ICTR-97-20-T
30-4-2002
(7042 - 7038)

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International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

OR: ENG

TRIAL CHAMBER III

Before: Judge Yakov Ostrovsky, Presiding
Judge Lloyd George Williams, Q.C.
Judge Pavel Dolenc

Registrar: Mr Adama Dieng

Date: 30 April 2002

ICTR
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THE PROSECUTOR

v.

LAURENT SEMANZA

Case No. ICTR-97-20-T

DECISION ON DEFENCE MOTION FOR LEAVE TO CALL REJOINDER WITNESSES

The Office of the Prosecutor:
Mr Chile Eboe-Osuji

Counsel for the Accused:
Mr Charles A. Taku
Mr Sadikou A. Alao

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

SITTING as Trial Chamber III, composed of Judges Yakov Ostrovsky, presiding, Lloyd G. Williams and Pavel Dolenc (the "Chamber");

BEING SEISED of the "Requête de la défense en vue d'appeler des témoins en duplique conformément aux dispositions de l'article 85 IV du règlement de procédure et de preuve" filed 24 April 2001 (the "Motion");

CONSIDERING the "Conclusions de la défense après la clôture des témoignages en réplique du procureur, a l'appui de sa requête en vue d'appeler des témoins en dupli1que conformément a l'article 85 IV du règlement de procédure et de preuve" dated 27 April 2002 and filed 29 April 2002;

CONSIDERING that the Prosecutor has not filed any response within the 5 day period prescribed in Rule 73(D) of the Rules;

NOW CONSIDERS the matter solely on the basis of the materials submitted by the Defence, pursuant to Rule 73(A) of the Rules:

Submissions of the Defence

1. In the Motion and in the supplemental document filed on 29 April 2002, the Defence requests, pursuant to Rule 85 of the Rules of Procedure and Evidence (the "Rules"), leave to call thirteen witnesses in rejoinder to contest the new testimony raised by the Prosecutor's rebuttal witnesses and to test their credibility. The Defence divides these witnesses into five categories, labeled A-E. For each of the witnesses the Defence has provided the Tribunal with a brief resume of the facts upon which the witness is expected to testify.

2. The Defence further requests that these witnesses be granted the protection of the Tribunal, pursuant to Rule 75 of the Rules, because of the precariousness of their situation in their various places of residence.

Deliberations

Rejoinder Evidence

3. Rule 85 envisions the possibility that the Defence may call evidence in rejoinder after the Prosecution has led evidence in rebuttal. There is no other Rule which provides any guidance to the Chamber as to when such evidence might be allowed.

4. In the event of such a lacuna, Rule 89(B) directs the Chamber to apply rules of evidence "which will best favour a fair determination of the matter before it and are consonant with the spirit of the Statute and the general principles of law". Civil law jurisdictions do not follow an adversarial process and therefore cannot provide any guidance to the Chamber in relation to rejoinder. In common law jurisdictions, the sequence of the presentation of evidence at trial is based on the adversarial system. The general common law rule is that the Prosecution bears the burden of proof and is

not permitted to "split its case". Therefore, the Prosecution must introduce all of the evidence that it intends to rely on to establish its case before the defendant is required to respond. The accused is entitled to know the entire prosecution case before being called upon to defend against it. This order of presentation of evidence protects the accused's rights to full answer and defence and against self-incrimination.

5. Where, however, a new issue is raised in the Defence case that the Prosecutor could not reasonably have anticipated, a common law judge has the discretion to permit the Prosecutor to bring rebuttal witnesses. Rebuttal is not permitted to merely confirm or reinforce the Prosecutor's case, or to deal with collateral issues. Rebuttal is permitted when it is necessary to ensure that each party has an opportunity to address issues central to the case.

6. The circumstances in which the common law permits rejoinder are even more limited. In principle, rejoinder by the Defence is only permitted where the Prosecutor in rebuttal has raised a new matter that is important to the case, but could not have been reasonably anticipated by the Defence. In such circumstances, the Defence may seek leave to call evidence in rejoinder to refute a particular piece of evidence introduced by the Prosecutor.

7. This narrow common law approach to rebuttal and rejoinder was adopted by the ICTY in *P. v. Delalic*, Case No IT-96-21-T, Decision on the Prosecution's Alternative Request to Reopen the Prosecution's Case, 19 August 1998:

> 23. The essence of the presentation of evidence in rebuttal is to call evidence to refute a particular piece of evidence which has been adduced by the defence. Such evidence is therefore limited to matters that arise directly and specifically out of defence evidence. Where the evidence sought to be introduced in rebuttal is itself evidence probative of the guilt of the accused, and where it is reasonably foreseeable by the Prosecution that some gap in the proof of guilt needs to be filled by the evidence called by it, then generally speaking the Trial Chamber will be reluctant to exercise its discretion to grant leave to adduce such evidence. The Prosecution thus, cannot call additional evidence merely because its case has been met by certain evidence to contradict it. However, if any matter arises *ex improviso* and unforeseen, the Trial Chamber will exercise its discretion and will allow such evidence to be adduced. On the other hand, evidence available to the Prosecution *ab initio*, the relevance of which does not arise *ex improviso,* and which remedies a defect in the case of the Prosecution, is generally not admissible.
>
> 24. In this context it may be noted that if new points are brought out by the Prosecution's evidence in rebuttal, the accused may respond by presenting evidence in rejoinder. The considerations applying to evidence in rebuttal apply *mutatis mutandis* to this situation, and the accused is thus not entitled at this stage to revisit the defence case as a whole, but is confined to presenting evidence which is directed to contradicting matters arising out of the evidence brought in rebuttal.

8. The Chamber adopts this formulation and holds that, in principle, rejoinder should only be permitted in relation to unanticipated issues newly raised in rebuttal.

Application to the Case at Bar

9. In this case, the Defence failed to give timely notice of alibi as required by Rule 67(A)(ii)(a). Nevertheless, pursuant to Rule 67(B), the Defence was permitted to rely on the defence of alibi and presented witnesses who testified that the Accused fled from his residence on 9 April 1994 and traveled via the communal office on his way to Murambi in Ruhengeri Prefecture.

10. As the Prosecutor did not receive the required notification, she could not reasonably have anticipated the defence of alibi. Therefore, the Chamber granted leave to the Prosecutor to call six rebuttal witnesses to counter the defence of alibi, which only became a live issue during the Defence case. Of the six permitted witnesses, only three actually testified at trial: DCH, XXK and the expert witness Professor Guichaoua. The examination-in-chief of these witnesses was limited by the Chamber to questions relating to the alibi of the Accused.

11. In response to these three Prosecution rebuttal witnesses, the Defence proposes to call thirteen witnesses in rejoinder. In support of its Motion, the Defence does not point to any new and unanticipated evidence or facts led by the Prosecution in rebuttal. The brief summaries of expected testimony reveal that the witnesses are expected to testify about two main subject areas: to reinforce the alibi of the Accused and to challenge the credibility of the Prosecutor's rebuttal witnesses. Witnesses CYM2, LJ, FFD, CW, BDB, ZBM, Ntagerura, Karemera, Ndindabahizi are further alibi witnesses and are expected to testify about the Accused's whereabouts during April 1994. Witnesses ABO, KKN, Ntabakuze and the Accused are proposed to testify about the alibi, but are also expected to challenge the credibility of witnesses DCH and XXK.

12. Examination of the anticipated testimonies reveals that none of these witnesses could qualify as a rejoinder witness. These witnesses are not concerned with any new issue raised by the Prosecution during rebuttal, which could not have been reasonably foreseen by the Defence. The defence of alibi was part of the Defence case-in-chief and all testimony about the Accused's whereabouts in April 1994 should have been adduced at that time. The main purpose of calling these witnesses is to buttress the alibi defence. Although the common law permits certain challenges to credibility of rebuttal witnesses to be made in rejoinder[1], the Defence has not demonstrated that its witnesses fall within the confines of these exceptions. The facts raised by the defence to challenge the credibility of the rebuttal witnesses relate only to collateral issues. Thus, the Chamber is of the view that it would serve no legitimate purpose to hear these proposed witnesses.

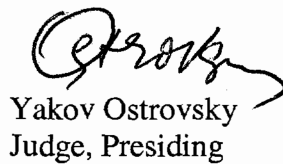
13. In reaching this conclusion, the Chamber is mindful of its overarching obligation to ensure a fair trial in full respect of the rights of the Accused. In the circumstances of this particular case, the Chamber is satisfied that it has given both parties a fair

[1] The five generally recognized categories of exceptions are: (1) to prove a charge of bias or partiality in favour of the opposite party; (2) To prove that the witness has previously been convicted of a criminal offence; (3) Where the proper foundation has been laid, a previous inconsistent statement may be proved to contradict a witness; (4) Medical evidence to prove that by reason of a of a physical or mental condition the witness is incapable of telling or unlikely to tell the truth; (5)Independent evidence that an adverse witness has a general reputation for untruthfulness and that the witness testifying to such reputation would not believe the impugned witness under oath. Sopinka et. al, *The Law of Evidence in Canada* (Markham: Butterworths Canada, 1992), pp. 880-890; Howard et. al, *Phipson on Evidence*, 15th Ed, (London: Sweet & Maxwell, 2000), p. 263.

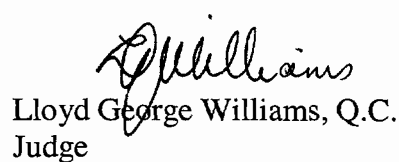
opportunity to be heard on all of the relevant issues. The Chamber recalls that the Prosecutor's rebuttal was limited by the Chamber to the defence of alibi, which was raised for the first time in the Defence case-in-chief without prior notice to the Prosecutor. Any evidence adduced in rebuttal that falls outside this narrow issue will not be considered by the Chamber in its deliberations.

14. For these reasons, the Chamber DECLINES to grant leave to the Defence to adduce rejoinder evidence and DISMISSES the motion in its entirety.

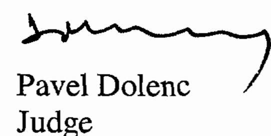
Arusha, 30 April 2002.



Yakov Ostrovsky
Judge, Presiding



Lloyd George Williams, Q.C.
Judge



Pavel Dolenc
Judge

(Seal of the Tribunal)