

ICTR-97-21-T
8/6/2001
(1083 - 1076)

1083
mbg.



International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

OR: ENG

TRIAL CHAMBER II

Before: Judge William H. Sekule, Presiding
Judge Mehmet Güney
Judge Erik Møse

Registry: Adama Dieng

Date: 8 June 2001

THE PROSECUTOR

v.

PAULINE NYIRAMASUHUKO
and
ARSÈNE SHALOM NTAHOBALI

Case No. ICTR-97-21-T

JUDICIAL RECORDS ARCHIVES
ICTR

2001 JUN - 8 1 P 2: 27 1

DECISION ON THE MOTION FOR SEPARATE TRIALS

(Rules 48, 72(B) iii) and 82(B) of the Rules)

The Office of the Prosecutor:

Silvana Arbia
Japhet Mono
Jonathan Moses
Adesola Adeboyejo
Manuel Bouwknecht

Counsel for Arsène Shalom Ntahobali:

René Saint-Léger
James Michael Bailey

International Criminal Tribunal for Rwanda Tribunal pénal international pour le Rwanda	
CERTIFIED TRUE COPY OF THE ORIGINAL SEEN BY ME COPIE CERTIFIÉE CONFORME À L'ORIGINAL PAR NOUS	
NAME / NOM:	JOHN N. KIYEYEU
SIGNATURE:	DATE: 08.06.2001

Handwritten initials and date: 08.06.2001

THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA (The "Tribunal"),

CONSIDERING the assumption, pursuant to Article 13(3) of the Statute of the Tribunal (the "Statute"), of Judge William H. Sekule as Presiding Judge of Trial Chamber II, on 16 May 2001;

CONSIDERING the "temporary assignment of Judge Erik Møse to Trial Chamber II", by a Decision rendered, pursuant to Rules 15(E) and 27 of the Rules of Procedure and Evidence of the Tribunal (the "Rules"), by President Navanethem Pillay on 16 May 2001, to replace Judge Laïty Kama;

SITTING THEREFORE as Trial Chamber II of the Tribunal, composed of Judge William H. Sekule, Presiding, Judge Mehmet Güney and Judge Erik Møse (the "Chamber");

BEING SEIZED of:

- i) the "Motion for Separate Trials under Rules 48, 72(B) iii) and 82(B)" (the "Motion") filed by the Defence Counsel for Accused Arsène Shalom Ntahobali on 25 April 2001;
- ii) the "Prosecutor's Response to Ntahobali's Motion for Separate Trial" (the "Response") filed on 3 May 2001;
- iii) the "Reply to the Prosecutor's Response to Ntahobali's Motion for Separate Trials" (the "Reply") filed on 28 May 2001;
- iv) the "Prosecutor's Response to Reply filed by Ntahobali on 28 May 2001 in respect to his Motion for Separate Trial" (the "Response to Reply") filed on 1 June 2001;

CONSIDERING the "Decision on the Prosecutor's Motion for Joinder of Trials of 5 October 1999" rendered in the present case (the "Joinder Decision of 5 October 1999"), in which the Chamber granted the Prosecutor's request for joinder of the trial of Accused Arsène Shalom Ntahobali and his co-Accused Pauline Nyiramasuhuko to that of four other Accused (the "other Accused");

CONSIDERING the "Decision on a Preliminary Motion by the Defence Counsel of Arsène Shalom Ntahobali for Separate Trials", filed on 29 May 1998 (the "Separate Trials Decision of 29 May 1998");

NOTING the Interoffice Memorandum of Court Management Section dated 27 April 2001 informing the Parties that, in accordance with Rule 73 of the Rules, the Chamber will consider the Motion on the basis of the written briefs only;

NOTING the Interoffice Memorandum by Court Management Section dated 28 May 2001 informing the Parties on the Extension of time for filing Replies to the Prosecutor's Response;

CONSIDERING the provisions of the Statute of the Tribunal, notably Article 20 of the Statute, and the Rules of Procedure and Evidence, specifically Rules 48, 72(B) iii) and 82(B) of the Rules;

SUBMISSIONS OF THE PARTIES:

Admissibility of the Defence Motion

1. The Defence filed the Motion on the basis of a review of new evidence by new Defence Counsel and on the Trial Chamber's continuing duty to monitor whether Accused Ntahobali would be unduly prejudiced if not severed from the other Accused. The Defence argues in the Reply that "the Tribunal's jurisprudence allows for bringing of such a Motion after the time limits set out in Rule 72(A)".

2. The Prosecutor submits that the instant Motion is time barred and that there must be information that raises the issue of a conflict of interests between the Accused and one or more other Accused in the same indictment or jointly tried with the Accused. Furthermore, the Prosecutor submits that the issue has already been decided upon, referring to the Joinder Decision of 5 October 1999 and the Separate Trials Decision of 29 May 1998.

Merits of the Motion

3. The Defence contends that it will demonstrate, as the trial progresses, that Rule 82(B) is applicable and a separate trial is fully justified. The Defence prays the Trial Chamber to grant her "continuing" Motion for a separate trial at any stage of the trial and to order that Accused Ntahobali be tried separately for, *inter alia*, the following reasons:

(a) To avoid a conflict of interests between the Accused and the other Accused that might cause serious prejudice to the Accused, because;

(i) The allegations of guilt of the other Accused, against which the evidence may be stronger, can spill over to the Accused Ntahobali, an alleged minor participant in the alleged conspiracy. The Defence points out that in conspiracy cases involving multiple Accused, joint trials may prejudice individual Accused;

(ii) The factual allegations against Accused Ntahobali are not similar to the other Accused with respect to the conspiracy counts. The redacted summaries of the intended Prosecution witnesses against Accused Ntahobali do not allege that the Accused was involved in a leading role or in orchestrating the plan;

(iii) Accused Ntahobali intends to call his mother, Pauline Nyiramasuhuko, co-Accused, to testify as a witness for his Defence;

(b) The Defence submits that the trial of Accused Ntahobali alone would be more expeditious.

4. The Prosecutor, in response, prays the Trial Chamber to dismiss the Motion as having no legal or factual basis, noting, *inter alia*, that:

(a) It is to be determined at trial, if any, what part Accused Ntahobali and the other Accused played in the alleged conspiracy.

ATW

(b) The Accused faces trial because there is a *prima facie* case against him. It is misleading to suggest, as the Defence submits, that the Accused is before the Tribunal only because of his association with another Accused, namely his mother, Pauline Nyiramasuhuko.

(c) None of the requirements for the testimony of co-Accused Pauline Nyiramasuhuko to the joint trial constituting a conflict of interests, as proposed in the Chamber's *Decision on the Preliminary Motion for Separate Trial*, *The Prosecutor v. Elie Ndayambaje* (ICTR-96-8-I, 25 April) (the "Separate Trial Decision of 25 April 2001"), have been met.

(d) The Trial Chamber held in its Separate Trial Decision of 25 April 2001 that a joint trial does not unreasonably delay the proceedings at the trial phase and granted the request for a joint trial in the interests of justice.

5. The Defence, in reply to the Prosecutor's Response, reiterates the request that the Chamber, if and when it considers it necessary on the basis of the evidence presented during the course of trial, grants a separate trial for the Accused.

6. The Prosecutor, in response to the Defence Reply, submits that Rule 72(C) of the Rules is relevant and reads: "The Trial Chamber shall dispose of preliminary motions *in limine litis*". The Prosecutor repeats that the Motion is to be decided upon before the commencement of trial.

AFTER HAVING DELIBERATED,

7. The Defence Motion is brought pursuant to Rule 72(B) iii) of the Rules, as a preliminary application for separate trial under Rule 82(B) of the Rules. Rule 72(B) iii) states that, "Preliminary motions by the accused are [*inter alia*] applications for severance of crimes joined in one indictment under Rule 49, or for separate trials under Rule 82(B)".

(a) On the Admissibility of the Defence Motion

8. The Prosecutor contends that the Motion was filed out of time, pursuant to Rule 72(A) of the Rules. The Defence does not contest that fact. The Defence, however, argues that the Tribunal's jurisprudence allows for bringing the Motion after the time limits set out in Rule 72 (A) of the Rules.

9. Consistent with its jurisprudence, the Chamber considers that applications for severance of crimes joined in one indictment under Rule 49, or for separate trials under Rule 82(B) of the Rules, may be brought, once the deadline under Rule 72(A) of the Rules has expired, "whenever there is information that raises the issue of a conflict of interests between the Accused and one or more Accused charged in the same indictment or joined with him for trial" ("Decision on the Defence Motion in opposition to Joinder and Motion for Severance and Separate Trial filed by the Accused Joseph Nzirorera" of 12 July 2000 and "Decision on the Defence Motion in Opposition to Joinder and Motion for Severance and Separate Trial filed by the Accused Juvénal Kajelijeli" of 6 July 2000, both Decisions rendered in Case No. ICTR 98-44-T, at para.12 ; "Decision on the Defence Motion for Separate Trial", *The Prosecutor v. Elie Ndayambaje*, Case No. ICTR-96-8-T, 25 April 2001,

at para. 7); *See also*, "Decision on the Defence Motion Seeking a Separate Trial for the Accused Sylvain Nsabimana", *The Prosecutor v. Sylvain Nsabimana et alia*, Case No. ICTR-97-29A-T, 8 September 2000, at para. 17)

10. As the Defence filed the Motion on the basis of a review of new evidence in this case, the Chamber finds that there is good cause to grant relief for the waiver of the time limit. The Chamber thus *proprio motu* waives the prescribed time limit stipulated in Rule 72(A) of the Rules and considers the Defence Motion.

11. The Chamber notes that the Defence filed a "continuous request" for a separate trial to be granted "at any time" during the course of trial. The Prosecutor, however, submits that such a request brought as a Motion under Rule 72 of the Rules "cannot be left undecided at the commencement of trial". The Chamber accepts the Prosecutor's submission and notes that it will deal with the instant Motion conclusively. A Motion pursuant to Rule 72 of the Rules cannot be left pending after having been decided upon by the Chamber. The Defence, though, is not prevented from bringing a Motion for severance of crimes joined in one indictment under Rule 49 of the Rules or for separate trials under Rule 82(B) of the Rules, during the course of trial whenever there is information that raises the issue of a conflict of interests.

(b) On whether a Conflict of Interests may arise if the Accused is Jointly Tried with his Mother, his Co-Accused, and the Other Accused

12. The Chamber notes that the Defence requests a separate trial for the Accused. According to the Defence, a conflict of interests may arise during the course of trial with respect to the unfair spillover of guilt from the other Accused to the Accused Ntahobali, an alleged minor participant in the alleged conspiracy. The Prosecutor, however, asserts that only after reviewing the evidence is it to be determined by the Chamber what part the Accused Ntahobali played in the alleged conspiracy.

13. Under Rule 48 of the Rules, "persons accused of the same or different crimes committed in the course of the same transaction may be jointly charged and tried". This procedure is not prejudicial to the Accused, since in "joint trials each accused shall be accorded the same rights as if he were being tried separately", pursuant to Rule 82(A) of the Rules. The Chamber recalls in this respect its Joinder Decision of 5 October 1999 granting the Prosecutor's Motion for Joinder of Trials in the present case, where the Chamber, after reiterating its commitment guaranteeing the rights of the Accused, *inter alia*, held that: "...a joint trial is proper in the case at bar. It is in the interest of justice that the same verdict should be rendered against all the Accused involved in the alleged criminal acts arising from the same transaction or series of transactions".

14. In accordance with Rule 82(B) of the Rules, "The Trial Chamber may order that persons accused jointly under Rule 48 be tried separately if it considers it necessary in order to avoid a conflict of interests that might cause serious prejudice to an accused, or to protect the interests of justice". The Chamber recalls in this respect that it decided to dismiss the Defence's request for separate trials in *The Prosecutor v. Nyiramasuhuko and Ntahobali* in its *Separate Trials Decision of 29 May 1998*. The Chamber found therein that "the Defence failed to convince the Tribunal in what manner and to what extent the joint trial in this case would seriously prejudice the accused or be contrary to the interests of justice, as required in

Rule 82(B) of the Rules. Indeed, the Tribunal finds that mere assertion by the Defence of the disparate occupations of the two accused at the time of the alleged acts does not by itself demonstrate to the Tribunal the prejudice that may be suffered by Arsène Shalom Ntahobali if tried jointly with Pauline Nyiramasuhuko”.

15. The Chamber further notes that it is not called upon at this stage of the proceedings to judge the merits of the charges against the Accused. The Chamber will not, at this time, address the issue of whether a conspiracy actually existed and if so what part, if any, Accused Ntahobali and the other Accused played. This is a substantive issue of the forthcoming trial on the merits. Rather, the Chamber’s task is only to determine whether, on the basis of a legal and factual assessment, holding a separate trial for Accused Ntahobali is justified. In this respect the Chamber recalls its Joinder Decision of 5 October 1999 in which it, *inter alia*, held that “in the instant case, there is sufficient showing of same transaction. Therefore [...] there exists both factual and legal basis for the holding of a joint trial.” The Defence submits that the instant Motion is based on a “review of new evidence”, contending that the allegations in the redacted summaries of the intended Prosecution witnesses are not similar for Accused Ntahobali, his co-Accused and the other Accused. The Chamber, however, notes that the Defence does not specify on what grounds the “review of new evidence” may create a conflict of interests between the Accused Ntahobali, his co-Accused and the other Accused.

16. The Chamber also recalls the Oral Decision on the Defence request for Severance and Separate Trial in *The Prosecutor v. Jean Bosco Barayagwiza* (Case No. ICTR-97-19-I, 26 September 2000, at para. 11), where the Trial Chamber held that: “A decision to grant or deny a motion for separate trial 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.” (*See also*, “Decision on the Defence Motion Seeking a Separate Trial for the Accused Sylvain Nsabimana”, *The Prosecutor v. Sylvain Nsabimana*, Case No. ICTR-97-29A-I, 8 September 2000, at para. 32; *See also*, “Decision on the Defence request to strike out the name of Joseph Nzirorera on Prosecution exhibits for identification”, *The Prosecutor v. Kajelijeli*, Case No. ICTR-98-44A-T, Oral Decision rendered on 15 March 2001).

Testimony of Other Accused Party to the Joint Trial

17. The Defence further contends that their intention to call another Accused party to the same trial, notably, to testify with respect to the Accused, might create a conflict of interests.

18. The Chamber recalls in this respect that, pursuant to Rule 85(C) of the Rules, “[t]he Accused may, if he so desires, appear as a witness in his own defence”. The Chamber held in its *Decision on the Defence Motion for Separate Trial* in *The Prosecutor v. Elie Ndayambaje* that “in consistence with the jurisprudence of the Tribunal, this Rule may be applied, in the context of a joint trial, to the effect that an Accused whose trial is joined to that of other Accused may be called to testify, notably by his Defence or by that of another Accused Party to his trial, under the conditions set out in Articles 90 and 91 of the Rules, and bearing in mind the fundamental right of the Accused “[n]ot to be compelled to testify against himself or herself or to confess guilt”, pursuant to Article 20(g) of the Statute” (*See*, “Decision on the

KM

Defence Motion for Separate Trial”, The Prosecutor v. Elie Ndayambaje, Case No. 96-8-T, 25 April 2001 at para. 13).

19. The Defence does not specify why calling the co-Accused to testify during the joint trial would constitute a conflict of interests between the Accused. The Chamber considers, as did Trial Chamber I of the Tribunal in an oral Decision rendered on 26 September 2000 in the The Prosecutor v. Jean Bosco Barayagwiza, that “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 Chamber notes that, on this occasion, the said Trial Chamber further defined, on the basis of principles laid out in *common law*, a “threshold showing” such an allegation of conflict of interests is to meet, as follows: “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” (See, “Decision on the Request by the Defence for Severance and Separate Trial”, The Prosecutor v. Jean Bosco Barayagwiza, Case No. ICTR-97-19-I, Oral Decision rendered on 26 September 2000, at para. 9). In the present case, no such showing was made by the Defence. The Chamber accordingly dismisses this objection.

20. For the above reasons, the Chamber finds that the Defence has failed to demonstrate that a conflict of interests may arise during the course of trial that might cause serious prejudice to the Accused to justify a separate trial for the Accused under Rule 82(B) of the Rules.

(c) On the Issue of Delay

Delay and Commencement of Trial

21. The Chamber is aware of the length of the detention of the Accused since his arrest and transfer to the Tribunal in July 1997, that is, more than four years ago and, indeed, expressed its concern in this regard at the last Status Conference, held on 2 February 2001, thus reminding both Parties that the trial could not be further postponed and had to take place soon for the sake of all the Accused’s right to be tried without undue delay envisioned under Article 20(c) of the Statute.

22. During the Pre-trial Conference held on 19 April 2001, the date for commencement of the joint trial was affirmed to be 14 May 2001, which was later postponed to 11 June 2001. The Chamber is of the view that granting a separate trial to the Accused at this stage of the proceedings, on the eve of trial, might in fact postpone further the commencement of the trial for the Accused.

Delay and Duration of Trial

23. Furthermore, as far as duration of the joint trial is concerned, once commenced, the Chamber notes that a joint trial might last over a longer period of time than that of a single Accused. It however follows from the case law of the European Court of Human Rights that “the reasonableness of the length of the proceedings needs to be assessed in each instance according to the particular circumstances” and with regard to, “among other things, the complexity of the case” (E.Ct.H.R., *Eckle v. Germany*, Judgement of 15 July 1982, Series A

AD

no. 51; *See also, inter alia, Neumeister*, 27 June 1968, Series A, No. 8; *König*, 28 June 1978, Series A, No. 27; *Foti and others*, 10 December 1982, Series A, No. 56; *Zimmerman and Steiner*, 13 July 1983, Series A, No 66, at par. 24). As the Chamber held in its *Decision on the Defence Motion for Separate Trial*, *The Prosecutor v. Elie Ndayambaje* (Case No. ICTR-96-8-T, 25 April 2001), “a joint trial might add to the complexity of a case at all stages of the proceedings, including at trial, and hence, to their length, without necessarily encroaching upon the right to be tried without undue delay”. In the present case, the Chamber is not convinced that a joint trial would delay unreasonably the trial proceedings.

24. In any event, the Chamber notes that the European Court of Human Rights held that the fact that an Accused might be tried faster, should severance be granted, does not by itself render unreasonable the length of the proceedings. Indeed, the Court held in the *Neumeister v. Austria* case, which involved 11 co-Accused, that: “the course of the investigation would probably have been accelerated had the applicant’s case been severed from those of his co-Accused, but nothing suggests that such a severance would have been compatible with the good administration of justice” (*See, Neumeister*, 27 June 1968, Series A, No. 8; our emphasis).

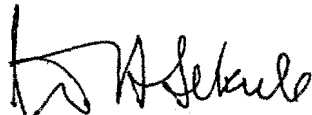
25. In this respect, the Chamber reiterates that it also granted the request for a joint trial in the interests of justice (para. 17 of the Joinder Decision of 5 October 1999), notably with respect to the physical and mental safety of witnesses, and to avoid their making several journeys to appear before the Tribunal and repeat their testimony (para. 16 of the Joinder Decision of 5 October 1999).

26. For the above reasons, the Chamber finds that the joint trial of the Accused will not infringe upon the Accused’s right to be tried without undue delay. Further, the Chamber reiterates that the Accused, as provided for in Rule 82(A), shall be accorded the same rights as if he were being tried separately.

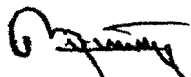
FOR ALL THE ABOVE REASONS, THE TRIBUNAL:

DISMISSES the Defence Motion for Separate Trials.

Arusha, 8 June 2001,



William H. Sekule
Presiding Judge



Mehmet Güney
Judge



Erik Møse
Judge

(Seal of the Tribunal)

