



UNITED NATIONS
NATIONS UNIES

**International Criminal Tribunal for Rwanda
Tribunal Pénal International pour le Rwanda**

TRIAL CHAMBER I

Original : English

Before: Judge Navanethem Pillay, Presiding
Judge Erik Møse
Judge Asoka de Zoysa Gunawardana

Registry: Ms Aminatta N'gum

Decision date: 26 September 2000

THE PROSECUTOR

v.

**JEAN BOSCO BARAYAGWIZA
Case N. ICTR-97-19-I**

**DECISION ON THE REQUEST OF THE DEFENCE FOR SEVERANCE AND
SEPARATE TRIAL**

Office of the Prosecutor:

M. Sankara Menon
Ms Charity Kagwi
M. Alphonse Van

Counsel for the Accused:

Ms Carmelle Marchessault
M. David Danielson

THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA (“the Tribunal”)

SITTING AS Trial Chamber I composed of Judge Navanethem Pillay, Presiding, Judge Erik Møse and Judge Asoka de Zoysa Gunawardana;

CONSIDERING the motion from the Defence for severance and separate trial, filed on 19 July 2000;

CONSIDERING the additional information in support of the motion for severance and separate trial filed by the Defence on 31 July 2000 ;

CONSIDERING the consolidated response of the Prosecutor to Defence’s motions for lack of jurisdiction and for separate trial, filed on 23 August 2000;

CONSIDERING the rejoinder of the Defence to the consolidated response of the Prosecutor, filed on 5 September 2000 ;

HAVING heard the Parties at a hearing on 20 September 2000.

The Submissions of the Parties

1. The Defence submitted that even though the decision of 6 June 2000 granting the joinder of the accused was based on Rule 48 *bis* of the Rules a separate trial can be ordered on the basis of Rule 82 B). The Defence further argued that a joint trial will lead to a conflict of interest since the accused could be unlawfully accused, by association, of the crimes allegedly committed by his co-accused, for example the crimes alleged against Ngeze and related to his activities in *Kangura* newspaper. According to the Defence this is an unlawful procedure, which demonstrates that the Prosecutor has no case against the accused and that she is trying to charge him with acts she would not have been able to charge him with in a separate trial. Another conflict of interest will arise, according to the Defence, from the fact that Ngeze will be one of the defence witnesses. The Defence quoted Trial Chamber II which granted a separate trial on the basis, notably, that the three co-accused of Kajelijeli may refuse to testify for him in the case of a joint trial, which would be in violation of the accused’s rights under Rule 82 A) of the Rules.¹ The Defence also stated that a joint trial is against the interest of

¹ See *The Prosecutor v. Augustin Bizimana et al*, Case N. ICTR-98-44-T, Decision on the Defence Motion in Opposition to Joinder and Motion for Severance and Separate Trial Filed by the Accused Juvenal Kajelijeli of 6 July 2000, para. 39 to 41.

justice for several reasons. Firstly, the amendment of the indictment is null and void since the Chamber did not consider the supporting material and thus could not establish the existence of the “same transaction”. Secondly, the joinder decision of 6 June 2000 is also null and void since although the Prosecutor asked for a joinder of trials the Chamber granted a joinder of indictments pursuant to Rule 48 bis, thus ruling *ultra petita*. Thirdly, the joinder decision being based on a motion precedent to the decision granting leave to amend, the joinder is not based on the amended indictment in which the Chamber granted the addition of the count of conspiracy. This means that the joinder is null and void *ab initio*. Fourthly, the Defence was not duly informed of the facts of the case on time and did not have the opportunity to respond on the merits of the case. Although the joinder was granted on 6 June 2000, the accused received part of the documents - audio and videotapes were missing - during the month of July, long after the two co-accused. In these conditions, the accused and his counsels cannot be ready for trial, they need to listen to the content of the tapes and testimonies which form the corner stone of the prosecution evidence. Lastly the Defence submitted that it is in the interest of justice to stay commencement of the trial pending rulings from both the Trial Chamber and the Appeals Chamber on the preliminary motions and on the appeals. The Defence submitted that the commencement of the trial, namely 18 September 2000, has to be postponed in order to be enable them to properly prepare their case.

2. In addition, the Defence submitted a brief, in which it complained about the late and incomplete disclosure of documents by the Prosecutor. The Defence estimated that several months will be necessary to examine the audio and video-tapes, to analyse the expert reports, as well as to identify defence witnesses. Accordingly, the Defence is asking for a postponement of one year of the date set for trial.
3. The Prosecution responded that on 13 June 2000, the accused lodged an appeal against the decision granting the joinder. Although the decision of the Appeals Chamber was pending, the accused is reintroducing the same issue by filing the present motion. The Prosecution further submitted that a postponement of the date set for trial will prejudice its case. A delay will hinder the protective measures granted to the witnesses, indeed since the identifying information of all the prosecution witnesses having been disclosed to the accused a

postponement will endanger them.

4. In a rejoinder, the Defence submitted that it has received lists of witnesses and cannot determine which one is going to testify against the accused. It reiterated that there is no valid indictment against the accused. The Defence further argued that it had already opposed the date set for the commencement of the trial, that is 18 September 2000, when it was scheduled on 16 May 2000.

The Chamber

With Regard to Conflict of Interest

5. The Trial Chamber notes that this issue has been dealt with, at length, by the same Chamber and reiterates its findings in the case of *The Prosecutor v. Hassan Ngeze*, in which it stated :

« A determination as to the nature of the specific interests of the accused and a possible conflict of these interests is best made by a Chamber at the trial stage of the proceedings »².

6. As for the evaluation of the evidence presented by the Prosecution and the possible incrimination of the accused by the evidence produced against his co-accused, the Chamber is of the view that this is also a matter to be assessed by the Judges at trial and cannot be adjudicated on the basis of the allegations made by the Defence. Furthermore, the Chamber considers that this argument of guilt- by- association is without merit, since in the course of a joint trial, the evidence in respect of each accused will be assessed separately in order to ascertain the guilt of each accused.
7. The Defence in its argument relied on the decision of Trial Chamber II in the case of *The Prosecutor v. Augustin Bizimana et al*, Case N. ICTR-98-44-T, in support of its motion for separation on the premise that co-accused, Hassan Ngeze, is a prospective defence

² See *The Prosecutor v. Hassan Ngeze*, Case No. ICTR-97-27-I, Decision on the Defence Request for Separate Trials of 12 July 2000, para. 9.

witness. Trial Chamber II ordered a separation of trial on the possibility of co-accused in the joint trial being unable to testify for the accused with attendant prejudice to the accused. Issues as to whether co-accused are compellable witnesses for other accused, or whether a confession made by one is admissible against the other, were not canvassed before that Chamber. It is to be noted that that case is distinguishable from this case on the facts. The Chamber in Bizimana appears to have an informed impression that the co-accused will refuse to testify in a joint trial, whereas in the present case, the Chamber has received no indication from the co-accused, Nahimana or Ngeze, as to the likelihood of their testifying for the accused.

8. In the said decision, Trial Chamber II cited, with approval, the test laid down in *R. v. Silvini*, namely that "...an accused who wishes to call a co-accused to testify as a witness for his defence may seek a separate trial, on the grounds that he has a right to be tried fairly, that is, to call the best witnesses available for his case. The test in deciding if severance should be granted on this ground, is whether such evidence might reasonably create a doubt as to the guilt of the accused."³ The Chamber considers that it is not apparent from the decision whether Trial Chamber II was presented with evidence to enable it to make an assessment, in accordance with the Silvini test, of whether the evidence might reasonably create a doubt as to the guilt of the accused. Moreover, the Silvini case is distinguishable on the grounds that it addressed trial by jury rather than by Judges, and was concerned with the situation where there was representation by one counsel of two accused, one of whom intended to plead guilty.
9. In the instant case, Defence in its brief has made a bare allegation of conflict of interest. A simple intimation that the accused intends to call his co-accused on his behalf is not enough for the Chamber to determine that there will be a conflict of interest sufficient to warrant a separate trial. The Defence was well placed to make a specific showing as to the content of the prospective testimony as it has received substantial disclosure of documents which the Prosecutor intends to use in evidence at the trial. In our view, the Defence has not discharged

³ See the Decision on the Defence motion in opposition to joinder and motion for severance and separate trial filed by the accused Juvenal Kajelijeli of 6 July 2000, para. 37. Referring to *R. v. Silvini* (1991), 68 C.C.C.(3d)251(Ont.C.A.).

its burden of showing potential prejudice under this allegation. If it is the Defence's intention to lead exculpatory evidence from Ngeze, then the request for separation must make a threshold showing of, firstly, a bona fide need for the testimony, secondly the specific substance of the testimony, thirdly the exculpatory nature and effect of the testimony and lastly the reasonable probability that the exculpatory testimony would follow severance, that is, the likelihood that the co-accused would in fact testify.⁴

10. Once the Defence makes the threshold showing, it is for the Chamber to examine the significance of the testimony in relation to the accused's apprehensions, to assess the extent of prejudice caused by the absence of the testimony, to consider the effects on judicial administration and economy and to give weight to the timeliness of the motion.⁵ The Trial Chamber considers that the Defence failed to meet these tests and hence the Judges are not persuaded that a conflict of interest arises.

11. A decision to grant or deny a motion for severance is left to the sound discretion of Judges of the Trial Chambers. It must be borne in mind that this is a trial by Judges and not by a Jury. The usual ground advanced by Defence for seeking a separate trial is that evidence which may, in law, be admissible against one accused and not the others, will be heard by the Jury and may be relied upon by them in reaching a verdict. It is generally assumed that judges can rise above such risk of prejudice and apply their professional judicial minds to the assessment of evidence.

With Regard to the Interest of Justice

12. The Defence argues that when considering the Joinder motion, the Judges did not consider the supporting material and thus could not assess the existence of a « same transaction » to grant the joinder. The Judges consider that that issue has already been dealt with and will not rule again on matters raised and disposed of in the decision granting the joinder.

⁴ See U.S v. McKinney, 53F. 3d 664, 667 (5th Circ. 1995)

⁵ See U.S v. Ramirez, 954F. 2d 1035, 1037 (5th Circ. 1992)

13. For the same reason, the Chamber will not revisit arguments relating to the grant of the joinder on the basis of Rule 48 *bis* of the Rules and not Rule 48⁶ which were covered in the decision handed down. The Defence is in fact trying to revisit issues that have been dealt with in the joinder and to have the decision reviewed, which cannot be allowed in first instance in the absence of new facts. Moreover, the Defence lodged an appeal against the joinder decision, which was rejected on 12 September 2000 by a Bench of the Appeals Chamber save in respect of the challenge to the existence of the indictment following the decisions of the Appeals Chamber and in respect of the alleged breach of the temporal jurisdiction. On 14 September 2000, the Appeals Chamber confirmed the ruling of the Trial Chamber, namely that there is a valid indictment, that the indictment has been reinstated by the Decision of 31 March 2000 and that the Chamber had therefore jurisdiction to rule on the Prosecutor's motions to amend the indictment and to join the accused.
14. Concerning the contention made by the Defence that the motion for joinder was filed by the Prosecutor before the decision granting leave to amend the indictment was issued. Even if this were correct, the crux of the matter is that it was the amended indictment that was put to the accused at his Initial Appearance and on which the decision to join was based. Nothing turns on the argument that the Prosecution filed the motion for joinder on the same day as the decision to amend.
15. In its oral decisions of 18 October 1999 and 18 April 2000, the Trial Chamber declined the accused's requests for adjournment which were based on similar grounds to the present request for adjournment. Events have also overtaken the motion, since the Appeals Chamber has, in the meantime, ruled on the interlocutory appeals. The appeals are indeed complete and issues relating to disclosure will be addressed at the Pre-Trial Conference. The Defence's request for an adjournment of one year based on lack of preparedness is considered to be an excessive demand and will cause serious prejudice to the co-accused.

⁶ See *The Prosecutor v. Jean Bosco Barayagwiza*, Case No. ICTR-97-19-I, Decision on the Prosecutor's Motion for Joinder of 6 June 2000, para. 9, p. 5.

FOR THESE REASONS

THE TRIBUNAL

DENIES the Defence motion for severance and separate trial.

DENIES the Defence request for adjournment of the trial.

Arusha, 26 September 2000

Navanethem Pillay
Presiding Judge

Asoka de Zoysa Gunawardana
Judge

Erik Møse
Judge

Seal of the Tribunal