a case both for leave to appeal and for interim measures and therefore the Application must fail in its entirety.

II. MERITS

Legal standard for Leave to Appeal

10. The Defence agrees with the Prosecution's articulation of the law on the applicable standard for leave to appeal and reiterates that under Rule 73(B) of the Rules, the Prosecution must establish, conjunctively, both *exceptional circumstances* and *irreparable harm*.⁷ The Defence however submits that the Prosecution fails to meet this threshold and therefore its Application must fail.
11. The essence of the Prosecution's case on appeal is to challenge the Trial Chamber's exercise of discretion in dismissing the Prosecution's objection to the cross examination of witness TF1-334 on evidence relating to the location of certain relations of his, and having overruled the objection, in refusing subsequent oral applications for those portions of the evidence relating to the locations of the witness's relatives to be redacted. In exercising its discretion in the manner that it did, the Prosecution essentially argues, the Trial Chamber compromised the privacy and security of the witness and his relations.
12. The Defence submits that, to the extent that the Prosecution's entire case on appeal questions the Trial Chamber's exercise of discretion, more so on findings of fact, it fails to meet the exceptional circumstances threshold for which leave to appeal may be granted.
13. It is trite that the Trial Chamber is the primary trier of fact and that the Appeals Chamber applies a deferral standard in reviewing a Trial Chamber's decision on matters of fact.

⁷ Prosecution Application paras 9 and 10.

Further, that the Appeals Chamber will only interfere with the discretion of the Trial Chamber in exceptional circumstances where the Trial Chamber's decision would otherwise result in a "grossly unfair outcome", or a "flagrant injustice".⁸ The Prosecution's case fails this test.

14. To the extent that the Prosecution's case in this matter seeks to challenge factual determinations by the Trial Chamber in the exercise of its discretion, the Prosecution's case is without merit whatsoever and leave to appeal must be refused on that basis. Leave to appeal must be refused for two primary reasons. Firstly, on the basis that the Prosecution's case on appeal is entirely hopeless and secondly, in that the Prosecution fails to meet the threshold for leave to appeal as argued further below.

Exceptional Circumstances

Question is one of general principles to be decided for the first time

15. Contrary to the assertion by the Prosecution in paragraph 26 of the Application, the issue in dispute in this matter does not raise a novel general principle of law. There is nothing in all the Trial Chamber's oral decisions to suggest that the Chamber misdirected itself on a point of law in overruling the Prosecution's objection to the questions on the locations witness TF1-334's relatives, and in denying subsequent applications for those portions to be redacted. Rather, the Trial Chamber simply applied itself to the facts before it and came to the decision, firstly that given the non-specific nature of the evidence, there was no discernable danger to the witness's relatives,⁹ and after hearing additional information, maintaining its earlier position given the public nature of the witness's evidence.¹⁰ This it might be underlined was against the background that the witness was testifying in open court having voluntarily relinquished the proactive measures that were in place in his favour.

⁸ See, for instance, *Kupreškić* Appeal Judgement, para. 29. See also *Furundžija* Appeal Judgement, para. 37; *Kunarac* Appeal Judgement, para. 39; *Krnojelac* Appeal Judgement, para. 13; *Vasiljević* Appeal Judgement, para. 8; *Kvočka* Appeal Judgement, para. 18.

⁹ Trial Transcript, 24 April 2008, page 8541.

¹⁰ Trial Transcript, 28 April 2008, page 8651.

16. The issue that falls for determination on appeal is not a general principle of law on the scope and nature of the Trial Chamber's obligation to protect the privacy and security of a witness who opts to testify in open court; an issue that is clearly established in the rules.¹¹ Rather, the issue is whether the Chamber erred in factually finding as it did that there was no discernable danger to the witness's relatives given that the evidence tendered was not specific; and after hearing further evidence, in maintaining its earlier position that the witness had opted to testify in open court and therefore his identity and, by reasonable extension, that of his relatives, was public knowledge. The real issue is therefore the well litigated question of discretion on findings of fact by the Trial Chamber.

Question raises serious issues of fundamental legal importance

17. Equally misplaced is the Prosecution's claim that the issue on appeal in this matter raises a fundamental point of law relating to the extent to which the Trial Chamber is **obliged** to exercise its discretion to disallow certain questions or take measures to minimise the risk of compromising the privacy and security of a witness.¹²
18. Two important issues stand out from the Prosecution's submission above. Firstly, the telling concession by the Prosecution that the issue of whether to allow certain questions impacting on the security of a witness is discretionary on the part of the Trial Chamber, and secondly, the inherent contradiction in then arguing that that discretion is mandatory.¹³
19. As a matter of law, there is no mandatory duty on the Trial Chamber to disallow certain questions or take measures to minimise the risk of compromising the privacy and security of a witness. As provided in Rule 75(A) of the Rules of this court,¹⁴ the matter is entirely discretionary depending on the facts or circumstances of the case. To argue as the Prosecution does, that that discretion translates to a peremptory norm where there is a potential risk that the privacy or security of a witness or his relations may be compromised,

¹¹ Rule 75.

¹² Prosecution Application, para. 27.

¹³ Also see paragraph 28 of the Application.

¹⁴ Rule 75(A).

is flawed both in law and in logic. There is no legal principle to support that proposition nor is the proposition legally tenable.

20. Secondly, the fundamental question relating to the circumstances when a Trial Chamber may exercise its discretion and when an appellate tribunal may interfere with that discretion is well litigated both before this court and in other international tribunals at the appellate level.¹⁵ There is therefore no need for further articulation of this issue at the appellate level. Therefore, to the extent that the Prosecution's case on appeal seeks to challenge the exercise of the Trial Chamber's discretion, the appeal does not raise any serious issue of fundamental legal importance. The question of discretion is well-litigated in international law.
21. The Prosecution therefore fails to establish exceptional circumstances and leave to appeal must be refused.

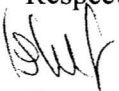
Irreparable prejudice

22. Leave to appeal must also be refused on the basis that the Prosecution fails to show that it would suffer irreparable prejudice if leave were not granted. The bald assertion that it is likely that future witnesses could be deterred from testifying if they are required to expose their families by questions that reveal their current locations is not sufficient to demonstrate irreparable prejudice. The argument overlooks the particular circumstances of the case, especially, that the witness voluntarily testified in open court after renouncing the protective measures regime that was in place for his protection. The argument also overlooks the entire protective measures regime that is well-entrenched in the Rules of the Special Court as well as in the court's jurisprudence. The Trial Chamber is always wary of the need to protect the privacy and security of the witnesses and has, where warranted, extended varying protective measures to the witnesses concerned.

¹⁵ See footnote 8.

23. While the fact that a witness chooses to testify in open court does not *ipso facto* divest the witness of all protection to his privacy and security, the need to protect the witness under those circumstances does not automatically warrant a curtailment of the extent of the defence's cross examination. The issue is always a matter of discretion for the court depending on the circumstances of each case.
24. The fact that the Trial Chamber in this case exercised its discretion against the Prosecution does not set a 'precedent' for all future cases. Each case will be determined on its own merits. As provided in Rules, where protective measures are warranted, the Trial Chamber may, at the behest of either party or of its own accord, extend protection to the witness concerned.¹⁶ To suggest that the Trial Chamber's decisions in this matter will deter future witnesses is therefore not only melodramatic; it is oblivious to the Rules and ill-conceived in law.
25. Leave to appeal must therefore be refused on the basis that the Prosecution's case on appeal is entirely without merit and further that the Prosecution fails to make a case both for exceptional circumstances and irreparable prejudice. The Prosecution's case for interim measures should also be dismissed accordingly.

Respectfully Submitted,



SILAS CHSKEBA

Courtenay Griffiths, QC

Lead Counsel for Mr. Charles Taylor

Dated this 8th Day of May 2008

The Hague, The Netherlands

¹⁶ Rule 75(A)

Table of Authorities

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Prosecutor v. Taylor, SCSL-03-01-T, Trial Transcript, 24 April 2008

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