

ICTR-96-13-A
19-Oct.-2001
(2061bis/A - 2058bis/A)

2061bis/A
D.

Fausto Pocar

Registry: Adama Dieng

Decision of: 18 May 2001

ALFRED MUSEMA

(Applicant)

v.

THE PROSECUTOR

(Respondent)

Case No. ICTR-96-13-A

DECISION

**“DEFENCE MOTION UNDER RULE 68 REQUESTING THE APPEALS CHAMBER
TO ORDER THE DISCLOSURE OF EXCULPATORY MATERIAL AND FOR
LEAVE TO FILE SUPPLEMENTARY GROUNDS OF APPEAL”**

Office of the Prosecutor:

Solomon Loh

Counsel for the Applicant:

Steven Kay, Q.C.

Michail Wladimiroff
Sylvia de Bertodano

Translation certified by LCSS, ICTR

JUDICIAL RECORDS ARCHIVES
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D.P.

HAG(A)01-027 (A)

The appeals chamber of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law committed in the territory of Rwanda and Rwandan citizens responsible for genocide and other such violations committed in the territory of neighbouring states between 1 January 1994 and 31 December 1994 (“the Appeals Chamber” and “the Tribunal” respectively),

Considering the Judgment and sentence rendered by Trial Chamber I on 27 January 2000 in *The Prosecutor v. Alfred Musema* (“the Judgment” and “the Sentence”),

Considering the appeal against the Judgment and Sentence by Alfred Musema on 1 March 2000,

Considering the “ *Defence Motion under Rule 68 Requesting the Appeals Chamber to Order the Prosecution to Disclose Exculpatory Material in its possession to the Defence; And for Leave to File Supplementary Grounds of Appeal*” filed with the Appeals Chamber by Alfred Musema on 19 April 2001 (“the Motion” and “the Applicant” respectively),

Considering the “ *Response to Defence Motion under Rule 68 Requesting the Appeals Chamber to Order the Prosecution to Disclose Exculpatory Material in its Possession to the Defence; And for Leave to file Supplementary Grounds of Appeal*” filed by the Prosecutor on 4 May 2001 (“the Response”),

Considering the “ *Notification of Intention to Disclose Three Witness Statements to Counsel for the Appellant*” filed by the Prosecutor on 17 May 2001 (“*Notification of Intention*”),

Whereas in his motion, the Applicant argues that: a detainee at the Detention Facility gave him the statement of “Witness II”, a protected witness in *The Prosecutor v. Elizaphan Ntakirutimana* ; the said statement tends to suggest the Applicant’s innocence in relation to Count 7 in respect of which Trial Chamber I found him guilty; Witness II’s statement is “exculpatory” pursuant to Rule 68 of the Rules of Procedure and Evidence (“the Rules”); the Prosecutor breached her obligations under Rule 68 of the Rules by failing to disclose, as soon as practicable, Witness II’s statement,

Whereas, the Applicant requests the Appeals Chamber to:

- (1) Order the immediate disclosure to the Defence of any other statements in the possession of the Prosecutor made by Witness II;
2. Order the immediate disclosure to the Defence of any other relevant material under Rule 68 which is in the possession of the Prosecutor;
3. Order the Prosecutor to file a statement of explanation for the nondisclosure of exculpatory material to the Defence;
4. Order the Prosecutor to file a certificate attesting that a full review of the materials available to the Prosecutor has taken place and that all the relevant evidence pursuant to Rule 68 concerning the Applicant has been disclosed to the Defence;
5. Authorize the Appellant to file supplementary grounds of appeal in respect of Count 7 based on the additional evidence.

Whereas , in her Response, the Prosecutor requests the Appeals Chamber to deny the Motion on the grounds, *inter alia* , that: she has not breached her obligations under Rule 68; Witness II’s statement disclosed to the Applicant is not exculpatory; she disclosed the said statement as a matter of courtesy; the Defence has not shown good cause as to why it should be permitted by the Appeals Chamber at this late stage in the proceedings to file Supplementary Grounds of Appeal; the motion is superfluous because she has reviewed all the evidence in her possession in order to re-confirm that she has disclosed to the Applicant all exculpatory evidence in her possession;

Whereas, in her Notification of Intention, the Prosecutor voluntarily informed the Appeals Chamber and Counsel for the Applicant that: she had reviewed all the evidence in her possession; she intended to disclose three witness statements to the Appellant as soon as it had been ensured that the transmission of the said statements would not infringe witness protection orders issued by Trial Chambers in other cases;

Considering that when referring to the witness statements that she intended to disclose, the Prosecutor submitted that these were statements which could “fall within the ambit of Rule 68”,¹ but did not admit that the statements fell under the said Rule,

Considering that no evidence was produced before the Appeals Chamber upon which the Chamber can rely to determine if the said statements fall under Rule 68 of the Rules; that even if the said statements fall within the ambit of this Rule, no additional evidence has been produced that will enable the Chamber to determine if nondisclosure by the Prosecutor constitutes a breach of her obligations under Rule 68 of the Rules,

Considering that Rule 68 of the Rules provides that “*The Prosecutor shall, as soon as practicable, disclose 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,*”

Considering that under the said Rule, “the initial decision as to whether evidence is exculpatory has to be made by the Prosecutor” and that “without further proof that the Prosecutor abused its judgment, the Appeals Chamber is not inclined to intervene in the exercise of this discretion by the Prosecution,”²

Considering that the Appeals Chamber would contemplate making an order for the filing of such a certificate sought by the Appellant only when “the Defence can satisfy a Chamber that the Prosecution has failed to discharge its obligations,”³

Considering that in the instant case, the Applicant has not produced evidence tending to suggest to the Appeals Chamber that the Prosecution “abused” its judgment or that the Prosecution “has failed to discharge its obligations,”

Considering that the Applicant has not clearly indicated what he intends to file as supplementary grounds of appeal and that, therefore, the Appeals Chamber is not in a position to consider this request,

Considering after all, that the Applicant has not filed a request for admission of any additional evidence on the basis of which he is seeking leave to file additional grounds,

Considering therefore that the Appellant’s requests are baseless.

For these reasons

Denies the Motion.

205860/A

Done in French and English, the French text being authoritative

Claude Jorda

President of the Appeals Chamber

Done at The Hague, The Netherlands, this 18th day of May 2001

Seal of the Tribunal
