



Original: English

No. ICC-01/04-02/06 OA6

Date: 19 June 2017

THE APPEALS CHAMBER

Before: Judge Sanji Mmasenono Monageng, Presiding Judge
Judge Christine Van den Wyngaert
Judge Howard Morrison
Judge Piotr Hofmański
Judge Raul C. Pangalangan

SITUATION IN THE DEMOCRATIC REPUBLIC OF THE CONGO

IN THE CASE OF THE PROSECUTOR v. BOSCO NTAGANDA

Public document

Decision on suspensive effect

Decision to be notified in accordance with regulation 31 of the Regulations of the Court to:

The Office of the Prosecutor
Ms Fatou Bensouda, Prosecutor
Ms Helen Brady

Counsel for the Defence
Mr Stéphane Bourgon
Mr Christopher Gosnell

Legal Representatives of Victims
Ms Sarah Pellet
Mr Dmytro Suprun

REGISTRY

Registrar
Mr Herman von Hebel

The Appeals Chamber of the International Criminal Court,

In the appeal of Mr Bosco Ntaganda against the decision of Trial Chamber VI entitled “Decision on Defence request for leave to file a ‘no case to answer’ motion” of 1 June 2017 (ICC-01/04-02/06-1931),

Having before it the “Notice of appeal and urgent request for suspensive effect” of 14 June 2017 (ICC-01/04-02/06-1960), in which a request for suspensive effect is made,

Issues the following

DECISION

The request for suspensive effect is rejected.

REASONS

I. PROCEDURAL HISTORY

A. Proceedings before the Trial Chamber

1. On 25 April 2017, Mr Bosco Ntaganda (“Mr Ntaganda”) filed a request before Trial Chamber VI (“Trial Chamber”), seeking “leave to file a motion of partial judgement of acquittal for the Counts 1 to 5, 7-8, 10-13 and 17-18 in relation to the ‘Second Attack’, and Count 17 in its totality [...]”¹ (“Request to File Partial Judgment Motion”). Mr Ntaganda argued, *inter alia*, that the Prosecutor had failed to adduce “any credible or sufficient evidence” that he “performed the *actus reus* of any of these crimes, let alone performed those acts with the requisite *mens rea*”² (“Contested Charges”).

¹ “Request for leave to file motion for partial judgment of acquittal”, 25 April 2017, ICC-01/04-02/06-1879-Conf, para. 42.

² Request to File Partial Judgment Motion, para. 2-3.

2. On 1 June 2017, following receipt of responses from both the victims participating in the proceedings and the Prosecutor,³ the Trial Chamber issued its decision denying the Request to File Partial Judgment Motion given, *inter alia*, “its broad discretion as to whether or not to pronounce upon such matters at this stage of proceedings” and the fact that “entertaining such a motion may also entail a lengthy process [...] and may thus not necessarily positively affect the expeditiousness of the trial, even if successful in part”.⁴

3. On 6 June 2017, Mr Ntaganda filed a request seeking leave to appeal the Impugned Decision.⁵

4. On 14 June 2017, the Trial Chamber granted Mr Ntaganda leave to appeal with respect to (i) “[w]hether the Chamber erred in permitting trial to proceed in respect of charges for which the Chamber declined to consider the sufficiency of the Prosecution’s evidence” and (ii) “[w]hether declining to entertain a Defence motion for a judgement of (partial) acquittal is a discretionary matter”.⁶

B. Proceedings before the Appeals Chamber

5. On 14 June 2017, Mr Ntaganda filed a request for suspensive effect in his appeal against the Impugned Decision.⁷ Mr Ntaganda submits that implementation of the Impugned Decision would cause an irreversible situation as he would be placed in a position of having to respond to charges in the Updated Document Containing the Charges for which he “might be acquitted” following the Trial Chamber’s adjudication of his motion for no case to answer.⁸ In particular, Mr Ntaganda argues that, given that the presentation of evidence for the defence case has already begun and the next witness to be heard is himself, the entirety of his testimony “impacts the

³ See “Joint Response by the Common Legal Representatives of the Victims to the Defence ‘Request for Leave to file motion for partial judgment of acquittal’”, 8 May 2017, ICC-01/04-02/06-1891-Conf, para. 33 and “Prosecution’s response to the ‘Request for leave to file motion for partial judgment of acquittal’”, ICC-01/04-02/06-1894-Conf”, 8 May 2017, ICC-01/04-02/06-1891-Conf, para. 46.

⁴ “Decision on Defence request for leave to file a ‘no case to answer’ motion”, 1 June 2017, [ICC-01/04-02/06-1931](#), (“Impugned Decision”) paras 25-26.

⁵ “Urgent Request for leave to appeal ‘Decision on Defence request for leave to file a ‘no case to answer’ motion’, 1 June 2017, ICC-01/04-02/06-1931”, 6 June 2017, [ICC-01/04-02/06-1937](#).

⁶ Transcript of 14 June 2017, ICC-01/04-02/06-T-209-CONF-ENG (ET), p. 24, line 15 to p. 26.

⁷ “Notice of appeal and urgent request for suspensive effect”, 14 June 2017, ICC-01/04-02/06-1960 (OA6) (“Request for Suspensive Effect”), para. 29.

⁸ Request for Suspensive Effect, para. 17.

assessment of the evidence in respect of all charges, in the sense that it is virtually impossible to segregate his evidence by count”.⁹ Thus in his view, his testimony must be “considered as a whole and his words cannot be unspoken once he takes the stand”.¹⁰ Mr Ntaganda contends that the prejudice he would face if “required to testify and respond to charges” for which he may later be acquitted would be irreversible.¹¹ According to Mr Ntaganda, this would violate “his fundamental right to remain silent, the right not to be subjected to any reversal of the burden of proof and the right to be tried without undue delay”.¹² In addition, Mr Ntaganda avers that the purpose of his appeal would be defeated should the trial and specifically his testimony continue.¹³

6. On 15 June 2017, following an order by the Appeals Chamber,¹⁴ the Prosecutor filed her response opposing the Request for Suspensive Effect.¹⁵ The Prosecutor argues that Mr Ntaganda’s arguments on the creation of an irreversible situation should the Impugned Decision be implemented are unsupported. In the Prosecutor’s view, continuation of the trial with Mr Ntaganda’s testimony does not lead to an irreversible situation since the Appeals Chamber is able to “reverse, confirm or amend the Impugned Decision irrespective of whether proceedings before [the] Trial Chamber [...] continue”.¹⁶ As to Mr Ntaganda’s argument that he would not be able to segregate his evidence by count, the Prosecutor argues that Mr Ntaganda in fact “concedes that even if he was acquitted at this stage of [the Contested Charges] [...] this would not impact on his evidence as a whole”.¹⁷ In any event, the Prosecutor contends that even if, *arguendo*, Mr Ntaganda could give specific evidence relating exclusively to the Contested Charges, this would not lead to an irreversible situation since the Judges of the Trial Chamber “are perfectly able to disregard discrete

⁹ Request for Suspensive Effect, paras 21-22.

¹⁰ Request for Suspensive Effect, para. 23.

¹¹ Request for Suspensive Effect, para. 23.

¹² Request for Suspensive Effect, para. 24.

¹³ Request for Suspensive Effect, paras 27-28.

¹⁴ “Order on the filing of responses”, 15 June 2017, [ICC-01/04-02/06-1964 \(OA 6\)](#), p. 3.

¹⁵ “Response to Mr Ntaganda’s urgent request for suspensive effect”, 15 June 2017, [ICC-01/04-02/06-1966 \(OA 6\)](#) (“Response to the Request for Suspensive Effect”), para. 11.

¹⁶ [Response to the Request for Suspensive Effect](#), para. 4.

¹⁷ [Response to the Request for Suspensive Effect](#), para. 6.

portions of Mr Ntaganda’s testimony for the purpose of their judgment under article 74 in this case”.¹⁸

7. With respect to Mr Ntaganda’s right to remain silent, the Prosecutor argues that Mr Ntaganda himself made the decision to give evidence in his defence and thus waived his right to remain silent “with full knowledge of all the charges that he is facing”, and that, as a result, “he cannot now claim that suspension of the [Impugned] Decision is necessary to protect his right to remain silent”.¹⁹ As to Mr Ntaganda’s right not to be subject to any reversal of the burden of proof and to be tried without undue delay, the Prosecutor submits that while suspension of the Impugned Decision would have no impact on the reversal of the burden of proof it would, however, delay the proceedings.²⁰ She also argues that Mr Ntaganda failed to demonstrate how the purpose of the appeal would be defeated if the Impugned Decision were implemented, and further refers to the Trial Chamber’s reasoning that Mr Ntaganda’s “arguments were ‘premised on unduly speculative grounds’ because the upcoming appeal ‘relates to whether a no case to answer motion must be entertained rather than necessarily granted or denied in substance’”.²¹

II. MERITS

8. Article 82 (3) of the Statute provides:

An appeal shall not of itself have suspensive effect unless the Appeals Chamber so orders, upon request, in accordance with the Rules of Procedure and Evidence.

9. The Appeals Chamber recalls that “[s]uspension involves the non-enforcement of a decision, the subject of an appeal”.²² The Appeals Chamber notes that, with his Request for Suspensive Effect, Mr Ntaganda seeks the suspension of the trial pending the determination of the appeal. With the Impugned Decision, however, the Trial Chamber did not order that the trial continue. It denied a procedural request, namely, a request for leave to file a ‘no case to answer’ motion. As such, the relief sought –

¹⁸ [Response to the Request for Suspensive Effect](#), para. 7.

¹⁹ [Response to the Request for Suspensive Effect](#), para. 8.

²⁰ [Response to the Request for Suspensive Effect](#), para. 8.


²¹ [Response to the Request for Suspensive Effect](#), para. 10.

²² *Prosecutor v. Joseph Kony et al.*, “Decision on the Prosecutor’s ‘Application for Appeals Chamber to Give Suspensive Effect to Prosecutor’s Application for Extraordinary Review’”, 13 July 2006, [ICC-02/04-01/05-92](#) (OA), para. 3.

suspension of the trial – cannot be attained through a suspension of the Impugned Decision. Indeed, the Appeals Chamber considers it difficult to discern any effect that suspending a decision that merely rejects a procedural motion would have.

10. Accordingly, the Appeals Chamber rejects the request; this is without prejudice to the Appeals Chamber’s eventual decision on the merits of Mr Ntaganda’s appeal against the Impugned Decision. The Appeals Chamber also recalls that the Trial Chamber has the power to adapt the proceedings before it in such a way as to address any concerns that Mr Ntaganda may have resulting from the appeal against the Impugned Decision.

Done in both English and French, the English version being authoritative.



Judge Sanji Mmasenono Monageng
Presiding Judge

Dated this 19th day of June 2017.

At The Hague, The Netherlands