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SCSL-03-01-T
(17252-17257)

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SPECIAL COURT FOR SIERRA LEONE

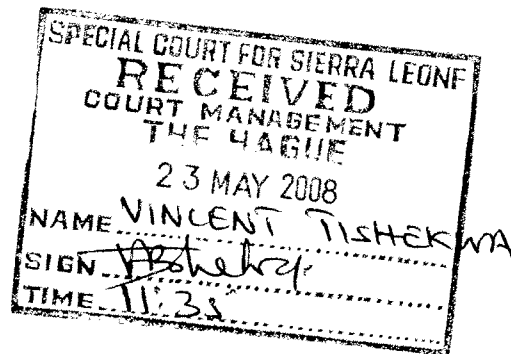
TRIAL CHAMBER II

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

Registrar: Herman von Hebel

Case No.: SCSL-03-1-T

Date: 22 May 2008



PROSECUTOR

v.

Charles Ghankay TAYLOR

DECISION ON CONFIDENTIAL DEFENCE MOTION FOR THE
DISCLOSURE OF EXCULPATORY MATERIAL PURSUANT TO RULE 68
OF THE RULES OF PROCEDURE AND EVIDENCE

Office of the Prosecutor:

Brenda J. Hollis
Leigh Lawrie

Defence Counsel for Charles G. Taylor:

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

TRIAL CHAMBER II ("Trial Chamber") of the Special Court for Sierra Leone ("Special Court");

SEISED of the "Confidential Defence Motion for the Disclosure of Exculpatory Material Pursuant to Rule 68 of the Rules of Procedure and Evidence", filed on 13 February 2008 ("Motion"),¹ wherein the Defence requests that the Trial Chamber order the Prosecution to disclose exculpatory material in its possession related to Prosecution witness TF1-371 and specifically requests:

- i. An Order to the Prosecution to conduct a thorough and complete search of any communication or correspondence, written or otherwise, direct or indirect, between the Office of the Prosecutor ("OTP") or any of its agents and witness TF1-371, prior to the meeting between the parties on 4 November 2005, and to provide the Trial Chamber with a declaration stating what searches have been made, where they have been made, and the result of such searches;
- ii. An Order to the Prosecution to immediately disclose to the Defence any Rule 68 material that falls within the purview of this Application, including the letter by the then Prosecutor, Desmond de Silva, QC, to witness TF1-371, dated 30 October 2005;
- iii. An Order to the Prosecution to provide the Defence with the names and contact details of its representatives, agents, or emissaries who made contact with witness TF1-371 on behalf of the Prosecution prior to the meeting with the witness on 4 November 2005;
- iv. An Order to the Prosecution to disclose "(1) the names of any Prosecution witness in this case regarding whom the OTP has granted any form of immunity from prosecution before the Special Court for Sierra Leone; (2) the names of any Prosecution witness in this case on whose behalf the OTP has intervened with a prosecution or governmental authority in any nation-state regarding a grant of immunity from prosecution in any such domestic jurisdiction; and (3) any and all documents, notes, correspondence, recordings, discs, et cetera, in respect of any witness that falls within the purview of (1) and (2) in this sub-paragraph"²

NOTING the "Confidential Prosecution Response to 'Defence Motion for the Disclosure of Exculpatory Material Pursuant to Rule 68 of the Rules of Procedure and Evidence'", filed on 25 February 2008 ("Response"),³ wherein the Prosecution opposes the Motion, and specifically responds to the points raised therein, stating that:

- i. The Defence request that the Prosecution be ordered to conduct a search is unnecessary, as the Prosecution has already performed such a search. Furthermore, the Defence request that the Prosecution be ordered to provide a declaration describing such a search is without justification;⁴
- ii. The Prosecution letter from the former Prosecutor, Desmond de Silva, Q.C., to Witness TF1-371 was read *verbatim* to the witness during an interview on 4 November 2005, and the unredacted transcript of that interview was disclosed to the Defence on 10 December 2007. The letter itself was disclosed to the Defence on 20 February 2008. Furthermore, as stated in Court

¹ SCSL-03-01-T-416 ("Motion").

² Motion, para. 23.

³ SCSL-03-01-T-426 ("Response").

⁴ Response, para.4.

on 4 February 2008, the Prosecution is not in possession of any other Rule 68 material in relation to Witness TF1-371;⁵

- iii. The Defence request that the Prosecution be ordered to provide certain details of its representatives, agents or emissaries who made contact with Witness TF1-371 prior to 4 November 2005 is unnecessary, as both the redacted and unredacted versions of the transcript of the 4 November 2005 interview identify the investigators who were in contact with the witness “during the November 2005 mission”. In relation to the “confidential source”, the Defence have not justified why disclosure should be made under the Rules and that “[t]he confidential source did not act as an agent or representative of the OTP to discuss, negotiate, or make any promises on behalf of the OTP regarding the conditions under which any interview would be conducted or testimony provided. The source also did not discuss issues such as immunities, indemnities or amnesties with the witness on behalf of, or as an agent or representative of the OTP;”⁶
- iv. The Chamber order the Prosecution to disclose “(1) the names of any Prosecution witness in this case regarding whom the OTP has granted any form of immunity from prosecution before the Special Court for Sierra Leone; (2) the names of any Prosecution witness in this case on whose behalf the OTP has intervened with a prosecution or governmental authority in any nation-state regarding a grant of immunity from prosecution in any such domestic jurisdiction; and (3) any and all documents, notes, correspondence, recordings, discs, et cetera, in respect of any witness that falls within the purview of (1) and (2) in this sub-paragraph”⁷ is based on unsubstantiated allegations and speculation, which do not amount to a *prima facie* showing that such material exists.⁸ Nonetheless, whilst the letter to TF1-371 amounts only to “a letter reflecting the Prosecutor’s considered exercise of his discretion, with no conditions attached”,⁹ and the Prosecution has “not granted immunity, amnesty or indemnity to any individual including TF1-371 and TF1-274,”¹⁰ the Prosecution did give similar letters to Witnesses TF1-532, TF1-274 and TF1-561.¹¹ The Prosecution has not intervened regarding a grant of immunity in any domestic jurisdiction;¹²

NOTING the “Confidential Defence Reply to Prosecution Response to ‘Defence Motion for the Disclosure of Exculpatory Material Pursuant to Rule 68 of the Rules of Procedure and Evidence’”, filed on 3 March 2008 (“Reply”),¹³ wherein the Defence reiterates its requests, and further submits that:

- i. The Defence accepts that the Prosecution has disclosed the identities of the investigators present, and, “to the extent that these were the only persons present,” the Defence takes no further issue on this point. However, the Prosecution has refused to disclose details of its “confidential source” involved in making contact with Witness TF1-371 on behalf of the OTP,

⁵ Response, paras 8, 10-12.

⁶ Response, para. 14.

⁷ Motion, para. 23.

⁸ Response, para. 15.

⁹ Response, para. 8.

¹⁰ Response, para. 17.

¹¹ Response, para. 16.

¹² Response, para. 16.

¹³ SCSL-03-01-T (“Reply”).

and, unless this person is a protected witness, his mere classification as a “confidential source” by the Prosecution “does not place any legal obligation on the Defence to seek an order from the court before the Prosecution can disclose the individual’s identity and particulars”;¹⁴

- ii. By disclosing the letter from former Prosecutor Desmond de Silva Q.C. to Witness TF1-371 seven days after the Defence filed the present Motion, the Prosecution was in breach of its Rule 68 obligations;¹⁵ and
- iii. The Defence persists with its claim for the relief set out in the Defence Motion to the extent that parts thereof remain unsatisfied;¹⁶

MINDFUL of Rule 68 of the Rules of Procedure and Evidence of the Special Court (“Rules”), which provides that:

- (A) The Prosecutor shall, within 14 days of receipt of the Defence Case Statement, make a statement under this Rule disclosing to the defence the existence of evidence known to the Prosecutor which may be relevant to issues raised in the Defence Case Statement.
- (B) The Prosecutor shall, within 30 days of the initial appearance of the accused, make a statement under this Rule disclosing to the defence the existence of evidence known to the Prosecutor which in any way tends to suggest the innocence or mitigate the guilt of the accused or may affect the credibility of prosecution evidence. The Prosecutor shall be under a continuing obligation to disclose any such exculpatory material;

CONSIDERING that before the Trial Chamber issues an order for further disclosure under Rule 68(B) it must be satisfied that the Defence has:

- a) identified the material sought with the requisite specificity;
- b) made a *prima facie* showing of the exculpatory or potentially exculpatory character of the materials requested; and
- c) made a *prima facie* showing of the Prosecution’s custody or control of the materials requested.¹⁷

ACCEPTING that the Prosecution has performed a search for records of communications between the Prosecution and Witness TF1-371 prior to 4 November 2005;

HOLDING therefore, that there is no basis on which to order the Prosecution to perform further searches, or to make a declaration concerning the details of any such searches;

FINDING that whilst the Prosecution has already disclosed the letter from the former Prosecutor Desmond de Silva Q.C. to Witness TF1-371, it did so belatedly on 20 February 2008, and in breach of its Rule 68 disclosure obligations, but that no material prejudice resulted and the Defence was able

¹⁴ Reply, paras 19 and 20.

¹⁵ Reply, para. 10.

¹⁶ Reply, para. 23.

¹⁷ *Prosecutor v. Karemera et al.*, ICTR-98-44-I, Decision on the Defence Motion for Disclosure of Exculpatory Evidence, 7 October 2003, para. 11; *Prosecutor v. Karemera et al.*, ICTR-98-44-T, Decision on Defence Motions for Disclosure of Information Obtained from Juvenal Uwilingiyimana, 27 April 2006, para. 9.

to cross-examine the witness on this document.¹⁸ Accordingly, the Trial Chamber finds that Defence request to disclose the letter is now moot and finds no basis on which to order the Prosecution to conduct further searches;

NOTING that, although the Prosecution has provided the Defence with the names of Prosecution investigators who were in contact with Witness TF1-371 on or prior to 4 November 2005, it has not, however, provided the identity of the “confidential source” who arranged the initial meeting between the Prosecution investigators and Witness TF1-371, and that, in arranging this meeting, the “confidential source” did so on behalf of the Prosecution, who cannot now be heard to say that he did not “act as an agent or representative of the OTP”.¹⁹

FINDING that the declaration of the Chief of Investigations that investigators from the Office of the Prosecutor met with the witness briefly on 3 November 2005 after such meeting had been earlier arranged by “a confidential source”²⁰ contradicts the testimony of Witness TF1-371 that he did not meet with the Office of the Prosecutor prior to 4 November 2005²¹ and thus gives rise to an obligation under Rule 68(B) to disclose the existence of evidence which may effect the credibility of prosecution evidence;

ACCEPTING that the Prosecution has disclosed the information in its possession specifically requested by the Defence in that it has disclosed that letters similar to the one given to Witness TF1-371 were given to Witnesses TF1-532, TF1-274 and TF1-561,²² and that it has not intervened regarding a grant of immunity in any domestic jurisdiction;

FINDING that the Defence has failed to identify with requisite specificity the remainder of the materials sought in paragraph 23 (iv) of the Motion, nor has it established that any such materials are in the custody or control of the Prosecution;

FOR THE ABOVE REASONS

GRANTS the Motion in part; and

ORDERS the disclosure to the Defence of the name and contact details of the “confidential source” who contacted TF1-371 on or prior to 3 November 2008 on behalf of the Prosecution;

DISMISSES the remainder of the Motion.

¹⁸ T. 1 February 2008, pp. 2918-2923.

¹⁹ Response, para. 14.


²⁰ Response, Annex B.

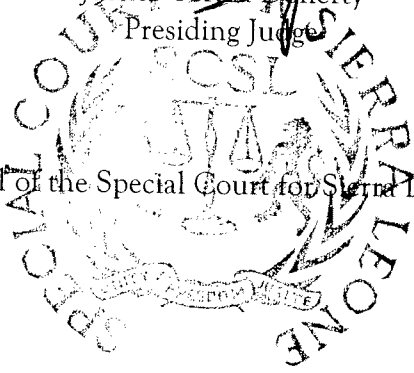
²¹ T. 1 February 2008, pp. 2913, 2919-2921.

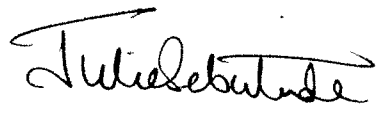
²² See also Confidential Annexes C and D;

Done at The Hague, The Netherlands, this 22nd day of May 2008.


Justice Richard Lussick


Justice Teresa Doherty
Presiding Judge


[Seal of the Special Court for Sierra Leone]


Justice Julia Sebutinde